OFFICE OF JUDICIAL EDUCATION
2023

January 2023

TO: Consumers of Wisconsin Jury Instructions – Civil

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 54 for the 1981 edition of Wis JI-Civil. The release contains material approved by the Wisconsin Civil Jury Instructions Committee through January 2023.

The following material is included in Release No. 54:

New Instructions	Revised Instructions				
8065	80	2020	2400	2401	2402
	2403	2500	2501	2505	2505A
	2507	2511	2513	2550	2722
	7050A	8100	8111		

Content. The 2023 supplement updates the publication on legislative actions and judicial decisions through October 21, 2022.

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

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OFFICE OF JUDICIAL EDUCATION
2023

Wis JI-Civil

(Release No. 54 – January 2023)

Filing Instructions

Remove Old Pages Titled	Insert New Pages Titled
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2023 Supplement filed by _____, _____.
initials date

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

2023

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME I

Wisconsin Civil Jury Instructions Committee

- 1/2023 Supplement (Release No. 54)

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WISCONSIN CIVIL JURY INSTRUCTIONS COMMITTEE (1959-2023)

CURRENT MEMBERS

Hon. William Sosnay, Milwaukee County (Chair)
Hon. Michael Fitzpatrick, Court of Appeals District IV
Hon. William Pocan, Milwaukee County
Hon. Michael Waterman, St. Croix County
Hon. Sarah Harless, Eau Claire County
Hon. Michael Aprahamian, Waukesha County
Hon. Emily Lonergan, Outagamie County

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Hon. Helmuth F. Arps (1959-1962)
Hon. M. Eugene Baker (1959-1975)
Hon. Michael J. Barron (1983-1996)
Hon. Dennis J. Barry (1994-1997)
Chief Justice Bruce F. Beilfuss (1959-1964)
Hon. Herbert A. Bunde (1962-1963)
Hon George A. Burns, Jr. (1976-1994)
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Hon. Merrill R. Farr (1962-1975)
Hon. James P. Fiedler (1981-1991)
Hon. Richard G. Greenwood (1983-1994)
Hon. Marc Hammer, (2017-2022)
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Hon. Barbara Key, (2016-2022)
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Hon. Norris Maloney (1964-1978)
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Hon. Richard W. Orton (1959-1961, 1973-1979)
Hon. Robert J. Parins (1970-1982)
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Hon. Albert J. Twesme (1962-1980)
Hon. Clair H. Voss (1974-1978)
Hon. Francis T. Wasielewski (1996-2006)
Hon. Patrick Willis (2006-2016)

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

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FOREWORD

Since 1959, the Wisconsin Jury Instructions project has produced over one thousand jury instructions to assist judges, lawyers, and, most importantly, jurors in understanding what the jury must decide at the conclusion of a trial. In 2020, the Jury Instructions project was transferred entirely to the Wisconsin Court System after 60 years as a cooperative effort between the Judicial Conference and the University of Wisconsin Law School. Publication and distribution of the Wisconsin Jury Instructions – Civil is now managed by the Office of Judicial Education with the assistance of the Wisconsin State Law Library. Throughout its sixty-three years of existence, the Wisconsin jury instructions model has proven unique in its longevity, continuity, and orientation toward the trial judge. Despite several structural changes over the last six decades, these distinctive aspects have remained consistent, and the jury instructions model has continued without interruption.

The instructions provided in Wisconsin Jury Instructions – Civil respond to a need for a comprehensive set of instructions to assist judges, juries, and lawyers in performing their role in civil cases. All published jury instructions share the same objective to provide a careful blending of the substantive law and the collective wisdom and courtroom experiences of the Committee members.

This set of instructions has been enriched by valuable suggestions from the judges and lawyers who have used the instructions in preparing trials, as well as presenting cases to juries. The Committee hopes this set will continue to receive the same valuable scrutiny from those who use it. We are proud of this publication and hope those who use it find it valuable.

