The Committee solicits comment on the following proposals by July 1, 2017. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Committee on Model Civil Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

## AMENDED

The Committee is considering the adoption of amended instructions to limit the use of "and/or."

### M Civ JI 2.02A Cameras in the Courtroom

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

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

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

#### Note on Use

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

#### History

M Civ JI 2.02A was added October 2013.

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

In this case the defendant has asserted [the affirmative defense that/certain affirmative defenses that] [*concisely state affirmative defense(s)*].

The defendant has the burden of proving [this defense/these defenses].

Your verdict will be for the defendant if any of these affirmative defenses has been proved.

#### Note on Use

This instruction is to be given if accord and satisfaction, release, ~~and/or~~ or statute of limitations that act as a complete bar to recovery are at issue. It may be used in conjunction with M Civ JI 16.08 Burden of Proof in Negligence Cases (To Be Used in Cases Filed on or after March 28, 1996) or, if applicable, M Civ JI 16.02 Burden of Proof in Negligence Cases on the Issues and Legal Effect Thereof.

#### History

M Civ JI 16.04 replaced SJI 21.03. Added September 1980.

### M Civ JI 30.01 Professional Negligence ~~and/or~~ / Malpractice

When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [*name profession*] of ordinary learning, judgment, or skill in [this community or a similar one/[*name particular specialty*]] would do, or the doing of something which a [*name profession/name particular specialty*] of ordinary learning, judgment, or skill would not do, under the same or similar circumstances you find to exist in this case.

It is for you to decide, based upon the evidence, what the ordinary [*name profession/name particular specialty*] of ordinary learning, judgment, or skill would do or would not do under the same or similar circumstances.

#### Notes on Use

There is caselaw support for the applicability of the malpractice instructions to the professionals noted: *Siirila v Barrios*, 398 Mich 576; 248 NW2d 171 (1976) (doctor); *Roberts v Young*, 369 Mich 133; 119 NW2d 627 (1963) (doctor); *Babbitt v Bumpus*, 73 Mich 331; 41 NW 417 (1889) (attorney); *Eggleston v Boardman*, 37 Mich 14 (1877) (attorney); *Tasse v Kaufman*, 54 Mich App 595; 221 NW2d 470 (1974) (dentist); *Ambassador Baptist Church v Seabreeze Heating & Cooling Co*, 28 Mich App 424; 184 NW2d 568 (1970) (architect); *Tschirhart v Pethtel*, 61 Mich App 581; 233 NW2d 93 (1975) (chiropractor).

Standards for liability of a certified public accountant are set forth in MCL 600.2962, added by 1995 PA 249.

If the defendant is a specialist, the name of that specialty should be stated where that option is given instead of the name of the defendant's profession.

#### Comment

The language in the instruction is supported by numerous cases, including *Roberts*; *Johnson v Borland*, 317 Mich 225; 26 NW2d 755 (1947); *Siirila*; *Fortner v Koch*, 272 Mich 273; 261 NW 762 (1935); *Tasse*. MCL 600.2912a.

#### History

M Civ JI 30.01 was added February 1, 1981. Amended May 2013.

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

In order to recover damages for either economic or noneconomic loss, plaintiff has the burden of proof on each of the following three elements:

(a) that the defendant was negligent;

(b) that the plaintiff was injured;

(c) that the negligence of the defendant was a proximate cause of injury to the plaintiff.

**ECONOMIC LOSS**

If you decide that all of these have been proved, then (subject to the rule of comparative negligence, which I will explain) plaintiff is entitled to recover damages for economic loss resulting from that injury, including: [*For insured defendants, insert those applicable economic loss damages suffered by the plaintiff in excess of compensable no-fault benefits for which plaintiff seeks recovery: for the first three years, amounts in excess of no-fault benefits for work loss, allowable expenses, and survivors' loss, and, for the period after three years, all work loss, allowable expenses, and survivors' loss. For uninsured defendants, insert any economic loss damages*], that you determine the plaintiff has incurred.

[*Read only if applicable*] If you find that plaintiff is entitled to recover for work loss beyond what is recoverable in no-fault benefits, you must reduce that by the taxes that would have been payable on account of income plaintiff would have received if he or she had not been injured.

**NONECONOMIC LOSS**

As to plaintiff's claim for damages for noneconomic loss, plaintiff has the burden of proving a fourth element:

(d) that plaintiff's injury resulted in [death/serious impairment of body function/or/permanent serious disfigurement].

