OFFICE OF JUDICIAL EDUCATION
2022

March 2022

TO: Holders of ***Wisconsin Jury Instructions – Civil***

FROM: Bryce Pierson, Office of Judicial Education – Wisconsin Court System
Legal Advisor – Jury Instructions
Reporter, Wisconsin Civil Jury Instructions Committee

SUBJECT: 2022 Supplement to ***Wisconsin Jury Instructions – Civil***

The enclosed 2022 supplement to ***Wisconsin Jury Instructions – Civil*** was recently approved by the Wisconsin Judicial Conference's Civil Jury Instructions Committee. It is the fifty-third supplement in the publication's 62-year history.

Content. The 2022 supplement updates the publication on legislative actions and judicial decisions through January 21, 2022.

Information. For information on the status of the Committee's work, please contact Bryce Pierson at bryce.pierson@wicourts.gov.

WIS JI-CIVIL

2022 Supplement

Filing Instructions

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FOR QUESTIONS:

If you have any questions about these filing instructions or the civil jury instructions, please contact the Committee's reporter, Bryce Pierson at bryce.pierson@wicourts.gov.

OFFICE OF JUDICIAL EDUCATION
2022

WISCONSIN JURY INSTRUCTIONS

CIVIL

Wisconsin Civil Jury Instructions Committee

- 2022 Supplement (Release No. 53)

OFFICE OF JUDICIAL EDUCATION
2022

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME I

Wisconsin Civil Jury Instructions Committee

- 2022 Supplement (Release No. 53)

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Reporter: Bryce Pierson, Office of Judicial Education – Wisconsin Court System

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50 PRELIMINARY INSTRUCTION: BEFORE TRIAL

(NOTE TO THE TRIAL JUDGE: The following is a suggested instruction to be given to the jury before opening statements are made by the lawyers for the parties. While most of this instruction should apply to most cases, some parts of it do not apply to all cases and some parts of it may not apply to the case before you now. Read the instruction before it is given and delete any parts that are not applicable. Also, the language used in this Instruction is "suggested" language. You may have another way of expressing the same ideas in this instruction and may do so, consistent with Wisconsin law.)

MEMBERS OF THE JURY:

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. [Do not let any personal feelings, prejudices or stereotypes about personal characteristics such as (race), (religion), (national origin), (sex), or (age) affect your consideration of the evidence.][1]

In fairness to the parties, keep an open mind during the trial. Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social

networking sites, to send or receive any information about this case or your experience as a juror. Once deliberations begin in the jury room you will then be in a position to intelligently and fairly exchange your views with other jurors.

CONDUCT

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers [interpreters,] or witnesses, do not speak with them. For their part, the parties, lawyers, [interpreters,] and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or listen to any news reports on radio, television, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while

you are serving on this jury. Do not use a computer, cell phone or other electronic device, including personal wearable electronics, applications, or tools with communication capabilities, to share any information about this case. For example, do not communicate by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you, the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decision in this case. After this trial is completed, you are free to communicate with anyone in any manner.

These rules are intended to assure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

PARTIES

A party who brings a lawsuit is called a plaintiff. In this case, the plaintiff[s] [is] [are] _____ [state separately as to each if more than one]. The

plaintiff[s] [is] [are] suing to [note: state purposes of the action for each plaintiff, for example, recover damages from a defendant].

[If there are multiple plaintiffs, give the following: You should decide the case of each plaintiff as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of [his] [her] [its] own claim(s). All instructions apply to each plaintiff unless I tell you otherwise.]

A party against whom a claim is made is called a defendant. In this case, the defendant[s] [is] [are] _____ [state separately to each if more than one].

[If there are multiple defendants, give the following: You should decide the case against each defendant as if it were a separate lawsuit. Each defendant is entitled to separate consideration of [his] [her] [its] own defenses. All instructions apply to each defendant unless I tell you otherwise.]

[If there is a counterclaiming defendant, give the following: The defendant[s] in this case have also filed a claim against the plaintiff[s]. [Identify the party making the counterclaim and the party against whom the counterclaim is made]. The claim of a defendant against a plaintiff is called a counterclaim. The defendant[s] [is] [are] counterclaiming for [note: state purposes of the counterclaim for each defendant, for example, recover damages from a plaintiff.]

[If there are parties with subrogated interests or other parties named in caption and

not appearing at trial, give the following: There [is another party] [are other parties] named in this case that will not participate in this trial. Do not speculate on the reasons. Any claims involving them are not to be considered by you in deciding this case.]

[If there are settled, dismissed, or withdrawn parties, give the following: [Former party] is no longer a party in this case. [The claims of that party] [Claims against that party] have been [settled] [dismissed] [withdrawn]. Do not speculate on the reasons.]

EVIDENCE

You are to decide the case solely on the evidence offered and received at trial. Evidence is:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence.

Remarks of the attorneys are not evidence. If any remarks suggest certain facts not in evidence, disregard the suggestion.

ORDER OF PROOF

Normally, a plaintiff will produce all witnesses and exhibits supporting plaintiff's

claim against the defendant before the defendant introduces any evidence, although exceptions are sometimes made to that rule to accommodate a witness. After the plaintiff's case is presented, the defendant may present witnesses and exhibits to establish any defenses. There is no requirement that the defendant call any witnesses or present any evidence [unless the defendant is making a claim against the plaintiff]. If the defendant does introduce evidence, the plaintiff is then permitted to offer additional evidence to rebut the defendant's case. Each witness is first examined by the lawyer who called the witness to testify and then the opposing lawyer is permitted to cross-examine.

OBJECTIONS

At times during a trial, objections may be made to the introduction of evidence. I do not permit arguments on objections to evidence to be made in your presence. Any ruling upon objections will be based solely upon the law and are not matters which should concern you at all. You must not infer from any ruling that I make or from anything that I should say during the trial that I hold any views for or against either party to this lawsuit.

During the trial, I will sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, will instruct that it be stricken from the record and that you are to disregard it and dismiss it from your minds. You should not draw any inference from an unanswered question, nor may you consider testimony which has been stricken in reaching your decision. This is because the law requires that your decision be made solely upon the competent evidence before you.

[NOTETAKING NOT ALLOWED

Do not take notes during the trial. Taking notes will not be permitted in this case because _____.]

[NOTETAKING PERMITTED

You are not required to but you may take notes during this trial, except during the opening statements and closing arguments. The court will provide you with materials.

In taking notes, you must be careful that it does not distract you from carefully listening to and observing the witnesses.

You may rely on your notes to refresh your memory during your deliberations. Otherwise, keep them confidential. After the trial, the notes will be collected and destroyed.]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

USE OF DEPOSITIONS

During the trial, the lawyers will often refer to and read from depositions. Depositions are transcripts of testimony taken before the trial. The testimony may be that

of a party or anybody who has knowledge of facts relating to the lawsuit. Deposition testimony, just like testimony during the trial, if received into evidence at the trial, may be considered by you along with the other evidence in reaching your verdict in this case.

[JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to ask written questions of the witnesses testifying in this case.

After both lawyers have finished questioning a witness, you may raise your hand if you have any questions that have not been addressed by the lawyers. Questions must be in writing and directed to the witness and not to the lawyers or me. If I determine that your question may be asked, I will ask it. If I do not ask your question, you should not speculate what the answer to the question is or why I did not ask it.]

CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;

- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

BURDEN OF PROOF

In every trial there is a burden of proof. The phrase "burden of proof" means that when a party comes into a courtroom and makes a claim, as the plaintiff is making here, the law says that claim must be proved. After the trial, I will instruct you on the proper burden of proof to be applied to the questions in the verdict that will be submitted to you.

[CLOSING ARGUMENTS

After all of the evidence is introduced and both parties have rested, the lawyers will again have an opportunity to address you in a closing argument. While the closing

arguments are very important, they are not evidence and you are not bound by the argument of either lawyer.

After the final arguments are concluded, I will instruct you on the rules of law applicable to the case, and you will then retire for your deliberations. Your function as jurors is to determine what the facts are and to apply the rules of law that I give you to the facts. The conclusion you reach will be your verdict. You will determine what the facts are from all the testimony that you hear and from exhibits that are submitted to you. You are the sole and exclusive judges of the facts. In that field, neither I nor anyone may invade your province. I will try to preside impartially during this trial and not to express any opinion concerning the facts. Any views of mine as to what the facts are totally irrelevant.

I do caution you, however, that under your oath as jurors, you are duty bound to accept the rules of law that I give you whether you agree with them or not. As the sole judges of the facts in this case, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it.]

OPENING STATEMENTS

We have now reached that stage of the proceedings where both lawyers have the opportunity to make an opening statement.

The purpose of an opening statement is to outline for you what each side expects to prove so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

After [counsel/the parties] have completed their opening statements, we will begin the trial, by (plaintiff)'s lawyer calling the first witness.

NOTES

1. The current non-exhaustive list of personal characteristics may be revised by the trial judge based on the needs of each case. An expanded list, for example, may include additional personal characteristics like [(disability) (gender) (gender identity) (sexual orientation)], etc.

COMMENT

This instruction was approved in 2010, and revised in 2017 and 2020. The 2017 revision included a "Note to the Trial Judge" at the beginning of the instruction. The 2020 revision expanded on the use of social media and other digital tools. This revision was approved by the Committee in October 2021; it added to the comment. See footnote 1.

400 SPOLIATION: INFERENCE

[Describe the conduct the court has found to constitute spoliation of evidence.]

You may, but are not required to, infer that ((plaintiff) (defendant)) (describe spoliation) because producing that evidence would have been unfavorable to (plaintiff)'s (defendant)'s interest.

(For example: The defendant destroyed all of his or her medical records for patient care provided prior to (relevant date). You may, but are not required to, infer that the defendant destroyed his or her medical records from prior to (relevant date) because producing that evidence would have been unfavorable to defendant's interest.)

COMMENT

This instruction and comment were approved in 2010. This revision was approved by the Committee in September 2021; it added to the comment.

Prior to giving this instruction, the court must first determine if spoliation occurred. If the court finds spoliation has occurred, the court must then determine if the proper sanction for the spoliation of evidence is to instruct the jury on the spoliation inference. This may be appropriate when the destruction of evidence is intentional.

Spoliation Defined. Omnia Praesumuntur Contra Spoliatorem: "All things are presumed against a despoiler or wrongdoer." Black's Law Dictionary 1086 (rev. 6th ed. 1990).

Spoliation is defined as the destruction or withholding of critically probative evidence resulting in prejudice to the opposing party. Estate of Neumann v. Neumann, 2001 WI App. 61, 242 Wis.2d 205, 245, 626 N.W.2d 821.

The duty to preserve evidence exists whether litigation is pending or not. In evaluating an allegation of document destruction a court should examine whether the party knew or should have known at the time it caused the destruction of the documents that litigation against (the opposing parties) was a distinct possibility. Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d 707, 718, 599 N.W.2d 411 (Ct. App. 1999), citing Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis. 2d 523, 532, 502

N.W.2d 881 Ct. App. 1993; S.C. Johnson & Son, Inc. v. Morris, 2010 WI App. 6, 322 Wis.2d 766, 779 N.W.2d 19.

When a party deliberately destroys documents, the court may find spoliation by applying a two-part analysis. First, the court should consider "whether the party responsible for the destruction of evidence knew, or should have known, at the time it destroyed the evidence that litigation was a distinct possibility." Second, the court should consider "whether the offending party destroyed documents which it knew, or should have known, would constitute evidence relevant to the pending or potential litigation." "The purposes of the spoliation doctrine are served only if the offending party has notice that the evidence is or is likely to be relevant to pending or foreseeable litigation and proceeds to destroy the evidence anyway." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App 15, ¶¶15 and 16, 269 Wis.2d 286, 294, 674 N.W.2d 886, 890.

There is a five step process for evaluating the destruction of evidence and whether it constitutes spoliation.

(1.) Identification, with as much specificity as possible, of the evidence destroyed;

(2.) The relationship of that evidence to the issues in the action;

(3.) The extent to which such evidence can now be obtained from other sources;

(4.) Whether the party responsible for the evidence destruction knew or should have known at the time it caused the destruction of the evidence that litigation against the opposing parties was a distinct possibility; and

(5.) Whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed upon the party responsible for the evidence destruction and if so, what those sanctions should be.

Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 177 Wis.2d 523, 532, 502 N.W.2d 881 Ct. App. 1993 citing Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747, 756 (D.N.J. 1981).

Burden of Proof. The party seeking the evidence must prove by clear, satisfactory, and convincing evidence that relevant evidence was intentionally withheld or destroyed. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶¶82 and 83, 242 Wis. 2d 205, 246, 626 N.W.2d 821 citing Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973).

Sanctions. The decision whether to impose a sanction for the spoliation of evidence is committed to the trial court's discretion. City of Stoughton v. Thomasson Lumber Co., 2004 WI App. 6, & 38, 269 Wis.2d 339, 675 N.W.2d 487 citing Garfoot v. Fireman's Fund Ins. Co., 228 Wis.2d at 717. A circuit court has a "broad canvas upon which to paint in determining what sanctions are necessary." Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District, 177 Wis. 2d 523, 538, 502 N.W.2d 881 (Ct. App. 1993).

The primary purpose behind the doctrine of spoliation is two fold: (1) to uphold the judicial system's truth-seeking function and (2) to deter parties from destroying evidence. A remedy for spoliation should "advance truth by assuming that the destroyed evidence would have hurt the party responsible for the

destruction of evidence and act as deterrent by eliminating the benefits of destroying the evidence." Ins. Co. of N. Am. v. Cease Electric Inc., 2004 WI App. 15, ¶16, 269 Wis.2d 286, 295, 674 N.W.2d 886, 891 (Ct. App. 2003).

Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are:

(1) Pretrial discovery sanctions;
(2) Monetary sanctions;
(3) Exclusion of evidence;
(4) Reading the Wis JI-Civil 400 to the jury;
(5) Dismissal of one or more claims; and
(6) See American Family Mut. Ins. Co. v. Golke, 319 Wis.2d 397, ¶42, 768 N.W.2d 729 (Ct. App. 2015); Sentry Ins. V. Royal Ins. Co. of America, 196 Wis.2d 907, 918-19, 539 N.W.2d 911 (Ct. App. 1995); Estate of Neumann v. Neumann, 242 Wis.2d 205, ¶80, 626 N.W.2d 821 (Ct. App. 2001); Mueller v. Bull's Eye Sport Shop, LLC, 2021 WI App 34, 398 Wis.2d 329, ¶20, 961 N.W.2d 112.

See also Wis. Stat. § 804.12 for sanctions for a failure to make discovery.

Spoliation Inference. Where the spoliation inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. Estate of Neumann v. Neumann, 2001 WI App. 61, ¶81, 242 Wis.2d 205, 246, 626 N.W.2d 821 citing Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829, 832 (Conn. 1996). The spoliation inference is inappropriate where evidence was negligently destroyed, but may be appropriate where destruction is intentional. Jagmin v. Simonds Abrasive Co., 61 Wis. 2d 60, 80-81, 211 N.W.2d 810 (1973). See also, Mueller, supra, at ¶21. In Wisconsin, the operation of the Maxim Omnia Praesumuntur Contra Spoliatorem is reserved for deliberate, intentional actions and not mere negligence even though the result may be the same as regards the person who desires the evidence. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973) Id. at 80-81. See also S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19.

A permissible inference instruction is a proper sanction when the spoliation was intentional but not egregious. American Fam. Mut. Ins. Co. v. Golke, 319 Wis. 2d 397, ¶42; Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 80-81, 211 N.W.2d 810 (1973). Wisconsin case law does not mandate that sanctions for intentional spoliation achieve a remedial effect or a definitive result. Instead, this instruction allows a jury to infer that that unavailable evidence is adverse to the spoliator. Mueller, supra, at ¶40.

1008 INTOXICATION: CHEMICAL TEST RESULTS [REFLECTS CHANGES IN 2003 WISCONSIN ACT 30]

The results of a chemical test for intoxication have been received in evidence.

(NOTE: USE THE APPROPRIATE PARAGRAPH):

[If you find there was an alcohol concentration of more than 0.04 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question, but it is not by itself a sufficient basis for a finding that the person (was under the influence of an intoxicant) (had an alcohol concentration of 0.8 or more) at the time in question.]

[If you find there was an alcohol concentration of 0.8 or more at the time of the test, you should find from that fact alone that the person was under the influence of an intoxicant at the time in question, unless you are satisfied to the contrary from other evidence.]

[If you find there was an alcohol concentration of more than 0.00 but less than 0.8 at the time of the test, you should consider that fact as relevant evidence on the issue of whether the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question, but it is not by itself a sufficient basis for a finding that the person was under the combined influence of alcohol and (a controlled substance) (a controlled substance analog) (any other drug) at the time in question.

COMMENT

This instruction and comment were originally published in 1961. They were revised in 1974, 1983, 1989, 1994, 1996, 2000, and 2003. This revision was approved by the Committee in January 2022; it added to the comment.

Evidence of chemical tests for intoxication is generally admissible if intoxication is at issue. Wis. Stat. § 885.235(1g). But if the sample (blood, breath, or urine) was taken more than three hours after the event, the analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if established by expert testimony. Wis. Stat.§ 885.235(3).

With regard to the operation of a commercial motor vehicle, Wis. Stat. § 885.235(1g)(d) indicates that an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

"The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant. . . ." Wis. Stat. § 885.235(4).

See also Wis JI-Criminal 230, 232, 234, 235, 237, 1185, 1185A, 1186 1186A, 1188, 1190, and 1191 for jury instructions dealing with chemical test results.

Prima Facie Evidence. In drafting this instruction, the question arose whether "prima facie evidence" was the same as presumption. Wis. Stat. § 903.01 makes clear that it is. The statute reads:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. (Emphasis added.)

Wis Stat. § 885.235(1g)(c) is a statutory provision that makes a chemical test showing an alcohol concentration of 0.08 or more (the basic facts) "prima facie evidence" of being under the influence of an intoxicant (the other fact). Wis. Stat. § 903.01 makes this statutory provision a presumption. Wis. Stat. § 903.01 makes clear, also, that the introduction of the basic fact establishes the presumed fact for the jury and shifts the burden to the opposing party to overcome or rebut the presumption.

In terms of meeting the presumption, Chief Justice Heffernan's words in Kruse v. Horlamus Indus., Inc., 130 Wis.2d 357, 365 66, 387 N.W.2d 64 (1986) are instructive:

> Under Wisconsin law, presumptions do not "disappear" or "burst" when evidence to the contrary of the presumed fact is introduced. This means that, even where rebutting evidence has been produced, the inference from the presumption survived and is sufficient to support a jury verdict until the presumption is met by evidence of equal weight.

This language supports the use of "should" in the civil instruction ("you should find from that fact alone that the person was under the influence of an intoxicant") rather than the permissive "may" used in the criminal instruction; it also supports the language "unless you are satisfied from other evidence to the contrary" because the presumption shifts the burden of production.

Civil/Criminal Distinction. In drafting this instruction, the Committee recognized that there is a distinction between Wis JI-Criminal 230 and Wis JI-Civil 1008. The Committee believes that Wis. Stat. § 903.01 supports the slightly different treatment in the civil instruction. Wis. Stat. § 903.03(3) supports the criminal instruction and indicates why the criminal instruction is worded as it is. The statute provides in the most relevant section:

> (3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt. (Emphasis added.)

The criminal instruction must use the permissive "may" and the cautionary adjunct because of the higher burden of proof. The instruction also must instruct that the jury can only rely on the presumed fact if all the evidence proves the presumed fact beyond a reasonable doubt. The instruction may not suggest that the burden shifts to the defendant to overcome or rebut the presumption.

1023 MEDICAL NEGLIGENCE

In (treating) (diagnosing) (plaintiff)'s (injuries) (condition), (doctor) was required to use the degree of care, skill, and judgment which reasonable (doctors who are in general practice) (specialists who practice the specialty which (doctor) practices) would exercise in the same or similar circumstances, having due regard for the state of medical science at the time (plaintiff) was (treated) (diagnosed). A doctor who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (doctor) was negligent.

A doctor is not negligent, however, for failing to use the highest degree of care, skill, and judgment or solely because a bad result may have followed (his) (her) (care and treatment) (surgical procedure) (diagnosis). The standard you must apply in determining if (doctor) was negligent is whether (doctor) failed to use the degree of care, skill, and judgment that reasonable (general practitioners) (specialists) would exercise given the state of medical knowledge at the time of the (treatment) (diagnosis) in issue.

[**Use this paragraph only if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable**: If you find from the evidence that more than one method of (treatment for) (diagnosing) (plaintiff)'s (injuries) (condition) was recognized as reasonable given the state of medical knowledge at that time, then (doctor) was at liberty to select any of the recognized methods. (Doctor) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnostic) methods

rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

You have heard testimony during this trial from doctors who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment that a reasonable doctor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts in the field of medicine and can only be established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial. In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert and whether reasons for the opinion are based on facts in the case. You are not bound by any expert's opinion.

(Insert the appropriate cause instruction. To avoid duplication, JI-1500 should not be given if the following two bracketed paragraphs are used.)

[The cause question asks whether there was a causal connection between negligence on the part of (doctor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an

injury) (a condition) or (an injury) (a condition) can be the result of the natural progression of (the injury) (the condition). In addition, the (injury) (condition) can be caused jointly by a person's negligence and also the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (doctor)'s negligence and also the natural progression of (plaintiff)'s (injury) (condition), then you should find that the (doctor)'s negligence was a cause of the (plaintiff)'s present condition of health.]

[The evidence indicates without dispute that when (plaintiff) retained the services of (doctor) and placed (himself) (herself) under (doctor)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (doctor). This question asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under the doctor's care, has been aggravated or further impaired as a natural result of the negligence of (doctor)'s (treatment) (diagnosis).]

(Insert appropriate damage instructions.)

[(Plaintiff) sustained injuries before the (treatment) (diagnosis) by (doctor). Such injuries have caused (and could in the future cause) (plaintiff) to endure pain and suffering and incur some disability. In answering these questions on damages, you will entirely exclude from your consideration all damages which resulted from the original injury; you

will consider only the damages (plaintiff) sustained as a result of the (treatment) (diagnosis) of by (doctor).]

[It will, therefore, be necessary for you to distinguish and separate, first, the natural results in damages that flow from (plaintiff)'s original (illness) (injuries) and, second, those that flow from (doctor)'s (treatment) (diagnosis) and allow (plaintiff) only the damages that naturally resulted from the (treatment) (diagnosis) by (doctor).]

COMMENT

This instruction was approved by the Committee in 1963. It was revised in 1966, 1974, 1984, 1987, 1988, 1989, 1990, 1991, 1992, 1995, 1996, 1998, 2002, 2009, 2011, and 2012. The comment was updated in 1990, 1992, 1996, 2001, 2002, 2003, 2004, 2005, 2006, 2009, 2011, 2012, 2016, 2017, 2019, and 2021. The 2009 revision added "(diagnosis)" throughout the instruction to the alleged negligence. This revision was approved by the Committee in October 2021; it added to the comment.

The Committee recommends that the basic inquiry with respect to the defendant's conduct be framed in simple terms of negligence. Failure on the part of the doctor to conform to the applicable standard of care constitutes negligence. This form of submission is preferable to the form previously employed, i.e., stating the duty in the question. The statement of the duty is the function of the instruction. The Committee recommends that the general negligence instruction, JI-Civil 1005, not be used in addition to this instruction.

There are a series of concepts involved in the instruction. The duty of the doctor in his or her care, treatment, and procedures; the effects of bad results on liability; the degree of care, skill, and judgment required to satisfy his or her duty; the duty allows a choice of accepted alternative methods of treatment; the doctor's liability cannot be predicated on other than expert testimony (except in a res ipsa case); and the issue is not on the judgment the doctor made but on the degree and skill he or she exercised in arriving at the judgment. The Committee concluded that foreseeability of injury or harm is inherent in the standard expressed in the first paragraph, and if an issue in the case, it must be addressed by expert testimony.

If the trial judge prefers, this instruction can be divided into its components (i.e., negligence, cause, alternative care, damages, etc.) when instructing the jury and when providing the jury with written instructions during its deliberations.

Standard of Care. This instruction reflects the changes recommended by the Wisconsin Supreme Court in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996). The former version of this instruction was based on prevailing case law which measured ordinary care based on what an "average"

physician would have done. The court in Nowatske said "the standard of care applicable to physicians in Wisconsin can not be conclusively established either by a reflection of what the majority of practitioners do or by a sum of the customs which those practitioners follow." Instead, the court said "it must be established by a determination of what it is reasonable to expect of a professional given the state of medical knowledge at the time of the treatment." Nowatske, supra, at 438-39. See also the comment to Wis JI-Civil 1005.

Standard of Care: Unlicensed First-Year Resident. The Wisconsin Supreme Court in Phelps v. Physicians Ins. Co., 2005 WI 85, 282 Wis.2d 69, 698 N.W.2d 643, has held that unlicensed first-year residents should be held to:

> the standard of care applicable to an unlicensed first-year resident . . . Although we anticipate this new standard of care to be lower than that of an average licensed physician in some cases, we do not expect that it will become a grant of immunity. After all, unlicensed first-year residents are graduates of a medical school who provide sophisticated health care services appropriate to their "in training" status. Therefore, unlicensed residents could still be found negligent if, for example, they undertook to treat outside the scope of their authority and expertise, or they failed to consult with someone more skilled and experienced when the standard of care required it.

The court characterized the status of an unlicensed first-year resident as "unique." It said the resident's authority was limited:

> Although [resident] could refer to himself as an "M.D.," his freedom of action was more restricted than that of a licensed physician. Indeed, the circuit court found that Dr. Lindemann "had no authority or privileges to provide primary obstetrical care," and "was not supposed to act as the primary attending physician." Rather, "[h]is primary duty was to assess and report findings and differential diagnoses to an upper level senior resident or to the attending obstetrician."

Effect of Bad Results. The second paragraph states the rule as to the effects of bad results on the doctor's liability. Bad results raise no presumption of negligence. DeBruine v. Voskuil, 168 Wis. 104, 169 N.W. 288 (1918); Ewing v. Goode, 78 F. 442 (S.D. Ohio 1897); Wurdemann v. Barnes, 92 Wis. 206, 66 N.W. 111 (1896); Francois v. Mokrohisky, supra; Finke v. Hess, 170 Wis. 149, 174 N.W. 466 (1920); Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1976). See also Nowatske v. Osterloh, supra.

The judgment of a doctor in his or her care, treatment, and procedures, whether good, bad, honest or mistaken, is not at issue on his or her liability. The issue raised is whether in making the judgment, he or she exercised that degree of care and skill imposed on him or her. If he or she failed to meet that standard, he or she was negligent and liable. Christianson v. Downs, supra; Hoven v. Kelble, supra; Carson v. Beloit, 32 Wis.2d 282, 145 N.W.2d 112 (1966); Wurdemann v. Barnes, supra; Jaeger v. Stratton, 170 Wis. 579, 176 N.W. 61 (1920).