(September 2021)

Bryce Pierson
Legal Advisor & Committee Reporter
Office of Judicial Education

COMMITTEE HISTORY

Foundation of the Wisconsin Civil Jury Instructions

As it is known today, the Wisconsin civil jury instructions model draws its origins to a 1958 panel discussion on uniform jury instructions sponsored by the Judicial Administration Section of the American Bar Association at its annual convention in Los Angeles. After attending this conference, Hon. Andrew. W. Parnell, Circuit Judge of the Tenth Circuit of Wisconsin and the future Chairman of the Civil Jury Instructions Committee, delivered a paper to the Wisconsin Board of Circuit Judges in which he advocated the necessity for uniform instructions in Wisconsin. In his paper, Judge Parnell urged the Board to initiate the development of uniform civil jury instructions, reminding the Board that:

> The task seems monumental, but it surely is not insurmountable. It is and should be, a function of this Board to set up the original machinery looking to the production, in due course, of uniform jury instructions in civil cases in our state. The arguments for it are patent and predominate. The ideal of progress and improvement in the judicial administration of our state should ever possess us and make us leaders in that field.

In response, the Board of Circuit Judges, in cooperation with the University of Wisconsin Extension Law Department[1], and the University of Wisconsin Law School[2], organized and conducted two seminars oriented around jury instructions in June of 1959. At these seminars, attendees discussed and appraised the necessity and the merits of uniform jury instructions in Wisconsin. As Judge Parnell would eventually note in his introduction to the original 1960 edition of the Wisconsin Jury Instructions-Civil, it was the "interest, desire, and enthusiasm" of the participating members of these two seminars that "ignited the inspirational spark that launched the program."

Although neither of these seminars produced immediate or recognizable model jury instructions, they made apparent the need for a reference resource that could assist the bench and bar of the State of Wisconsin in the preparation of jury instructions. Therefore, it was determined that a comprehensive strategy would have to be formulated to organize, review, develop, approve, produce, and distribute a book of uniform civil jury instructions.

Following the June seminars, the chairperson and the executive committee of each seminar held several meetings to tentatively resolve preliminary details of sponsoring, publishing, authoring, and editing. The resulting conclusions were then presented to the Board of Circuit Judges at its fall meeting in 1959. As a result, the Board established by resolution the Circuit Judges Civil Jury Instructions Committee. The Board also approved the preliminary agreements that provided the Committee would constitute the authoring personnel. Additionally, Professor John E. Conway of the University of Wisconsin Law

School would serve as editor, and the Extension Law Department would sponsor and produce the uniform civil jury instructions publication.

The first meeting of the appointed Circuit Judges Civil Jury Instructions Committee was held in Madison in October of 1959. At this inaugural gathering, the Committee determined the time, frequency, and places of its meetings, the procedures to prepare the meeting agendas, the assignments for authorship, editing details, and the means of publication. The Committee also determined how it would gather submissions for review and the procedure it would follow for approving proposed instructions.

The Committee began its review process by assembling more than two hundred proposed instructions which were submitted by Wisconsin trial judges and members of the State Bar. Assignments of specific proposals for instruction were then provided to individual members of the Committee who were responsible for preparing a draft of each proposed instruction. An accompanying brief, comments, and supporting legal research were also sought. During the meeting, the author presented their prepared material and answered questions from the other participating members. If the Committee determined that amendments or corrections were necessary, the draft would be tabled until revision were made. If the proposed material was tentatively approved, the instruction was submitted to the editor for editing and arrangement and then returned for eventual approval by the whole Committee. The current Civil Jury Instructions Committee still utilizes this review and approval procedure.

Development of the Original Model Instructions

The Circuit Judges Civil Jury Instructions Committee met nine times between 1959 and 1960 and averaged approximately 17 instructions at each meeting. As a result of these efforts, the first edition of Wisconsin Jury Instructions-Civil was published by the University of Wisconsin-Extension Law Department in December 1960 and included 150 approved model instructions[3]. Following the publication of this edition, the Committee continued to meet consistently to maintain a regular record of updating material and producing supplements to the 1960 edition. In 1978, the Committee released a supplement that included a revised preface by Editor John E. Conway. This preface provided advice and expectations for how users should use the instructions. These objectives and explanations remain accurate today.

