



(Instruction – Revision)  
(Notes on Use – Revision)  
(Committee Comment – Revision)

MAI 35.19 ILLUSTRATIONS – PUNITIVE DAMAGES – BIFURCATED TRIAL UNDER §510.263 – NO  
COMPARABLE FAULT – TWO DEFENDANTS – APPORTIONMENT OF FAULT  
BETWEEN  
DEFENDANTS

(Instruction – Revision)  
(Committee Comment – Revision)

### **ORDER**

1. Revisions of previously approved MAI-CIVIL Instructions, Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Instructions, Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after July 1, 2008, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

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LAURA DENVIR STITH

Chief Justice

**6.02 [1998 Revision] Wrongful Death — Aggravating Circumstances**  
(No Change)

**Committee Comment (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

See *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. banc 1995).

Where issues of “harm to others” arise in the context of aggravating circumstances in a wrongful death case, the requirements of the Supreme Court in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), will be implicated. See the bracketed paragraph and accompanying Note on Use 1 to MAI 10.02 for appropriate modification of an instruction submitting “damages for aggravating circumstances” in such cases.

**10.01 [2008 Revision] Damages — Exemplary — Outrageous Conduct — Intentional Torts**  
(Approved November 28, 2007; Effective July 1, 2008)

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction Number \_\_\_\_\_ (*here insert number of plaintiff’s verdict directing instruction*) was outrageous because of defendant’s evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff’s damages instruction*), you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant’s conduct was outrageous. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.]<sup>1</sup>

**Notes on Use (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

1. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

Rule 71.06 provides in part:

“When exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict.”

Where the claim for actual damages is submitted on negligence as opposed to an intentional tort, MAI 10.01 is not applicable; use MAI 10.02 or MAI 10.07, whichever is appropriate. *Sharp v. Robberson*, 495 S.W.2d 394 (Mo. banc 1973). Where the claim for actual damages is submitted on strict liability as opposed to intentional tort or negligence, use MAI 10.04 or MAI 10.05, whichever is appropriate. *Racer v. Utterman*, 629 S.W.2d 387 (Mo. App. 1981). Where the claim for actual damages is submitted on negligence and strict liability, use MAI 10.06.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The “clear and convincing” standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996), has been incorporated into the burden of proof instruction MAI 3.01.

#### **Committee Comment (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

In *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. banc 1989), the Court adopted this instruction for the submission of punitive damages in intentional tort cases and held that the definition of “legal malice” in MAI 16.01 should no longer be used.

See MAI 4.15 and 4.16 for submission of punitive damages in libel and slander cases.

See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to §510.263, RSMo. See §510.265 for limitations on punitive damages in certain cases.

#### **10.02 [2008 Revision] Damages — Exemplary — Negligence Constituting Conscious Disregard for Others**

(Approved November 28, 2007; Effective July 1, 2008)

If you find in favor of plaintiff under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction based on negligence*), and if you believe the conduct of defendant as submitted in Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction based on negligence*) showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant’s conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.]<sup>1</sup>

### Notes on Use (2008 Revision)

(Approved November 28, 2007; Effective July 1, 2008)

1. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction in a case where exemplary damages are submissible in connection with a claim for actual damages based on negligence as opposed to intentional tort or strict liability. *Sharp v. Robberson*, 495 S.W.2d 394 (Mo. banc 1973).

**Caution:** Under *Menaugh v. Resler Optometry, Inc.* 799 S.W.2d 71 (Mo. banc 1990), MAI 10.02 will not be adequate to submit punitive damages under the following circumstances:

1. *Where the verdict directing instruction contains alternative submissions of negligence but fewer than all submissions will support a punitive damage instruction.* Under these circumstances, *Menaugh* suggests that the punitive damage instruction be limited to that portion of the verdict director that requires the jury to find the essential mental element. *Id.* at 74, 75.