"Not omniscience, but due care, diligence, judgment, and skill are required of physicians. When they meet such test, they are not liable for results or errors in judgment." Jaeger v. Stratton, supra.

"The question . . . is not whether a physician has made a mistake; rather, the question is whether he was negligent." Francois v. Mokrohisky, supra.

"The law . . . recognizes the medical profession for what it is: a class of fallible men, some of whom are unusually well qualified and expert, and some of whom are not. The standard to which they must conform is determined by the practices of neither the very best nor the worst of the class." Francois v. Mokrohisky, supra.

In 1988, the court in Schuster v. Altenberg, supra, reaffirmed the concept that liability will not be imposed under this negligence standard for mere errors in judgment. It quoted from its earlier holdings:

> The law governing this case is well settled. A doctor is not an insurer or guarantor of the correctness of his diagnosis; the requirement is that he use proper care and skill. Knief v. Sargent, 40 Wis.2d 4, 8, 161 N.W.2d 232 (1968). The question is not whether the physician made a mistake in diagnosis, but rather whether he failed to conform to the accepted standard of care. Francois v. Mokrohisky, 67 Wis.2d 196, 201, 226 N.W.2d 470 (1975). Christianson v. Downs, 90 Wis.2d 332, 338, 279 N.W.2d 918 (1979).

The second paragraph also deals with the extent and quality of the doctor's treatment required to satisfy his or her duty. A doctor is not required to exercise the highest degree of care, skill, and judgment. Hrubes v. Faber, 163 Wis. 89, 157 N.W. 519 (1916); DeBruine v. Voskuil, supra; Jaeger v. Stratton, supra; Trogun v. Fruchtman, supra; Christianson v. Downs, supra; Carson v. Beloit, supra; Francois v. Mokrohisky, supra; Hoven v. Kelble, supra.

Alternative Methods. It is appropriate to instruct the jury using the bracketed language at the bottom of page one when there is evidence that more than one method of treatment or diagnosis is recognized as reasonable. See Nowatske v. Osterloh, supra, at 448. This is true even if an alternative method is not actually employed, as long as the treatment utilized is not the equivalent of "doing nothing." See Barney v. Mickelson, 2020 WI 40, ¶31, 391 Wis.2d 212, 942 N.W.2d 891. (In Barney, there was substantial testimony that the continued use of an external monitor was a reasonable method to continue to assess the patient's heart rate and was within the standard of care, even if accepted alternatives were available and could have been utilized). It is inappropriate, however, to give this instruction where the alleged negligence "lies in failing to do something, not in negligently choosing between courses of actions." Miller v. Kim, 191 Wis. 2d 187, 198, 528 N.W.2d 72 (1995). (The circuit court in Miller committed prejudicial error when it gave the alternative methods instruction because experts unanimously testified that a spinal tap is the only reasonable method of diagnosis for a young child with symptoms of spinal meningitis). The reasonable pursuit of an accepted alternative method does not establish a doctor's liability, even if experts disagree on the method used. A physician is required by statute to inform a patient about the availability of all alternate, viable medical treatments and the benefits and risks of these treatments, Wis. Stat. § 448.30. For claims based on a failure by a physician to adequately inform a patient, see Wis JI-Civil 1023.2 Malpractice: Informed Consent.

Unnecessary and improper treatment constitutes medical malpractice. Northwest Gen. Hosp. v. Yee, 115 Wis.2d 59, 61-62, 339 N.W.2d 583 (1983).

Expert Testimony. Expert testimony is needed to support a finding of negligence on the part of the doctor. Kuehnemann v. Boyd, 193 Wis. 588, 214 N.W. 326 (1927); Holton v. Burton, supra; Lindloff v. Ross, 208 Wis. 482, 243 N.W. 403 (1932); Ahola v. Sincock, 6 Wis.2d 332, 94 N.W.2d 566 (1959); Froh

v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 270 N.W.2d 83 (Ct. App. 1978); McManus v. Donlin, 23 Wis.2d 289, 127 N.W.2d 22 (1964); Treptau v. Behrens Spa, Inc., supra.

The degree of care and skill (of a physician) can only be proved by the testimony of experts. Without such testimony, the jury has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required of him or her. Kuehnemann v. Boyd, supra; Holton v. Burton, supra; Lindloff v. Ross, supra. In 2011, the Committee added language which instructs the jury that in determining the weight of an expert's testimony, it should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. The jury is further instructed that it is not bound by any expert's opinion. See Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191.

For a discussion of the admissibility of expert evidence in a medical negligence case, see Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816.

The general instruction on expert testimony, Wis JI-Civil 260, should be used for issues in the trial other than standard of care.

Causation. The court in Young v. Professionals Ins. Co., 154 Wis.2d 742, 454 N.W.2d 24 (Ct. App. 1990), was critical of an earlier version of JI-1023 relating to cause. The present instruction concerning situations when there is evidence of both negligence and a condition of health resulting from the natural progression of a disease (injury) correctly states that a doctor's negligence may be causal, notwithstanding, that the plaintiff's present condition of health may in part be the result of the natural progression of plaintiff's disease (injury). This is because Wisconsin has long adopted the "substantial factor test" in deciding causation questions and no longer requires that the negligence be the sole or proximate cause. Matuschka v. Murphy, 173 Wis. 484, 180 N.W. 821 (1921), has been overruled because it is "likely to misstate the law of causation." See Young, supra, at 749.

This instruction comports with the supreme court's decision in Fischer v. Ganju, 168 Wis.2d 834, 485 N.W.2d 10 (1992). In Fischer, the supreme court stated that a paragraph from a prior version JI-1023 (1989) was "less than completely accurate." The version given by the trial judge in Fischer in January 1990 was based on the 1989 version of this instruction which was published in April of 1989. This version was revised by the committee following the decision in Young v. Professionals Ins. Co., supra. The revised JI- 1023 was published in May of 1991 as part of the 1991 supplement. This revision (1991) changed the language of the prior version dealing with causation. It has not been revised since the 1991 supplement. The Committee has closely compared this present version of Wis JI-Civil 1023 to the court's criticism of the 1989 version of the instruction. The Committee concludes that the causation language of the present instruction is consistent with the discussion of causation in the Fischer decision and accurately states the law of causation in medical malpractice pre-existing condition cases.

Specialists. See Johnson v. Agoncillo, 183 Wis.2d 143, 515 N.W.2d 508 (Ct. App. 1994), where the First District Court of Appeals held that under current Wisconsin law, a doctor who practices one medical specialty is not held to the standard of care of another medical specialty, even when treating a patient in that latter specialty. Dr. Agoncillo was a family practitioner treating a high-risk obstetrical patient. Plaintiff Johnson requested an instruction that would hold Agoncillo to the standard of the "average physician who

treats high risk obstetrical patients. . . .” The trial judge refused to give such an instruction and the court of appeals affirmed, stating:

> Thus, that Dr. Agoncillo chose to care for and treat Ms. Johnson during her high-risk pregnancy did not transform his class of physician to that of those who treat high-risk obstetrical patients; he was and he remained a general family practitioner who treated obstetrical patients and, as instructed by the trial court, he was thus ‘required to use the degree of care, skill, and judgment which is usually exercised in the same or similar circumstances’ by the average physician in that class.

The court went on to say, however, that the physician who attempts to treat a patient outside her or his expertise is not, thereby, immunized from liability. Referring to a cardiologist who treats a cancer patient, the court said in Johnson at 152:

> If competent evidence establishes that the average cardiologist would either refer the cancer patient to an oncologist or would consult with an oncologist, the cardiologist could be found negligent for not referring or consulting.

Captain of Ship Doctrine. In a recent decision, the plaintiff in a medical malpractice action argued that the surgeon should be held vicariously liable for the negligence of two hospital nurses from a county-owned hospital who were responsible for counting sponges. Lewis v. Physicians Ins. Co., 2001 WI 60, 243 Wis.2d 648, 627 N.W.2d 484. The hospital was county-owned and, therefore, its liability at the time was limited to $50,000.

The trial court, on summary judgment, agreed with the plaintiff’s argument that, as a matter of law, the surgeon is the “captain of the ship” and is responsible for the actions of the parties that were in the operating room. Interestingly, the plaintiff did not argue that the surgeon was vicariously liable for the nurses’ actions under the doctrine of respondeat superior. Both the court of appeals and supreme court rejected the adoption of the captain of the ship doctrine to impose liability on the doctor. The supreme court said the “captain of the ship doctrine” has lost its vitality across the country as plaintiffs have been able to sustain actions against full-care modern hospitals for the negligence of their employees.

Psychiatric Malpractice Claims. The Wisconsin Supreme Court recognized in Schuster v. Altenberg, supra, that a psychiatrist may be negligent by:

1. negligent diagnosing and treating, including failing to warn of side effects of medication,
2. failing to warn a patient’s family of the patient’s condition and its dangerous implications,
3. failing to seek the commitment of the patient.

Warning a patient of risks associated with a condition and the patient as to appropriate conduct constitutes treatment as to which a physician must use ordinary care. Schuster v. Altenberg, supra. A psychiatrist may be held liable to third parties for failing to warn of the side effects of medication if the side effects were such that a patient should have been cautioned against driving, because it was foreseeable that an accident could result causing harm to the patient or third parties.

A psychotherapist has the duty to warn third parties or to institute proceeding for the detention or commitment of a dangerous individual for the protection of the patient or the public.

Dental Malpractice. For dental malpractice, see Wis JI-Civil 1023.14.

Determination of Future Economic Damages. In a claim based on injury from any treatment or operation performed by, or from any omission by, a person who is a health care provider, the determination of future economic damages must reflect present value, life expectancy, and the effects of inflation. Specifically, Wis. Stat. § 893.55(4)(e) states:

> (e) Economic damages recovered under ch 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, shall be determined for the period during which the damages are expected to accrue, taking into account the estimated life expectancy of the person, then reduced to present value, taking into account the effects of inflation.

The Committee interprets this subsection as requiring the jury to make a reduction based on the time value of money and to consider inflation in determining future economic damages. The Committee believes that the statutory language quoted above does not mean that the trial judge should make allowance for present value of money or inflation immediately after the jury has determined economic damages or on motions after verdict.

Medical Negligence Damage Caps. In Ferdon v. Wisc. Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, the court held that the $350,000 cap (adjusted for inflation) on noneconomic medical malpractice damages set forth in Wis. Stat. §§ 655.017 and 893.55(4) violates the equal protection guarantees of the Wisconsin Constitution. Previously, the court had held there is a single cap on noneconomic damages recoverable from health care providers for medical malpractice. Maurin v. Hall, 2004 WI 100, 274 Wis.2d 28, 682 N.W.2d 866. The amount of the cap is determined by whether the patient survives the malpractice or whether the patient dies. When the patient survives, the cap is contained in Wis. Stat. § 893.55(4)(d). When the patient dies, the cap is contained in Wis. Stat. § 895.04(4). In cases where medical malpractice leads to death, the wrongful death cap applies in lieu of - - not in addition to - - the medical malpractice cap. Following Ferdon, the legislature acted to impose a $750,000 cap on noneconomic damages set forth ins Wis. Stat. § 893.55(1d)(b).

The court in Ferdon also created an intermediate level of constitutional review that it called "rational basis with teeth, or meaningful rational basis." However, in Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 914 N.W.2d 678, the court overruled Ferdon for erroneously invading the province of the legislature and found that rational basis with teeth has no standards for application and created uncertainty under the law. Instead, the court held that rational basis review is appropriate because the cap on noneconomic damages does not deny any fundamental right or implicate any suspect class. When the five-step rational basis scrutiny provided in Aicher v. Wis. Patients Comp. Fund, 2000 WI 98, 237 Wis.2d 99, 613 N.W.2d 849 was applied, the court concluded that "the legislature's comprehensive plan that guarantees payment while controlling liability for medical malpractice through the use of insurance, contributions to the Fund and a cap on noneconomic damages has a rational basis." Therefore, the $750,000 cap on noneconomic damages in medical malpractice actions is not facially unconstitutional." See Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 2018 WI 78, 383 Wis.2d 1, 31, 914 N.W.2d 678.

Bystander Recovery Claims for Negligent Infliction of Emotional Distress Based on Misdiagnosis. See the committee commentary to Wis. JI-Civil 1510 and 1511.

Answering Special Verdict Questions; Possibility of Inconsistent Verdicts. In medical negligence cases, allowing the jury to award damages regardless of how it answered negligence and cause verdict questions can lead to inconsistent verdicts under Runjo v. St. Paul Fire Marine Ins. Co., 197 Wis.2d 594, 541 N.W.2d 173 (Ct. App. 1995); LaCombe v. Aurora Medical Group, Inc., 2004 WI App 119, 274 Wis.2d 771, 683 N.W.2d 532; Hegarty v. Beauchaine, 2006 WI App 248, 297 Wis.2d 70, 727 N.W.2d 857. In Runjo, the jury was instructed to answer the damage questions only if it affirmatively answered the negligence and cause questions.

Time limitations. A circuit court may dismiss a plaintiff's medical malpractice claim as untimely. See Wis. Stat. § 893.55(1m)(a) concerning the statute of limitations for medical malpractice claims. See Wis. Stat. § 893.55(1m)(b) concerning the grounds on which the statute of repose bars such claims.

For time limitations concerning claims based on an alleged omission, specifically a misdiagnosis or failure to diagnose, see Paul v. Skemp, 2001 WI 42, ¶25, 242 Wis. 2d 507, 625 N.W.2d 860. See also Brusa v. Mercy Health Sys., Inc., 2007 WI App 166, ¶¶11, 14, 304 Wis. 2d 138, 737 N.W.2d 1, and Winzer v. Hartmann, 2021 WI App 68, 399 Wis.2d 555, 966 N.W.2d 101.

1023.5 PROFESSIONAL NEGLIGENCE: LEGAL—STATUS OF LAWYER AS A SPECIALIST IS NOT IN DISPUTE

In providing legal services to a client, it is a lawyer's duty to use the degree of care, skill, and judgment which reasonably prudent lawyers practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence. The burden is on (plaintiff) to prove that (lawyer) was negligent.

You are to determine whether (lawyer) was negligent in representing (plaintiff) in light of the facts and circumstances of which (lawyer) was aware or should have discovered at the time legal services were provided to (plaintiff). A lawyer is negligent if the lawyer fails to discover or recognize the importance of relevant facts or legal principles which reasonably prudent lawyers would discover or recognize or if the lawyer's skill or judgment was not consistent with that exercised by reasonably prudent lawyers. A lawyer is not negligent because of the results of (his) (her) representation, if (his)(her) efforts were those reasonably prudent lawyers would have taken.

[Use this paragraph if the parties stipulate or the trial judge finds as a matter of law that the lawyer presented himself or herself as a specialist in the relevant area of law: Lawyers who present themselves to the public or their clients as having special experience, knowledge, or skill in a particular area of law are held to the standard of care of reasonably prudent lawyers with that special experience, knowledge, or skill. This is the standard you should apply in considering question _____ of the special verdict.]

You have heard testimony during this trial from lawyers who have testified as expert witnesses. The reason for this is because the degree of care, skill, and judgment which a reasonably prudent lawyer would exercise is not a matter within the common knowledge of lay persons. This standard is within the special knowledge of experts in the field of law and can only be established by expert testimony. You, therefore, may not speculate or guess what that standard of care, skill, and judgment is in deciding this case, but rather must attempt to determine this from the expert testimony that you heard in this trial.

(Also Give Wis JI-Civil 265)

SPECIAL VERDICT

1. Was (lawyer) negligent in providing legal services to (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 1998, 2002, 2003, 2016, 2020, and 2021. This revision was approved by the Committee in January 2022; it added to the comment.

If the status of the lawyer as a specialist is in dispute, see Wis JI-Civil 1023.5A.

Consistent with the supreme court's direction in medical malpractice cases, the Committee has eliminated reference to "guaranteed results" and has framed the duty of lawyers in terms of "reasonable care" rather than in reference to what is "usually exercised" by lawyers. See Nowatske v. Osterloh, 198 Wis. 2d 419, 543 N.W.2d 265 (1996), and Comment to Wis JI-Civil 1023.

Elements. The Wisconsin Supreme Court has said that the following rule governs legal malpractice actions:

> In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action. Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506.

To establish causation and injury in a legal malpractice action, the plaintiff is often compelled to prove the equivalent of two cases in a single proceeding or what has been referred to as a "suit within a suit." Lewandowski v. Continental Casualty Co., 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979); Helmbrecht v. St. Paul Ins. Co., 122 Wis.2d 94, 103, 362 N.W.2d 118 (1985); see also Pierce v. Colwell, 209 Wis.2d 355, 563 N.W.2d 166 (Ct. App. 1997). This entails establishing that, "'but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.'" Lewandowski, 88 Wis.2d at 277, citing 7 Am. Jur. 2d, Attorneys at Law, sec. 188 at 156 (1963).

In Helmbrecht v. St. Paul Ins. Co., supra, the court made several important holdings which cleared up some uncertainty. First, in calculating damages due to the loss of a claim, an objective standard should be used, i.e., what a reasonable judge (jury) would have awarded in the initial action. Second, the court said the Code of Professional Responsibility, although beneficial as an ethical guide, "does not exhaustively define the obligations an attorney owes his client," nor does it "undertake to define standards for civil liability of lawyers for professional conduct." Helmbrecht, supra, at 111.

In Denzer v. Rouse, 48 Wis.2d 528, 534 180 N.W.2d 521 (1970), the court said that "between the end points of competence and malpractice lies a broad area of difficult and complex situations in which an attorney is bound to exercise his best judgment in the light of his education and experience, but is not held to a standard of perfection or infallibility of judgment."

Cause. The court of appeals in 1997 considered the following question: When a client is represented sequentially by two lawyers, both of whom were arguably negligent with respect to the same manner, can the first lawyer's alleged negligence be a cause of the client's damages if the client would not have sustained any damage if the second lawyer could have prevented the harm but did not? The court of appeals concluded that the answer to this question was "no." Seltrecht v. Bremer, 214 Wis.2d 110, 571 N.W.2d 686 (Ct. App. 1997).

Outcome of Representation. In DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995), the court of appeals considered a lawyer's mistaken judgment that was made in good faith. The court stated: "we will not hold attorneys responsible when their decisions are ones that a reasonably prudent attorney might make even though they are later determined by a court of law to be erroneous." Id. at 724. The Committee believes that juries should be informed that the outcome of the representation is not determinative of lawyer's negligence. The jury should, instead, determine whether the representation conformed with reasonable care, considering all of the evidence.

Nature of Representation. If there is a dispute concerning the nature or scope of the representation, add the following paragraph:

Whether (lawyer) has discharged (his) (her) duty depends on the purpose for which (lawyer) was retained or agreed to provide representation. The purpose (or scope) of the representation for which the (lawyer) was retained is for you to determine from the evidence. It is irrelevant to the determination of the lawyer's negligence whether the lawyer was paid.

Specialists. The court of appeals has adopted the higher standard of care for lawyers who represent themselves as specialists in Duffy Law Office v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (1995). The Committee recommends use of the higher standard paragraph when the trial court finds that there is credible evidence of such representation by the lawyer. See also Wis JI-Civil 1023.5A. Since most areas of practice do not have State Bar sanctioned specialty certification, these cases will generally present a question of fact concerning whether the lawyer held himself or herself out as a specialist to the public or to the particular client. (Patent and admiralty practice have recognition as specialists by policy and tradition in federal courts.)

Contributory Negligence. The contributory negligence of a client can be a defense in a legal malpractice action. Gustavson v. O'Brien, supra at 204.

Tort Versus Contract Claim. The Wisconsin Supreme Court has stated that legal malpractice may give rise to either a tort claim or a contract claim. The tort claim arises from a breach of the attorney's common law duty; whereas, the contract claim arises from a breach of a duty created by contractual agreement between the attorney and the client. See Milwaukee County v. Schmidt, Gardner, and Erickson, 43 Wis.2d 445, 168 N.W.2d 559 (1969); Klingbeil v. Saucerman, 165 Wis. 60, 160 N.W. 1051 (1917).

Expert Testimony. Expert testimony is not required to establish a standard of care in cases involving conduct not necessarily related to legal expertise where the matters to be proved do not involve special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind and which require special learning, study, or experience. Nor is expert testimony required where no issue is raised as to defendant's responsibility, where the negligence of defendant is apparent and undisputed, and where the record discloses obvious and explicit carelessness in defendant's failure to meet the duty of care owed to plaintiff for the court will not require expert testimony to define further that which is already abundantly clear. Olfe v. Gordon, 93 Wis.2d 173, 286 N.W.2d 573 (1980). See also Kraft v. Steinhafel, 2015 WI App 62, 364 Wis.2d 672, 869 N.W.2d 506; DeThorne v. Bakken, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (1995). In Olfe v. Gordon, supra, the client's claim alleged negligence by the attorney in failing to follow specific instructions. The court concluded that proof of this negligence does not require expert testimony. Such a claim is controlled by the law of agency. Thus, the duties of care owed by the attorney to the client are established not by the legal profession's standards but by the law of agency. The court held that a jury is competent to understand and apply the standards of care to which agents are held. Olfe v. Gordon, supra at 184 (citing Wis JI-Civil 4000, Agency: Definition, and Wis JI-Civil 4020, Agent's Duties Owed to Principal).

Damages. The supreme court has said it is appropriate, in some complex cases, for the trial judge to determine reasonable attorney's fees as a matter of law. See Glamann v. St. Paul Fire & Marine Ins., 144 Wis.2d 865, 424 N.W.2d 924 (1988). For the determination and awarding of attorney fees (both trial and appellate), see Glamann, supra at 870-75.

Legal Malpractice Claim for Criminal Defense. The court of appeals has held that, in a legal malpractice claim for criminal defense, the plaintiff must prove that he or she did not commit the offenses of which he or she was convicted. Hicks v. Nunnery, 253 Wis.2d 721, 643 N.W.2d 809 (2002). This proof requirement is commonly referred to as the "actual innocence" rule, and was adopted in Hicks as a matter of public policy. More specifically, this rule is meant to prevent individuals who commit criminal offenses and are convicted of those crimes from recovering damages for legal malpractice. In such a case, the following language is suggested:

> Question no. _____ asks whether (Plaintiff) is innocent of the charge of _____. This charge consists of the following elements: (Here explain the elements of the offense from the appropriate instruction in Wisconsin Jury Instructions-Criminal.)
>
> (Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) is innocent.
>
> [Give JI-Civil 200, Ordinary Burden of Proof]
>
> The suggested question for the special verdict is:
>
> Was Plaintiff innocent of the charge of _____?

The court of appeals in Hicks states that "the question of plaintiff's innocence is in addition to, not a substitute for, a jury question regarding whether the plaintiff would have been found not guilty absent the defendant's negligence. A defendant's negligence must . . . have been a substantial factor contributing to the plaintiff's conviction." Thus, the questions of existence of the attorney-client relationship, negligence, causation and damages would be first submitted for the jury's consideration.

Actual Innocence Rule. The application of the actual innocence rule has been considered in several Wisconsin decisions. As noted, the rule was first adopted in Hicks v. Nunnery, supra, which held that, in addition to proving the four elements of a standard legal malpractice claim, public policy considerations require that a criminal malpractice plaintiff must also establish that he or she "is innocent of the charges of which he [or she] was convicted." Hicks, supra at ¶46. This is true even if a plaintiff can prove that his or her conviction resulted from their attorney's failure "to bring a clearly meritorious motion to suppress evidence that establishes guilt, which the state could not prove without it[,]" Id. at ¶43.

The court of appeals later relied on the actual innocence rule adopted by Hicks in Tallmadge v. Boyle, 2007 WI App 47, 300 Wis.2d 510, 730 N.W.2d 173. In this decision, the court stated that the public policy considerations supporting the actual innocence rule require that the criminal malpractice plaintiff must "prove that 'but for' that defense counsel's actions, the convicted criminal would be free." Id. at ¶22. This principle was later refined in Skindzelewski v. Smith, 2020 WI 57, 392 Wis.2d 117, 944 N.W.2d 575. In that case, the claimant conceded his guilt to the underlying offense but advocated for an exception to the actual innocence rule because his attorney had negligently failed to raise a statute of limitations defense that would have precluded his conviction. Stating that such an exception would be contrary to public policy considerations and would reward criminality, the court in Skindzelewski explained that even if an attorney's negligence results in a conviction that is unauthorized by law, there is no applicable exception to the actual innocence rule if the error does not negate a guilty defendant's culpability. Id. at 128. The court concluded that "[T]he law bars such legal malpractice claims because even if an attorney's negligence harms a

defendant by adversely affecting the outcome of the case, attorney error does not negate a guilty defendant's culpability." Id. at 130.

Split innocence. In order to establish a claim for legal malpractice, a criminal malpractice plaintiff who claims "split innocence" need only show that they are actually innocent of the convictions that form the basis of their complaint of legal malpractice. See Jama v. Gonzalez, 2021 WI App 3, 395 Wis.2d 655, PP43-44, 954 N.W.2d 1 (Affirmed by an equally divided court in Jama v. Gonzalez, 2021 WI 79, 399 Wis.2d 392, 965 N.W.2d 458). The split innocence exception adopted in Jama is distinct from the exception to the actual innocence rule requested and denied in Skindzelewski, supra.

Nonliability of an Attorney to a Non-Client. A longstanding rule in Wisconsin is that an attorney is not liable to a non-client for "acts committed in the exercise of his [or her] duties as an attorney." See Auric v. Continental Cas. Co., 111 Wis.2d 507, 512, 331 N.W.2d 325 (1983). However, there are exceptions to this rule in the context of estate planning. The "Auric exception," established in Auric, holds that the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of a will even though the beneficiary is a third-party not in privity with the attorney. In general, this exception allows a named beneficiary to sue an attorney for malpractice when the beneficiary can show that he or she was harmed by attorney negligence that frustrated the intent of the attorney's client.

In 2009, the post-Auric decision of Tensfeldt v. Haberman, 2009 WI 77, 319 Wis.2d 329, 768 N.W.2d 641 seemed to narrowly limit the Auric exception to negligence by an attorney in drafting or supervising the execution of an estate-planning document which resulted in a loss to a named beneficiary. However, the supreme court's holding in MacLeish v. Boardman Clark LLP, 2019 WI 31, 386 Wis.2d 50, 924 N.W.2d 799, provided that "[t]he narrow Auric exception to the rule of nonliability of an attorney to a non-client applies to the administration of an estate in addition to the drafting of a will. That is, a non- client who is a named beneficiary in a will has standing to sue an attorney for malpractice if the beneficiary can demonstrate that the attorney's negligent administration of the estate thwarted the testator's clear intent." Id. at ¶48.