If you decide that all four elements have been proved, then (subject to the rule of comparative negligence, which I will explain) plaintiff is entitled to recover damages for noneconomic loss that you determine the plaintiff has sustained as a result of that [death/injury].

**COMPARATIVE NEGLIGENCE**

The defendant has the burden of proof on [his/her] claim that the plaintiff was negligent and that such negligence was a proximate cause of plaintiff's [injury/death].

If your verdict is for the plaintiff and you find that the negligence of both parties was a proximate cause of plaintiff's [injury/death], then you must determine the degree of such negligence, expressed as a percentage, attributable to each party.

Negligence on the part of the plaintiff does not bar recovery by plaintiff against the defendant for damages for economic loss. However, the percentage of negligence attributable to the plaintiff will be used by the court to reduce the amount of damages for economic loss that you find were sustained by plaintiff.

Negligence on the part of the plaintiff does not bar recovery by plaintiff against the defendant for damages for noneconomic loss unless plaintiff's negligence is more than 50 percent. If the plaintiff's negligence is more than 50 percent, your verdict will be for the defendant as to plaintiff's claim for damages for noneconomic loss. Where the plaintiff's negligence is 50 percent or less, the percentage of negligence attributable to plaintiff will be used by the court to reduce the amount of damages for noneconomic loss that you find were sustained by the plaintiff.

The court will furnish a Special Verdict Form that will list the questions you must answer. Your answers to the questions in the verdict form will constitute your verdict.

## Notes 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.

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

We, the jury, answer the questions submitted as follows:

QUESTION NO. 1: Was the defendant negligent?

Answer: ____ (yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 2.

QUESTION NO. 2: Was the plaintiff injured ~~and/or~~ or damaged in one or more of the ways claimed?

Answer: ____ (yes or no)

If your answer is "yes" and your answer to QUESTION NO. 1 is "yes," go on to QUESTION NO. 3.

If your answer is "yes" and your answer to QUESTION NO. 1 is "no," go on to QUESTION NO. 4.

If your answer is "no," do not answer any further questions.

QUESTION NO. 3: Was the defendant's negligence a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____ (yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 4.

QUESTION NO. 4: Did the defendant breach an express warranty?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 5.

If your answer is "no," go on to QUESTION NO. 6.

QUESTION NO. 5: Was the defendant's breach of express warranty a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____ (yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 6.

*QUESTION NO. 6: Did the defendant breach an implied warranty?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 7.

If your answer is "no," but your answer to either QUESTION NO. 3 or 5 is "yes," go on to QUESTION NO. 8.

If your answer is "no," and your answer to either QUESTION NO. 1 or 3 is "no," and your answer to either QUESTION NO. 4 or 5 is "no," do not answer any further questions.

*QUESTION NO. 7: Was the defendant's breach of implied warranty a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 8.

If your answer is "no," but your answer to either QUESTION NO. 3 or QUESTION NO. 5 is "yes," go on to QUESTION NO. 8.

If your answer is "no," and your answer to either QUESTION NO. 1 or 3 is "no," and your answer to either QUESTION NO. 4 or 5 is "no," do not answer any further questions.

QUESTION NO. 8: Was [*name of nonparty*] negligent?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 9.

If your answer is "no," go on to QUESTION NO. 10.

QUESTION NO. 9: Was [*name of nonparty*]'s negligence a proximate cause of the injury or damage claimed by the plaintiff?

Answer: ____ (yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 10.

QUESTION NO. 10: Was the plaintiff negligent?

Answer: ____ (yes or no)

If your answer is "yes," go on to QUESTION NO. 11.

If your answer is "no," go on to QUESTION NO. 12.

QUESTION NO. 11: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

Answer: ____ (yes or no)

If your answer is "yes" or "no," go on to QUESTION NO. 12.

QUESTION NO. 12:

A. Using 100 percent as the total, enter the percentage of fault attributable to the defendant:

____ percent

B. If you answered "yes" to QUESTION NO. 9, then using 100 percent as the total, enter the percentage of fault attributable to [*name of nonparty*]:

____ percent

C. If you answered "yes" to QUESTION NO. 11, then using 100 percent as the total, enter the percentage of fault attributable to the plaintiff:

____ percent

The total of these must equal 100 percent: TOTAL 100 percent

QUESTION NO. 13: If you find that plaintiff has sustained damages for [*describe past economic damages claimed by the plaintiff such as lost wages, medical expenses, etc.*] to the present date, give the total amount of damages to the present date.