In 1981, a new edition of the Wisconsin Jury Instructions-Civil was published, which amended the product's format and added 70 new instructions. Supplementation of the 1981 edition has continued on frequent basis, with each new supplement designated "Release No._____." As of April 2021, 52 supplements have been published since the 1981 revised edition.

Court Reorganization and Publication Incorporation into the Wisconsin Court System

In 1978, the Wisconsin court system was reorganized, and the old statutory boards, including the Board of Circuit Court Judges, were abolished. Furthermore, the Circuit Judges Civil Jury Instructions Committee's name was changed to the Civil Jury Instructions Committee.

In 1986, the University of Wisconsin-Extension, Department of Law, was integrated with the University of Wisconsin Law School as its Office of Continuing Education and Outreach. That office was renamed Continuing Education and External Affairs in 2016. In 2021, the University of Wisconsin transitioned its publication responsibilities to the Wisconsin Court System's Office of Judicial Education. That same year, in partnership with the Wisconsin State Law Library, the Office of Judicial Education converted the production of supplemental releases from physical copies to an all-digital format. The entire set of Wisconsin Jury Instructions-Civil is now available at no cost to the user in Word and PDF format at https://wilawlibrary.gov/jury.

Characteristics of the Wis JI-Civil Model

Several characteristics of the civil jury instructions model add significantly to the product's strength and value. First and foremost is the model's orientation toward the trial judge. As the giving of instructions is exclusively a judicial function, a primary focus of the Committee is to assist colleagues on the trial bench who may handle a wide variety of cases. A common point of reference for the Committee when discussing a new or amended instruction is the hypothetical judge faced with a civil trial issue after rotating from a criminal or family law caseload.

Another critical aspect of the model's orientation toward the trial judge is the make-up of the Committee itself. The seven voting members of the Committee are ~~trial court~~ judges, and only they can approve proposed instructions or amendments. Additionally, the Committee's ability to approve and publish model instructions is done without any additional endorsement by the Judicial Conference or the Supreme Court. A direct result of this arrangement is that trial judges are allowed to use model instructions as guides instead of directives. When necessary, a trial judge may depart from the exact language of the instruction if it does not fit the facts of the case or when they believe an improvement to the model can be made. This model is opposed to a model, like that implemented in Missouri, in which instructions are approved by order of the state supreme court order and must be given without change.

Finally, another unique aspect of the civil jury instructions model is its association with the notion of "law in action." This concept examines the role of law, not just as it exists statutorily or in case law, but as it is actually applied in the courtroom. The

incorporation of this concept into the jury instructions model can be drawn back to the original partnership with the University of Wisconsin Law School and its pursuit of the Wisconsin Idea.[4] Utilizing the assistance of experts like Professor John E. Conway, early versions of the Wisconsin jury instructions committees provided an all-inclusive perspective of the law. Over the years, the committees have sought to continue this practice by recruiting member judges from across the state and support from non-voting emeritus members and law school faculty. Although the University of Wisconsin Law School is no longer part of the jury instructions model, the committees and the Wisconsin Court System still strive to achieve the objectives embodied in the "law in action" concept.

How to Use the Model Jury Instructions[5]

Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. Therefore, it must be emphasized that in very few cases will it be possible to use these instructions verbatim. They are fundamentally models, checklists, or minimum standards. A distinction must be drawn between general instructions, which may frequently be used without change, and the substantive law instructions, which may often have to be modified to fit the needs of the particular case.[6] The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered.[7]

The general instructions are broken down into descriptive categories and presented in the logical order in which they are usually given within each category. Three-digit numbers are used for the general instructions and four-digit numbers for those dealing with substantive law. In the substantive law areas, they are arranged numerically. The gaps between the numbers have been left purposely to permit the insertion of later material. Where there is no remaining space between two whole numbers (see, numbers 1026 and 1027) and it is necessary to insert another instruction, a decimal number is used (1026.5). Instructions that are alternatives bear the same whole number, with one having an "A" suffixed (see 1325 and 1325A).