2. *Where the verdict directing instruction contains a single submission of negligence but the evidence demonstrates alternate sets of facts, both of which support the submission, but only one of which will support punitive damages.* Under these circumstances, *Menaugh* suggests the addition of such additional facts to MAI 10.02 as are necessary to justify a punitive damage submission. *Id.* at 74, 75.

3. *Where the verdict directing instruction does not contain a submission on the issue of defendant’s “knowledge.”* Under these circumstances, *Menaugh* states that MAI 10.02 is inadequate because it does not require the jury to find the essential mental element. *Id.* at 74. *Menaugh* recognizes that those verdict directing instructions such as the “premises liability” instruction in *Sharp* will be sufficient to submit the issue of defendant’s “knowledge” and may then be followed by MAI 10.02 without modification. *Id.* at 74. For further discussion of the “knowledge” issue, see *Hoover’s Dairy, Inc. v. Mid-America Dairymen*, 700 S.W.2d 426 (Mo. banc 1985).

The problems addressed in *Menaugh* should be resolved by utilization of MAI 10.07.

Such problems should not arise when using MAI 10.04 [Strict Liability - Either Product Defect or Failure to Warn Submitted] or MAI 10.05 [Strict Liability - Both Product Defect and Failure to Warn Submitted] but may arise when using MAI 10.06 [Both Negligence and Strict Liability Submitted] in the context of the negligence submission. If such a problem arises in using MAI 10.06, counsel should adapt that portion of MAI 10.06 relating to negligence with the method of submission demonstrated by MAI 10.07.

See MAI 10.01 for submission of punitive damages in connection with an intentional tort.

Under *Menaugh*, the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

Where punitive damages are submitted in a case involving only pecuniary harm, without bodily injury, this instruction may be modified by substituting the phrase “rights of others” for the phrase “safety of others.” *Haynam v. Laclede Electric Co-op., Inc.*, 889 S.W.2d 148 (Mo. App. 1994).

The “clear and convincing” standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

#### **Committee Comment (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

Existing MAI 10.01 fits some cases but does not fit the drunken driver case.

In *Nichols v. Bresnahan*, 357 Mo. 1126, 212 S.W.2d 570, 573 (1948), the Court cited with approval Restatement of Torts §500 (1935), as follows:

“The actor’s conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor’s conduct not only creates an unreasonable risk of bodily harm to the other, but also involves a high degree of probability that substantial harm will result to him.”

The Court approved an instruction requiring a finding that defendant’s conduct exhibited “a conscious disregard or indifference to the . . . consequences.” *Id.*

In *Evans v. Illinois Cent. R. Co.*, 289 Mo. 493, 233 S.W. 397, 400 (banc 1921), the Court said:

“A wanton act is a wrongful act done on purpose, or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference whether wrong or injury is done or not. As we understand the words ‘conscious disregard of the life and bodily safety’, they add nothing to the words ‘willful, wanton and reckless’, and are included within the meaning of those words. As

applied to an act, they necessarily mean that such act was intentionally done without regard to the rights of others, and in full realization of the probable results thereof.”

See also, *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo. banc 1991), regarding the submissibility of punitive damages in a case involving an intoxicated driver.

See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to §510.263, RSMo. See §510.265 for limitations on punitive damages in certain cases.

#### **10.04 [2008 Revision] Damages — Exemplary — Strict Liability —**

##### **Either Product Defect or Failure to Warn Submitted**

(Approved November 28, 2007; Effective July 1, 2008)

If you find in favor of plaintiff under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's strict liability verdict directing instruction*) and if you believe:

First, at the time defendant sold the (*describe product*), defendant knew of the [defective condition and danger]<sup>1</sup> [danger]<sup>2</sup> submitted in Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's strict liability verdict directing instruction*), and

Second, defendant thereby showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not party to this case]<sup>3</sup>

##### **Notes on Use (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

1. When plaintiff's only strict liability submission is based on MAI 25.04, use this bracketed phrase.
2. When plaintiff's only strict liability submission is based on MAI 25.05, use this bracketed term.

3. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Phillip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction in a case where exemplary damages are submissible in connection with a claim for actual damages based on strict liability under either MAI 25.04 or MAI 25.05, as opposed to negligence or intentional tort. If plaintiff submits under both MAI 25.04 and MAI 25.05, use MAI 10.05. If plaintiff submits on both negligence and strict liability, use MAI 10.06.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The “clear and convincing” standard of proof for punitive damages adopted by *Rodriquez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

#### **Committee Comment (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

It was held in *Racer v. Utterman*, 629 S.W.2d 387 (Mo. App. 1981), that MAI 10.02 is inappropriate for submission of punitive damages in a case wherein compensatory damages are awarded against a strict liability defendant but that:

If plaintiff, in addition to proving the conduct necessary to support such a strict liability claim, can also establish a degree of fault in such conduct sufficient to justify punitive damages, those damages may also be recovered. *Id.* at 396.

MAI 10.04 is drafted to submit the issue of punitive damages under the evidence detailed in the *Racer* opinion. If the substantive law and evidence support a submission on a theory other than actual knowledge of the product defect, then there should be an appropriate modification of paragraph First.

See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to §510.263, RSMo. See §510.265 for limitations on punitive damages in certain cases.

#### **10.05 [2008 Revision] Damages — Exemplary — Strict Liability — Both Product Defect and Failure to Warn Submitted**

(Approved November 28, 2007; Effective July 1, 2008)

First, if you find in favor of plaintiff under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction MAI 25.04*) and if you believe that at the time defendant sold the (*describe product*) defendant knew of the defective condition and danger submitted in Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction MAI 25.04*), or

if you find in favor of plaintiff under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction MAI 25.05*) and if you believe that at the time defendant sold the (*describe product*) defendant knew of the danger submitted in Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction MAI 25.05*), and

Second, if you believe that defendant, in one or more of the respects submitted in paragraph First, thereby showed complete indifference to or conscious disregard for the safety of others,

then in addition to any damages to which you may find plaintiff entitled under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.]<sup>1</sup>

#### **Notes on Use (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

1. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction where exemplary damages are submissible in connection with a claim for actual damages based on both MAI 25.04 and MAI 25.05 and the evidence would permit an award of punitive damages under either theory.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The “clear and convincing” standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

**Committee Comment (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to §510.263, RSMo. See §510.265 for limitations on punitive damages in certain cases.

**10.06 [2008 Revision] Damages — Exemplary — Both Negligence and Strict Liability Submitted**

(Approved November 28, 2007; Effective July 1, 2008)

If you find in favor of plaintiff under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction based on negligence*), and if you believe the conduct of defendant as submitted in Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction based on negligence*) showed complete indifference to or conscious disregard for the safety of others, or

If you find in favor of plaintiff under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's strict liability verdict directing instruction*) and if you believe:

First, at the time defendant sold the (*describe product*), defendant knew of the [defective condition and danger]<sup>1</sup>[danger]<sup>2</sup> submitted in Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's strict liability verdict directing instruction*), and

Second, defendant thereby showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.]<sup>3</sup>

### **Notes on Use (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

1. When plaintiff's only strict liability submission is based on MAI 25.04, use this bracketed phrase.
2. When plaintiff's only strict liability submission is based on MAI 25.05, use this bracketed term.
3. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Phillip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction in a case where exemplary damages are submissible in connection with a claim for actual damages based on both negligence and strict liability under either MAI 25.04 or MAI 25.05 and the evidence would permit an award of punitive damages under either theory. If plaintiff submits a claim for actual damages based on some other combination of theories that supports the submission of punitive damages, this instruction should be modified to combine the appropriate instructions for Chapter 10 in the manner of MAI 10.06.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The "clear and convincing" standard of proof for punitive damages adopted by *Rodriquez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

See the **Caution** in the Notes on Use to MAI 10.02 for further discussion of potential problems in the submission of punitive damages based on negligence addressed in *Menaugh*. See also MAI 10.07.