Answer: $_____.____

QUESTION NO. 14: If you find that the plaintiff will incur costs for medical or other health care in the future, give the total amount for each year in which the plaintiff will incur costs.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

QUESTION NO. 15: If you find that plaintiff will sustain damages for [lost wages or earnings/or/lost earning capacity/and/[*describe other economic loss claimed by plaintiff*]] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

**NONECONOMIC DAMAGES**

NOTE: If you determined in QUESTION NO. 12 that plaintiff was more than 50 percent at fault, then do not answer any further questions. If you determined in QUESTION NO. 12 that plaintiff was 50 percent or less at fault, then go on to QUESTION NO. 16.

QUESTION NO. 16: What is the total amount of plaintiff's damages to the present date for [*describe past noneconomic damages claimed by the plaintiff such as M Civ JI 50.02 Pain and Suffering, Etc., M Civ JI 50.03 Disability and Disfigurement, and M Civ JI 50.04 Aggravation of Preexisting Ailment or Condition*]?

Answer: $_____.____

QUESTION NO. 17: If you find that plaintiff will sustain damages for [*describe future noneconomic damages claimed by plaintiff*] in the future, give the total amount for each year in which the plaintiff will sustain damages.

Answer:

$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]
$_____.____ for [*year*]

Signed,

_____

Foreperson

_____

Date

### Notes on Use

This form of verdict should only be used for cases that are filed on or after March 28, 1996. 1995 PA 161, § 3; 1995 PA 249, § 3.

This verdict form should not be used if the plaintiff is over 60 years of age.

This form of verdict is appropriate in a case in which the evidence would allow an award of damages for a 20-year period in the future. This form must be modified by the trial judge to add or delete lines in Questions No. 14, 15, and 17 in cases in which the evidence supports an award of damages for a period longer or shorter than 20 years.

*This form of verdict must be modified by deleting Questions No. 6 and 7 in an action against a manufacturer for an alleged defect in the design of its product. *Prentis v Yale Manufacturing Co*, 421 Mich 670; 365 NW2d 176 (1984).

The trial judge should omit any questions that are not an issue in the case.

## M Civ JI 90.22A
## Valuation Witnesses

Witnesses have testified as valuation experts to assist you in arriving at a conclusion as to the value of the property taken. In weighing the soundness of such opinions, you should consider the following:

(a) the length and diversity of the witness's experience;

(b) the professional attainments of the witness;

(c) whether the witness is regularly retained by diverse, responsible persons and thus has a widespread professional standing to maintain;

(d) the experience that the witness has had in dealing with the kind of property about which [he/or/she] has testified; ~~and/or~~ and

(e) whether the witness has accurately described the physical condition of the property, or has made inaccurate statements about its physical characteristics that may have been reflected in the valuation the witness placed on such property.

The opinion of a valuation witness is to be weighed by you, but you must form your own intelligent opinion. In weighing the testimony of any witness as to value, you should consider whether [he/or/she] has accompanied [his/or/her] opinion with a frank and complete disclosure of facts and a logical explanation of [his/or/her] reasons that will enable you properly to determine the weight to be given to the opinion the witness has stated.

### Comment

See *In re Dillman*, 256 Mich 654; 239 NW 883 (1932); *George v Harrison Twp*, 44 Mich App 357; 205 NW2d 254 (1973).

### History

M Civ JI 90.22A was added October 1981.

## M Civ JI 97.06
## Reading of Petition

We are here today on a petition filed by [_____], a Children's Protective Services worker for the [_____] County Family Independence Agency*, alleging that the Court has jurisdiction over [*names of children*], who [was/were] born on [_____], and [is/are] now _____ years of age. Under Michigan law, the Family Division of the Circuit Court has jurisdiction in proceedings concerning any child under 18 years of age found within the County: (read pertinent statutory allegations from MCL 712A.2(b)~~(1), (2), (3), (4) and/or~~ and ~~(5)~~).

The allegations which the petitioner will attempt to prove are as follows: (read factual allegations in petition.)

### Note on Use

*Because others may file petitions, this sentence may need to modified accordingly.

### History

M Civ JI 97.06 was added March 2005.

## M Civ JI 97.36
## Definitions

(1) Neglect means the failure of a parent, guardian, nonparent adult, or custodian to provide the care that a child needs, including

the failure to protect the physical and emotional health of a child. Neglect may be intentional or unintentional. It is for you, the jury, to determine from the evidence in this case, what care was necessary for the [child/children], and whether or not [his/her/their] parent(s), guardian, nonparent adult, or custodian provided that care.