For estate planning post-MacLeish, see Pence v. Slate, 387 Wis.2d 685, 928 N.W.2d 806 (Table), 2019 WI App 26.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

1153 RIGHT OF WAY: AT INTERSECTION WITH THROUGH HIGHWAY

A safety statute provides that the operator of a vehicle shall stop before entering a through highway and shall yield the right of way to other vehicles which have entered or are approaching the intersection upon the through highway.[1]

"Right of way" means the privilege of the immediate use of the roadway.[2]

The highway on which (operator) was operating a vehicle was a "through highway" as defined by the statute[3] at the time of the collision.

A vehicle on a through highway is approaching an intersection when it is so close to the intersection that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the vehicle which stopped, as required, before entry onto the through highway moves onto the highway and into the path of the oncoming vehicle.

If you find that the oncoming vehicle on the through highway had entered the intersection, or was approaching it as here defined, it then became the duty of the operator of the vehicle entering the through highway to yield the right of way to the vehicle on the through highway.

NOTES

1. Wis. Stat. §§ 346.18(3).
2. Wis. Stat. § 340.01(51).

3. Wis. Stat. § 340.01(67).

COMMENT

This instruction and comment were originally published in 1966. The comment was, revised in 1983 and the instruction was revised in 2008. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

This instruction is based on the assumption that there is no issue on the record about one highway being a through highway, as defined by Wis. Stat. § 340.01(67). If, however, an issue develops as to whether the highway in question is a through highway, then a preliminary question would be required and would be covered by an instruction giving the statutory definition.

Although the law in Wisconsin gives the operator of a vehicle on a through highway a preference, such preference is not absolute. Leckwee v. Gibson, 90 Wis.2d 275, 280 N.W.2d 186 (1979). In Leckwee, the court, citing prior decisions, stated:

> It is clear that:
>
> . . . while one may have the right of way and may presume others will respect it, he may nevertheless be negligent in respect to management and control if his right of way is not respected and he does not do what he can do to prevent the accident. Chille v. Howell (1967), 34 Wis.2d 491, 497, 149 N.W.2d 600. Tombal v. Farmers Ins. Exchange, 62 Wis.2d 64, 69, 214 N.W.2d 291 (1974).
>
> The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Having the right of way does not relieve one of the duty of watching the road for vehicles on the highway or entering thereon. Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163 (1959).

The former version of the comment to this instruction included an optional paragraph based on Ogle v. Avina, 33 Wis.2d 125, 146 N.W.2d 422 (1966). This optional paragraph expressed a view which held that a "special dignity" was to be afforded to an operator of a vehicle traveling on an arterial. The optional portion stated that the right of way of the operator of a vehicle on the through highway meant "not only the right to the immediate use of the roadway; but the enjoyment of such right without being required to brake one's rate of speed or divert one's course to the right or left."

Because of the contrary holdings in Leckwee and cases cited by the court in Leckwee, which refused to extend an absolute preference to an operator of a vehicle on a through highway, the optional paragraph is withdrawn.

Where the issue is presented as to the negligence of the operator of a vehicle on a through highway with respect to management and control or lookout, see Wis JI-Civil 1030, 1090, 1190, and 1191.

Wis. Stat. § 346.18(3) is the stopping statute referred to in the first paragraph. If stopping is at issue, it would be covered by a separate question and by Wis JI-Civil 1325.

In regard to the duty to look and to calculate, see Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1155 RIGHT OF WAY: AT INTERSECTIONS OF HIGHWAYS

A safety statute provides that when two vehicles approach or enter an intersection at approximately the same time, the operator of the vehicle on the left shall yield the right of way to the vehicle on the right. The statute does not make the right of way on the part of the vehicle on the right depend on whether it reaches or begins to enter the intersection first.[1]

"Right of way" means the privilege of the immediate use of the roadway.[2]

The phrase "approach or enter an intersection at approximately the same time" means the approach or entry of two vehicles toward or into the intersection so nearly at the same time that there is imminent danger of a collision if both vehicles continue their same courses at their same speeds.

If you find that the vehicles in question approached or entered the intersection at approximately the same time, then it became the duty of (the operator of the vehicle on the left) to yield the right of way to the vehicle on the right. This duty compelled (operator) either to stop the vehicle, if necessary, or to control and manage it so that (he) (she) could yield the right of way to the vehicle within the zone of danger on the right and avoid colliding with it.

NOTES

1. Wis. Stat. § 346.18(1).

2. Wis. Stat. § 340.01(51).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2002 and 2008. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

The question of right of way is to be answered only in the event the operator of the vehicle on the right is not negligent with respect to speed. The last sentence of Wis. Stat. § 346.18(1) provides that, "The operator of any vehicle driving at an unlawful speed forfeits any right of way which he (or she) would otherwise have under this subsection."

This instruction is based on the language adopted in the case of Home Fire & Marine Ins. Co. v. Farmers Mut. Auto Ins. Co., 274 Wis. 210, 214, 79 N.W.2d 834 (1956), and Kraskey v. Johnson, 266 Wis. 201, 206, 63 N.W.2d 112 (1954), citing Vogel v. Vetting, 265 Wis. 19, 25, 60 N.W.2d 399 (1953). See also Nessler v. Nowicki, 12 Wis.2d 421, 425, 107 N.W.2d 616 (1961).

It is recommended that the verdict contain a direction to the jury that they should first consider the question of speed on the part of the operator who has the geographical right of way before the right of way of the competing operator is considered. See Burkhalter v. Hartford Accident & Indem. Ins. Co., 268 Wis. 385, 388, 68 N.W.2d 2 (1955); Leonard v. Employers Mut. Liab. Ins. Co., 265 Wis. 464, 468, 62 N.W.2d 10 (1953); Johnson v. Fireman's Fund Indem. Co., 264 Wis. 358, 361, 59 N.W.2d 660 (1953).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1157 RIGHT OF WAY: AT INTERSECTION OF HIGHWAYS; ULTIMATE VERDICT QUESTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that when two vehicles approach or enter an intersection at approximately the same time, the operator of the vehicle on the left shall yield the right of way to the vehicle on the right. The statute does not make the right of way on the part of the vehicle on the right depend on whether it reaches or begins to enter the intersection first.[2]

The phrase "approach or enter an intersection at approximately the same time" means the approach or entry of two vehicles toward or into the intersection so nearly at the same time that there is imminent danger of a collision if both vehicles continue their same courses at their same speeds.

If you find that the vehicles in question approached or entered the intersection at approximately the same time, then it became the duty of the operator of the vehicles on the left to yield the right of way to the vehicle on the right. This duty compelled the operator either to stop the operator's vehicle, if necessary, or to control and manage it so that the operator could yield the right of way to the vehicle within the zone of danger on the operator's right and avoid colliding with it.

The safety statute provides that the operator of any vehicle operating at an unlawful

speed on a highway is negligent and forfeits any right of way which he or she would otherwise have. Thus, before you can find negligence for failure to yield the right of way, you must first find that the vehicle on the right was being operated at a lawful speed.

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.18(1).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. This revision was approved by the Committee in September 2021.

Baier v. Farmers Mut. Auto Ins. Co., 8 Wis.2d 506, 99 N.W.2d 709 (1959); Van Wie v. Hill, 15 Wis.2d 98, 103, 105, 112 N.W.2d 168 (1961).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Speed. Speed need not be causal to deprive an operator of his or her statutory right of way. Van Wie v. Hill, supra.

Home Fire & Marine Ins. Co. v. Farmers Mut. Auto Ins. Co., 274 Wis. 210, 79 N.W.2d 834 (1956).

Kraskey v. Johnson, 266 Wis. 201, 63 N.W.2d 112 (1954).

Nessler v. Nowicki, 12 Wis.2d 421, 107 N.W.2d 616 (1961).

Burkhalter v. Hartford Accident & Indem. Ins. Co., 268 Wis. 385, 68 N.W.2d 2 (1955).

Leonard v. Employers Mut. Liab. Ins. Co., 265 Wis. 464, 62 N.W.2d 10 (1953).

Paragraph 5 should not be used unless, under the evidence, the right hand operator can be found negligent as to speed. "Unlawful speed" mentioned in paragraph 5 is defined in Wis JI-Civil 1285. See Drake v. Farmers Mut. Auto Ins. Co., 22 Wis.2d 56, 125 N.W.2d 391 (1963).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a

crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1158 RIGHT OF WAY: TO PEDESTRIAN CROSSING AT CONTROLLED INTERSECTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that at an intersection or crosswalk where traffic is controlled by (traffic control signals) (a traffic officer), the operator of a vehicle shall yield the right of way to a pedestrian crossing or who has started to cross the highway on a green or 'WALK' signal.[2]

If you find that (pedestrian) was crossing or had started to cross the highway (at the direction of a traffic officer) (with the green or 'WALK' signal in his or her favor), it became the duty of (operator) to yield the right of way to (pedestrian).

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.18(1).

COMMENT

This instruction and comment were approved in 1977. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

Schoehauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

If the highway is a divided highway or contains safety zones, use Wis JI-Civil 1160.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1159 RIGHT OF WAY: PEDESTRIAN CONTROL SIGNAL: WALK SIGNAL

Question __ asks whether (name) failed to yield the right of way to (name).

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that, "A pedestrian facing a 'Walk' signal may proceed across the roadway in the direction of the signal and shall be given the right of way by the operators of all vehicles."[2]

If you find that (pedestrian) faced a 'Walk' signal and was proceeding across the roadway in the direction of the signal, then it became the duty of (operator) to yield the right of way to (pedestrian).

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.38(1).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

The pedestrian also retains the right of way if he or she has partially completed his or her walk to the far curb or to a safety island when the light changes to "Wait" or "Don't Walk." Wis. Stat. § 346.38(2).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1160 RIGHT OF WAY: TO PEDESTRIAN AT INTERSECTIONS OR CROSSWALKS ON DIVIDED HIGHWAYS OR HIGHWAYS PROVIDED WITH SAFETY ZONES

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

In a divided highway, the term "roadway" refers to each roadway separately but not to all the roadways collectively.[2]

The statutes further provide that at intersections or crosswalks on divided highways or highways provided with safety zones where traffic is controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right of way to a pedestrian who (is crossing or) has started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone with the green or "WALK" signal in his or her favor.[3]

Divided highway is defined as a highway with two or more roadways separated by spaces not intended for the use of vehicular traffic.[4]

The term "safety zone" means the area or space officially set apart within a roadway for the exclusive use of pedestrians, including those about to board or alighting from public conveyances, and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.[5]

If you find that (pedestrian) (was crossing or) had started to cross the roadway either

from the near curb or shoulder or from the center dividing strip or safety zone (at the direction of a traffic officer) (with the green or "WALK" signal in (his) (her) favor), then it became the duty of (operator) to yield the right of way to (pedestrian).

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 340.01(54).
3. Wis. Stat. § 346.23(2).
4. Wis. Stat. § 340.01(15).
5. Wis. Stat. § 340.01(55).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

If the facts warrant it, the court should instruct that the pedestrian no longer enjoys the right of way over a vehicle if the signal turns against the pedestrian before the pedestrian leaves the center dividing space or safety zone. If that occurs, the right of way belongs to the vehicle lawfully proceeding directly ahead on a green or "GO" signal. Wis. Stat. § 346.23(2).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1165 RIGHT OF WAY: TO PEDESTRIAN AT UNCONTROLLED INTERSECTION OR CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that, at an intersection or crosswalk where traffic is not controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right of way to a pedestrian who is crossing the roadway within a marked or unmarked crosswalk.[2]

(A marked crosswalk is any portion of a roadway clearly indicated for pedestrian crossing by signs, lines, or other markings on the surface of the roadway.)

(An unmarked crosswalk is formed by extending imaginary lines the width of the sidewalk at an intersection, across the roadway, to the sidewalk on the opposite side of the intersection.)

(If there is a sidewalk on only one side of an intersection, an unmarked crosswalk is formed by extending imaginary lines the width of the sidewalk, at right angles to the centerline of the roadway, to the opposite side of the intersection.)

If you find that (plaintiff) was crossing the roadway within a (marked) (unmarked) crosswalk, then it became the duty of (defendant) to yield the right of way to (plaintiff). If, however, you find that (plaintiff) was crossing the roadway and was not within a (marked) (unmarked) crosswalk, then it became (plaintiff)'s duty to yield the right of way to

(defendant).

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.24(1).

COMMENT

This instruction was approved in 1978 and revised in 1989. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

"Marked" or "Unmarked" crosswalk. The appropriate statutory definition of "marked" or "unmarked" crosswalk should be given. Definitions are found in Wis. Stat. § 340.01(10)(a) or (b). There may be marked crosswalks at places other than intersections.

Burke v. Tesmer, 224 Wis. 667, 670 71, 272 N.W. 857 (1937), indicates that there are no unmarked crosswalks at intersections in the country where there are no sidewalks and that a pedestrian crossing at such an intersection is under a duty to yield the right of way to a vehicle on the highway. Wis. Stat. § 346.24(2) is a statutory admonition to pedestrians not to suddenly leave a curb or other place of safety and walk or run into the path of a vehicle.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1170 RIGHT OF WAY: BLIND PEDESTRIAN ON HIGHWAY

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that a operator of a vehicle must stop the vehicle before approaching closer than 10 feet to a pedestrian carrying a cane or walking stick which is white in color or white trimmed with red and which is held in an extended or raised position and shall take such precautions as may be necessary to avoid accident or injury to the pedestrian. The fact that the pedestrian may be violating any of the laws applicable to pedestrians does not relieve the operator of a vehicle from the duties imposed by the rule just stated.[2]

If you find that (pedestrian) was carrying a cane or walking stick identified by the specified colors and extended or raised in position, then it became the duty of (operator) to stop the vehicle before approaching closer than 10 feet to (him) (her) and to take such precautions as might be necessary to avoid accident or injury to the pedestrian.

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.26(1).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was

approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

A blind person unidentified by cane or walking stick enjoys the rights of other pedestrians in crossing highways. Wis. Stat. § 346.26(2).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1175 RIGHT OF WAY: ENTERING HIGHWAY FROM AN ALLEY OR NONHIGHWAY ACCESS POINT

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that the operator of a vehicle entering a highway from an alley or from a point of access other than another highway shall yield the right of way to all vehicles approaching on the highway which the operator is entering.[2]

The word "entering" means going or moving into.

The phrase "point of access" means a place where an entry can be made onto a highway.

A vehicle is said to be approaching the point where the entry on a highway is to be made when it is not so far distant the entry point that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the operator of the vehicle intending to enter the highway undertakes to do so and operates a vehicle across or into the path of the oncoming vehicle.

If you find that the vehicle on the highway was approaching the place where the entry onto the highway was to be made, then it became the duty of the operator entering the highway to yield the right of way to the vehicle on the highway.

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.18(4).

COMMENT

The instruction and comment were originally published in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

If there is need for a definition of "alley," see Wis. Stat. § 340.01(2).

Plog v. Zolper, 1 Wis.2d 517, 525 29, 85 N.W.2d 492, 498 99 (1957).

The negligence of one using excessive speed on an arterial does not excuse one approaching the arterial for not yielding the right of way. Ogle v. Avina, 33 Wis.2d 125, 132, 146 N.W.2d 422 (1966). One entering an arterial must be reasonably sure he or she can enter into the flow of traffic thereon without disrupting it. Ogle v. Avina, supra at 133. However, having the right of way does not relieve an operator of the duty of watching the road for vehicles entering onto the highway. Leckwee v. Gibson, 90 Wis.2d 275, 287, 280 N.W.2d 186 (1979).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1180 RIGHT OF WAY: FUNERAL PROCESSIONS; MILITARY CONVOYS

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that, "(Funeral processions) ([M]ilitary convoys) have the right of way at intersections when vehicles comprising such procession have their bright headlights lighted. . . ."[2]

[Note: The preceding paragraph may be subject to certain conditions and exceptions in Wis. Stat. § 346.20(4)(a), (b), or (c). Conclude the paragraph with the statement of the law as to the applicable condition or exception.]

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.20(1).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 2008. This revision was approved by the Committee in September 2021.

This instruction is prepared solely as a suggested general pattern. It can be adapted to fit the particular need of any given situation.

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1185 RIGHT OF WAY: GREEN ARROW

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that vehicular traffic facing a green arrow signal may enter the intersection only to make the movement indicated by the arrow but shall yield the right of way to pedestrians lawfully within a crosswalk and to other traffic lawfully using the intersection.[2]

["Vehicular traffic," includes any device in, upon, or by which persons or property may be transported or drawn upon a highway. The term includes (bicycles) (_____).]

If you find that (_____) faced a green arrow signal before entry into the intersection, then it became (_____)'s duty to yield the right of way (to pedestrians lawfully within a crosswalk at the intersection) (to other traffic lawfully using the intersection).

NOTES

1. Wis. Stat. §§ 346.18(3).

2. Wis. Stat. § 346.37(1)(d).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

The blank in the third paragraph is for the inclusion of other vehicles about which the jury may be in doubt. Wis. Stat. § 340.01(74) has a specific mention of snowmobiles.

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1190 RIGHT OF WAY: GREEN SIGNAL

The Wisconsin statues define "right of way" as the privilege of the immediate use of the roadway.[1]

The statutes further provide that vehicular traffic facing a green signal may proceed straight through or turn right or left unless a sign at the place prohibits either turn, but vehicular traffic shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time the signal is exhibited.[2]

"Vehicular traffic," includes any device in, upon, or by which persons or property may be transported or drawn upon a highway. The term includes (bicycles) (____).

"Adjacent" means near, close, or adjoining. As here used, it refers to (the crosswalk the driver of the vehicle will be compelled to cross if the driver moves straight ahead) (the crosswalk the driver will be compelled to cross on the intersecting street if the driver turns right or left).

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.37(1)(a).

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

The blank in the third paragraph is for the inclusion of other vehicles about which the jury may be in doubt. Wis. Stat. § 340.01(74) has a specific mention of snowmobiles.

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1190.5 PLAINTIFF AND DEFENDANT EACH CLAIMS GREEN LIGHT IN THEIR FAVOR

Both operators claim that the green traffic light (or "Go" signal) was facing them as they proceeded to cross the intersection in question. It was a physical impossibility for this to happen, in the absence of evidence that the lights were not in good working order. It is for you to determine which operator the green light was facing and which operator, at that same time, the red light was facing as each operator proceeded into the intersection.

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

Matthews v. Schuh, 5 Wis.2d 521, 526, 93 N.W.2d 364 (1958).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1191 DUTY OF OPERATOR ENTERING INTERSECTION WITH GREEN LIGHT IN OPERATOR'S FAVOR: LOOKOUT

An operator entering an intersection with the light in his or her favor does not have an absolute right of way. The operator, when entering the intersection, has the duty of maintaining an efficient lookout to determine the presence of other vehicles approaching his or her course of travel and must also exercise reasonable judgment in calculating the distance and speed of any approaching vehicles so as to determine whether such approaching vehicle will run the light. If after such lookout and calculation it is apparent that the approaching vehicle is going to run the light, then the operator having the light in his or her favor must exercise ordinary care in an attempt to avoid a collision.

If the operator entering the intersection with the light in his or her favor properly determined that any automobile approaching the intersection was traveling at such speed and was at such distance from the intersection that the approaching operator could, as a matter of physical fact, yield the right of way if the operator responded to the red light, then the operator with lights in his or her favor, after entering the intersection, need not make continuing observations to either side for approaching traffic.

COMMENT

The instruction and comment were originally published in 1972, and editorial changes were made in 1992 to address gender references in the instruction. The comment was updated in 2008. This revision was approved by the Committee in September 2021.

See Wis JI-Civil 1190, Right of Way: Green Signal; Wis JI-Civil 1030, Right to Assume Due Care; and Wis JI-Civil 1090, Driver at Arterial Approaching Intersection: Lookout; Right of Way; Flashing Yellow Signal.

Hardware Dealers Mut. Fire Ins. Co. v. Home Mut. Ins. Co., 24 Wis.2d 381, 129 N.W.2d 214 (1964); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); Wilson v. Koch, 241 Wis. 594, 6 N.W.2d 659 (1942); Gleason v. Gillihan, 32 Wis.2d 50, 55, 145 N.W.2d 90 (1966).

When approaching a green light, if an operator's view of traffic approaching on the intersection road is obstructed, the operator has a duty to make further observation at a point which will enable the operator to take effective steps to avoid a collision. Oelke v. Earle, supra, at 483. See also Battice v. Michaelis, 255 Wis. 571, 576, 39 N.W.2d 702 (1949).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1192 DUTY OF OPERATOR APPROACHING INTERSECTION WHEN AMBER LIGHT SHOWS

A safety statute provides that an operator facing a yellow signal shown with or following a green light, shall stop before entering the intersection unless so close to it that a stop cannot be made in safety.[1]

If you find that the yellow or amber light, which signifies caution, was showing before (operator) entered the intersection, then (operator) was required to stop unless (he) (she) was so close to the traffic signal that a stop could not be made in safety.

NOTES

Wis. Stat. § 346.37(1)(b).

COMMENT

The instruction and comment were originally published in their present form in 1966. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

1193 RED TRAFFIC CONTROL LIGHT SIGNALING STOP

A safety statute provides that vehicles facing a red traffic light shall stop before entering the crosswalk on the near side of an intersection, or, if there is no crosswalk, at a point indicated by a clearly visible sign or other marking, or if there is no sign or marking, before entering the intersection, and shall remain standing until a green light or other signal permitting movement is shown.[1]

NOTES

1. Wis. Stat. § 346.37(1)(c).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008. This revision was approved by the Committee in September 2021.

1193.5 FLASHING RED TRAFFIC CONTROL LIGHT

When a red traffic control light is illuminated with rapid intermittent flashes, operators of vehicles shall stop before entering the intersection at the nearest crosswalk or at a limit line if marked, or, if there is no crosswalk or limit line, then before entering the intersection; the right to proceed is subject to the rules applicable after making a stop at a stop sign.[1]

[Here add appropriate parts of Wis JI-Civil 1325 Stop at Stop Signs.]

NOTES

1. Wis. Stat. § 346.39(1).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1195 RIGHT OF WAY: LEFT TURN AT INTERSECTION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that the operator of a vehicle within an intersection intending to turn to the left across the path of any vehicle approaching from the opposite direction shall yield the right of way to that vehicle.[2]

The word "approaching" involves a concept of nearness in space and time. A vehicle is approaching an intersection when it is not so far distant from the intersection that, considering the speed at which it is traveling, it is reasonable to assume that a collision will occur if the operator of the vehicle intending to turn left undertakes to do so by changing the course of the vehicle from the right lane, across the center line, and into the path of the oncoming vehicle.

If you find that the oncoming vehicle was approaching the intersection, it became the duty of the operator turning left to yield the right of way to the approaching vehicle.

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.18(2).

COMMENT

The instruction and comment were originally published in their present form in 1967. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Wis. Stat. § 346.18(7) provides: "The operator of any vehicle intending to turn to the left into an alley or private driveway across the path of any vehicle approaching from the opposite direction shall yield the right of way to such vehicle." Thus this statute does impose a duty on the left turning operators independent of lookout. Zartner v. Scopp, 28 Wis.2d 205, 216, 137 N.W.2d 107 (1965).

For the definition of "intersection," see Wis. Stat. § 340.01(25).

See Plog v. Zolper, 1 Wis.2d 517, 529, 85 N.W.2d 492 (1957).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1205 RIGHT OF WAY: MOVING FROM PARKED POSITION

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that the operator of any vehicle that has been parked or standing shall, while moving the vehicle from its position, yield the right of way to all vehicles approaching on the highway.[2]

A vehicle is said to be "approaching" when it is not so far distant that, considering the rate of speed at which it is traveling, it would be reasonable to assume that a collision would occur if the vehicle parked or standing is put in motion and moved onto the roadway and into the path of the oncoming vehicle.

If you find that the oncoming vehicle on the highway was approaching, then it became the duty of the operator of the parked or standing vehicle, while moving it from its position, to yield the right of way to a vehicle approaching on the highway.

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.18(5).

COMMENT

The instruction and comment were originally published in their present form in 1960 and revised in 2008. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1210 RIGHT OF WAY: ON APPROACH OF EMERGENCY VEHICLE

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that upon the approach of any authorized emergency vehicle giving audible signal by siren, the operator of a vehicle shall yield the right of way and shall immediately operate the vehicle to a position as near as possible and parallel to the right curb or to the right hand edge of the shoulder of the roadway, clear of any intersection and, unless otherwise directed by a traffic officer, shall stop and remain standing in such position until the authorized emergency vehicle has passed.[2]

[The (type of vehicle) was an emergency vehicle, as defined in the statutes.]

[Note: In the alternative, the language of Wis. Stat. § 340.01(3)(a), (b), (c), (d), (e), (f), or (g) may appropriately be used in defining "emergency vehicle."]

"Audible" means capable of being heard.[3]

"Roadway" means that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel.[4]

If you find that the emergency vehicle of (name) was approaching, giving audible signal by siren, then it became the duty of (name) to yield the right of way.

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.19(1).

3. The definition of "audible" is its common meaning.

4. "Roadway" is defined in Wis. Stat. § 340.01(54).

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 2008. An editorial correction was made in 1996. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

As to "audible signal," see Frankland v. Peterson, 268 Wis. 394, 397, 67 N.W.2d 865, 866 (1955); Swinkles v. Wisconsin Michigan Power Co., 221 Wis. 280, 287 88, 267 N.W. 1, 4 5 (1936).

If the fact of hearing the signal is in issue, and the evidence warrants, it may be desirable to expand the definition of "audible" to cover a siren in good operating condition, and a reasonably attentive vehicle operator or pedestrian. The operator giving the signal need not show that the signal was actually heard by the operator. Werner Trans. Co. v. Zimmerman, 201 F.2d 687, 691 (1953). Testimony that the signal was not heard may be negative testimony and may require an instruction on the value of such testimony. Anderson v. Stricker, 266 Wis. 1, 5 6, 62 N.W.2d 396, 398 (1953); Hunter v. Sirianni Candy Co., 233 Wis. 130, 132 33, 288 N.W. 766, 769 (1939); Zenner v. Chicago, St. P., M. & O. Ry., 219 Wis. 124, 126 27, 262 N.W.2d 581, 582 83 (1935). See Wis JI-Civil 315, Negative Testimony.

This instruction is based on the assumption that there is no issue on the emergency nature of the vehicle involved. If this issue develops, it may require a separate preliminary question with an instruction defining emergency vehicles.