### **Committee Comment (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to §510.263, RSMo. See §510.265 for limitations on punitive damages in certain cases.

## **10.07 [2008 Revision] Damages — Exemplary — Modification of MAI 10.02 —**

### **Submission of Specific Acts and Knowledge**

(Approved November 28, 2007; Effective July 1, 2008)

If you find in favor of plaintiff under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's verdict directing instruction based on negligence*), and if you believe that:

First, (*here describe the act or omission that justifies the submission of punitive damages*), and

Second, defendant knew or had information from which defendant, in the exercise of ordinary care,<sup>1</sup> should have known that such conduct created a high degree of probability of injury, and

Third, defendant thereby showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number \_\_\_\_\_ (*here insert number of plaintiff's damage instruction*) you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.]<sup>2</sup>

#### **Notes on Use (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

1. The phrase "ordinary care" must be defined. See Chapter 11.
2. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This instruction is MAI 10.02 modified to resolve the problems addressed in *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990). See the **Caution** in the Notes on Use to MAI 10.02 for further discussion.

The use of the phrase "had information from which defendant, in the exercise of ordinary care, should have known" is the equivalent of the phrase "had reason to know" as defined in Restatement (First) and (Second) of Torts §12 and as used in *Stojkovic v. Mid-America Dairymen*, 700 S.W.2d 426 (Mo. banc 1984). The Committee has opted to use this equivalent phrase rather than "had reason to know" because it is thought that the phrase "had reason to know" may be confusing or misleading to the jury.

Under *Menaugh*, the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

Where punitive damages are submitted in a case involving only pecuniary harm, without bodily injury, this instruction may be modified by substituting the phrase “rights of others” for the phrase “safety of others”. *Haynam v. Laclede Elec. Co-op., Inc.*, 889 S.W.2d 148 (Mo. App. 1994).

The “clear and convincing” standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

**Committee Comment (2008 Revision)**

(Approved November 28, 2007; Effective July 1, 2008)

See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to §510.263, RSMo. See §510.265 for limitations on punitive damages in certain cases.

**35.19 [2008 Revision] Illustrations — Punitive Damages — Bifurcated Trial Under §510.263 — No Comparative Fault — Two Defendants — Apportionment of Fault Between Defendants**

(Approved November 28, 2007; Effective July 1, 2008)

Non-employee plaintiff Hurt was injured on a construction site (not a public highway) when Acme road grader backed over him. The road grader was manufactured by Acme without a back up warning device. At the time of the sale of the road grader Acme had notice of thirty incidents of individuals being backed over by this product. The claim against Acme is for design defect and for punitive damages.

Defendant Driver is sued for failure to keep a careful lookout for compensatory damages only. Driver and Acme have filed cross-claims against each other for apportionment of fault. There is no comparative fault. Acme has requested a bifurcated trial under §510.263, RSMo.

Instruction Number 1

(Same as MAI 2.01)

Instruction Number 2

(See MAI 2.03 (2005 Revision))

As you remember, the court gave you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the

instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction Number 3

(See MAI 2.02 (1980 Revision))

In returning your verdicts you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 4

(See MAI 3.01 (1998 Revision))

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon plaintiff to cause you to believe that the evidence has clearly and convincingly established the propositions of fact required for the recovery of punitive damages. However, on all other propositions of fact, the burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you can not return a verdict requiring belief of that proposition.

Instruction Number 5

(See MAI 2.04 (1981 Revision))

There are two claims submitted to you and each of them contains a separate verdict form. The verdict forms included in these instructions contain directions for completion and will allow you to return the permissible verdicts in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

\* \* \*

Instruction Number 6

(See MAI 2.05 (1980 New), Modified)

Instructions 6 through 14 and general instructions 1 through 5 apply to the claim of plaintiff Hurt for *compensatory damages* for personal injury *and to the determination of the liability of defendant Acme for punitive damages*. Use Verdict A to return your verdict on *these issues*.

