

1740 DAMAGES: COMMON SCHEME OR PLAN; CONCERTED ACTION (WIS. STAT. § 895.045(2))

Question _____ asks whether the defendants engaged in concerted action?

Parties engage in concerted action when they pursue a common scheme or plan to accomplish a result that injures the plaintiff. Parties engaged in concerted action do not have to intend that plaintiff be injured.

Parties engage in concerted action if you determine that the following three elements existed:

1. there was an explicit or tacit agreement to act in accordance with a mutually agreed upon scheme or plan. The agreement need not be expressed in words, but it may be implied and understood to exist from the conduct itself; and
2. mutual acts were committed in furtherance of the common scheme or plan that were negligent or intentional; and
3. the acts undertaken to accomplish the common scheme or plan were the acts that resulted in damages.

SPECIAL VERDICT

If you have answered Question _____ and Question _____ "yes" as to (defendant), then answer Question _____.

Did (defendants) engage in concerted action (describe alleged action)?

Answer: _____

Yes or No

COMMENT

This instruction and comment were first approved in 2005. They were revised in 2009.

If the jury does not find a defendant to have negligently or intentionally caused plaintiff's injuries, then that defendant is not liable for joint and several liability under Wis. Stat. § 895.045(2).

The Committee believes that the question of whether parties have acted in accordance with a common scheme or plan is a question of fact for the factfinder. It is not evident from the language of the statute that an improper motive or unlawful act is necessary for a common scheme or plan to exist.

Legislative Change. In 1995, the Wisconsin Legislature modified the common law of joint and several liability. Under 1995 Wisconsin Act 17 (amending Wis. Stat. § 895.045), the liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person whose percentage of causal negligence is 51% or more is jointly and severally liable for the damages allowed. However, if two or more persons "act in accordance with a common scheme or plan," the law imposes joint and several liability on each person. The 1995 legislative change is described by a statement prepared by the Director of State Courts regarding Senate Bill 11:

This Bill revises the laws relating to comparative negligence and punitive damages. Presently, if several persons contribute to the cause of an injury to the plaintiff, each of the tortfeasors is jointly and severally liable for the plaintiff's damages, as reduced by the plaintiff's percentage of negligence. This bill provides that the negligence of the plaintiff is measured against each joint tortfeasors' percentage of negligence. A joint tortfeasors' liability is limited to the percentage of total causal negligence attributed to that party.

The legislation provided one exception to the limitation of joint and several liability. That exception is § 895.05(2) which states:

(2) Concerted Action. Notwithstanding (1), if two or more parties' act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in § 895.85(5).

Civil Jury Instruction 1740 deals with this exception which creates an issue of fact for the fact finder.

Concerted Action Doctrine. In 2008, the supreme court concluded that Wis. Stat. § 895.045(2) is the legislative codification of the concerted action theory of liability. Richards v. Badger Mut. Ins. Co., 2008 WI 52, 309 Wis.2d 541, 749 N.W.2d 581. The court stated:

¶46 From our review of Wisconsin cases and learned treatises, wherein principles of concerted action are discussed, terms similar to those in Wis. Stat. § 895.045(2) are employed and the concerted action theory of liability is explained, we conclude that § 895.045(2) is the codification of the concerted action theory of liability. The statute is consistent with the concerted action theory as explained by Wisconsin courts and in learned treatises such as Prosser's *The Law of Torts* and the Restatement (Second) of Torts § 876. Our decision in this

regard is supported by those who considered this question when drafting the Wisconsin Civil Jury Instruction 1740.

¶47 Our conclusion that Wis. Stat. § 895.045(2) is the codification of the concerted action theory of liability does not change Wisconsin law in regard to whether the actions of a tortfeasor were a substantial factor in causing harm sustained by another. This is so because in order to fit within the parameters of § 895.045(2), a tortfeasor must already be causally negligent under substantive law. Danks, 298 Wis.2d 348, ¶39. One is causally negligent when his or her conduct is a substantial factor in causing injury to another. Johnson v. Misericordia Cmty. Hosp., 97 Wis.2d 521, 561, 294 N.W.2d 501 (Ct. App. 1980). Accordingly, under our interpretation of § 895.045(2), a person who is causally negligent with regard to a recovering plaintiff will have proportionate liability under § 895.045(1), unless something more is proved about that tortfeasor's conduct that will bring it within the purview of subsection (2). Danks, 298 Wis.2d 348, ¶39.

Elements of Concerted Action. In Richards, the supreme court held that for joint and several liability to exist "concerted action must be proved;" that something more than causal negligence is required before the actions of a tortfeasor will come within Wis. Stat. § 895.045(2). The court listed three "factual predicates necessary to proving concerted action:"

¶50 There are three factual predicates necessary to proving concerted action. First, there must be an explicit or tacit agreement among the parties to act in accordance with a mutually agreed upon scheme or plan. See Collins, 116 Wis.2d at 185. Parallel action, without more, is insufficient to show a common scheme or plan. Id. Second, there must be mutual acts committed in furtherance of that common scheme or plan that are tortious acts. See Ogle, 33 Wis.2d at 135. Third, the tortious acts that are undertaken to accomplish the common scheme or plan must be the acts that result in damages. See Collins, 116 Wis.2d at 184-85.

Instruction and Special Verdict. This instruction and suggested verdict are designed for a case involving only 2 defendants. If a party claims that he or she did not participate in a common scheme or plan with other defendants, it may be necessary to add questions directed at the alleged concerted action of each of the defendants individually, or possible combinations of defendants, e.g. A & B, A & B & C, A & C, or B & C.