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1220 RIGHT OF WAY: PEDESTRIAN'S DUTY: AT PEDESTRIAN CONTROL SIGNAL

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that no pedestrian may start to cross the roadway (or other vehicular crossing) in the direction of a "Don't Walk" signal, but a pedestrian who has partially completed crossing on the "Walk" signal may proceed to a sidewalk or safety island while the "Don't Walk" signal is showing.[2]

If you find that (pedestrian) was facing a "Don't Walk" signal, then it was (pedestrian)'s duty before entering into the roadway to yield the right of way to an approaching vehicle on the roadway. If, however, you find that (pedestrian) started to cross the roadway on a "Walk" signal and had partially completed crossing when the signal turned to "Don't Walk," then (pedestrian) had the right to proceed to the (sidewalk) (safety island).

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.38(2).

See City of Hartford v. Godfrey, 92 Wis.2d 815, 286 N.W.2d 10 (Ct. App. 1979); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

COMMENT

The instruction and comment were originally published in 1960. The comment was updated in 1989. Editorial changes were made in 1992 to address gender references in the instruction. The instruction was

revised in 1992 and 2008. This revision was approved by the Committee in September 2021.

The first paragraph refers to Wis. Stat. §§ 340.01(51) and 346.38(2). See City of Hartford v. Godfrey, 92 Wis.2d 815, 286 N.W.2d 10 (Ct. App. 1979); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

"Roadway" is defined in Wis. Stat. § 340.01(54).

See Sub. (1) of § 346.38 giving the pedestrian the right of way if on a "walk" signal.

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1225 RIGHT OF WAY: PEDESTRIAN'S DUTY: CROSSING AT CONTROLLED INTERSECTION OR CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that at an intersection or crosswalk where traffic is controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right of way to a pedestrian who has started to cross the highway on a green or "Walk" signal and in all other cases pedestrians shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal.[2]

If you find that at (intersection), where traffic was controlled by (traffic control signals) (a traffic officer), (pedestrian) was in the act of crossing the highway on the (green) (Walk) signal, then (pedestrian) was entitled to the right of way over an approaching vehicle. However, if you find that (pedestrian) was not crossing or had not started to cross the highway on a (green) (Walk) signal, then it became (pedestrian)'s duty to yield the right of way to an approaching vehicle on the highway proceeding directly ahead on the (green) signal.

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.23(1).

See also, See City of Hartford v. Godfrey, 92 Wis.2d 815, 286 N.W.2d 10 (Ct. App. 1979); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971).

COMMENT

The instruction and comment were originally published in their present form in 1972. This comment was updated in 1989 and 2008. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

For the definition of "intersection," see Wis. Stat. § 340.01(25); for "traffic control signal," see § 340.01(39); for "pedestrian,": see 340.01(43); and for "crosswalk," see § 340.01(10)(a) and (b). For the right of way at intersections or crosswalks on divided highways or highway provided with safety zones, see Wis. Stat. § 346.23(2).

An instruction defining "crosswalk" was approved in Van Galder v. Snyder, 254 Wis. 120, 123, 35 N.W.2d 187, 188 89 (1948). The changing of a light does not justify an operator of a vehicle to move forward until a reasonable opportunity is given to the pedestrian to reach the sidewalk. Raaber v. Brzoskowski, 204 Wis. 319, 321, 236 N.W. 133, 134 (1931).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1230 RIGHT OF WAY: PEDESTRIAN'S DUTY: CROSSING ROADWAY AT POINT OTHER THAN CROSSWALK

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that a pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to all vehicles upon the roadway.[2]

If you find that (pedestrian) was crossing the roadway at a point other than a marked or unmarked crosswalk, then it became (pedestrian)'s duty to yield the right of way to a vehicle approaching on the roadway.

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.25.

See also, the notes to these sections in Wis. Stat. Annot.

COMMENT

The instruction and comment were originally published in their present form in 1972. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

For the definition of "roadway," see Wis. Stat. § 340.01(54); for "marked" or "unmarked crosswalk," see § 340.01(10)(a) and (b).

Wis. Stat. § 891.44 provides an exception to § 346.25, and this instruction is not to be given when the pedestrian is a child under 7 years of age. Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 201 N.W.2d 745 (1972).

The duty of a pedestrian to yield the right of way under Wis. Stat. § 346.25 is absolute, regardless of

any negligence on the part of the operator. Failure to yield is causal negligence as a matter of law. Field v. Vinograd, 10 Wis.2d 500, 505, 103 N.W.2d 671 (1960); Staples v. Glienke, 142 Wis.2d 19, 416 N.W.2d 920 (Ct. App. 1987).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1235 RIGHT OF WAY: PEDESTRIAN'S DUTY: DIVIDED HIGHWAYS OR HIGHWAYS WITH SAFETY ZONES

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that at intersections or crosswalks on divided highways or highways provided with safety zones where traffic is controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right of way to a pedestrian who has started to cross the roadway either from the near curb or shoulder or from the center dividing strip or safety zone with the green or "Walk" signal in his or her favor.[2] If the signal turns against a pedestrian before the pedestrian leaves the center dividing space or safety island, the pedestrian shall yield the right of way to vehicles lawfully proceeding directly ahead on a green signal.

If you find that at (intersection on a divided highway), where traffic was controlled by traffic control signals, (pedestrian) was in the act of crossing the roadway from the near curb or shoulder with the (green) (Walk) signal in (his) (her) favor, then (pedestrian) was entitled to the right of way over an approaching vehicle. However, if you find that the signal turned against (pedestrian) before (he) (she) left the center dividing space or safety island, then it was (pedestrian)'s duty to yield the right of way to a vehicle on the roadway lawfully proceeding directly ahead on the (green) signal.

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.23(2).

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

For the definition of specific words and phrases, see Wis. Stat. § 340.01.

The instruction should be changed to accommodate it to the factual situation, as to crosswalk, or divided highway, or highways provided with safety zones, or if traffic is controlled by a traffic officer.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1240 RIGHT OF WAY: PEDESTRIAN'S DUTY: FACING GREEN ARROW

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that no pedestrian facing a green arrow signal shall enter the roadway unless the pedestrian can do so safely and without interfering with any vehicular traffic.[2]

If you find that (pedestrian) was facing a green arrow, then it became (pedestrian)'s duty, before entering onto the roadway, to yield the right of way to an approaching vehicle unless (pedestrian) could enter the roadway safely and without interference with vehicle traffic on the roadway.

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.37(1)(d)(2).

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

"Roadway" is defined in Wis. Stat. § 340.01(54).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1245 RIGHT OF WAY: PEDESTRIAN'S DUTY: FACING RED SIGNAL

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that no pedestrian facing a red signal shall enter the roadway unless the pedestrian can do so safely and without interfering with any vehicular traffic.[2]

If you find that (pedestrian) was facing a red signal, then it was (pedestrian)'s duty before entering onto the highway to yield the right of way to an approaching vehicle unless (he) (she) could enter the roadway safely and without interference with traffic on the roadway.

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.37(1)(c)(2).

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

"Roadway" is defined in Wis. Stat. § 340.01(54).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1250 RIGHT OF WAY: PEDESTRIAN'S DUTY: STANDING OR LOITERING ON HIGHWAY

The Wisconsin statutes define "right of way" as the privilege of the immediate use of the roadway[1] and, further provide, that no person shall be on a roadway for the purpose of soliciting a ride from the operator of any vehicle other than a public passenger vehicle.[2]

If you find that (pedestrian) was on the roadway for the purpose of soliciting a ride from the operator of any vehicle other than a public passenger vehicle, then it was (pedestrian)'s duty to yield the right of way to a vehicle approaching on the roadway.

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.29(1).

COMMENT

The instruction and comment were originally published in their present form in 1960. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

The instruction should be changed to accommodate it to the factual situation if the pedestrian is loitering on the roadway, as prohibited by Wis. Stat. § 346.29(2), or if the pedestrian is on a bridge, or approach thereto, to fish or swim, in violation of signs prohibiting his or her presence thereon for such purpose, as prohibited by subsection (3).

"Roadway" is defined in Wis. Stat. § 340.01(54).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a

crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1255 RIGHT OF WAY: PEDESTRIAN'S DUTY AT UNCONTROLLED INTERSECTION OR CROSSWALK; SUDDENLY LEAVING CURB OR PLACE OF SAFETY

A safety statute provides that at an intersection or crosswalk where traffic is not controlled by traffic control signals or by a traffic officer, the operator of a vehicle shall yield the right of way to a pedestrian who is crossing the highway within a marked or unmarked crosswalk.

"Right of way" means the privilege of the immediate use of the roadway.[1]

The statute further provides that a pedestrian shall not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is difficult for the operator of the vehicle to yield the right of way.[2]

If you find that (pedestrian) suddenly left the curb [or other place of safety] and walked or ran into the path of (operator)'s vehicle which was so close that it was difficult for (operator) to yield, then (operator) did not have a duty to yield the right of way; but if you find that (pedestrian) did not enter the roadway, then it became the duty of (operator) to yield the right of way to (pedestrian).

NOTES

1. Wis. Stat. § 340.01(51).
2. Wis. Stat. § 346.24(2).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Wis JI-Civil 1165 covers the duty of the motorist to yield the right of way to a pedestrian crossing an uncontrolled intersection within a crosswalk. Wis JI-Civil 1225 covers the right of way situation where the pedestrian crosses at a controlled intersection or crosswalk. Wis JI-Civil 1230 covers the duty of a pedestrian who crosses at a point other than a crosswalk.

This instruction covers the situation where the pedestrian is within the crosswalk but has darted into the street from a place of safety. Other combinations of pedestrian motorist right of way situations can be handled in the manner suggested by this instruction.

Hintz v. Mielke, 15 Wis.2d 258, 263, 112 N.W.2d 720 (1961); Schoenauer v. Wendinger, 49 Wis.2d 415, 182 N.W.2d 441 (1971); Schueler v. City of Madison, 49 Wis.2d 695, 183 N.W.2d 116 (1971).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1260 POSITION ON HIGHWAY: PEDESTRIAN'S DUTY; WALKING ON HIGHWAY

A safety statute provides that a pedestrian walking along and upon a highway other than a sidewalk shall walk on and along the left side of the highway and upon meeting a vehicle shall, if practicable, step to the extreme outer edge of the traveled portion of the highway. The traveled portion of the highway includes the shoulder.[1]

If you find that (pedestrian) was on the left side of the highway as (he) (she) walked on and along it, then it became (pedestrian)'s duty upon meeting a vehicle, if it could be practicably done by (him) (her), to step to the extreme outer limits of the traveled portion of the highway.

NOTES

1. Wis. Stat. § 346.28(1).

COMMENT

This instruction and comment were approved in 1977. The comment was updated in 1989. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

Pedestrian walking on right side of highway is negligent as a matter of law. Panzer v. Hesse, 249 Wis. 340, 24 N.W.2d 613 (1946); Staples v. Glienke, 142 Wis.2d 19, 416 N.W.2d 920 (Ct. App. 1987).

The traveled portion of the highway includes the shoulder. Wojciechowski v. Baron, 274 Wis. 364, 80 N.W.2d 424 (1957).

The jury may find a pedestrian walking on the edge of the blacktop roadway not negligent. Dahl v. Ellis, 35 Wis.2d 441, 151 N.W.2d 61 (1967).

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1265 RIGHT OF WAY: PERSONS WORKING ON HIGHWAY

A safety statute provides that an operator of a vehicle shall yield the right of way to persons engaged in maintenance or construction work on a highway whenever the operator is notified of their presence by flagmen or warning signs.[1]

"Right of way" means the privilege of the immediate use of the roadway.[2]

If you find that (plaintiff) was engaged in maintenance or construction work on a highway at the time and place in question and that a flagman or warning signs were present to notify (defendant) of (plaintiff)'s presence and occupation, then it became the duty of (defendant) to yield the right of way to (plaintiff).

NOTES

1. Wis. Stat. § 346.27.
2. Wis. Stat. § 40.01(51).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in September 2021.

As to the lessened duty of care imposed on persons so engaged in highway construction, see Knowles v. Stargel, 261 Wis. 106, 109 10, 52 N.W.2d 387 (1952); Gunning v. King, 249 Wis. 176, 180 81, 23 N.W.2d 602 (1946); Isgro v. Plankington Packing Co., 176 Wis. 507, 514 16, 186 N.W. 606 (1922).

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

1270 RIGHT OF WAY: WHEN VEHICLE USING ALLEY OR NONHIGHWAY ACCESS TO STOP

A safety statute provides that the operator of a vehicle emerging from an alley or about to cross or enter a highway from any point of access other than another highway shall stop the vehicle immediately prior to moving onto the sidewalk, or onto the sidewalk area extending across the path of the vehicle, and shall yield the right of way to any pedestrian, and upon crossing or entering the roadway shall yield the right of way to all vehicles approaching on the roadway.[1]

"Right of way" means the privilege of the immediate use of the roadway.[2]

The words "emerging from" mean "leaving or coming out of."

"Point of access," means "a place where an entry can be made onto a highway."

NOTES

1. Wis. Stat. § 346.47(1).
2. Wis. Stat. § 340.01(51).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

Wis. Stat. § 346.18(4) provides for yielding the right of way to vehicles approaching on the highway under these circumstances. Wis JI-Civil 1175 Right of Way: Entering Highway from an Alley or Non Highway Access Point covers this situation.

Rights and duties of bicyclists. Different right-of-way standards apply depending on whether a bicyclist was using the roadway as any other vehicle or as a pedestrian upon a sidewalk or within a crosswalk. See Chernetski v. American Family Mutual Insurance Co., 183 Wis.2d 68, 515 N.W.2d 283 (1994) and Estate of Zhu v. Hodgson, 2021 WI App 10, 395 Wis.2d 768, 954 N.W.2d 748.

1275 RIGHT OF WAY: WHEN YIELD SIGN INSTALLED

A safety statute provides that the operator of a vehicle when approaching any intersection at which has been installed a yield right of way sign, shall yield the right of way to other vehicles which have entered the intersection from an intersecting highway or which are approaching so closely on the intersecting highway as to constitute a hazard of collision and, if necessary, shall reduce speed or stop to yield.[1]

"Right of way" means the privilege of the immediate use of the roadway.[2]

NOTES

1. Wis. Stat. § 346.18(6)
2. Wis. Stat. § 340.01(51)

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2008. This revision was approved by the Committee in September 2021.

Driver or Operator. This instruction applies to either an operator or a driver of a motor vehicle. If "driver" is more appropriate to the evidence, then substitute "driver" for "operator."

1393 LIABILITY OF A PARTICIPANT IN A RECREATIONAL ACTIVITY

A person participating in recreational activities, including (specify recreational activity, e.g., camping), accepts the risk inherent in the recreational activity of which the ordinary prudent person is or should be aware.

A participant in a recreational activity must do all of the following:

1. Act within the limits of his or her ability.
2. Heed all warnings regarding participating in the recreational activity.
3. Maintain control of his or her person and the (equipment) (devices) (animals) he or she is using while participating in the activity.
4. Refrain from acting in any manner that may cause or contribute to the death or injury to himself or herself or to other persons while participating in the recreational activity.

A participant who fails to do so is negligent.

COMMENT

This instruction and comment were approved in September 2021.

This instruction provides the duties of a recreational participant pursuant to Wis. Stat. § 895.525(4)(a).

See Wis. Stat. Sec. 895.525(2)(b) for the definition of "recreational activity".

For liability of contact sports participants, see Wis JI-Civil 2020.

§ 895.525 "does not impose a greater duty on an individual than that which exists under the common law." Rockweit by Donohue v. Senecal, 197 Wis.2d 409, 417, 541 N.W.2d 742.

In Ansani v. Cascade Mountain, Inc., 223 Wis.2d 39, 49, 588 N.W.2d 321 (Ct. App. 1998), the court

of appeals concluded that pursuant to § 895.525, a skier had a duty to exercise ordinary care to avoid foreseeable harms, including adherence to four statutorily enumerated conditions stated in subsec. (4). Additionally, citing Rockweit, supra, the Ansani court concluded that § 895.525 does not mandate that all who ski are negligent under all circumstances as a matter of law. 223 Wis.2d 39 at 49.

See Wis JI-Civil 1005 for the definition of "ordinary care."

Wis. Stat. § 895.525; Jury Instructions. The court in Ansani, supra, held that the trial court properly instructed the jury that the person participating in the recreational activity of skiing was obligated to comply with all four conditions enumerated in § 895.525(4) and that the participant had a duty of ordinary care to avoid foreseeable harms. 223 Wis.2d 39 at 59. This was opposed to instructing the jury that the participant was negligent as a matter of law solely because he skied. Id. at 59.

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1762 PERSONAL INJURIES: FUTURE LOSS OF EARNING CAPACITY

(Question _____) (Subdivision _____ of question _____) asks what sum of money will fairly and reasonably compensate (plaintiff) for future loss of earning capacity.

If you are satisfied that (plaintiff) has suffered a loss of future earning capacity as a result of the injuries sustained in the accident, your answer to this question will be the difference between what (plaintiff) will reasonably be able to earn in the future in view of the injuries sustained and what (he) (she) would have been able to earn had (he) (she) not been injured.

[Where appropriate add the following paragraph: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) loss of future earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of (plaintiff)'s services to the business, (and the profits of the business).]

While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of (loss of future earning capacity) requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is

exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

COMMENT

This instruction and comment were approved in 1998 and revised in 2000 and 2003. This revision was approved by the Committee in October 2021; it added to the comment.

Burden. The injured party bears the burden "to establish to a reasonable certainty the damages sustained[.]" Ghiardi, James D., Personal Injury Damages in Wisconsin (1964). "The evidence must be sufficient to enable the jury to estimate with reasonable probability what would have happened had the injury not occurred." Schulz v. St. Mary's Hosp., 81 Wis. 2d 638, 657, 260 N.W.2d 783 (1978).

Determining damages. Damages for loss of earning capacity are "generally arrived at by comparing what the injured party was capable of earning before and after the time of the injury." Klink v. Cappelli, 179 Wis. 2d 624, 630, 508 N.W.2d 435 (Ct. App. 1993). Without a showing of evidence, "the jury must speculate or conjecture as to the amount of lost earning capacity." Klink, supra, at 630, citing Schulz v. St. Mary's Hosp., 81 Wis.2d 638, 658, 260 N.W.2d 783, 790 (1978). The Wisconsin Supreme Court has held that the jury may not "speculate" when it determines a damages award for loss of future earning capacity. Ianni v. Grain Dealers Mut. Ins. Co., 42 Wis. 2d 354, 364, 166 N.W.2d, 148 (1969).

Evidence of permanent injury. "It is true that evidence of a permanent injury may be sufficient in itself for the inference of a loss of earning capacity where the nature of the injury by common knowledge disables the plaintiff from performing the only type of work he or she is fitted to do, but, except in such situation, the fact of injury, standing alone, is not sufficient to establish a loss of earning capacity." Ianni, supra, at 363, citing Wells v. National Indemnity Co. (1968), 41 Wis.2d 1, 162 N.W.2d 562.

Loss of Earning Capacity – Business Profits. Where an injured plaintiff is the owner and operator of a business, the profits of which business are mainly dependent on plaintiff's personal exertions, the profits of the business, along with all other evidence pertaining to the operation of the business, may be considered in determining plaintiff's loss of earning capacity. However, if the income of the business is chiefly the result of capital invested, the labor of others, or other factors than the personal services of the owner, evidence of business profits should not be received. See Featherly v. Continental Ins. Co., 73 Wis.2d 273, 243 N.W.2d 806 (1976).

Evidence of Future Loss. See Comment to Wis. JI-Civil 1760. The last paragraph of the instruction was previously contained in Wis JI-Civil 1705 as a general instruction. The Committee believed it was important and more convenient to users to add this general language from Wis JI-Civil 1705 to each instruction on future loss of earning capacity and pecuniary loss.

1900.4 SAFE PLACE STATUTE: INJURY TO FREQUENTER: NEGLIGENCE OF EMPLOYER OR OWNER OF A PLACE OF EMPLOYMENT

(Give Wis JI-Civil 1005.)

Question 1 asks: Was (defendant) negligent in failing to (construct) (repair) (maintain) the premises as safe as the nature of its business would reasonably permit.

The Wisconsin Legislature enacted a law which is known as the Safe-Place Statute, which applies to this case. That law imposes a duty upon (defendant) in this case to (construct) (repair) (maintain) the premises upon which (plaintiff) was injured so as to make them safe. The law requires (defendant) to (furnish and use safety devices and safeguards) (adopt and use methods and processes) reasonably adequate to render the place of employment safe. Violation of this law is negligence.

The term "safe" or "safety," as used in this law, does not mean absolute safety. The term "safe" or "safety," as applied to the premises in this case, means such freedom from danger to the life, health, safety, or welfare of (plaintiff) as the nature of the premises will reasonably permit.

(Defendant) was not required to guarantee (plaintiff)'s safety but rather was required to (construct) (repair) (maintain) the premises as safe as the nature of the place would reasonably permit.

In determining whether (defendant)'s premises were as free from danger as its nature would permit, you will consider the adequacy of the (construction) (repair) (maintenance) of the premises, bearing in mind the nature of the business and the manner in which the business is customarily conducted.

[**Note:** The following paragraph should not be given where the defect is a structural defect: To find that (defendant) failed to (construct) (repair) (maintain) the premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

COMMENT

The instruction and comment were approved by the Committee in 1974. The instruction was revised in 1986, 1992, 1995, 1996, 1998, and 2003. This instruction was renumbered in 1976 from Wis JI-Civil 1900. The comment was updated in 1990, 1993, 1995, 1998, 2001, 2003, 2004, 2006, 2014, and 2020. This revision was approved by the Committee in September 2021, it added to the comment.

See Petoskey v. Schmidt, 21 Wis.2d 323, 124 N.W.2d 1 (1963); For the form of the question, see Petoskey, supra; Krause v. V. F. W. Post 6498, 9 Wis.2d 547, 101 N.W.2d 645 (1960).

The safe-place statute imposes a higher standard of care than ordinary negligence at common law, Krause, supra; Saxhaug v. Forsyth Leather Co., 252 Wis. 376, 31 N.W.2d 589 (1948); Dykstra v. Arthur G. McKee & Co., 92 Wis.2d 17, 26, 284 N.W.2d 692 (1979); Topp v. Continental Ins. Co., 83 Wis.2d 780,

266 N.W.2d 397 (1978). Although the safe-place statute establishes a higher standard, failure of a safe place claim does not necessarily preclude a common law negligence claim arising out of the same condition. A safe-place statute addresses the condition of the premises while the common law claim looks at negligent acts. Megal v. Green Bay Area Visitor & Convention Bureau, et al., 2004 WI 98, Case No. 02-2932.

The giving of common-law negligence instruction followed by the safe-place instruction was approved in Carr v. Amusement, Inc., 47 Wis.2d 368, 375, 177 N.W.2d 388 (1970).

Although the statute creates a presumption that an injury was caused by a violation of the statute, the presumption does not establish as a matter of law that the defendant's negligence was greater than the plaintiff's, Brons v. Bischoff, 89 Wis.2d 80, 88, 277 N.W.2d 854 (1979); Fondell v. Lucky Stores, supra; Imnus v. Wisconsin Public Ser. Corp., 260 Wis. 433, 51 N.W.2d 42 (1952).

In reading Wis. Stat. § 101.11, it is suggested that parts dealing solely with employment be omitted, as well as other portions inappropriate under the facts of the case. A community-based residential facility, as defined in Wis. Stat. § 50.01(1), is a place of employment. Wis. Stat. § 101.11(3).

This instruction applies to an injury to a frequenter. For the definition of "frequenter," see Wis. Stat. § 101.01(2)(e) and JI-Civil 1901. Independent contractor employee as frequenter – McNally v. Goodenough, 5 Wis.2d 293, 300, 92 N.W.2d 890 (1958); Dykstra, supra; Sampson v. Laskin, 66 Wis.2d 318, 326, 224 N.W.2d 594 (1975); Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226, 284 N.W.2d 621 (1979).

The definition of "safe" and "safety" is from Wis. Stat. § 101.01(2)(g).

Nature of Business. Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 446, 253 N.W. 579 (1934). Free from danger – Olson v. Whitney Bros. Co., 160 Wis. 606, 612-13, 150 N.W. 959 (1915); Dykstra v. Arthur G. McKee & Co., supra; Topp v. Continental Ins. Co., supra, at 788; Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 230-31, 270 N.W.2d 205 (1978). An Elks Club was held to be a "place of employment" in Schmorrow v. Sentry Ins. Co., 138 Wis.2d 31, 405 N.W.2d 672 (Ct. App. 1987).

The defendant is not a guarantor of a frequenter's safety. Hipke v. Industrial Comm'n, 261 Wis. 226, 52 N.W.2d 401 (1952).

A business is not an insurer of a frequenter's safety. Zehren v. F. W. Woolworth Co., supra; Dykstra, supra; Stefanovich v. Iowa Nat'l Mut. Ins. Co., 86 Wis.2d 161, 166, 271 N.W.2d 867 (1978); May v. Skelly Oil Co., 83 Wis.2d 30, 36, 264 N.W.2d 574 (1978).

Safety is a relative, not an absolute, term. Sykes v. Bensinger Recreation Corp., 117 F.2d 964, 967 (7th Cir. 1941); Heckel v. Standard Gateway Theater, 229 Wis. 80, 281 N.W. 640 (1938); May v. Skelly, supra.

The statutory duty is to make the place as safe as the nature and place of employment will reasonably permit. Mullen v. Larson-Morgan Co., 212 Wis. 52, 249 N.W. 67 (1933); Saxhaug v. Forsyth Leather Co., supra. This duty is not a lesser standard than that imposed by the common law, Balas v. St. Sebastian's Congregation, 66 Wis.2d 421, 425, 225 N.W.2d 428 (1975).

A place is safe if it is as free from danger as the nature of the employment will reasonably permit when used in a customary or usual manner for the work intended or in such a manner as an ordinarily prudent and careful person might anticipate it might be used. Olson v. Whitney Bros. Co., supra; Topp v. Continental, supra.

The words "construction" or "constructing" should be used when, on the facts, faulty construction is involved.

Notice. Werner v. Gimbel Bros., 8 Wis.2d 491, 99 N.W.2d 708 (1959). There is no requirement of notice where the condition was created by the party sought to be charged. Merriman v. Cash-Way, Inc., 35 Wis.2d 112, 150 N.W.2d 472 (1967); Kosnar v. J. C. Penney Co., 6 Wis.2d 238, 242, 277, 132 N.W.2d 595 (1965).) Or where the alleged defect is a structural defect Hannebaum v. DiRenzo & Bomier, 162 Wis.2d 488, 469 N.W.2d 900 (Ct. App. 1991); see also Fitzgerald v. Badger State Mut. Casualty Co., 67 Wis.2d 321, 227 N.W.2d 444 (1975). Also, if the defendant claims that no defective condition existed, then proof of notice is not necessary. Petoskey v. Schmidt, supra.