Instruction Number 7

(See MAI 25.04 (1978 Revision), Modified, MAI 19.01 (1986 Revision))

*On the claim of plaintiff Hurt for compensatory damages for personal injury against defendant Acme*, your verdict must be for plaintiff Hurt if you believe <sup>1</sup>:

First, defendant Acme sold the road grader in the course of defendant's business, and

Second, the road grader was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the road grader was used in a manner reasonably anticipated, and

Fourth, such defective condition as existed when the road grader was sold directly caused or directly contributed to cause damage to plaintiff.

Instruction Number 8

(Converse Omitted)

Instruction Number 9

(See MAI 17.01 (1980 Revision), MAI 17.05 (1965 New), MAI 19.01 (1986 Revision))

*On the claim of plaintiff Hurt for compensatory damages for personal injury against defendant Driver*, your verdict must be for plaintiff Hurt if you believe <sup>1</sup>:

First, defendant Driver failed to keep a careful lookout, and

Second, defendant Driver was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff Hurt.

Instruction Number 10

(Converse Omitted)

Instruction Number 11

(See MAI 11.07 (1996 Revision))

The term "negligent" or "negligence" as used in these instructions means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction Number 12

(See MAI 4.01 (1980 Revision), Modified)

If you find in favor of plaintiff and against one or more defendants, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably

certain to sustain in the future that the occurrence mentioned in the evidence directly caused or directly contributed to cause.

Instruction Number 13

(See MAI 10.04 (2008 Revision), Modified)

If you find in favor of plaintiff Hurt and against defendant Acme under Instruction Number 7,<sup>2</sup> and if you believe that:

First, at the time defendant Acme sold the road grader, defendant knew of the defective condition and danger submitted in Instruction Number 7, and

Second, defendant Acme thereby showed complete indifference to or conscious disregard for the safety of others,

then, *in Verdict A, you may find that defendant Acme is liable for punitive damages.*

You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others.

*If you find that defendant Acme is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of the trial.*

Instruction Number 14

(Converse Omitted, See MAI 33.16 (1991 New))<sup>3</sup>

Verdict A

(See MAI 36.11 (1980 Revision), Modified)<sup>4</sup>

Note: Complete this form as required by your verdict.

On the claim of plaintiff Hurt *for compensatory damages for personal injury* against defendant Acme, we, the undersigned jurors, find in favor of:

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Plaintiff Hurt

OR

Defendant Acme

On the claim of plaintiff Hurt *for compensatory damages for personal injury* against defendant Driver, we, the undersigned jurors, find in favor of:

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Plaintiff Hurt

OR

Defendant Driver

Note: Complete the following paragraph only if one or more of the above findings is in favor of plaintiff Hurt.

We, the undersigned jurors, assess the *compensatory* damages of plaintiff Hurt at \$\_\_\_\_\_ (*stating the amount*).

Note: *If you found in favor of plaintiff Hurt and against defendant Acme, complete the following paragraph by writing in the word(s) required by your verdict. We, the*

*undersigned jurors, find that defendant Acme \_\_\_\_\_ liable for*  
*(“is” or “is not”)*  
*punitive damages.*

Note: All jurors who agree to the above must sign below.

_____	_____
_____	_____
_____	_____
_____	_____

Instruction Number 15

(See MAI 2.05 (1980 New))

Instructions 15 through 16 and general instructions 1 through 5 apply to the claim between defendants for apportionment of fault. Use Verdict B to return your verdict on this claim.

Instruction Number 16

(See MAI 4.12 (1979 New), Modified)

If Verdict A is in favor of plaintiff Hurt and against both defendants, you must assess the proportion of fault which each defendant listed in Verdict B has for plaintiff’s *compensatory* damages.