(2) The legal definition of cruelty is the same as the common understanding of the word cruelty. It implies physical or emotional mistreatment of a child.

(3) Depravity means a morally corrupt act or practice.

(4) The legal definition of criminality is the same as the common understanding of the word criminality. Criminality is present when a person violates the criminal laws of the state of Michigan or of the United States. Whether a violation of the criminal laws of the state of Michigan or of the United States by a parent, guardian, nonparent adult, or custodian renders the home or environment of a child an unfit place for the child to live in is for you to decide based on all of the evidence in the case.

(5) A child is without proper custody or guardianship when he or she is: (1) left with, or found in the custody of, a person other than a legal parent, legal guardian, or other person authorized by law or court order to have custody of the child, and (2) the child was originally placed, or came to be, in the custody of a person not legally entitled to custody of the child for either an indefinite period of time, no matter how short, or for a definite, but unreasonably long, period of time. What is unreasonably long depends on all the circumstances. It is proper for a parent or guardian to place his or her child with another person who is legally responsible for the care and maintenance of the child and who is able to and does provide the child with proper care and maintenance. A baby sitter, relative, or other caregiver is not legally responsible for the care and maintenance of a child after the previously agreed-upon period of care has ended.

(6) Education means learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and any psychological limitations of a child, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.

(7) A child is abandoned when the child's [parent(s)/guardian/custodian] leave(s) the child for any length of time, no matter how short, with the intention of never returning for the child. The intent of the [parent(s)/guardian/custodian] to abandon the child may be inferred from the [parent's/parents'/guardian's/custodian's] words ~~and/or~~ or actions surrounding the act of leaving the child.

### Comment

MCL 712A.2(b)(1)(A) and (B).

### History

M Civ JI 97.36 was added March 2005.

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

The buyer has failed to pay for [lost/damaged] goods. The buyer must pay for [lost/damaged] goods when:

(a) the buyer has accepted the goods, or

(b) conforming goods are [lost/damaged]

(i) *(within a commercially reasonable time after [the goods are delivered to the carrier/the goods are duly tendered by the carrier at the

(ii) *(after the seller delivers the goods to [*name of bailee*] and [gives the buyer ~~such~~ the notification ~~and/or~~ or documents necessary to enable the buyer to take delivery/the bailee acknowledges the buyer's right to possession of the goods].)

(iii) *([after the buyer has received the goods, if the seller is a merchant/or/after the seller has duly tendered delivery of the goods if the seller is not a merchant].)

### Notes on Use

*The court should choose the subsection that is applicable. If there is an issue of which subsection applies, this instruction must be modified.

This instruction does not apply if there is a contractual agreement to the contrary, or if the sale is on approval. See MCL 440.2509(4). (See *Hayward v Postma*, 31 Mich App 720; 188 NW2d 31 (1971) for a discussion of contractual agreements on risk of loss.)

If an issue, this instruction may have to be supplemented to indicate the special rules relating to negotiable and nonnegotiable documents of title.

### Comment

MCL 440.2509, .2709.

See *Eberhard Manufacturing Co v Brown*, 61 Mich App 268; 232 NW2d 378 (1975) (applying MCL 440.2509(1) to a "shipment" contract), and *Hayward* (applying MCL 440.2509(3)).

### History

M Civ JI 140.21 was added January 1987.

## M Civ JI 142.19 Modification

The parties to a contract can agree to modify a contract by changing one or more of its terms while continuing to be bound by the rest of the contract. Whether the contract was modified by the parties depends on their intent as shown by their words, whether written or oral, or their conduct. In this case, the parties agree that they entered into a contract.

[*Name of party*] claims that after this contract was made, the parties agreed to change the terms of the original contract. To find that the terms of the original contract were changed, you must decide that there is clear and convincing evidence that:

(a) there was a mutual agreement to modify or waive the terms of the original contract, and

(b) unless the agreement to modify or waive the contract was in writing signed by [*name of party being sued on contract*], that [*name of party*] gave consideration in exchange for the modification and that [*name of party being sued on contract*] agreed to the change in the terms of the original contract.

If you decide this was shown by clear and convincing evidence, then the parties changed their original contract and they are bound by the contract as modified.

Otherwise, the parties did not change their original contract.

*The fact there was a written modification ~~and/or~~ or anti-waiver clause in the original contract does not bar the parties from modifying or waiving those clauses. [*Name*

*of party claiming there was an amendment*] must prove by clear and convincing evidence that the parties intended, as shown by their words or conduct, to modify or waive the modification and/or anti-waiver clause as well.