The employer must have notice of the defect except where the alleged defect is a structural defect, Fitzgerald, supra. Krause v. V. F. W. Post 6498, supra; Pettric v. Gridley Dairy Co., 202 Wis. 289, 232 N.W. 595 (1930). As to the length of time of notice required, see Bergevin v. Chippewa Falls, 82 Wis. 505, 52 N.W. 588 (1892); Topp v. Continental Ins. Co., supra at 780; Fitzgerald v. Badger State Mut. Casualty Co., supra, at 326; Dykstra, supra; May v. Skelly Oil Co., supra, at 36.

Defect Versus Unsafe Condition. This instruction provides that a property owner is liable for injuries caused by a structural defect regardless of whether the owner knew or should have known that the defect existed. However, where the property condition that causes the injury is an unsafe condition associated with the structure, the owner is liable only if it had actual or constructive notice of the condition. This instruction contains an optional paragraph to be used in cases involving a structural defect. This paragraph reads:

> [**Note**: The following paragraph should not be given where the defect is a structural defect. To find that (defendant) failed to (construct) (repair) or (maintain) the premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

A decision of the supreme court discussed whether a loose stairway nosing that caused the plaintiff to fall down stairs was a "structural defect" or an "unsafe condition associated with the structure." The trial judge found that the loose nosing was a structural defect and, therefore, did not instruct the jury on notice. The court said that the classification of the loose nosing was a question of law. Barry v. Employers Mut. Casualty Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517. The court concluded that the nosing was an "unsafe condition." Thus, the court said the plaintiff was required to prove the defendant property owner had notice of the condition. Because the jury was not instructed on the notice issue, the court said the case

was not fully tried and remanded the case. For a discussion of defect versus unsafe condition, see Mair v. Trollhaugen Ski Resort, 2006 WI 61, 291 Wis.2d 132, 715 N.W.2d 598.

Constructive Notice. Constructive notice requires evidence as to the length of time that the condition existed Kaufman v. State Street Ltd. Partnership, 187 Wis.2d 54, 59 (Ct. App., 1994). An owner or employer is deemed to have constructive notice when that defect or condition has existed a long enough time for a reasonably diligent owner to discover and repair it. May v. Skelley Oil Co., 83 Wis.2d 30, 36 (1978); Strack v. Great Atlantic & Pacific Tea Co., 35 Wis.2d 51, 55 (1967). Determining the exact point in time at which an unsafe condition commenced is not an essential condition in establishing constructive notice. Although a plaintiff is still obligated to prove the unsafe condition lasted long enough to establish constructive notice, it is not necessary for the plaintiff to locate the "temporal commencement" of the unsafe condition if the evidence shows it existed long enough to give a reasonably diligent owner an opportunity to discover and remedy it. Correa v. Woodman's Food Market, 2020 WI 43, ¶26, 391 Wis. 2d 651, 943 N.W.2d 535.

"Speculation as to how long the unsafe condition existed and what reasonable inspection would entail are insufficient to establish constructive notice." Kochanski v. Speedway SuperAmerica, LLC, 2014 WI 72, ¶36, 356 Wis.2d 1, 850 N.W.2d 160. Therefore, before a case may reach the jury, the plaintiff "must present a quantum of evidence sufficient to render the eventual answer non-speculative." See Correa v. Woodman's Food Market, supra, at 662.

Length of time required for constructive notice depends on the surrounding facts and circumstances, including the nature of the business and the nature of the defect. May, 83 Wis.2d 30 at 37. The need for "length of time" evidence (and therefore any constructive notice) is obviated where harm from the method of merchandising is reasonably foreseeable. See Strack, 35 Wis.2d 51 at 55.

Duty to Inspect. Wisconsin Bridge and Iron Co. v. Industrial Comm'n, 8 Wis.2d 612, 618, 99 N.W.2d 817 (1959). There is no duty to inspect and warn unless it is shown that the premises were not in a reasonably safe condition. Balas v. St. Sebastian's, supra.

Acts of Operation Versus an Unsafe Condition. In Stefanovich v. Iowa Nat'l Mut. Ins. Co., supra, at 166, the court stated that liability under the safe-place statute is based on unsafe conditions, not unsafe acts. See also Korenak v. Curative Workshop Adult Rehabilitation Center, 71 Wis.2d 77, 84, 237 N.W.2d 43 (1976). Similarly, the court in Leitner v. Milwaukee County, 94 Wis.2d 186, 195, 287 N.W.2d 803 (1980), concluded that injuries to a frequenter caused by unsafe conditions of an employer's premises are covered by the safe-place statute, while injuries caused by negligent, inadvertent, or even intentional acts committed therein are not. See also Viola v. Wisconsin Electric Power Co., 352 Wis.2d 541, 842 N.W.2d 515 (2014).

Recreational Use Immunity. If a private property owner is immune from liability under Wis. Stat. § 895.52(2), the owner is not subject to liability under the safe-place statute. However, if the recreational use immunity of § 895.52(2) is negated by Wis. Stat. § 895.52(6) (because the owner collects over $500 in payments), then the safe-place statute may apply to premises used for recreational purposes. Douglas v. Dewey, 154 Wis.2d 451, 453 N.W.2d 500 (Ct. App. 1990).

Construction statute of repose. Wis. Stat. § 893.89 sets forth a seven-year statute of repose during which a plaintiff must bring an action for injuries resulting from improvements to real property. The

"construction statute of repose" bars safe place claims "resulting from injuries caused by structural defects, but not by unsafe conditions associated with the structure," beginning seven years after a structure is substantially completed. See Mair, supra, at ¶29. For purposes of determining whether the construction statute of repose is applicable, the fundamental inquiry is "whether the safe place claims resulted from an injury caused by a structural defect or by an unsafe condition associated with the structure." Nooyen v. Wisconsin Electric Power Company, 390 Wis.2d 687, ¶12, 939 N.W.2d 621 (Ct. App. 2020). See also the comment on "Defect Versus Unsafe Condition" above.

Wisconsin Stat. § 893.89(4)(a)-(d) creates four exceptions to which the construction statute of repose does not apply. See, Hocking v. City of Dodgeville, 2010 WI 59, 326 Wis.2d 115, 785 N.W.2d 398, and Soletski v. Krueger International, Inc., 2019 WI App 7, 385 Wis.2d 787, 924 N.W.2d 207 concerning exceptions to the statute of repose.

2600 MALICIOUS PROSECUTION: INSTITUTING A CRIMINAL PROCEEDING

Question _____ asks did (defendant) maliciously prosecute (plaintiff).

To establish malicious prosecution, (plaintiff) must prove the following six elements:

1) A criminal proceeding was brought against (plaintiff).

2) (Defendant) was actively involved in instituting the criminal proceeding (prosecution) against (plaintiff).

3) The criminal proceeding was terminated in favor of (plaintiff).

4) (Defendant) acted with malice in instituting the criminal proceeding (prosecution).

5) The criminal charges were made without probable cause.

6) (Plaintiff) suffered damages as a result of the criminal proceeding (prosecution) on those charges.

The fourth element requires that (defendant) acted with malice in instituting the criminal proceeding in causing (the prosecution) (charges to be brought). A person acts with malice when he or she has a hostile or vindictive motive, or acts primarily for a purpose other than bringing a guilty person to justice.

The fifth element relates to whether the charges made by (defendant) were without probable cause. This element is satisfied if, at the time (defendant) made the charges against (plaintiff), (defendant) knew or had reason to believe that (plaintiff) was not guilty of the

charge(s). There is no probable cause if you are satisfied that (defendant) did not have sufficient facts concerning (plaintiff)'s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) had committed a criminal offense.

It is not enough that (plaintiff) establish that (defendant) acted with malice in instituting the criminal proceeding (in causing the prosecution); (plaintiff) must also prove that (defendant) had no probable cause to make the charges.

SPECIAL VERDICT

Question 1: Did (defendant) maliciously prosecute (plaintiff)?

Answer: _____

(Yes or No)

Question 2: What sum of money will compensate (plaintiff) for [insert damages]?

Answer: _____

COMMENT

The instruction and comment were initially approved by the Committee in 1966. The instruction and comment were revised in 1986, 1991, 2014, and 2015. This revision was approved by the Committee in September 2021; it added to the comment.

Elements. The six essential elements in an action for malicious prosecution are:

(1) a prior institution of judicial proceedings against the plaintiff;
(2) such former proceedings must have been put in motion by or at the instance of the defendant in the malicious prosecution action;

(3) such proceedings must have terminated in favor of the defendant in such criminal proceedings;
(4) malice in instituting the former proceedings;
(5) want of probable cause for instituting the former proceedings;
(6) damage.

See Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Elmer v. Chicago & N.W. Ry., 257 Wis. 228, 43 N.W.2d 244 (1950).

The first three elements may be determined by the court. Ordinarily, the first three elements do not arise in a malicious prosecution action, as they are generally established beyond question by the records in the criminal proceedings. Therefore, no special instruction is necessary on these elements.

The fourth element, "malice in instituting the criminal proceedings," and the fifth element, lack of probable cause, are submitted in this instruction.

Instigation of Prior Proceedings. A party will be found to have instigated prior criminal proceedings against the present plaintiff if that party was instrumental in prosecuting the present plaintiff. Thus, the malicious swearing and signing of a criminal complaint can satisfy the instigation-of-prior-proceedings element for malicious prosecution. Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1952). But, no malicious prosecution action will lie where the defendant supplied the authorities with information and the prosecution was begun only after the authorities conducted their own independent investigation. Pollock v. Vilter Mfg. Corp., 23 Wis.2d 29, 126 N.W.2d 602 (1964).

Element 3; Termination of Prior Criminal Actions. A termination of the original proceeding resulting from a voluntary settlement or agreement between the parties does not satisfy the "favorable termination" element and, thus, bars a subsequent malicious prosecution suit. Lechner v. Ebenreiter, 235 Wis. 244, 292 N.W. 913, 916 (1940). However, the discharge by an examining magistrate, or a nolle prosequi by the district attorney, except under certain circumstances, does satisfy the "favorable termination" element. Id. at 917. Additionally, dismissal of one count of a criminal complaint does not constitute favorable termination of the proceedings where the defendant in the prior action is convicted on another count arising out of the same incident. Heilgeist v. Chasser, 98 Wis.2d 97, 295 N.W.2d 26 (Ct. App. 1980).

Element 4; Malice. The plaintiff must prove that the defendant acted "maliciously" in order to recover in a malicious prosecution suit. Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). While the voluntary dismissal of the prior proceeding may be used to establish the lack of probable cause for the prior action, a voluntary dismissal may not be used to infer the existence of malice. Id; Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). There must be some independent evidence of conduct from which improper motives can be inferred. Id. Malice may be proven by showing "malice in fact" or "malice in law." Meyer, supra.

"Malice in fact" involves situations where the defendant acted chiefly from motives of ill will. Id. A willful and wanton disregard for the facts or law may provide a basis for malice in fact but such willful and wanton conduct must be of such a nature and character as to evince a hostile or vindictive motive. Id.

"Malice in law" may exist even when the defendant cannot be shown to have acted from motives of

actual ill will or vindictiveness. Malice in law exists if evidence is presented from which the jury might infer that the defendant instigated the former proceedings for an improper motive or purpose, that is, for a primary purpose other than bringing an offender to justice. Meyer, supra; Yelk, supra. An example of malice in law is where a criminal prosecution is instituted for the purpose of collecting a debt or compelling the delivery of property. See Peters, supra.

Element 5; Lack of Probable Cause for the Prior Proceedings. Lack of probable cause is an essential element for an action for malicious prosecution. Krieg v. Dayton-Hudson Corp., 104 Wis.2d 455, 311 N.W.2d 641 (1981). Probable cause is an objective standard measured by the reasonably prudent person's belief in the cause of action in light of the facts known or reasonably ascertainable. Id. However, probable cause for the prior action is not necessarily lacking where the present defendant acted without knowledge of all of the facts or acted negligently. See Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966).

For prior criminal proceedings, the court should not apply the state of mind of a prosecutor in determining whether a private party had probable cause to believe that another person committed a crime. Rather, the court should decide whether there was a quantum of evidence that would lead an ordinary and reasonable layman in the circumstances to believe that the present plaintiff committed a crime. Hajec v. Novitzke, 46 Wis.2d 402, 175 N.W.2d 193 (1970). Discharge of the present plaintiff in the prior criminal proceeding is prima facie evidence of want of probable cause. Id.

Advice of Counsel. Advice of counsel is an affirmative defense. If the defense of advice of counsel is in the case, then the Committee suggests that the trial judge submit that question to the jury first. In Elmer, supra, the court held that advice of counsel is a complete defense. This was affirmed in Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

If full disclosure of all facts within the knowledge of the defendant was made to the district attorney or his lawyer for the purpose of obtaining legal guidance and the disclosure results in advice which is honestly followed in commencing the criminal proceedings, such proof constitutes a complete defense. The result is that one of the essential elements of malicious prosecution, i.e., want of probable cause, is negated and the entire malicious prosecution action fails. Also, in some instances, the determination of whether there has been such a full and fair disclosure is a matter of law and not properly for the jury. See Smith v. Federal Rubber Co., 170 Wis. 497, 175 N.W. 808 (1920).

Differences Between Abuse of Process and Malicious Prosecution. For a discussion of the differences between the tort of malicious prosecution and abuse of process, see Brownsell v. Klawitter, 102 Wis.2d 108, 306 N.W.2d 41 (1981), Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983), and Maniaci v. Marquette University, 50 Wis.2d 287, 184 N.W.2d 168 (1971).

Burden of Proof. The Committee believes the burden of proof to establish malicious prosecution is the middle burden. See Wis JI-Civil 205.

2605 MALICIOUS PROSECUTION: INSTITUTING A CIVIL PROCEEDING

Question _____ asks: did (plaintiff) maliciously prosecute (defendant) [by instituting a civil proceeding].

To establish a malicious prosecution based on instituting a civil proceeding, (plaintiff) must prove the following six elements:

1) A judicial proceeding was (brought) (continued) against (plaintiff). [Insert type of civil proceeding] is a judicial proceeding.
2) The proceeding was (brought) (continued) by, or at the instance of, (defendant).
3) The proceeding was terminated in favor of (plaintiff).
4) (Defendant) acted with malice in instituting the proceedings.
5) The proceeding was instituted without probable cause.
6) (Plaintiff) suffered damages as a result of the proceeding.

The fourth element requires that (defendant) acted with malice in instituting the proceeding. A proceeding is maliciously instituted when a person who brings the proceeding has a hostile or vindictive motive or when the person's primary purpose was something other than succeeding on the merits of the claim.

The fifth element relates to whether the proceeding instituted by (defendant) was without probable cause. This element is satisfied if, at the time (defendant) initiated the proceeding against (plaintiff), (defendant) knew or had reason to believe that (plaintiff)

was not [insert facts necessary to establish probable cause]. There is no probable cause if you are satisfied (defendant) did not have sufficient facts concerning (plaintiff)'s conduct that would lead a person of ordinary caution and prudence to believe (plaintiff) [insert facts establishing a claim.]

SPECIAL VERDICT

Question 1: Did (defendant) maliciously prosecute (plaintiff)?

ANSWER: _____

(Yes or No)

Question 2: What sum of money will compensate (plaintiff) for [insert damages]?

ANSWER: _____

COMMENT

This instruction and comment were approved in 2015. This revision was approved by the Committee in September 2021; it removed language following the elements of the instruction and added to the comment.

See also, the Comment to Wis JI-Civil 2600.

Institution of a Prior Civil Action. In Wisconsin, the unjustified institution of a prior criminal or civil action may provide a valid claim for malicious prosecution as long as the other five elements of malicious prosecution are present. Strid v. Converse, 111 Wis.2d 418, 331 N.W.2d 350 (1983); Maniaci v. Marquette Univ., 50 Wis.2d 287, 184 N.W.2d 168 (1970).

Element 3; Termination of Prior Action in Present Plaintiff's Favor. The prior civil action is terminated in the present plaintiff's favor when the prior action results in a defense verdict or dismissal on the merits with prejudice. However, the voluntary compromise and settlement of a prior civil suit does not satisfy the "favorable termination" element and, thus, bars a subsequent malicious prosecution suit. Thompson v. Beecham, 72 Wis. 2d 356 (1976); Tower Special Facilities, Inc. v. Investment Club, Inc., 104

Wis.2d 221 (Ct. App. 1981); Lechner v. Ebenreiter, 235 Wis. 244, 292 N.W. 913 (1940). Similarly, termination of the prior proceeding by some act, trick, or device of the present defendant does not constitute a "favorable termination." See Bristol v. Eckhardt, 254 Wis. 297 (1948); Schwartz v. Schwartz, 206 Wis. 420 (1932) (no bar to malicious prosecution suit where settlement of prior action induced by duress).

In Monroe v. Chase, 2021 WI 66, ¶3, 397 Wis.2d 805, 961 N.W.2d 50, the Wisconsin Supreme Court clarified that a withdrawal of a prior proceeding may satisfy the favorable-termination element of a malicious prosecution action. The Court came to this conclusion after adopting the approach of the Restatement (Second) of Torts §674 cmt. J., which "focuses on the circumstances of the termination to determine whether it was favorable." Id. at ¶20. The Restatement (Second) of Torts §674 cmt. J, provides as follows:

> Termination in favor of the person against whom civil proceedings are brought. Civil proceedings may be terminated in favor of the person against whom they are brought . . . by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his [or her] failure to prosecute them . . . Whether a withdrawal or abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought, and whether the withdrawal is evidence of a lack of probable cause for the initiation, depends upon the circumstances under which the proceedings are withdrawn.

Whether or not a withdrawal of a prior proceeding constitutes a favorable termination is a question for a fact-finder. Monroe, supra, at ¶26.

Element 4; Malice. The plaintiff must prove that the defendant acted "maliciously" to recover in a malicious prosecution suit. Meyer v. Ewald, 66 Wis.2d 168, 224 N.W.2d 419 (1974). While the voluntary dismissal of the prior proceeding may be used to establish the lack of probable cause for the prior action, the voluntary dismissal may not be used to infer the existence of malice. Id.; Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4 (1967). There must be some independent evidence of conduct from which improper motives can be inferred. Id. Malice may be proven by showing "malice in fact" or "malice in law." Meyer, supra.

"Malice in fact" involves situations where the defendant acted chiefly from motives of ill will. Id. A willful and wanton disregard for the facts or law may provide a basis for malice in fact but such willful and wanton conduct must be of such a nature and character as to evince a hostile or vindictive motive. Id.

"Malice in law" may exist even when the defendant cannot be shown to have acted from motives of actual ill will or vindictiveness. Malice in law exists if evidence is presented from which the jury might infer that the defendant instigated the former proceedings for an improper motive or purpose, that is, for a primary purpose other than bringing an offender to justice. Meyer, supra; Yelk, supra. An example of malice in law is where a criminal prosecution is instituted for the purpose of collecting a debt or compelling the delivery of property. See Peters v. Hall, 263 Wis. 450, 57 N.W.2d 723 (1953).

Element 5; Lack of Probable Cause for the Prior Civil Proceedings. Lack of probable cause is an essential element for an action for malicious prosecution. Krieg v. Dayton-Hudson Corp., 104 Wis.2d

455, 311 N.W.2d 641 (1981). Probable cause is an objective standard measured by the reasonably prudent person's belief in the cause of action in light of the facts known or reasonably ascertainable. Id. However, probable cause for the prior action is not necessarily lacking where the present defendant acted without knowledge of all of the facts or acted negligently. See Neumann v. Industrial Sound Engineering, Inc., 31 Wis.2d 471, 143 N.W.2d 543 (1966).

Probable cause may be lacking with respect to prior civil proceedings where the party initiating the prior proceedings acted without a reasonable belief in the existence of the facts underlying the claim or did not reasonably believe that such facts state a valid claim. Neumann, supra. Generally, for purposes of a malicious prosecution action, no inference of want of probable cause arises from the dismissal of the prior civil proceeding. Novick v. Becker, 4 Wis.2d 432, 90 N.W.2d 620 (1958). However, the dismissal of an involuntary bankruptcy petition or insanity proceeding is prima facie evidence of lack of probable cause because these actions "stand in the same class as a criminal case." Neumann, supra.

Advice of Counsel. See Wis JI-Civil 2611.

Element 6; Damages. For malicious prosecution suits involving prior civil proceedings, Wisconsin adheres to the minority "English" rule that the plaintiff must plead and prove special damages. Krieg, supra; Schier v. Denny, 9 Wis.2d 340 (1960); Johnson v. Calado, 159 Wis.2d 446; 464 N.W.2d 647 (1991). "Special damages" are injuries in the nature of an interference with the person or property of the present plaintiff by the prior action. See Schier, supra, Myhre v. Hessey, 242 Wis. 638, 9 N.W.2d 106 (1943). Special damages are present where the present plaintiff has been subjected to a wrongfully brought garnishment action (Novick, supra) or a wrongful winding up of a partnership which interfered with the plaintiff's possession and use of property (Luby v. Bennett, 111 Wis. 613 (1901)).

An allegation that the present plaintiff incurred expenses in defending himself against the prior proceeding fails to allege special damages. See Myhre, supra. In Schier, supra, the Wisconsin Supreme Court concluded that the plaintiff's claims of business reputation damage, mental anguish, public ridicule, humiliation, embarrassment, and attorney fees failed to allege such interference with the plaintiff's person or property as to amount to special damages.

Burden of Proof. The committee believes the burden of proof to establish malicious prosecution is the middle burden. See Wis JI-Civil 205.

2770 WISCONSIN FAIR DEALERSHIP LAW: GOOD CAUSE FOR TERMINATION, CANCELLATION, NONRENEWAL, FAILURE TO RENEW, OR SUBSTANTIAL CHANGE IN COMPETITIVE CIRCUMSTANCES (WIS. STAT. § 135.03)

The plaintiff claims that (grantor) violated the Wisconsin Fair Dealership Law by (terminating) (cancelling) (failing to renew) (substantially changing the competitive circumstances) of its dealership agreement w/_____ without good cause. Question ____ of the special verdict asks:

Was the dealership agreement between (dealer) and (grantor) (e.g. terminated, cancelled, etc.) by (grantor) for good cause?

To answer this question "yes" you must determine whether (grantor) had good cause to (e.g. terminate) the dealership agreement it had with (dealer). The burden of proof on this question is on (grantor) to satisfy you that it had good cause to (e.g. terminate) the dealership agreement.

To determine if good cause existed, you must consider the efforts of (dealer) in fulfilling the terms of the agreement. [(Grantor) had good cause to (e.g. terminate) its dealership agreement with (dealer) if (dealer) did not substantially comply with an essential and reasonable requirement imposed, or sought to be imposed, by (grantor). [A requirement that discriminates against (dealer) and does not apply to other similar dealers either by its terms or in the way it is enforced is not an essential and reasonable requirement.)]

[**Where evidence of bad faith by a dealer is presented**: (Grantor) had good cause to

(insert act) if (dealer) acted in bad faith in carrying out the dealership agreement. Bad faith means an intention to take unfair advantage of (grantor) through fraud, dishonesty, or failure to cooperate or to provide accurate information, or by other activities that render the transaction unfair to (grantor).]

SPECIAL VERDICT

See Wis JI-Civil 2772.

COMMENT

This instruction was approved in 2002 and revised in 2004. This revision was approved by the Committee in January 2022; it revised the language of the instruction to more accurately mirror the statute.

Wis. Stat. § 135.03. For the definition of "good cause," and the burden of proof, see Wis. Stat. § 135.02(4).

2790 TRADE NAME INFRINGEMENT

(Plaintiff) alleges that (defendant) has infringed (plaintiff)'s trade name. Trade names are entitled to protection from infringement to protect the reputation and goodwill of the trade name owner.

A trade name is a word or designation (symbol), or a combination of words or designations, that is used in a manner that identifies a business and distinguishes it from the business or enterprise of others.

To find infringement in this case, you must find first that (plaintiff)'s use of the name "_____" is a trade name; and, second, that the use of the name "_____" by (defendant) creates a likelihood of confusion among the consuming public with (plaintiff)'s trade name, "_____."

A designation is protectable as a trade name only if the designation is distinctive. Designations can be either inherently distinctive or can acquire distinctiveness, through secondary meaning. Inherently distinctive designations are designations that are likely to be perceived by prospective purchasers as symbols that indicate an association with a particular source. Secondary meaning describes the function of identifying goods or services with a particular or single source. A name that is inherently distinctive does not require secondary meaning to be protectable. A name that is not inherently distinctive requires secondary meaning to be protectable. Secondary meaning occurs when the

consuming public has come to recognize the trade name as one that identifies the business. The consuming public must recognize the trade name as identifying and distinguishing a (plaintiff)'s goods or services. Secondary meaning can be established through: direct evidence, such as consumer testimony or consumer surveys, or through circumstantial evidence, such as evidence of exclusivity, length and manner of the trade name's use, the amount and manner of advertising, amount of sales, market share, and number of customers.

To constitute an infringement, it is not necessary that every word of the trade name be appropriated. It is sufficient that enough be taken to deceive the public. If one word of the trade name is the prominent portion, it may be given greater weight than surrounding words.

(Plaintiff) and (defendant) do not have to be in direct competition for you to find infringement.

[A designation that is understood by prospective customers to denominate the general category of services or business with which it is used is a generic designation. The user of a generic designation, for example, barber shop, lumber company, hospital, or plumber, can never acquire rights in the generic designation as a trade name.]

Once (plaintiff) has established that the designation it seeks to protect is distinctive, either inherently or through secondary meaning, it must prove that (defendant)'s use of a similar designation will cause a likelihood of confusion. In determining whether there is

or was a likelihood of confusion between (plaintiff)'s [trade] name and (defendant)'s use of "_____" you may draw on your common experience as citizens of the community.

The factors you may consider in determining likelihood of confusion are:

- the degree of similarity between the names
- the similarity of the products and overlap of marketing channels
- the area and manner of concurrent use
- the degree of care likely to be used by consumers in selecting the (goods) (services)
- the strength and distinctiveness of (plaintiff)'s name
- evidence of actual confusion, and (defendant)'s intent when selecting the name.

No one factor or consideration is conclusive. Each aspect should be weighed in light of the total evidence presented at the trial. However, while actual confusion or deception is not essential to a finding of trade name infringement, this evidence is entitled to substantial weight.

SPECIAL VERDICT

Question 1: Did (plaintiff) establish that its use of the name "_____" is a trade name?

ANSWER: _____

Yes or No

If you answered "yes" to question 1, then answer the following question.

Question 2: Does (defendant)'s use of the name "_____" infringe (plaintiff)'s trade name?

If you answered "yes" to question 2, then answer the following question.

Question 3: Was (defendant)'s infringement a cause of damages to (plaintiff)?

ANSWER: _____

Yes or No

If you answered "yes" to question 3, then answer the following question.