Verdict B

(See MAI 36.15 (1979 New), Modified)

Note: Complete this form if fault is to be apportioned.

On the claim between defendants for assessment of the proportions of fault for plaintiff Hurt’s *compensatory* damages assessed in Verdict A, we, the undersigned jurors, find:

Note: Complete by writing in the percentage of the relative fault for each defendant you believe to be at fault. The total of the percentages you assess must not exceed 100%

Defendant Acme is \_\_\_\_\_% at fault.

Defendant Driver is \_\_\_\_\_% at fault.

Note: All jurors who agree with the above findings must sign below.

Four horizontal lines on the left and four horizontal lines on the right, intended for juror signatures.

\* \* \*

Instruction Number 17<sup>5</sup>

(See MAI 2.05 (1980 New), Modified)

Instructions 17 through 18 and *general instructions 1 through 5* apply to the determination of the amount of punitive damages to be assessed against defendant Acme. Use Verdict C to return your verdict as to the amount of punitive damages.<sup>6</sup>

Instruction Number 18<sup>3</sup>

(See MAI 10.04 (2008 Revision), Modified)

In addition to any *compensatory damages* you assessed in Verdict A, you may assess an additional amount as punitive damages in such sum as you believe will serve to punish defendant Acme *for the conduct for which you found that defendant Acme is liable for punitive damages* and will serve to deter defendant Acme and others from like conduct.

You may consider harm to others in determining whether defendant’s conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not party to this case.

Verdict C

(Not in MAI)

Note: Complete this form as required by your verdict.

We, the undersigned jurors, assess punitive damages against defendant Acme at \$\_\_\_\_\_ (stating the amount, or, if none, write the word “none”).

Note: All jurors who agree to the above must sign below.

Four horizontal lines on the left and four horizontal lines on the right, intended for juror signatures.

(Approved November 28, 2007; Effective July 1, 2008)

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. banc 1990), the amount of punitive damages assessed against a defendant is *not* to be reduced by any percentage of fault assessed to plaintiff in a comparative fault case.

**Caution:** Section 538.210.5, RSMo, provides that punitive damages may be assessed against a health care provider in actions accruing after February 3, 1986, only where the health care provider demonstrated willful, wanton, or malicious misconduct. The Committee takes no position on the constitutionality of Senate Bill 663, 1986 Mo. Laws 879.

The Committee takes no position on the constitutionality of House Bill 700, 84<sup>th</sup> General Assembly, 1<sup>st</sup> Regular Session (1987), of which §510.263, RSMo, was a part, and which was perpetuated in House Bill 393 of the 93<sup>rd</sup> General Assembly (2005) with limitations on punitive damages in certain cases.

The trial judge should exercise sound discretion in affording attorneys appropriate leeway during the various stages of trial to describe to the jury the proceedings contemplated by §510.263, RSMo.

After the first stage of trial, there may be additional evidence in the second stage relating to the net worth of the defendants found liable for punitive damages. There may also be additional argument by counsel as to the amount (possibly “zero”) to be assessed by the jury as punitive damages. The Committee takes no position as to whether additional evidence, other than net worth, may be admissible in the second stage of trial.

The method in this Illustration of splitting MAI 10.04 and modifying its component parts for submission of punitive damages in a bifurcated trial pursuant to §510.263 may be utilized with any punitive damage instruction in Chapter 10.

The word “assess” is used in Instruction Number 18 rather than the phrase “award plaintiff” because the award of punitive damages may not inure entirely to the benefit of the plaintiff. Second §537.675, RSMo, provides a mechanism for the State of Missouri to obtain one-half of any final judgment awarding punitive damages. The Committee takes no position on the constitutionality of §537.675 or whether the potential interest of the State of Missouri and the “Tort Victims Compensation Fund” created by §537.675.1 may be argued to the jury.