It is suggested that the comment and the footnotes appearing below the instruction be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Editorial directions will appear in the body of the instructions in brackets and centered upon the page. These directions tell the user to, for example, select a proper paragraph, insert a paragraph from a different instruction, or to read the verdict question with which the instruction deals. Words and phrases which are to be used alternatively appear in parenthesis and italics. Alternative paragraphs are denoted by brackets at the beginning and end of each alternative paragraphs. Words and phrases which are not appropriate for every case, but which should be given in some situations, are also in brackets.

The book itself may be cited as "Wis JI-Civil" and each instruction by adding the appropriate number. For example, "Wis JI-Civil 405." It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he or she point out the nature of the change and the reason therefore.

INQUIRIES AND SUGGESTIONS

Inquiries and suggestions from judges and lawyers are among the most important sources of new business for the Committee. It is always informative to receive questions and suggestions from those the Committee is trying to serve. Individuals are encouraged to contact the reporter by phone, mail, or e-mail or to consult with any Committee member. Copies of approved but not published material are available from the reporter, as are working drafts.

A list of all current members is provided, beginning on the following page. A list of all the former judges who served on the Committee follows.

Civil Jury Instructions Committee

Bryce Pierson
Legal Advisor & Reporter – Jury Instructions
Office of Judicial Education
110 E. Main St., Ste. 200
Madison, WI 53703-3328
Phone: (608) 535-3233
Email: Bryce.pierson@wicourts.gov

The Civil Jury Instructions Committee
Current Members and Emeritus Members as of 2021

Judges

Hon. William Sosnay, Chair	Milwaukee Co.
Hon. Michael Fitzpatrick	Court of Appeals District IV
Hon. William Pocan	Milwaukee Co.
Hon. Michael Waterman	St. Croix Co.
Hon. Sarah Harless	Eau Claire Co.
Hon. Michael Aprahamian	Waukesha Co.
Hon. Emily Lonergan	Outagamie Co.

Emeritus Members

Hon. Francis Wasielewski
Hon. Daniel Dillon
Hon. Lisa Stark
Hon. Emily Mueller
Hon. Dennis Moroney
Hon. Michael Schumacher
Hon. Paul Reilly
Hon. Barbara Key

Reporter

Bryce Pierson	Wis. Office of Judicial Education

The Civil Jury Instructions Committee
Members

Judges

Hon. Helmuth F. Arps	(1959-1962)
Hon. M. Eugene Baker	(1959-1975)
Hon. Michael J. Barron	(1983-1996)
Hon. Dennis J. Barry	(1994-1997)
Chief Justice Bruce F. Beilfuss	(1959-1964)
Hon. Herbert A. Bunde	(1962-1963)
Hon George A. Burns, Jr.	(1976-1994)
Hon. Lewis J. Charles	(1962-1976)
Hon. William E. Crane	(1978-1994)
Hon. Richard J. Dietz	(1997-2006)
Hon. Daniel Dillon	(2005-2018)
Hon. Edward M. DuQuaine	(1959-1961)
Hon. Mark J. Farnum	(1979-1989)
Hon. Merrill R. Farr	(1962-1975)
Hon. James P. Fiedler	(1981-1991)
Hon. Richard G. Greenwood	(1983-1994)
Hon. Marc Hammer	(2017-2022)
Hon Gerald W. Jaeckle	(1989-1994)
Hon. P. Charles Jones	(1994-2004)
Hon. Barbara Key	(2016-2022)
Hon. Philip Kirk	(2006-2009)
Hon. Norris Maloney	(1964-1978)
Hon. Robert Mawdsley	(1997-2007)
Hon. Dennis Moroney	(2010-2020)
Hon. Emily Mueller	(2004-2014)
Hon. Gordon Myse	(1978-1983)
Hon. Harvey L. Neelen	(1959-1977)
Hon. J. Michael Nolan	(1991-2001)
Hon. Daniel Noonan	(2003-2013)
Hon. William I. O'Neill	(1959-1974)
Hon. Richard W. Orton	(1959-1961, 1973-1979)
Hon. Robert J. Parins	(1970-1982)
Hon. Andrew W. Parnell	(1959-1982)
Hon. Robert F. Pfiffner	(1970-1987)
Hon. Paul Reilly	(2005-2018)
Hon. John Roethe	(2003-2007)