**Note on Use**

This instruction should be accompanied by M Civ JI 8.01, Meaning of Burden of Proof, which defines clear and convincing evidence. The names of the parties may require a change depending on who relies on the modification.

*Use if applicable.

**Comment**

*Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362 (2003). MCL 566.1 provides:

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

**History**

M Civ JI 142.19 was added March 2005.

## PROPOSED

The Committee is considering the adoption of new instructions for use in cases alleging common law or statutory conversion.

### [NEW] M CIV JI CHAPTER 111 CONVERSION

### [NEW] M CIV JI 111.01 Common Law Conversion—Elements

Plaintiff claims that defendant is responsible for conversion of personal property. Conversion means any distinct act of dominion or control wrongfully exerted over another's personal property that is in denial of or inconsistent with the other's right to that property. There are a number of ways that conversion can occur. Some examples of conversion are: intentionally dispossessing another of the property; intentionally destroying or altering the property; using the property without authority; or disposing of the property by selling, pledging, gifting, or leasing it.

**Comment**

*Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc*, 497 Mich 337 (2015.)

### [NEW] M CIV JI 111.02 Common Law Conversion—Burden of Proof

Plaintiff has the burden of proving each of the following:

1. That plaintiff owned the [insert name of personal property];

2. That defendant committed a distinct act of dominion or control wrongfully exerted over plaintiff's [insert name of personal property] that was in denial of or inconsistent with plaintiff's right to that property; and

3. That 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.

**Comment**

*Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc*, 497 Mich 337 (rel'd June 17, 2015.)

### [NEW] M CIV JI 111.03 Statutory Conversion—Elements

Plaintiff [also] claims that defendant is responsible for what is known as statutory conversion of personal property. [As I just mentioned,] Conversion means any distinct act of dominion or control wrongfully exerted over another's personal property that is in denial of or inconsistent with the other's right to that property.

[Again,] There are a number of ways that conversion can occur. Some examples of conversion are: intentionally dispossessing another of the property; intentionally destroying or altering the property; using the property without authority; or disposing of the property by selling, pledging, gifting, or leasing it.

In addition, in a statutory conversion claim, the defendant must have converted the property to the defendant's own use. By "defendant's own use" I mean that defendant employed the converted property for some purpose personal to the defendant's interests, even if that purpose is not the object's ordinarily intended purpose.

**Note on Use**

Use the bracketed language if plaintiff alleges both common law and statutory conversion.

**Comment**

*Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc*, 497 Mich 337 (rel'd June 17, 2015). MCL 600.2919a.

### [NEW] M CIV JI 111.04 Statutory Conversion—Burden of Proof

Plaintiff has the burden of proving each of the following:

1. That plaintiff owned the [insert name of personal property];

2. That defendant committed a distinct act of dominion or control wrongfully exerted over plaintiff's [insert name of personal property] that was in denial of or inconsistent with plaintiff's right to that property;

3. That defendant's conversion of the property was for his own use; and

4. That 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.

**Comment**

*Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc*, 497 Mich 337 (2015) MCL 600.2919a.

### [NEW] M CIV JI 111.05 Statutory Conversion—Treble Damages

If you find that defendant converted property to [his/her/its] own use, you may

award three times the amount of actual damages sustained, but you are not required to do so.

If you find that defendant bought, received, possessed, concealed, or aided in the concealment of property that [he/she/it] knew was converted, you may award three times the amount of actual damages sustained, but you are not required to do so.

**Note on Use**

Either or both of these paragraphs should be used as the facts dictate.

**Comment**

MCL 600.2919a(1); *Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc*, 497 Mich 337 (2015).

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The Committee is considering the adoption of new instructions for use in cases alleging a violation of the Michigan Franchise Investment Law.

## [NEW] M CIV JI CHAPTER 112 FRANCHISE INVESTMENT LAW

## [NEW] M CIV JI 112.01 FRANCHISE INVESTMENT LAW; PROHIBITED PRACTICES—EXPLANATION

We have a state law known as the Franchise Investment Law, which provides that a person shall not, in connection with the filing, offer, sale, or purchase of any franchise, directly or indirectly:

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

(b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

(c) engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

When I use the phrase "scheme or artifice to defraud," I mean any plan or pattern intended to deceive others in order to obtain something of value.

When I use the phrase "material fact" I mean that the statement cannot be an opinion, belief, speculation, or prediction. It must relate to something past or present that can be proved or disproved. Additionally, it must be of enough importance in the matter that a reasonable person would be likely to rely on it.

