1021.2 ILLNESS WITHOUT FOREWARNING

(Defendant) has denied that (he) (she) was negligent in the operation of the automobile on the ground that, without prior warning, (he) (she) was subjected to an illness that affected (his) (her) ability (to understand and appreciate the duty to exercise ordinary care in driving the car) (to control the car in an ordinarily prudent manner).

The law of Wisconsin is that where a driver, through sudden illness or loss of consciousness, commits an act or omits a precaution which would otherwise constitute negligence, such act or omission is not negligence if the occurrence of such illness or loss of consciousness was not preceded by sufficient warning that a person of ordinary intelligence and prudence ought reasonably to foresee that he or she, by driving a car would, subject the person or property of another or of himself or herself to an unreasonable risk of injury or damage.

However, when the occurrence of the illness or loss of consciousness should have been reasonably foreseen, then the person so disabled may be found negligent. The negligence is not in the manner of driving but rather in driving at all, if the person should reasonably have foreseen that the illness or lack of consciousness might occur and affect the person's manner of driving.

COMMENT

The instruction and comment were approved by the Committee in 1971. The comment was reviewed without change in 1980 and 1989. The comment was updated in 2001.

Breunig v. American Family Ins. Co., 45 Wis.2d 536, 173 N.W.2d 619 (1970).

The party asserting the defense of illness without forewarning has the burden of proof to establish it. 28 A.L.R.2d 16, 38 (1953). See Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 623 N.W.2d 751.

A sleeping driver is negligent as a matter of law. Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). In Theisen, supra, the court noted that certain illnesses while driving would not be negligence as a matter of law:

> We exclude from this holding those exceptional cases of loss of consciousness resulting from injury inflicted by an outside force or fainting or heart attack, epileptic seizure, or other illness which suddenly incapacitates the driver of an automobile and when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen. When, however, such occurrence should have been reasonably foreseen, we have held the driver of a motor vehicle negligent as a matter of law, as in the sleep cases. Eleason v. Western Casualty & Surety Co., (1948), 254 Wis. 134, 35 N.W.2d 301 (epilepsy); Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co., supra; Theisen v. Milwaukee Automobile Mut. Ins. Co., supra at 99.