Hon. Michael Schumacher	(2011-2021)
Hon Richard H. Stafford	(1987-1997)
Hon. Lisa Stark	(2001-2011)
Hon. Michael P. Sullivan	(1994-2003)
Hon. Joseph M. Troy	(1994-2003)
Hon. Albert J. Twesme	(1962-1980)
Hon. Clair H. Voss	(1974-1978)
Hon. Francis T. Wasielewski	(1996-2006)
Hon. Patrick Willis	(2006-2016)

Comment

1. The University of Wisconsin Extension Law Department was represented by Professor William Bradford Smith.

2. The University of Wisconsin Law School was represented by Professor John E. Conway.

3. The original 1960 edition included an introduction drafted by Judge Andrew W. Parnell. In that introduction, Judge Parnell provided the following claims and disclaimers made by the Committee concerning its work:

1. This book is the first tangible realization of a long-abiding dream of the Board of Circuit Judges relating to uniform jury instructions.
2. It is but a part of a projected end result.
3. It will be a readily available service to the trial judge in time of pressure of meeting deadlines on preparation of instructions.
4. It may be conveniently employed by the trial judge while the battle still rages about him, in his presence and hearing, deprived, as he then is, of the leisure and tranquility of legal research.
5. It will bring confidence to the new trial judges and remove for them the need of desperately seeking and gathering a disorganized file of prolix, unedited, and miscellaneous instructions from the usual sources of supply.
6. It will be an aid to the trial attorneys in preparing specific and pertinent requests for instructions.
7. It will avoid for the court the almost hopeless task of timely and correctly appraising, evaluating, and avoiding partial, slanted, and incomplete, or inaccurate submitted instructions at the close of trial.
8. It will minimize the ever-present hazards of hasty, ill-considered, or erroneous instructions.
9. It will reduce the frequency of retrials for avoidable errors.
10. It will make a small but fair contribution to the betterment of judicial administration in our state trial courts.

We Forcefully Disclaim that:

1. It its free from error, completely accurate, or a model of perfection in form statement,

or expression.

2. It is presented as a standard of instructions pattern to be blindly and unquestionably followed.
3. It is the final answer to all instructional problems.
4. It will remove all need for the trial judge's industry and ingenuity in the preparationof instructions.
5. It has grown to the full stature of its possibilities.
6. It will lessen the duties if the trial attorneys with respect to the preparation and submission of timely written instructions.
7. It is above criticism.
8. It forestalls any constructive suggestions for it improvement.
9. It is as clear, concise, and correct as it can or ought to be.

4. The Wisconsin Idea is often described as being based on the principle that "the boundaries of the University are the boundaries of the State." It also has a second aspect which recognizes that University faculty and staff who participate in activities like the jury instructions projects use the experience to enrich their teaching, research, and service responsibilities.

5. Much of the language provided in the "How to Use" section comes from both the Preface to the 1962 edition of Wisconsin Jury Instructions-Criminal authored by Editor John H. Bowers, and the Revised Preface to the 1978 edition of the Wisconsin Jury Instructions-Civil authored by Editor John E. Conway. The advice and expectations for how the instructions should be used provided by Mr. Bowers and Mr. Conway remain accurate today.