Question 4: What sum of money, if any, do you award against (defendant) as damages for the trade name infringement?

$ _____

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2020. This revision was approved by the Committee in September 2021; it updated the comment.

In Ritter v. Farrow, 2021 WI 14, 395 Wis.2d 787, 955 N.W.2d 122, the Wisconsin Supreme Court provided a brief primer on trademarks and trade names. The Court concluded that while Wisconsin law has long recognized a common law and statutory cause of action for trademark and trade name infringement, "the state's jurisprudence on trademark law is 'undeveloped.'" Id. at ¶25. Therefore, the Court provided that it "look to federal law for guidance and key principles, as well as to treatises" when interpreting such infringement matters. Id. at ¶25. See also First Wis. Nat'l Bank of Milwaukee v. Wichman, 85 Wis.2d 54, 63, 270 N.W.2d 168 (1978), Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd., 2004 WI App 129, ¶34, 275 Wis.2d 397, 685 N.W.2d 853.

Trade Name. The Wisconsin Supreme Court defined trade name in First Wisconsin National Bank of Milwaukee v. Wichman, 85 Wis.2d 54, 270 N.W.2d 168 (1978), in which the court adopted the rationale of Restatement (Second) of Torts, Tentative Draft No. 8 as the common law in Wisconsin. The court said:

> Restatement (Second) of Torts capsulizes this trend of the courts to bring the definitions of trade names and trademarks in harmony with their function. Tentative Draft No. 8 (1963), sec. 715, defines both trademarks and trade names which have acquired a secondary meaning as trademarks. The term, "trade name," standing alone, refers to a business name. Sec. 716, supra. Sec. 715 defines trademark:
>
> "A trademark is a word, name, symbol, device, letter, numeral, or picture, or any combination of any of them in any form or arrangement, which is used by a person on or in connection with his goods or services in a manner which identifies them as his and distinguishes them from those of others, provided such use is not prohibited by legislative enactment or by an otherwise defined public policy."

"[i]f a trade name has acquired distinctiveness, or secondary meaning, and thus identifies a particular business entity, the user of such trade name is entitled to protection against infringement of that trade name in the same manner and to the same extent as the user of a trademark which has acquired a secondary meaning, that is, to protect the user of the trade name in his business and to protect the public against confusion and deception. The mere fact of the use of a trade name, however, is not sufficient to entitle the user to enjoin all other uses. It is necessary to show that the effect of the use has been to identify the particular business entity and to distinguish it from others and that the actor's use of likely to cause confusion and deception." 85 Wis.2d 54, at p. 62-63; Sec. 717, supra, comment a.

Infringement Claims; Jury Instructions. In D. L. Anderson, 2008 WI 126, 314 Wis.2d 560, 757 N.W.2d 803, the Wisconsin Supreme Court discussed the elements, proof, damages, and jury instructions for trade infringement cases.

The supreme court approved the Wichman analysis of trade name infringement for use in jury instructions, in D. L. Anderson's Lakeside Leisure Co., Inc. v. Anderson:

> "¶42 The trade name infringement jury instructions given by the circuit court were based directly on language in Wisconsin case law.[fn15] In First Wisconsin National Bank of Milwaukee v. Wichman, 85 Wis.2d 54, 270 N.W.2d 168 (1978), this court adopted the approach enunciated in the Restatement (Second) of Torts §§ 715, 716, 717 (Tentative Draft No. 8, 1963). There this court said, "[T]he user of [a] trade name is entitled to protection against infringement of that trade name." Wichman, Page 1985 Wis.2d at 62-63. Spheeris Sporting Goods, Inc. v. Spheeris on Capitol, 157 Wis.2d 298, 459 N.W.2d 581 (Ct. App. 1990), which like this case dealt with a trade name in connection with the purchase of a business appears to be the source of the sections in the jury instructions on trade names that include family names: "Ordinarily, a party has a right to do business under his or her own name. The right may, however, be voluntarily limited by contract. . . . [W]hen a family name is part of a trade name, the family name may be transferred to the purchaser the same as any other asset of the business." Id. at 308 (citations omitted).

Elements. The plaintiff must prove two elements to establish infringement: First, that the plaintiff's trade name has acquired a secondary meaning, and, second, that there is a likelihood of confusion between plaintiff's name and the one the defendant is using.

Anderson approved the trial court's instructions on secondary meaning and likelihood of confusion as

follows:

> ¶ 50 Next we proceed to the question of whether the evidence was sufficient to support the jury's verdict. The jury was instructed as follows regarding trade name infringement:
>
> When a trade name has acquired a secondary meaning, the name is entitled to protection from unfair competition based on trade name infringement. . . . If you find that plaintiff's trade name has acquired secondary meaning, you must then determine whether there is a likelihood of confusion between plaintiff's trade name, "D. L. Anderson Co." and defendant's name, "Anderson Marine" . . . . It is not necessary to constitute an infringement that every word of the trade name be appropriated. It is sufficient that enough be taken to deceive the public. If one word of the trade name is the salient portion, it may be given greater weight than surrounding words.
>
> ¶ 51 The jury instructions thus lay out the two elements a plaintiff must establish to prevail on a trade name infringement Page 23 claim: that the name had secondary meaning and that a second party's use created a likelihood of confusion.
>
> ¶ 52 Secondary meaning "describes the function of identifying goods or services with a particular or single source. . . . Key to establishing secondary meaning for a trade name is evidence that the relevant target group mentally identifies the trade name as the single source for the product." Spheeris, 157 Wis.2d at 312 (citations omitted). . .

Damages for Infringement. Anderson approved the use of the tort damage instruction, modified Wis JI-Civil 1700. On this point, the supreme court reversed the court of appeals, and clarified that a damage verdict for trade name infringement does not require precise mathematical evidence:

> ¶ 62 As we noted, the jury was instructed here that the party claiming damages must "satisfy [the jury] by the greater weight of the credible evidence, to a reasonable certainty, that the person sustained damages . . . and the amount of the damages." Wis JI-Civil 1700.
>
> ¶ 63 In evaluating the sufficiency of the evidence on a damage award in tort, there is thus a two-step analysis: the fact of damages and the amount.
>
> ¶ 64 "[T]he fact of damage need only be proved with reasonable, not absolute, certainty. And once the fact of damage is established with reasonable certainty, the amount of damages need only be shown with as much certainty as the nature of the tort and the circumstances of the case permit." 4 Rudolf Callmann, Callmann on Unfair Competition, Trademarks and Monopolies § 23:55 (4th ed. 2003).

Infringement claims in connection with the purchase of a business. In Ritter v. Farrow, supra, the Wisconsin Supreme Court, citing McCarthy on Trademarks and Unfair Competition § 18:37 (5th ed. 2019), provided that "It is an 'old and clear rule, universally followed' that when a business is sold, 'trademarks and the good will of the business that the trademarks symbolize are presumed to pass with the sale of the business.'" 2021 WI 14 at ¶27. Therefore, when a business sells the entirety of its assets, the trade name is presumably included, and passes to the buyer.

Reverse trademark confusion. For a decision discussing the theory of reverse trademark confusion, see Fabick, Inc. v. JFTCO, Inc., 944 F.3d 649, (7th Cir. 2019).

3028 CONTRACTS IMPLIED IN LAW (UNJUST ENRICHMENT)

This case involves a claim based upon alleged unjust enrichment.

The elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge or appreciation of the benefit by the defendant; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be unfair for him or her to retain it without paying the value thereof.

It is not necessary to prove that the recipient of the benefit was at fault or guilty of wrongdoing in any way, but it must be established that as between the parties it would be unfair for the recipient to retain the benefit without paying the reasonable value of the benefit.

A benefit to the defendant may be (services rendered for (defendant)) (goods or merchandise received by (defendant)) (improvements to (defendant)'s real estate) (money paid to (defendant) or someone else on (defendant)'s behalf).

A loss to the plaintiff without an actual benefit to the defendant is not recoverable as unjust enrichment.

If a person declines in advance a benefit to be conferred by another, then the person conferring the benefit may not recover for unjust enrichment.

[It is not a defense to the action that (defendant) is a minor or otherwise incompetent to make a contract, but a minor may show that in equity and good conscience, (plaintiff) is

not entitled to recover in whole or in part.]

[In this case, (plaintiff) has alleged fault or wrongdoing on the part of (defendant) (fraud) (duress) (nonperformance or breach of contract) which is elsewhere in these instructions defined for you. The burden of proof is on (plaintiff) to establish wrongdoing by (defendant).]

COMMENT

This instruction was originally approved by the Committee in 1979 and revised in 2015 and 2020. This revision was approved by the Committee in September 2021; it added to the comment.

In cases where an unjust enrichment claim is based on contributions made by one party for the benefit of another, the unjust enrichment claim must demonstrate that, viewed in their entirety, the contributions were made to a "joint enterprise" in which the parties were mutually engaged, and which resulted in an accumulation of wealth that a party had unfairly retained. See Sands v. Menard, 2017 WI 110, ¶43, 379 Wis.2d 1, 904 N.W.2d 789.

"A claim for unjust enrichment may exist when two people work together or when two people combine assets for defendant's benefit." See Lawlis v. Thompson, 137 Wis.2d 490, 493, 405 N.W.2d 317 (1987).

Knowledge of Benefit. When the benefit conferred can be easily returned, like money for example, the benefited party need not have knowledge or appreciation of the gain at the precise time it is conferred. Instead, the party asserting an unjust enrichment claim satisfies the knowledge or appreciation element by proving that the benefited party had knowledge of or appreciated the benefit at a time which provided the party a fair opportunity to choose whether to accept or reject that benefit. Buckett v. Jante, 2009 WI App.55, 316 Wis.2d 804, 767 N.W.2d 376.

Subject matter covered in contract. The doctrine of unjust enrichment does not apply where parties have entered into a contract, and the subject matter of that contract covers the aspects of a plaintiff's equitable claim. Greenlee v. Rainbow Auction/Realty Co., 202 Wis.2d 653, 671-672, 553 N.W.2d 257 (1996). However, "Wisconsin law does not bar a party from seeking equitable relief for a benefit conferred, if that benefit falls outside the scope of the parties' contractual relationship." Meyer v. Laser Vision Inst., LLC, 2006 WI App 70, 290 Wis. 2d 764, 781, 714 N.W.2d 223 quoting Northern Crossarm Co., Inc. v. Chemical Specialties, Inc., 318 F.Supp.2d 752. This is known as the "total business relationship exception."

Issue triable of right by a jury. Recovery based on unjust enrichment is sometimes referred to as an action for "quasi contract," Watts v. Watts, 137 Wis.2d 506, 530-531, 405 N.W.2d 303 (1987). This doctrine has been a well-recognized and long-accepted as part of Wisconsin law since 1844. See Rogers v.

Bradford, 1 Pinney Wis. 418 (1844). Quasi contracts are legal obligations in the sense that they originated in the courts of law and are enforced by legal remedies. Graf v. Neith Co-op. Dairy Products Association, 216 Wis. 519, 257 N.W. 618, 619 (1934). See also Arjay Investment Co. v. Kohlmetz, 9 Wis.2d 535, 539, 101 N.W.2d 700 (1960), Watts, supra, at 530, and Lawlis, supra, at 496. Because actions on the theory of quasi contract are actions at law, they are triable as of right to a jury. See State v. Schweda, 2007 WI 100, ¶20, 303 Wis.2d 353, 736 N.W.2d 49 (2007).

3079 TERMINATION OF EASEMENT BY ABANDONMENT

(Servient landowner) contends that the easement was abandoned by (easement holder). To prove this abandonment, (servient landowner) must prove that (easement holder) has shown by (his) (her) (its) conduct a clear intention to forgo all future uses authorized by the easement. The fact that (easement holder) has not used the easement for (specify period of nonuse, e.g., three years) is not by itself proof of abandonment, but it is evidence that you may consider in deciding whether (he) (she) (it) intended to abandon the easement. You must find that (easement holder)'s conduct clearly indicates an intention to give up the use of the easement for the future as well as for the present.

[Conduct, that is inconsistent with the continued use of the easement, indicates an intention to give it up].

[**Use this paragraph if there is evidence of that the easement holder made verbal expressions indicative on an intent to abandon:** Verbal expressions, by themselves are insufficient to constitute the type of conduct required to forgo all future uses authorized by an easement. However, verbal expressions may give meaning to acts that indicate an intention to abandon an easement but do not conclusively demonstrate such an intention on their own.]

COMMENT

This instruction and comment were approved by the Committee in September 2021.

This instruction should be used when a servient landowner sues or defends by claiming that the dominant owner's easement has been abandoned.

In Burkman v. New Lisbon, 246 Wis. 547, 18 N.W.2d 4 (1945), the Wisconsin Supreme Court adopted comments (c) and (d) of the RESTATEMENT OF THE LAW OF PROPERTY, VOL. V, § 504 (1940) to determine whether flowage rights acquired by prescription were lost by abandonment. Comments (c) and (d) read as follows:

> c. Conduct as to Use. An intentional relinquishment of an easement indicated by conduct respecting the use authorized by it constitutes an abandonment of the easement. The intention required in the abandonment of an easement is the intention not to make in the future the uses authorized by it. The benefit of an easement lies in the privilege of use of the land subject to it. There is no abandonment unless there is a giving up of that use. The giving up must be evidenced by conduct respecting the use of such a character as to indicate an intention to give up the use for the future as well as for the present. Conduct, when inconsistent with the continuance of the use, indicates an intention to give it up. The conduct required for abandonment cannot consist of verbal expressions of intention. Such expressions are effective to extinguish an easement only when they comply with the requirements of a release and operate as such. Verbal expressions of an intention to abandon are relevant, however, for the purpose of giving meaning to acts which are susceptible of being interpreted as indicating an intention to give up the use authorized by an easement, but which do not give themselves conclusively demonstrate the intention which animated them.
>
> d. Non-use. Conduct from which an intention to abandon an easement may be inferred may consist in a failure to make the use authorized. Non-use does not of itself produce an abandonment no matter how long continued. It but evidences the necessary intention. Its effectiveness as evidence is dependent upon the circumstances. Under some circumstances a relatively short period of non-use may be sufficient to give rise to the necessary inference; under other circumstances a relatively long period may be insufficient. The duration of the period of nonuse, though never conclusive as to the intention to abandon, is ordinarily admissible for the purpose of showing intention in that regard. (Emphasis added).

Comments (c) and (d) of the RESTATEMENT OF THE LAW OF PROPERTY, VOL. V, § 504 (1940) were also adopted by the Wisconsin Court of Appeals in Spencer v. Kosir, 2007 WI App 135, 301 Wis.2d 521, 733 N.W.2d 921 and Bohn v. Leiber, 2020 WI App 52, 393 Wis.2d 757, 948 N.W.2d 370.

Demonstrating an intention to permanently abandon. In Spencer v. Kosir, 2007 WI App 135, 301 Wis.2d 521, ¶10, 733 N.W.2d 921, the Wisconsin Court of Appeals noted the requirement that there be an "affirmative act" by the easement holder, rather than the property owner, to show abandonment. For example, despite a significant period of non-use by the easement holder, along with acquiescence in the property owner's non-permitted use of the property, the court found no abandonment since there was a lack of an affirmative action by the easement holder demonstrating his intent to abandon. Id. at ¶¶9-10.

In regard to the affirmative action requirement, Bohn v. Leiber, 2020 WI App 52, 393 Wis.2d 757, 766, 948 N.W.2d 370, is distinguishable from Spencer, supra. In Bohn, the Wisconsin Court of Appeals

determined that the easement holder's comment that "he had 'no intention of ever building a roadway on the easement,' by itself, would be insufficient to constitute abandonment." Additionally, the fact that the easement area was never utilized as a roadway, by itself, would also be insufficient to show abandonment. Id. at 766. However, when these examples were coupled with the easement holder's affirmative act of planting numerous trees within the easement area, the court concluded that there was a question of fact as to whether the easement was abandoned.

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CIVIL

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3110 INSURANCE CONTRACT: DEFINITION OF "RESIDENT" OR "MEMBER OF A HOUSEHOLD"

Question No.____ asks was _____ a resident of _____'s household at the time of the (accident) (injury).

A resident of a household is one, who, in a manner consistent with the closeness of a family or household, lives under the same roof.

However, a person may be a resident of more than one household for insurance purposes. Residents of a household are not required to live under the same roof to be considered part of the same household for insurance purposes provided they have the intent to return to live under the same roof.

Factors you may consider in determining residency include:

- The subjective or declared intent to return, if any, and actions evidencing this intent;
- Whether the parties live in a close, intimate, and informal relationship;
- Whether the intended duration of the relationship is likely to be substantial;
- Whether it is reasonable to conclude that the parties would consider the relationship when contracting for insurance;
- The age of the respective parties;
- Whether a separate residence is established;
- The self-sufficiency of the person;

- The frequency and duration of stays in the residence;
- Whether personal possessions remain in the home;
- Whether a person is driving or has the opportunity to drive cars interchangeably rather than by merely causal use; and,
- Whether the residence continues to be the mailing address of the parties.

A determination of residency is based upon the facts of each individual case. Consider all of the relevant facts and circumstances in determining whether _____ was a resident of _____'s household at the time of the (accident) (injury). No single factor is controlling, but all of the elements must combine to a greater or lesser degree to establish the relationship.

The burden of proof on the issue of whether _____ was a resident of _____'s household is upon (plaintiff).

If, after review of all the facts and circumstances in this case you find that (plaintiff) was a resident of _____'s household at the time of the (accident) (injury), you should answer question _____ on the Special Verdict "yes." If not, you should answer that question "no."

COMMENT

This instruction and comment were approved in 2002 and revised in 2012. The comment was also updated in 2003. This revision was approved by the Committee in October 2021; it added to the comment.

Muskevitch-Otto v. Otto, 2001 WI App 242, 248 Wis.2d 1, 635 N.W.2d 611 (Ct. App. 2001); Seichter v. McDonald, 228 Wis.2d 838, 845, 599 N.W.2d 71, 74 (Ct. App. 1999); Ross v. Martini, 204 Wis.2d 354, 555 N.W.2d 381, (Ct. App. 1996); Londre v. Continental Western Ins. Co., 117 Wis.2d 54, 58, 343 N.W.2d

128 (Ct. App. 1983); Belling v. Harn, 65 Wis.2d 108, 112-114 (1974); Pamperin v. Milwaukee Mutual Ins., 55 Wis.2d 27, 35-37, 197 N.W.2d 783 (1972); Doern v. Crawford, 30 Wis.2d 206, 140 N.W.2d 193 (1966); National Farmers Union Property & Casualty v. Maca, 26 Wis.2d 399, 407-408 (1965).

Resident; Member. Although not explicitly stated, the terms "resident" or "member" of a household appear to be equivalent. The Supreme Court has used them interchangeably. Belling, pp. 109, 111; Pamperin, pp. 33-34.

The term "resident or member of the same household" as used in policies of automobile liability insurance is not ambiguous. It should be given its plain and common meaning regardless of whether it is used to define exclusion or inclusion from coverage or whether the question is one of creating or terminating the relationship. Pamperin, p. 37.

Factors. No single factor is the sole or controlling test of whether a person is a resident of a household. Londre, p. 54. The issue of residency for insurance purposes "is fact specific to each case." Seichter, p. 845. The Seichter court approved use of considerations from a Minnesota case, Schoer v. West Bend Mutual Ins. Co., 473 N.W.2d 73, 76 (Minn. App. 1991) which had been cited with approval in Ross v. Martini, supra. The list of factors in paragraph 4 is not exhaustive.

Unmarried persons can be residents of the same household, but whether they are depends on the facts in each case. Quinlan v. Coombs, 105 Wis.2d 330, 333, 314 N.W.2d 125, (Ct. App. 1981).

Residence Distinguished from Domicile. "It might be said that 'domicile' includes residence, but 'residence' does not necessarily include domicile. Domicile is generally regarded as the place where a man has his fixed and permanent home or residence to which he intends to return whenever he is absent therefrom." Estate of Daniels, 53 Wis.2d 611, 614-5 (1971).

The length of time necessary to establish residency for insurance purposes is sufficient if "the intended duration is likely to be substantial." Pamperin, p. 37 "[W]hile the intended duration does not require the permanency generally associated with the establishment of a legal domicile, something more is required than a mere temporary sojourn." Pamperin, p. 35.

Thus, a person may have only one domicile but may have more than one household for insurance purposes. Londre, p. 58.

Children. A child placed in a family-operated foster home pursuant to a court dispositional order under sec. 48.34 Stats. is considered a resident of that household for insurance purposes. A.G. v. Travelers Ins. Co., 112 Wis.2d 18, 24 (Ct. App. 1983).

The intent of minor children of divorced parents is discussed in Ross v. Martini, supra, pp. 358-9. Where the child is of tender years, the finder of fact would look to the intent of the child's parent or custodian. Muskevitch-Otto v. Otto, par. 9 p. 8. Generally, the issue of residence for minor children of divorced parents is "inexorably linked" to custody provided in the divorce decree. Ross, p. 359. It is possible in joint custody situations for children to be members of both parents' households for insurance purposes. Londre, supra, p. 59.

Divorce. As a matter of public policy, removal from a household following commencement of divorce proceedings and during the pendency of the action is not a factor to be given weight in determining residency in a family household. Language to the contrary in the Doern case is withdrawn. Belling v. Harn, 65 Wis.2d 108, 115-116, 221 N.W.2d 888 (1974). However, this modification of Doern appears to be limited to divorce proceedings. Seichter, p. 843, fn. 1.

Legal separation. Wisconsin law plainly distinguishes between a divorce and a legal separation. Pursuant to Wis. Stat. § 767.001(1f), "divorce" is defined as "the dissolution of the marriage relationship." In contrast, a judgment of legal separation does not terminate a marriage. As the Wisconsin Supreme Court has noted, "there are ... rights and obligations remaining in the marriage after a legal separation." Kemper Independence Insurance Company v. Islami, 2021 WI 53, ¶18, 397 Wis.2d 394, 959 N.W.2d 912, citing Herbst v. Hansen, 46 Wis. 2d 697, 706, 176N.W.2d 380 (1970). A legal separation does not alter the status of two individuals as spouses under the law, and therefore a named insured's spouse remains covered under a policy. Kemper, supra, at ¶18. The fact that a named insured and their spouse may commence living separate and apart while legal separation is pending "is not a factor to be given weight in determining whether or not such spouses are members of the same household." Belling, supra, at 118.

Intent. While Pamperin, pp. 35, 37, Seichter, pp. 843-844, and other cases hold that no one element is controlling on the question of household membership, and an individual's subjective or declared intent, while a fact to be considered, is also not controlling, the Court of Appeals in Muskevitsch-Otto v. Otto supra, approved an instruction which made intent "the key element." The instruction provided that "In deciding whether a person is a resident of a particular household, the key element is the intent of that person to be a resident of the household in question and to live under the same roof . . . ." (emphasis supplied). In harmonizing these decisions, the Committee believes that because of the fact-driven nature of these cases, intent might assume more importance in a particular situation. However, none of the Pamperin elements (including intent) predominates as a matter of law. Until further guidance on this issue is received from the appellate courts, the Committee believes the more prudent course is to follow Pamperin and Seichter.

"In Your Care" Policy Language. For cases involving policy language dealing with the term "in your care," see also, Cierzan v. Kriegal, 2002 WI App 317, 259 Wis.2d 264, 655 N.W.2d 217. In this decision, the court of appeals listed the relevant considerations in determining whether a person is in the care of the insured.

7050 INVOLUNTARY COMMITMENT: MENTALLY ILL

(Insert Wis JI Civil 100, Opening.)

A petition has been filed seeking the involuntary [(initial commitment) (recommitment)] of (respondent). The petition alleges that (respondent) is mentally ill; that (his) (her) mental illness is subject to treatment; and that (he) (she) is dangerous.

The fact that a petition has been filed is not evidence that (respondent) is mentally ill, dangerous, or a proper subject for treatment. Our law presumes that a person is not mentally ill until you are convinced that the person is mentally ill. If you find that (respondent) is mentally ill based on the evidence, that fact does not mean that you must find that (respondent) is also dangerous. The burden of proving each of the allegations in the petition is on (petitioner).

This is a civil, not a criminal, case. [The fact that the district attorney is present does not mean that (respondent) is accused of a crime. The district attorney and _____, the other attorney, are required to be here by the Wisconsin statutes.] While (respondent) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of (respondent)'s personal liberty. Therefore, you should approach this task with a sense of serious duty.

Wis JI Civil 110, Arguments of Counsel

Wis JI Civil 115, Objections of Counsel

Wis JI Civil 120, Judge's Demeanor

Wis JI Civil 130, Stricken Testimony

Wis JI Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI Civil 260, Expert Testimony: General

Wis JI Civil 265, Expert Testimony: Hypothetical Question

Wis JI-Civil 205, Middle Burden of Proof

Wis JI Civil 145, Special Verdict Questions: Interrelationship

At the end of the trial, I will give you a special verdict consisting of three questions.

Question 1 asks: Is (respondent) mentally ill?

The term "mentally ill" means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs the judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.

Question 2 asks: Is (respondent) a proper subject for treatment?

A person who is mentally ill is a proper subject for treatment if (his) (her) mental illness is treatable. In determining if (respondent)'s mental illness is treatable, you should consider whether the administration of any, or a combination of, techniques may control, improve, or cure the substantial disordering of the person's thought, mood, perception, orientation, or memory.

Question 3 asks: Is (respondent) dangerous to [(himself) (herself)] or to others?