When I use the word "rely," I mean that plaintiff would not have [entered into the contract/[*describe other action*]] if defendant had not [created the false impression/made the [representation/promise]], even if the [false impression/representation/promise] was not the only reason for plaintiff's action.

**Comment**

MCL 445.1505. A private right of action is permitted by MCL 445.1531. *United States v Goldblatt*, 813 F2d 619 (CA 3, 1987). The definitions of "material fact" and "rely" are taken from M Civ JI 128.10 and 128.11.

## M CIV JI 112.02 FRANCHISE—DEFINITION

When I use the term "franchise," I mean a contract or agreement, either express or implied, whether oral or written, between two or more persons to which all of the following apply:

(a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.

(b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

(c) The franchisee is required to pay, directly or indirectly, a franchise fee.

**Comment**

MCL 445.1502(3)(a)–(c).

## M CIV JI 112.03 FRANCHISEE AND FRANCHISOR—DEFINITION

When I use the term "franchisee," I mean a person to whom a franchise is granted. When I use the term "franchisor," I mean a person who grants a franchise and includes a subfranchisor.

**Comment**

MCL 445.1502(4)–(5).

## M CIV JI 112.04 OFFER OR OFFER TO SELL—DEFINITION

The terms "offer" or "offer to sell" include an attempt to offer to dispose of a franchise or interest in a franchise for value. It also includes solicitation of an offer to buy a franchise or interest in a franchise for value. It doesn't include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee.

**Comment**

MCL 445.1503(3).

## M CIV JI 112.05 PERSON—DEFINITION

When I use the term "person," I mean an individual, corporation, partnership, joint venture, association, joint stock company, trust, or unincorporated organization.

**Comment**

MCL 445.1503(5).

## M CIV JI 112.06 SALE OR SELL—DEFINITION

The terms "sale" or "sell" include a contract or agreement of sale of a franchise or interest in a franchise for value. It also means a contract to sell or disposition of a franchise or interest in a franchise for value.

**Comment**

MCL 445.1503(8).

## M CIV JI 112.07 FRANCHISE FEE—DEFINITION

"Franchise fee" means a fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including, but not limited to, payments for goods and services.

**Comment**

MCL 445.1503(1).

## M CIV JI 112.08 PAYMENT FOR GOODS AND SERVICES AS FRANCHISE FEE

If a franchisee is forced to pay a price in excess of a bona fide wholesale price for goods or if the franchisee is required to purchase excess goods for which there is no well-established market in this state, the excess costs borne by the franchisee in favor of the franchisor constitutes the payment of an indirect franchise fee.

### Comment

*Hamade v Sunoco, Inc*, 271 Mich App 145, 157; 721 NW2d 233 (2006).

## M CIV JI 112.09 PAYMENTS THAT DO NOT CONSTITUTE A FRANCHISE FEE

The following are not the payment of a franchise fee:

(a) The purchase or agreement to purchase goods, equipment, or fixtures directly or on consignment at a bona fide wholesale price.

(b) The payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring the credit card.

(c) Amounts paid to a trading stamp company by a person issuing trading stamps in connection with the retail sale of merchandise or service.

(d) Payments made in connection with the lease or agreement to lease of a franchised business operated by a franchisee on the premises of a franchisor as long as the franchised business is incidental to the business conducted by the franchisor at such premises.

### Note on Use

Use only those subsections that are applicable.

### Comment

MCL 445.1503(1).

## [NEW] M CIV JI 112.10 FRANCHISE INVESTMENT LAW—BURDEN OF PROOF

Plaintiff has the burden of proving each of the following:

(1) 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) The plaintiff justifiably relied on the alleged misrepresentation or omission; and

(3) The plaintiff suffered damages.

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.

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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.

The members of the Committee on Model Civil Jury Instructions are:

**Chair:** Hon. Mark T. Boonstra

**Reporter:** Timothy J. Raubinger

**Members:** Benjamin J. Aloia; Robert L. Avers; Hon. Jane M. Beckering; Mark R. Bendure; W. Mack Faison; Hon. Kathleen A. Feeney; Gary N. Felty Jr.; William B. Forrest III; Donald J. Gasiorek; James F. Hewson; C. Thomas Ludden; Daniel J. McCarthy; Hon. Elizabeth M. Pezzetti; Daniel J. Schulte; Hon. Douglas B. Shapiro; Hon. Michael R. Smith; Hon. Donald A. Teeple; Thomas Van Dusen; Hon. Michael D. Warren Jr.; Thomas W. Waun.

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