6. As Justice Currie stated in Sharp v. Milwaukee & Suburban Transport Co., 18 Wis.2d 467, 118 N.W.2d 905, 912 (1963): "While the instructions embodied in Wis JI-Civil - Part 1 are a valuable tool to the trial courts, charges to the jury sometimes require more than a compendium of extracts from these uniform instructions without varying their wording to fit the facts of the particular case at hand."

7. For example, a particular instruction may be limited to one ground of negligence; but in a trial where the evidence warrants submission of several grounds which are related, it may be necessary to modify the instructions suggested here to accommodate not only the facts of the case but also the impact of the two grounds of negligence on each other.

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80 RECORDING PLAYED TO THE JURY

You are about to (hear an audio recording) (hear and view an audiovisual recording). Recordings are evidence and you may consider them, just as any other evidence. Listen carefully; some parts may be hard to understand.

[You may consider the actions of a person, facial expressions, and lip movements that you can observe on videotapes to help you to determine what was actually said and who said it.]

[You will be provided a transcript to help you listen to the recording. If you notice any difference between what you heard on the recordings and what you read in the transcript(s), you must rely on what you heard, not what you read.]

COMMENT

This instruction was approved by the Committee in 2010. It is based on Wis JI-Criminal 158. This revision was approved by the Committee in September 2022; it added to the comment.

This draft was based on an instruction adapted from The Pattern Jury Instructions for the 7th Circuit, 3.17. [Available online at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf.]

Effective January 1, 2010, SCR 71.01 (2) is amended to create new subsection (e):

(2) All proceedings in the circuit court shall be reported, except for the following:

. . .

(e) Audio recordings of any type that are played during the proceeding, marked as an exhibit, and offered into evidence. If only part of the recording is played in court, the part played shall be precisely identified in the record.

In the Matter of Amendment of Supreme Court Rule 71.01 Regarding Required Reporting of Court Proceedings. 2009 WI 104

If the jury requests that a recording be played back during jury deliberations, see State v. Anderson, 2006 WI 77, ¶¶30-31, 291 Wis.2d 673, 717 N.W.2d 74 (overruled in part on other grounds. See State v. Alexander, 2013 WI 70, ¶¶26-28, 349 Wis. 2d 327, 833 N.W.2d 126): the jury should return to the courtroom and the recording should be played for the jury in open court.

The Committee recommends that the court or the parties make a record of exactly what was played during deliberations by noting the beginning and end times from the exhibit.

A helpful summary of the procedures that a trial judge should follow when an audio/visual recording has been received into evidence and played at trial, and a jury requests to listen to or watch the recording during deliberations is provided in CRIMINAL SM-9 When a Jury Requests to Hear/See Audio/Visual Evidence During Deliberations.

OFFICE OF JUDICIAL EDUCATION

2023

WISCONSIN JURY INSTRUCTIONS

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2020 SPORTS INJURY: RECKLESS OR INTENTIONAL MISCONDUCT

A participant in a (recreational) (amateur) (professional) athletic activity that includes physical contact is liable for injury caused to another participant during the activity if the participant who caused the injury acted recklessly or with intent to cause injury.

[A participant acts with intent to cause injury if (he) (she) engages in conduct with the intent to cause injury by that conduct. An intent to cause injury exists where the participant either means to cause injury by (his) (her) conduct or where an injury is almost certain to follow from this conduct.]

[A participant acts recklessly if (his) (her) conduct is in reckless disregard of the safety of another. It occurs where a participant engages in conduct under circumstances in which (he) (she) knows or a reasonable person under the same circumstances would know that the conduct creates a high risk of physical harm to another and (he) (she) proceeds in conscious disregard of or indifference to that risk. Conduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadvertence or lack of skill is not reckless conduct.]

In considering the conduct involved in this case, you should consider the sport involved; the rules, regulations, customs and practices governing the sport, including the types of contact and the level of violence generally accepted; the risks inherent in the game and those that are outside the realm of anticipation; and the protective equipment worn.

You should also consider the age and physical attributes of the participants and their respective skills and knowledge of the rules and customs of the game.