[NOTE: MORE THAN ONE STANDARD FOR DANGEROUSNESS MAY

APPLY. SELECT THE STANDARD(S) ALLEGED AND SUPPORTED BY SUFFICIENT EVIDENCE AS PUT FORTH BY THE PETITIONER

[Under Standard A, a person is dangerous to (himself) (herself) if (he)(she) evidences a substantial probability of physical harm to (himself) (herself) as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.] [or]

[Under Standard B, a person is dangerous to others if (he) (she) evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt, or threat to do serious physical harm.] [or]

[Under Standard C, a person is dangerous to (himself) (herself) or others if (he) (she) evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is substantial probability of physical impairment or injury to (himself) (herself) or other individuals. The probability of physical impairment or injury is not substantial (if reasonable provision for (respondent)'s protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services) (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor: if (respondent) is appropriate for services or placement under § 48.13(4) or (11) or §

938.13(4)) (where the subject is a minor: (Respondent)'s status as a minor does not automatically establish a substantial probability of physical impairment or injury). Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for (himself) (herself), by a person other than a treatment facility, does not constitute reasonable provision for the individual's protection available in the community.] [or]

[Under Standard D, a person is dangerous to (himself) (herself) if (he) (she) evidences behavior manifested by recent acts or omissions that, due to mental illness, (he) (she) is unable to satisfy basic needs for nourishment, medical care, shelter, or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless (respondent) receives prompt and adequate treatment for this mental illness. No substantial probability of harm exists (if reasonable provision for (respondent)'s treatment and protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services), (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor; if (respondent) is appropriate for services or placement under § 48.13(4) or (11) or § 938.13(4).) (Respondent)'s status as a minor does not automatically establish a substantial probability of death, serious physical injury, serious physical debilitation or serious

disease. Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by any person other than a treatment facility, does not constitute reasonable provision for the individual's treatment or protection available in the community.] [or]

[Under Standard E, a person is dangerous to (himself) (herself) if (he) (she) has recently had explained to (him) (her) the advantages and disadvantages of and alternatives to accepting a particular medication or treatment and; (1) Due to mental illness, (respondent) is (incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives) (substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives of (his) (her) mental illness to make an informed choice as to whether to accept or refuse medication or treatment); and (2) There is a substantial probability, as demonstrated by both (respondent)'s treatment history and (his) (her) recent acts or omissions, that (he) (she) needs care or treatment to prevent further disability or deterioration, and further, there exists a substantial probability that, if left untreated, (he) (she) will lack the services necessary for (his) (her) health or safety, and will suffer severe mental, emotional, or physical harm that will result in (respondent)'s loss of ability to function independently in the community or loss of cognitive or volitional control over (his) (her) thoughts or actions; and (3) There is no reasonable probability that (respondent) will avail (himself) (herself) of services in the

community for care or treatment necessary to prevent (him) (her) from suffering severe mental, emotional, or physical harm.]

Do not concern yourselves with the length of custody or nature of any treatment that I might order as a result of your answers to the questions of the Special Verdict.

[**Note**: Give Wis JI Civil 180, Five Sixths Verdict and Wis JI Civil 190, Closing.]

SUGGESTED VERDICT

Question 1: Is (respondent) mentally ill?

Answer:_____

Yes or No

Question 2: If you answered question 1 "yes," then answer this question:

Is (respondent) a proper subject for treatment?

Answer:_____

Yes or No

Question 3: If you answered questions 1 and 2 "yes," then answer this question:

Is (respondent) dangerous to [(himself) (herself)] or to others?

Answer:_____

Yes or No

Question 3(a): If you answered question 3 "yes," then answer this question: Under which standard(s) has it been proven by clear and convincing evidence that (respondent) is

dangerous? [For initial commitment hearings and recommitment hearings not alleging 51.20(1)(am), SELECT THE STANDARD(S) ALLEGED AND SUPPORTED BY SUFFICIENT EVIDENCE AS PUT FORTH BY THE PETITIONER and include:]

Standard A _____	Answer:	Yes or No
Standard B _____	Answer:	Yes or No
Standard C _____	Answer:	Yes or No
Standard D _____	Answer:	Yes or No
Standard E _____	Answer:	Yes or No

[**Note**: For a trial involving several of the statutory definitions of "dangerous," see the comment below on the "Dangerousness Standard" for advice on subdividing verdict question 3(a).]

COMMENT

The instruction was revised in 1981, 1989, 1998, 2002, 2006, 2014, and 2018. The comment was updated in 2011, 2012, 2014, 2015, 2016, 2017, 2018, 2019, 2020, and 2021.

While this verdict and jury instruction are designed for an alleged mentally ill case, they can, by substitution of the disability terms, be converted to a verdict and jury instruction for an alleged drug dependent case or developmentally disabled case.

Proper Subject for Treatment. The court of appeals approved the language of the instruction dealing with the determination of whether the individual is a proper subject for treatment in verdict question three. In Matter of Mental Condition of C.J., 120 Wis.2d 355, 354 N.W.2d 219 (Ct. App. 1984). A person with Alzheimer's disease is not a proper subject for treatment under Chapter 51. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179. See also Waukesha County v. J.W.J., 2017 WI 57, 375 Wis.2d 542, 895 N.W.2d 783

In Fond du Lac County v. Helen E.F., the supreme court said the court of appeals in C.J., supra, provided a "useful and well-constructed fact-based test for determining whether a subject individual is capable of rehabilitation, and therefore treatable under Wis. Stat. § 51.01(17)." The supreme court said the following test from C.J. accurately reflects the interests embodied in chs. 51 and 55.

> If treatment will "maximize[e] the [] individual functioning and maintenance" of the subject, but not "help [] in controlling or improving their disorder []," then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will "go beyond controlling . . . activity" and will "go to controlling [the] disorder and its symptoms," then the subject individual has rehabilitative potential, and is a proper subject for treatment. Fond du Lac County v. Helen E.F., supra, at ¶36.

Mental Illness. The definition of "mental illness" does not include alcoholism. Wis. Stat. § 51.20(13)(b).

Alzheimer's disease does not fall within the definition of a mental illness as it is a "degenerative brain disorder." An individual with Alzheimer's disease is not a proper subject for treatment. Ch. 51 provides for active treatment for those who are proper subjects for treatment, while Ch. 55 provides for residential care and custody of those persons with mental disabilities, such as Alzheimer's, that are likely to be permanent. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179.

Dangerousness Standard. The issue of dangerousness is an element in all commitment proceedings, except proceedings under Wis. Stat. 51.20(1)(ar). The Committee believes the specification by the petitioner of the applicable standard(s) at issue as well as a finding by the factfinder as to which dangerousness standard(s) were proven by clear and convincing evidence is mandatory. See Langlade County v. D.J.W., 2020 WI 41, 391 Wis.2d 231, 942 N.W.2d 277. While D.J.W involved a recommitment hearing, the Committee believes and recommends that, based on language in D.J.W., that specific findings regarding which standard(s) of dangerousness is alleged and which standard(s) of dangerousness have been proven must also occur at initial commitment hearings. See ¶¶42-44. In addition to these considerations, specificity is also important in cases in which dangerousness is alleged under sec. 51.20(1)(a)2.e. ("Standard E"). That is because a person committed based on this standard may only be treated on an inpatient basis for up to 30 days. See Wis. Stat. § 51.20(13)(g)2d.b. Thus, knowing which standard forms the basis for a dangerousness finding will also affect disposition in the event both Standard E and another standard are alleged.

Threats. In Outagamie County v. Michael H., supra, the court concluded that in evaluating dangerousness, "an articulated plan is not a necessary component of a suicide threat." See ¶6. The court concluded that it did not need to adopt a precise definition for "threat" for purposes of Wis. Stat. § 51.20.

Acceptance of Medication and Treatment. Medication is a "service" within the meaning of the community services exclusion of the Standard E (Wis. Stat. 51.20(1)(a)2.e.). In re Kelly M., 2011 WI App 69, 333 Wis.2d 719, 798 N.W.2d 697. Individuals who are under a Ch. 55 protective placement or who are a proper subject for a Ch. 55 protective placement come within the Ch. 55 exclusion within Standard E and Wis. Stats. § 55.14 should be utilized for the petition for the involuntary administration of medication. Commitment is available under Standard E for individuals who have dual diagnoses; i.e. a diagnosis of mental illness and also a diagnosis of drug dependency or developmental disability. In re Kelly M., supra.

Right to Remain Silent. Under Wis. Stat § 51.20(5), the subject individual has the right to remain silent at the commitment hearing. If requested by the individual, the trial court should instruct the jury on the individual's failure to testify. See Wis JI-Criminal 315.

Cooperation with Doctors. If there is evidence that the patient did not properly cooperate with the doctors, then this instruction should be included following the instruction on expert testimony:

> There is testimony in this case that (respondent) was unresponsive to the doctors. You are advised that he/she has the constitutional right to remain unresponsive and to say nothing. He/She was so informed by the court and by the officials at the hospital. He/She also had then the right to refuse treatment. In answering question 1, you may consider his/her silent behavior only if you are convinced that his/her silence was related to his/her mental condition and was not an exercise of his/her constitutional right to remain silent.

Temporary Protective Placement. If the jury returns a verdict finding that the individual is mentally ill and dangerous but not a "proper subject for treatment," the trial judge may consider ordering temporary protective placement for the individual pursuant to Wis. Stat. § 51.67 which states:

> **51.67 Alternate procedure; protective services**. (intro.) If, after a hearing under § 51.13(4) or 51.20, the court finds that commitment under this chapter is not warranted and that the subject individual is a fit subject for guardianship and protective placement or services, the court may, without further notice, appoint a temporary guardian for the subject individual and order temporary protective placement or services under ch. 55 for a period not to exceed 30 days. Temporary protective placement for an individual in a center for the developmentally disabled is subject to § 51.06(3). Any interested party may then file a petition for permanent guardianship or protective placement or services, including medication, under ch. 55. If the individual is in a treatment facility, the individual may remain in the facility during the period of temporary protective placement if no other appropriate facility is available. The court may order psychotropic medication as a temporary protective service under this section if it finds that there is probable cause to believe the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for an participate in subsequent legal proceedings. An individual is not competent to refuse psychotropic medication if, because of serious and persistent mental illness, and after the advantages of and alternatives to accepting the particular psychotropic medication have been explained to the individual ….

Definition of a Drug. In a case involving drug-dependency and the definition of the term "drug," see Wis. Stat. § 450.01(10) and § 961.01(11). See also an unpublished decision (one-judge) which discusses the court's jury instruction allowing the jury to consider multiple definitions of the term "drug." Marathon County v. Zachary W., 2015 WI App 13, 359 Wis.2d 676, 859 N.W.2d 629.

Prisoner. When Wis. Stat. § 51.20(1)(ar) is pled, it governs the involuntary commitment of inmates of the Wisconsin state prison system. If a commitment or recommitment proceeding concerns a prisoner pursuant to § 51.20(1)(ar), the following elements must be proven: "a county must show that (1) the individual is an inmate of the Wisconsin state prison system; (2) the inmate is mentally ill; (3) the inmate is a proper subject for treatment and is in need of treatment; (4) appropriate less restrictive forms of treatment were attempted with the inmate, and they were unsuccessful; (5) the inmate was fully informed about his treatment needs, the mental health services available, and his rights; and (6) the inmate had an opportunity to discuss his treatment needs, the services available, and his rights with a psychologist or a licensed physician." For the involuntary commitment of a mentally ill prisoner, see Winnebago County v.

Christopher S., 2016 WI 1, ¶27, 366 Wis.2d 1, 878 N.W.2d 109. While a finding of dangerousness is not required for commitment, it is required for an involuntary medication order in a Wis. Stat. sec. 51.20(1)(ar) proceeding. See Winnebago County v. Christopher S. (III), 2020 WI 33, 391 Wis.2d 35, 940 N.W.2d 875.

Psychotropic Medication Order. Where a psychotropic medication order is sought related to a commitment proceeding, a court, not a jury, makes the determination. Wis. Stat. § 51.61(1)(g)3.

7050A INVOLUNTARY COMMITMENT: MENTALLY ILL: RECOMMITMENT ALLEGING Wis. Stat. § 51.20(1)(am)

(Insert Wis JI Civil 100, Opening.)

A petition has been filed seeking the involuntary recommitment of (respondent). The petition alleges that (respondent) is mentally ill; that (his) (her) mental illness is subject to treatment; and that (he) (she) is dangerous.

The fact that a petition has been filed is not evidence that (respondent) is mentally ill, dangerous, or a proper subject for treatment. Our law presumes that a person is not mentally ill until you are convinced that the person is mentally ill. If you find that (respondent) is mentally ill based on the evidence, that fact does not mean that you must find that (respondent) is also dangerous. The burden of proving each of the allegations in the petition is on (petitioner).

This is a civil, not a criminal, case. [The fact that the district attorney is present does not mean that (respondent) is accused of a crime. The district attorney and _____, the other attorney, are required to be here by the Wisconsin statutes.] While (respondent) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of (respondent)'s personal liberty. Therefore, you should approach this task with a sense of serious duty.

Wis JI Civil 110, Arguments of Counsel

Wis JI Civil 115, Objections of Counsel

Wis JI Civil 120, Judge's Demeanor

Wis JI Civil 130, Stricken Testimony

Wis JI Civil 215, Credibility of Witnesses; Weight of Evidence

Wis JI Civil 260, Expert Testimony: General

Wis JI Civil 265, Expert Testimony: Hypothetical Question.

Wis JI-Civil 205, Middle Burden of Proof

Wis JI Civil 145, Special Verdict Questions: Interrelationship

At the end of the trial, I will give you a special verdict consisting of three questions.

Question 1 asks: Is (respondent) mentally ill?

The term "mentally ill" means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs the judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life.

Question 2 asks: Is (respondent) a proper subject for treatment?

A person who is mentally ill is a proper subject for treatment if (his) (her) mental illness is treatable. In determining if (respondent)'s mental illness is treatable, you should consider whether the administration of any, or a combination of, techniques may control, improve, or cure the substantial disordering of the person's thought, mood, perception, orientation, or memory.

Question 3 asks: Is (respondent) dangerous to [(himself) (herself)] or to others?

This is a recommitment proceeding and therefore there may not be proof of recent

acts or omissions demonstrating that (respondent) is dangerous, however, the law provides that you may find (respondent) to be dangerous to [(himself) (herself)] or to others if there is a substantial likelihood based on (respondent)'s treatment record that (respondent) would be a proper subject for commitment if treatment were withdrawn, meaning that (respondent) would meet one or more of the dangerousness standards, A through E, described below if treatment were withdrawn. If you find that (respondent) is dangerous if treatment were withdrawn, you must state under which standard(s) (A, B, C, D, E) you came to this conclusion.

[NOTE: MORE THAN ONE STANDARD FOR DANGEROUSNESS MAY APPLY. SELECT THE STANDARD(S) ALLEGED AND SUPPORTED BY SUFFICIENT EVIDENCE AS PUT FORTH BY THE PETITIONER]

[Under Standard A, a person is dangerous to (himself) (herself) if (he)(she) evidences a substantial probability of physical harm to (himself) (herself) as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.] [or]

[Under Standard B, a person is dangerous to others if (he) (she) evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt, or threat to do serious physical harm.] [or]

[Under Standard C, a person is dangerous to (himself) (herself) or others if (he)

(she) evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is substantial probability of physical impairment or injury to (himself) (herself) or other individuals. The probability of physical impairment or injury is not substantial (if reasonable provision for (respondent)'s protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services) (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor: if (respondent) is appropriate for services or placement under § 48.13(4) or (11) or § 938.13(4)) (where the subject is a minor: (Respondent)'s status as a minor does not automatically establish a substantial probability of physical impairment or injury). Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for (himself) (herself), by a person other than a treatment facility, does not constitute reasonable provision for the individual's protection available in the community.] [or]

[Under Standard D, a person is dangerous to (himself) (herself) if (he) (she) evidences behavior manifested by recent acts or omissions that, due to mental illness, (he) (she) is unable to satisfy basic needs for nourishment, medical care, shelter, or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless (respondent) receives prompt and adequate

treatment for this mental illness. No substantial probability of harm exists (if reasonable provision for (respondent)'s treatment and protection is available in the community and there is a reasonable probability that (respondent) will avail (himself) (herself) of these services), (if (respondent) may be provided protective placement or protective services under chp. 55) (or) (where the subject is a minor; if (respondent) is appropriate for services or placement under § 48.13(4) or (11) or § 938.13(4).) (Respondent)'s status as a minor does not automatically establish a substantial probability of death, serious physical injury, serious physical debilitation or serious disease. Food, shelter, or other care provided to an individual who is substantially incapable of obtaining the care for himself or herself, by any person other than a treatment facility, does not constitute reasonable provision for the individual's treatment or protection available in the community.] [or]

[Under Standard E, a person is dangerous to (himself) (herself) if (he) (she) has recently had explained to (him) (her) the advantages and disadvantages of and alternatives to accepting a particular medication or treatment and; (1) Due to mental illness, (respondent) is (incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives) (substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives of (his) (her) mental illness to make an informed choice as to whether to accept or refuse medication or treatment); and (2) There is a substantial

probability, as demonstrated by both (respondent)'s treatment history and (his) (her) recent acts or omissions, that (he) (she) needs care or treatment to prevent further disability or deterioration, and further, there exists a substantial probability that, if left untreated, (he) (she) will lack the services necessary for (his) (her) health or safety, and will suffer severe mental, emotional, or physical harm that will result in (respondent)'s loss of ability to function independently in the community or loss of cognitive or volitional control over (his) (her) thoughts or actions; and (3) There is no reasonable probability that (respondent) will avail (himself) (herself) of services in the community for care or treatment necessary to prevent (him) (her) from suffering severe mental, emotional, or physical harm.]

Do not concern yourselves with the length of custody or nature of any treatment that I might order as a result of your answers to the questions of the Special Verdict.

[**Note**: Give Wis JI Civil 180, Five Sixths Verdict and Wis JI Civil 190, Closing.]

SUGGESTED VERDICT

Question 1: Is (respondent) mentally ill?

Answer: _____

Yes or No

Question 2: If you answered question 1 "yes," then answer this question:

Is (respondent) a proper subject for treatment?

Answer: _____

Yes or No

Question 3: If you answered questions 1 and 2 "yes," then answer this question:

Is (respondent) dangerous to [(himself) (herself)] or to others?

Answer: _____

Yes or No

Question 3(a): If you answered question 3 "yes," then answer this question: If you find (respondent) dangerous if treatment were withdrawn, under which standard(s) has it been proven by clear and convincing evidence that (respondent) is dangerous if treatment were withdrawn? [SELECT THE STANDARD(S) ALLEGED AND SUPPORTED BY SUFFICIENT EVIDENCE AS PUT FORTH BY THE PETITIONER and include:]

Standard A _____	Answer:	Yes or No
Standard B _____	Answer:	Yes or No
Standard C _____	Answer:	Yes or No
Standard D _____	Answer:	Yes or No
Standard E _____	Answer:	Yes or No

[**Note**: For a trial involving several of the statutory definitions of "dangerous," see the comment below on the "Dangerousness Standard in Recommitment Proceedings under

Wis. Stat. 51.20(1)(am)" for advice on subdividing verdict question 3(a).]

COMMENT

This instructions and comment were approved by the Committee in September 2021.

While this verdict and jury instruction are designed for an alleged mentally ill case, they can, by substitution of the disability terms, be converted to a verdict and jury instruction for an alleged drug dependent case or developmentally disabled case.

Proper Subject for Treatment. The court of appeals approved the language of the instruction dealing with the determination of whether the individual is a proper subject for treatment in verdict question three. In Matter of Mental Condition of C.J., 120 Wis.2d 355, 354 N.W.2d 219 (Ct. App. 1984). A person with Alzheimer's disease is not a proper subject for treatment under Chapter 51. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179. See also Waukesha County v. J.W.J., 2017 WI 57, 375 Wis.2d 542, 895 N.W.2d 783

In Fond du Lac County v. Helen E.F., the supreme court said the court of appeals in C.J., supra, provided a "useful and well-constructed fact-based test for determining whether a subject individual is capable of rehabilitation, and therefore treatable under Wis. Stat. § 51.01(17)." The supreme court said the following test from C.J. accurately reflects the interests embodied in chs. 51 and 55.

> If treatment will "maximize[e] the [] individual functioning and maintenance" of the subject, but not "help [] in controlling or improving their disorder []," then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will "go beyond controlling . . . activity" and will "go to controlling [the] disorder and its symptoms," then the subject individual has rehabilitative potential, and is a proper subject for treatment. Fond du Lac County v. Helen E.F., supra, at ¶36.

Mental Illness. The definition of "mental illness" does not include alcoholism. Wis. Stat. § 51.20(13)(b).

Alzheimer's disease does not fall within the definition of a mental illness as it is a "degenerative brain disorder." An individual with Alzheimer's disease is not a proper subject for treatment. Ch. 51 provides for active treatment for those who are proper subjects for treatment, while Ch. 55 provides for residential care and custody of those persons with mental disabilities, such as Alzheimer's, that are likely to be permanent. Fond du Lac County v. Helen E.F., 2012 WI 50, 340 Wis.2d 500, 814 N.W.2d 179.

Dangerousness Standard in Recommitment Proceedings under Wis. Stat. 51.20(1)(am). If the individual has been the subject of inpatient or outpatient treatment for mental illness immediately prior to commencement of the proceeding as a result of a voluntary admission, a commitment or protective placement, or protective services ordered by a court, the requirements of a recent overt act, attempt, or threat to act or a pattern of recent acts, omissions, or behavior may be satisfied by a showing that there is a substantial likelihood, based on the individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn. Wis. Stat. § 51.20(1)(am). If the individual has been

admitted voluntarily to an inpatient treatment facility for not more than 30 days prior to the commencement of these proceedings and remains under voluntary admission at the time of the commencement of these proceedings, the requirements of a specific recent overt act, attempt, or threat to act or pattern of recent acts or omissions may be satisfied by a showing of an act, attempt or threat to act, or a pattern of acts or omissions which took place immediately previous to the voluntary admission. Specific factual findings must be made with reference to the subdivision of 51.20(1)(a)2. on which the recommitment is based. Langlade County v D.J.W., 2020 WI 41, 391 Wis.2d 231, 942 N.W.2d 277. The instructions and verdict must include any of the standard(s) that the evidence supports.

In addition to these considerations, specificity is also important in cases in which dangerousness is alleged under sec. 51.20(1)(a)2.e. ("Standard E"). That is because a person committed based on this standard may only be treated on an inpatient basis for up to 30 days. See Wis. Stat. sec. 51.20(13)(g)2d.b. Thus, knowing which standard forms the basis for a dangerousness finding will also affect disposition in the event both Standard E and another standard are alleged.

Threats. In Outagamie County v. Michael H., supra, the court concluded that in evaluating dangerousness, "an articulated plan is not a necessary component of a suicide threat." Paragraph 6. The court concluded that it did not need to adopt a precise definition for "threat" for purposes of Wis. Stat. § 51.20.

Acceptance of Medication and Treatment. Medication is a "service" within the meaning of the community services exclusion of the Standard E (Wis. Stat. 51.20(1)(a)2.e.). In re Kelly M., 2011 WI App 69, 333 Wis.2d 719, 798 N.W.2d 697. Individuals who are under a Ch. 55 protective placement or who are a proper subject for a Ch. 55 protective placement come within the Ch. 55 exclusion within Standard E and Wis. Stats. § 55.14 should be utilized for the petition for the involuntary administration of medication. Commitment is available under Standard E for individuals who have dual diagnoses; i.e. a diagnosis of mental illness and also a diagnosis of drug dependency or developmental disability. In re Kelly M., supra.

Right to Remain Silent. Under Wis. Stat § 51.20(5), the subject individual has the right to remain silent at the commitment hearing. If requested by the individual, the trial court should instruct the jury on the individual's failure to testify. See Wis JI-Criminal 315.

Cooperation with Doctors. If there is evidence that the patient did not properly cooperate with the doctors, then this instruction should be included following the instruction on expert testimony:

> There is testimony in this case that (respondent) was unresponsive to the doctors. You are advised that he/she has the constitutional right to remain unresponsive and to say nothing. He/She was so informed by the court and by the officials at the hospital. He/She also had then the right to refuse treatment. In answering question 1, you may consider his/her silent behavior only if you are convinced that his/her silence was related to his/her mental condition and was not an exercise of his/her constitutional right to remain silent.

Temporary Protective Placement. If the jury returns a verdict finding that the individual is mentally ill and dangerous but not a "proper subject for treatment," the trial judge may consider ordering temporary protective placement for the individual pursuant to Wis. Stat. § 51.67 which states:

51.67 Alternate procedure; protective services. (intro.) If, after a hearing under § 51.13(4) or 51.20, the court finds that commitment under this chapter is not warranted and that the subject individual is a fit subject for guardianship and protective placement or services, the court may, without further notice, appoint a temporary guardian for the subject individual and order temporary protective placement or services under ch. 55 for a period not to exceed 30 days. Temporary protective placement for an individual in a center for the developmentally disabled is subject to § 51.06(3). Any interested party may then file a petition for permanent guardianship or protective placement or services, including medication, under ch. 55. If the individual is in a treatment facility, the individual may remain in the facility during the period of temporary protective placement if no other appropriate facility is available. The court may order psychotropic medication as a temporary protective service under this section if it finds that there is probable cause to believe the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for an participate in subsequent legal proceedings. An individual is not competent to refuse psychotropic medication if, because of serious and persistent mental illness, and after the advantages of and alternatives to accepting the particular psychotropic medication have been explained to the individual ….

Definition of a Drug. In a case involving drug-dependency and the definition of the term "drug," see Wis. Stat. § 450.01(10) and § 961.01(11). See also an unpublished decision (one-judge) which discusses the court's jury instruction allowing the jury to consider multiple definitions of the term "drug." Marathon County v. Zachary W., 2015 WI App 13, 359 Wis.2d 676, 859 N.W.2d 629.

Prisoner. When Wis. Stat. § 51.20(1)(ar) is pled, it governs the involuntary commitment of inmates of the Wisconsin state prison system. If a recommitment proceeding concerns a prisoner pursuant to § 51.20(1)(ar), the following elements must be proven: "a county must show that (1) the individual is an inmate of the Wisconsin state prison system; (2) the inmate is mentally ill; (3) the inmate is a proper subject for treatment and is in need of treatment; (4) appropriate less restrictive forms of treatment were attempted with the inmate, and they were unsuccessful; (5) the inmate was fully informed about his treatment needs, the mental health services available, and his rights; and (6) the inmate had an opportunity to discuss his treatment needs, the services available, and his rights with a psychologist or a licensed physician." For the involuntary commitment of a mentally ill prisoner, see Winnebago County v. Christopher S., 2016 WI 1, ¶27, 366 Wis.2d 1, 878 N.W.2d 109. While a finding of dangerousness is not required for commitment, it is required for an involuntary medication order in a Wis. Stat. sec. 51.20(1)(ar) proceeding. See Winnebago County v. Christopher S.(III), 2020 WI 33, 391 Wis.2d 35, 940 N.W.2d 875.

Psychotropic Medication Order. Where a psychotropic medication order is sought related to a commitment proceeding, a court, not a jury, makes the determination. Wis. Stat. § 51.61(1)(g)3.

8025 TRESPASS: OWNER'S DUTY TO TRESPASSER; DUTY TO CHILD TRESPASSER (ATTRACTIVE NUISANCE)

TRESPASSER: DEFINITION

A person who enters or remains upon property in possession of another without express or implied consent is a trespasser.[1]

Consent to be on the premises of another may be express or implied. There is an express consent when the possessor[2] expressly invites or authorizes another person to be on his or her premises. There is an implied consent when the possessor, by his or her conduct or his or her words, or both, by implication consents to such other person's being on the premises.

In determining whether an implied consent exists, you should look at all of the circumstances then existing, including the acquiescence of the possessor, if any, in the previous use of the premises by others (including the plaintiff); the customary use, if any, of the premises by others (including the plaintiff); the apparent holding out of the premises, if any, to a particular use by the public; and the general arrangement or design of the premises. If, under all the existing circumstances, a reasonable person would conclude that the possessor of the premises impliedly consented that the plaintiff be on the premises, then there was consent.

Question ____ asks: At the time and place in question, was (plaintiff) a trespasser?

If by your answer to Question ____ you have found that the plaintiff, _____, was

a trespasser, it will then be for you to determine whether the defendant, _____, as the (owner) (occupant possessor) of the premises, complied with those rules of law relating to the duties owed by an owner-occupant to a trespasser.

A trespasser enters upon premises of another at his or her peril. The (owner) (occupant-possessor) is under no duty to anticipate a trespasser's entry or to provide for a trespasser's safety. An (owner) (occupant possessor) may engage in any lawful work conducted in a customary manner, upon his or her premises without incurring liability to a trespasser. This is so even though some danger to trespassers reasonably may be anticipated due to the nature of the work being performed or the manner in which it is being conducted. The (owner's) (occupant-possessor's) only duty to a trespasser is to refrain from acts which willfully, wantonly, or recklessly cause injury or death to trespassers. If (owner) (occupant-possessor) becomes aware, or in the exercise of ordinary care should have become aware, of the presence of trespassers upon his or her premises, (he) (she) may not affirmatively act or set any force in motion likely to cause injury or death to trespassers.

Willful actions are deliberate acts with intent to accomplish a result. Wanton or reckless actions are those so unreasonable and dangerous that the actor knows or should know that it is highly probable harm to another will result.[3]

Question ____ asks:

At or immediately before the (injury to) (death of) (plaintiff), were the actions of (defendant) willful, wanton, or reckless?

If you determined that the actions of (defendant) were willful, wanton, or reckless, then you must determine if the actions were a cause of (plaintiff)'s (injury)(death);

Question ____ asks:

Was the action of (defendant) a cause of (injury)(death) to (plaintiff)?

(**NOTE:** If the plaintiff is a child and his or her claim is based on "attractive nuisance," the following instruction should be given. For a suggested verdict, see Wis JI-Civil 8027.)

CHILD TRESPASSER

When a child trespasses upon the premises of another, the owner-occupant owes no duty of care to a child injured or killed unless all of the following apply:

a) The possessor of real property maintained, or allowed to exist, an artificial condition on the property that was inherently dangerous to children.

b) The possessor of real property knew or should have known that children trespassed on the property.

c) The possessor of real property knew or should have known that the artificial condition he or she maintained or allowed to exist was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children.

d) The injured or killed child, because of his or her youth or tender age, did not discover the condition or realize the risk involved in entering onto the property or in playing in close proximity to the inherently dangerous artificial condition.

e) The possessor of real property could have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained or allowed to exist.

An artificial condition, as used in this instruction, includes a machine or device as well as a land condition artificially created. The duty of the possessor is to exercise ordinary care to eliminate dangers or otherwise protect children. Ordinary care is that degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances. The duty placed upon the possessor is to take such steps as a reasonable person would take under the circumstances. The duty of the possessor does not apply to children who know, or should know, of the danger involved in the condition.

In determining whether the (artificial condition), maintained on the land known to be subject to trespass by children, involves an unreasonable risk to them, you should consider and compare the recognizable risk to the children with the utility to the possessor of maintaining the condition. In this regard, you should consider whether safeguards could reasonably be provided which would obviate the danger without materially interfering with the purpose for the artificial condition. You must further decide if the (artificial condition) was a cause of the (injury to) (death of) (child).

NOTES

1. Wis. Stat. § 895.529(1)(b). This instruction was revised in accordance with 2011 Act 93.

2. Wis. Stat. § 895.529(1)(a). "Possessor of real property" means an owner, lessee, tenant, or other lawful occupant of real property.

3. This exception does not apply if the possessor used reasonable and necessary force for the purpose of self-defense or the defense of others under Wis. Stat. § 939.48 or used reasonable and necessary force for the protection of property under § 939.49

COMMENT

The committee revised the instruction and comment in 2012. The comment was revised in 2016. This revision was approved by the Committee in September 2021; it added to the notes and comment.

Wis. Stat. § 895.529. See Wis. Stat. § 895.529(4) which states: "This section does not create or increase any liability on the part of a possessor of real property for circumstances not specified under this section and does not affect any immunity from or defenses to liability available to a possessor of real property under common law or another statute."

This instruction incorporates the former Wis JI-Civil 8012: Trespasser: Definition and Wis JI-Civil 8015: Trespass: Consent of Possessor to Another's Being on Premises. The instruction also covers a claim based on attractive nuisance which formerly had been addressed in Wis JI-Civil 1011.

Special Verdicts. For special verdicts on the duty of a possessor of property, see Wis JI-Civil 8026 and 8027.

It is the opinion of the committee that there is no comparative negligence comparison involving an owner's duty to a child trespasser (attractive nuisance). It is our opinion that Wis. Stat. § 895.529(3)(b) is designed to limit the liability of a landowner and that the statute does not provide for a comparison of negligence.

Burden of Proof. The committee believes the burden of proof as to the first verdict question (i.e. was the plaintiff a trespasser?) is on the defendant to show the plaintiff was a trespasser. The middle burden of proof applies to the question: "At or immediately before the injuries to plaintiff, were the actions of defendant willful, wanton, or reckless"?

Attractive Nuisance. See Wis. Stat. § 895.529(3)(b); Christians v. Homestake Enterprises, Ltd., 101 Wis.2d 25, 303 N.W.2d 608 (1981); Restatement, Second, Torts § 339. For a suggested verdict, see Wis JI-Civil 8027.

Duty to Non-Trespassers. In Antoniewicz v. Reszczynski, 70 Wis.2d 836, fn. 4, 236 N.W.2d 1 (1975), the court abolished the distinction between the duty owed to licensees and invitees by possessors of land. The decision created one common and equal duty that a possessor of land owes to all persons on his or her lands (excepting trespassers) and that is the duty to exercise ordinary care. See Wis JI-Civil 8020.

Duty of care owed to trespassers. Wis. Stat. § 895.529(2) states that "Except as provided in sub. (3), a possessor of real property owes no duty of care to a trespasser." As noted in Note 2, supra, § 895.529(1)(a) defines a "possessor of real property" as "an owner, lessee, tenant, or other lawful occupant of real property." However, there is no statutory definition provided for the phrase "other lawful occupant of real property."

In Stroede v. Society Insurance, 2021 WI 43, 397 Wis.2d 17, 959 N.W.2d 305, the Wisconsin Supreme Court provided an interpretation of this phrase, and determined that such a person "must have some degree of possession or control over the property and the ability to give and withdraw consent to enter or remain on the property." Id. at ¶19.

8060 ADVERSE POSSESSION NOT FOUNDED ON WRITTEN INSTRUMENT (WIS. STAT. § 893.25)

(Name of adverse possessor) claims ownership of real estate based on adverse possession. To claim ownership of real estate based on adverse possession, a person, together with his or her predecessors in interest, must have had uninterrupted adverse possession of the real estate for at least 20 years. Real estate is adversely possessed when the person claiming adverse possession (together with (his) (her) predecessors in interest) has had actual continued occupation of the real estate, under a claim of title, exclusive of any other right and the real estate claimed and occupied is either protected by a substantial enclosure or is usually cultivated or improved.

[In determining whether real estate is adversely possessed, you must look at the physical character of the possession. The physical possession must be open, notorious, exclusive, continuous, and hostile for at least 20 years.]

[The adverse possession must be sufficiently open and obvious to have apprised (title holder) of both the fact of the possession and the intent to exclude others from possession. Exclusive possession does not mean absolutely exclusive but rather the kind of possession that would characterize an owner's use.]

[Note: The following paragraph should be given where the use claimed to be continuous is seasonal in nature: Where the adverse possession is seasonal in character, the requirement of continuity of possession is satisfied by the use of the real estate

according to the existing seasonal uses, needs, requirements, and limitations, taking into consideration the location and the adaptability of the real estate for the seasonal use.]

["Hostile" does not mean a deliberate, willful, or unfriendly intent. If the characteristics of open, notorious, exclusive, and continuous possession are satisfied, the law presumes the element of hostile intent. "Hostile" means that the person in actual possession of the land claims exclusive right to it.]

[Land is "actually occupied" when it is used in a way it is ordinarily capable of being used and in such a manner as an owner would use it. Actual occupation is not limited to structural encroachment, although that it is a common physical characteristic of possession.]

The requirement of "substantial enclosure" must alert a reasonable person of a dispute over the land. "Usually cultivated or improved" means the one in possession has put the land to the same kind of use that a title holder might generally put the land.

(Title holder) is presumed to be in possession of the land claimed by (adverse possessor). Therefore, the burden is on (adverse possessor) to establish (his) (her) claim. Finally, (adverse possessor) has the burden of proof to clearly define the area of land claimed to be adversely possessed. While absolute precision or utilization of a surveyor is not required to establish lines of occupancy, the evidence must provide a reasonably accurate basis upon which to determine the boundary of the land adversely possessed.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1996. The comment was updated in 2011, 2015, 2016, and 2018. The instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. This revision was approved by the Committee in October 2021; it added to the comment.

Elements. To constitute adverse possession, "the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." Pierz v. Gorski, 88 Wis.2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979) (citations omitted); see also Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280. "Hostile" does not mean a deliberate and unfriendly animus; rather, the law presumes the element of hostile intent if the other requirements of open, notorious, continuous, and exclusive use are satisfied. Burkhardt v. Smith, 17 Wis.2d 132, 139, 115 N.W.2d 540 (1962). Kruckenberg v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164. "Both the fact of possession and its real adverse character" must be sufficiently open and obvious to "apprize the true owner in the exercise of reasonable diligence of the fact and of an intention to usurp the possession of that which in law is his own." Allie v. Russo, 88 Wis.2d 334, 343-44, 276 N.W.2d 730 (1979) (citations omitted). The size and nature of the disputed area are relevant in deciding if the use is sufficient to apprise the true owner of an adverse claim. See Pierz, 88 Wis.2d at 139.

In 2017, the Wisconsin Legislative Council published an information memorandum, IM-2017-04, which provides background information on the law of adverse possession and provides an overview of relevant court decision and statutes.

Tacking. The Judicial Council Committee's note following Wis. Stat. § 893.25 indicates that the phrase "in connection with his or her predecessors in interest" expresses the doctrine of "tacking" together periods of possession by adverse possessors in privity with each other.

Presumption of Hostile Possession. In Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280, the Wisconsin Supreme Court held that evidence regarding a possessor's subjective intent to claim title may be relevant in an adverse possession claim to rebut the presumption of hostility that arises when all other elements of adverse possession are satisfied. The court said the circuit court properly considered the predecessors in interest subjective intent and concluded that the adverse possession claimants failed to establish adverse possession for the requisite statutory period. The question presented in this case was whether the plaintiffs could establish that they adversely possessed the disputed property when their predecessors in interest expressly disclaimed ownership of it and sought permission to use the property from an entity that they mistakenly believed was its true owner.

Burden of Proof. This instruction is similar to the one used by the trial court in Kruse v. Horlamus Indus., 130 Wis.2d 357, 387 N.W.2d 64 (1986). It also conforms with the supreme court's clarification in Kruse as to the burden of proof to be used in adverse possession cases. The court held that the civil burden, not the middle burden, of proof applies in adverse possession cases. Some older cases used the term "clear and positive" evidence regarding evidence of possession. The court stated at page 362:

> The confusion surrounding the phrase "clear and positive," derives from the word, "clear," which frequently appears in the middle burden of proof. Because of the confusion which this portion of the instruction may cause, we direct that the words, "must be clear and positive and," be omitted from the instruction. The amended instruction will therefore read, "The evidence of possession must be strictly construed against the claimant." The instruction as so modified comports with the presumption of § 893.30 Stats. that favors the holder of the legal title.

Titleholder. As suggested in a footnote in Kruse (p. 361), this instruction uses the term "title holder" as opposed to the term "true owner" to avoid possible confusion.

Seasonal Use. In both Laabs v. Bolger, 25 Wis.2d 17, 23, 130 N.W.2d 270 (1964) [involving a deer-hunting shack] and Kraus v. Mueller, 12 Wis.2d 430, 440, 107 N.W.2d 467 (1960) [involving a summer-cottage property], the court cites the A.L.R. annotation, "Adverse Possession: Sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes," 24 A.L.R. 2d 632, 633, for the rule that seasonal use can satisfy the continuity requirement under certain circumstances, with the annotation stating:

> The requirement of continuity of possession as one of the essential elements of adverse possession is satisfied, as regards activities which are seasonal in character (other than those relating to agriculture and logging), by the use of land commensurate with and appropriate to existing seasonal uses, needs, requirements, and limitations, having regard for the location and adaptability of the land to such uses.

Defining the Area Possessed. The requirement that the adverse possessor provide a reasonably accurate basis upon which a legal description of the occupied area can be based is stated in Droege v. Daymaker Cranberries, Inc., 88 Wis.2d 140, 146; 276 N.W.2d 356 (Ct. App. 1979). The trial court must be provided with a reasonably accurate basis to determine the boundary. Otto v. Cornell, 119 Wis.2d 4, 11, 349 N.W.2d 703 (1984).

The court of appeals in Klinefelter v. Ditch, 161 Wis.2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991) notes:

> § 893.25 Stats. makes no distinction between "wild lands" and any others. Whether land is wild or not, a substantial enclosure plus "actual continued occupation" under a claim of right results in adverse possession if maintained for twenty years.

Permission. Hostile intent does not exist if the use is pursuant to the titleholder's permission. Northwoods Dev. Corp. v. Klement, 139 Wis.2d 695, 129 N.W.2d 121 (1964). See also Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280.

Substantial Enclosure. See Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Illinois Steel Co. v. Bilot, 109 Wis. 418, 444, 84 N.W.2d 855 (1901); Kruckenberg v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164.

Acquiescence. The adverse possessor may contend that, by tolerating his or her use, the titleholder was acquiescing in the use rather than permitting it, and argue that use by acquiescence is adverse. Allie v.

Russo, 88 Wis.2d 334, 343, 276 N.W.2d 730 (1979). However, for the doctrine of acquiescence to apply, the adverse possessor's use of the disputed property must be exclusive. See Allie v. Russo, supra, at pp. 345-47, and cases cited therein.

The doctrine of acquiescence is a "supplement" to the older rule of adverse possession which held that adverse intent was the first prerequisite of adverse possession. Chandelle Enters., LLC v. XLNT Dairy Farm, Inc., 2005 WI App 110, 282 Wis.2d 806, 699 N.W.2d 241. Northrop v. Opperman, 2010 WI App 80, 325 Wis.2d 445, 784 N.W.2d 736; Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631. Courts have developed the doctrine of acquiescence, which substitutes "mutual acceptance" for adverse or hostile intent. Buza v. Wojtalewicz, 48 Wis.2d 557, 562-63, 180 N.W.2d 556 (1970). See also Shrestha, Jessica, "Hey! That's My Land," Wisconsin Lawyer, Vol. 83, No. 3, March 2010 and Vol. 88, No. 7, June 2015.

All-or-nothing vs. portions of land theories. The way that a claimant pursues a theory of adverse possession can limit their ability to argue that the finder of fact should be offered an opportunity to find that portions of the land have been adversely possessed rather than an all-or-nothing choice. See Pierz v. Gorski, 88 Wis.2d 131, 134, 276 N.W.2d 352 (Ct. App. 1979) (allowing adverse possession "[o]nly to the extent" actual occupancy, along with other requirements, are proven); and Droege v. Daymaker Cranberries, Inc., 88 Wis.2d 140, 147, 276 N.W.2d 356 (Ct. App. 1979) (When "evidence was presented as to the extent of occupancy of only a portion of the land, only that portion may be awarded."). Per these two decisions, a rule that appears to emerge is that adverse possession claimants certainly **can**, and must generally be allowed to, pursue theories of adverse possession to portions within claims on larger parcels of property.

8100 EMINENT DOMAIN: FAIR MARKET VALUE (TOTAL TAKING)

The sole question in the Special Verdict asks, "What was the fair market value of the property on (date of evaluation)?"

In answering this question, consider only the price for which the property would have sold on (date of evaluation) by a seller then willing, but not forced, to sell, to a buyer who was then willing and able, but not forced, to buy. Fair market value is not what the property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the seller or his or her unwillingness to sell the property.

You should consider the use to which the property was put by the owner or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the property, is the use to which the property could legally, physically, and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation).

They must not be merely possible uses based upon speculation, theory, or conjecture. You should consider every element that establishes the fair market value of the property.

SPECIAL VERDICT

What was the fair market value of the property on (date of evaluation)?

$ _____

COMMENT

This instruction and comment were approved in 2006. The comment was revised in 2009, 2010, 2011, 2014, 2015, and 2020. The 2020 revision updated case law citations. This revision was approved by the Committee in January 2022; it added to the comment.

Wis. Stat. § 32.09(5).

Fair Market Value. The definition of "fair market value" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005). The principle that the trier of fact is to consider every element which would be considered by the buyer and the seller in the marketplace in setting the price for the subject property on the date of taking is found in Ken-Crete Products Company v. State Highway Commission, 24 Wis.2d 355, 359-360, 129 N.W.2d 130 (1964), Herro v. Department of Natural Resources, 67 Wis.2d 407, 420, 227 N.W.2d 456 (1974) and Clarmar Realty Company, Inc. v. Redevelopment Authority of the City of Milwaukee, 129 Wis. 2d 81, 91, 383 N.W.2d 890 (1986). See also 260 North 12th Street, LLC v. State of Wisconsin Dep't of Transportation, 2011 WI 103, 336 Wis.2d 150, 805 N.W.2d 381.

Date of Evaluation. Under Wis. Stat. § 32.09(1), the value of the subject property in eminent domain valuation litigation is to be determined as of the date of evaluation. Schey Enterprises, Inc. v. State, 52 Wis.2d 361, 190 N.W.2d 149 (1971). For a taking under Wis. Stat. § 32.05, the date of evaluation is the date the award is recorded in the register of deeds office, which is also the date of taking. For a taking under Wis. Stat. § 32.06, the date of evaluation is the date of filing the lis pendens.

Unit Rule. In a total taking, fair market value must be determined using the "unit rule." Green Bay Broadcasting v. Redevelopment Authority, 116 Wis.2d 1, 342 N.W.2d 27 (1983); see also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648; The Lamar Co. v. Country Side Restaurant, 2012 WI 46, 340 Wis.2d 335, 814 N.W.2d 159.

The Wisconsin Supreme Court discussed the "unit rule" in City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority, 2009 WI 84, 319 Wis.2d 553, 768 N.W.2d 749. The issue in the case was

expressed as follows: "If the VFW, which holds a long-term favorable lease, receives no compensation for its leasehold interest under the unit rule, has the VFW's right to just compensation under Article I, Section 13 of the Wisconsin Constitution been violated? In other words, the court is asked to determine whether the application of the unit rule in the present case violates the just compensation clause when the fair market value of the property is zero, rendering the VFW entitled to $0 for the loss of its property interest as a lessee."

The court concluded that using the unit rule in the case to value the whole property to determine the amount of compensation due to the VFW does not violate the just compensation clause. The court said that the VFW receives just compensation when it receives no compensation for its leasehold interest in a property that has no value.

> The VFW court explained the unit rule as follows:
> . . . under the unit rule there is no separate valuation of improvements or natural attributes of the land, and the manner in which the land is owned or the number of owners does not affect the value of the property.[21] When property that is held in partial estates by multiple owners is condemned, the condemnor provides compensation by paying the value of an undivided interest in the property rather than by paying the value of each owner's partial interest.[22] Simply stated, the unit rule determines the fair market value as if only one person owned the property. When the value of the property is determined, the condemnor makes a single payment for the property taken and the payment is then apportioned among the various owners.[23]
>
> That property is valued as an integrated and comprehensive unit does not mean that the individual components of value may not be examined or considered in arriving at an overall fair market value.[24] "The unit rule requires only that the various components be valued as contributing parts of an organic whole."[25]
>
> In Wisconsin jurisprudence, "acceptance [of the unit rule] is beyond question."[26] Indeed the unit rule is accepted in the majority of American jurisdictions.[27] The unit rule is a carefully guarded rule and only in rare and exceptional situations are departures permitted.[28]

Jurisdictional Offer. For a taking under Wis. Stat. § 32.05, a jurisdictional offer does not have to equal the appraisal on which the offer is based. Otterstatter v. City of Watertown, 378 Wis.2d 697, ¶27, 904 N.W.2d 396 (Ct. App. 2017). Instead, the words "based upon" provided in § 32.05 (2)(b) and (3)(e) mean that "the appraisal must be a supporting part or fundamental ingredient of the jurisdictional offer." Id. at ¶24. See also, Christus Lutheran Church of Appleton v. Wisconsin Dept. of Transportation, 2021 WI 30, ¶30, 396 Wis.2d 302, 956 N.W.2d 837.

Likewise, the fact that a jurisdictional offer increases based on the re-evaluation of items "considered but not fully addressed in the initial appraisal" does not mean that the offer is not "based upon" the appraisal. Christus, supra, at ¶33. The statutory process provided in § 32.05 does not require that a condemnor stay with its initial offer based on its appraisal, "but rather it is required to negotiate to see if that number was too low." Otterstatter, supra, ¶28. There is no statutory prohibition against offering more than the appraised amount in the jurisdictional offer.

Environmental Contamination and Remediation Costs. In 260 North 12th Street, LLC v. State of

Wisconsin Dept. of Transportation, 2011 WI 103, 336 Wis.2d 150, 805 N.W.2d 381, the Wisconsin Supreme Court held that a property's environmental contamination and the costs to remediate it are relevant to the property's fair market value if they would influence a prudent purchaser who is willing and able, but not obliged, to buy the property. 2011 WI 103, ¶7, 47, and 48. In this case, the trial judge instructed the jury according to JI-Civil 8100. See 260 North 12th Street, supra, ¶65-67.

Damages for the Taking of an Easement or a Loss of Direct Access. See 118th Street Kenosha, LLC v. Wisconsin Dept. of Transportation, 2014 WI 125, 359 Wis.2d 30, 856 N.W.2d 486.

8110 EMINENT DOMAIN: CHANGE IN GRADE*

You have heard testimony about a change in grade on the property.

A change in grade may affect the fair market value of the remaining property. If the completed public project changes the grade of the remaining property, you are to consider the change in grade when you determine the fair market value of the remaining property immediately after (date of evaluation) as if the public project was completed by (date of evaluation).

COMMENT

This instruction and comment were approved in 2006. The instruction was revised in 2008. This revision was approved in October 2021; it added to the comment.

*This instruction is to be used only in partial taking cases. Read in conjunction with Wis. JI-Civil 8102. See also Wis. Stat. § 32.09 (6)(f).

There can also be a change in grade under Wis. Stat. § 32.18 where no property has been taken. A modification of this instruction should be used in such cases.

Definition of "property." Wis. Stat. Sec. 32.01(2) provides a definition for the term "property" as it is used in matters concerning eminent domain. While the legislature did not define the term "lands" in this definition, the Wisconsin Supreme Court determined that § 32.01(2) indicates that "lands" constitutes some smaller subset of "property," … and that per § 32.01(2), "'property' includes 'estates in lands, fixtures[,] and personal property directly connected with lands.'" United America, LLC v. Wis. Dept. of Transportation, 2021 WI 44, ¶12, 397 Wis.2d 42, 959 N.W.2d 317.

Compensation for damages under § 32.18. Wis. Stat. Sec. 32.18 applies only when a change in grade is not accompanied by the "constitutional taking" of land, and recovery is limited to "damages to the lands." United America, supra, at ¶3. In United America, the Wisconsin Supreme Court concluded that based on its interpretation of the definition of "property," the phrase "'damages to the lands' is a narrower category of injuries than 'damages to property.'" Id., at ¶13. Therefore, under § 32.18, compensation for the diminution in property value is barred. Id., at ¶21. See Wis. Stat. Sec. 32.01(6)(f) for grade changes involving a taking of land.

8120 EMINENT DOMAIN: COMPARABLE SALES APPROACH*

You have heard testimony about other sales [and contracts] to assist you in determining the fair market value of the property on (date of evaluation) [and/or the fair market value of the remaining property immediately after (date of evaluation), as if the public project had been completed by (date of evaluation)].

In determining fair market value, you must consider the price and other terms and circumstances of any good faith sale of [or contract for the sale of] comparable property. A sale [or contract] is comparable if it was made within a reasonable time before or after (date of evaluation) and if that property is sufficiently similar with respect to location, situation, usability, improvements, and other characteristics to warrant a reasonable belief that it is comparable to the property [or remaining property] being valued.

You are to consider all the elements of similarity and dissimilarity in deciding whether the other sales [or contracts] assist you in determining the fair market value of the property on (date of evaluation) [and/or the fair market value of the remaining property immediately after (date of evaluation) as if the public project had been completed by (date of evaluation)].

COMMENT

This instruction and comment were approved in 2006. It was revised in 2008 and 2021. The 2021 revision reflects statutory amendments pursuant to 2017 Wisconsin Act 243 [effective date: April 5, 2018].

*The bracketed language is to be used in partial taking cases.

Wis. Stat. § 32.09 (1m)(a) provides:

> As a basis for determining value, a commission in condemnation or a court shall consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable within the meaning of this paragraph if it was made within a reasonable time before or after the date of evaluation and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements, and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

See Calaway v. Brown County, 202 Wis. 2d 736, 553 N.W.2d 809 (Ct. App. 1996)(citing Kamrowski v. State of Wis., 37 Wis.3d 195, 201-02, 155 N.W.2d 125, 129 (1967)); Rademann v. State Dept. of Transportation., 252 Wis. 2d 191, 642 N.W.2d 600 (Ct. App. 2002); Alsum v. Wisconsin Dept. of Transportation, 276 Wis. 2d 654, 689 N.W.2d 68 (Ct. App. 2004); Justmann v. Portage County, 278 Wis. 2d 487, 692 N.W.2d 273 (Ct. App. 2004) and Rosen v. Milwaukee, 72 Wis. 2d 653, 242 N.W.2d 681, (1976).

Income Approach to Valuation. The trial judge must decide if evidence on the income approach is admissible. See Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648; Alsum v. Wisconsin Dept. of Transportation, 276 Wis.2d 654, 689 N.W.2d 68 (Ct. App. 2004); National Auto Truckstops, Inc. v. State, Dept. of Transportation, 263 Wis. 2d 649, 665 N.W. 2d 198 (2003); Wisconsin Dept. of Transportation, supra; Rademann v. State Dept. of Transportation, 252 Wis. 2d 191, 642 N.W.2d 600 (Ct. App. 2002).

See also, the comment to Wis JI-Civil 8130.

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