[If you find that (defendant) engaged in conduct and intended to cause injury by that conduct, however great or small, or that (defendant)'s conduct was almost certain to cause injury in some way, however great or small, then (defendant) acted with intent to injure.]

[If you find that (defendant) engaged in conduct which (he) (she) knew or a reasonable person under the same circumstance would know created a high risk of physical harm to another, and (he) (she) proceeded anyway, then (defendant) acted recklessly.]

COMMENT

This instruction and comment were approved in 1997. The comment was updated in 2006 and 2018. This revision was approved by the Committee in October 2022; it added to the comment.

The instruction is based on Wis. Stat. § 895.525(4m) which codified the theory espoused by the dissent in Lestina v. West Bend Mut. Ins. Co., 176 Wis.2d 901, 501 N.W.2d 28 (1993). The statute reads:

> **(4m)** LIABILITY OF CONTACT SPORTS PARTICIPANTS. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.
>
> (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

The Wisconsin Supreme Court has cited the language of paragraph 3 of this section with approval. See Noffke v. Bakke, 315 Wis. 2d 350, ¶ 36 (2009).

Paragraph four is taken from the majority opinion in Lestina. Although these considerations were intended to aid the fact-finder in defining actionable ordinary negligence in a sports injury context, the Committee thought they would be helpful in either intentional or reckless sports injury cases, as well.

For a case involving a sports-related injury, see Shain v. Racine Raiders Football Club, Inc., 2006 WI App 257, 297 Wis.2d 869, 726 N.W.2d 346.

Exculpatory releases. "It is well-settled that an exculpatory clause ... cannot, under any circumstances ... preclude claims based on reckless or intentional conduct." See Brooten v. Hickok Rehab. Servs., LLC, 2013 WI App 71, ¶10, 348 Wis. 2d 251, 831 N.W.2d 445. See also Werdehoff v. General Star Indemnity Co., 229 Wis. 2d 489, 600 N.W.2d 214 (Ct. App. 1999), and Schabelski v. Nova Casualty Company, 2022 WI App 41, 404 Wis.2d 217, 978 N.W.2d 530.

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LAW NOTE FOR TRIAL JUDGES

2400 MISREPRESENTATION: BASES FOR LIABILITY AND DAMAGES

Wisconsin recognizes three common law categories of misrepresentation: intentional, strict responsibility, and negligent misrepresentation. All three require that the defendant made an untrue representation of fact and that the plaintiff relied upon the representation. Intentional misrepresentation additionally requires that the defendant knowingly or recklessly made the untrue representation with the intent to deceive the plaintiff. Strict responsibility misrepresentation does not require a showing of an intent to deceive, rather the plaintiff must only show that the defendant had an economic interest in the transaction and made the representation on the defendant's personal knowledge under circumstances in which the defendant necessarily ought to have known the truth or untruth of the statement.[1] Negligent misrepresentation differs from intentional and strict responsibility misrepresentation in the circumstances and quality of the representation of fact. Under negligent misrepresentation, the untrue statement of fact need only be "negligently" made rather than intentional and the speaker does not require an economic interest in making the representation.

Intentional Misrepresentation

The elements of intentional misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation either knowing that it was untrue, or recklessly not caring whether it was

true or false; (4) the defendant made the representation with the intent to deceive the plaintiff in order to induce the plaintiff to act to plaintiff's pecuniary damage; and (5) the plaintiff believed that the representation was true and relied on it.[2] The plaintiff's reliance on the representation must be justifiable.[3]

Strict Responsibility Misrepresentation

The elements of strict responsibility misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it.[4] The plaintiff's reliance on the representation must be justifiable.[5]

Strict responsibility applies to those situations where public opinion calls for placing the loss on the innocent defendant rather than on the innocent plaintiff and requires the presence of two factors before liability may be found: (1) "a representation made as of defendant's own knowledge, concerning a matter about which he or she purports to have knowledge, so that he or she may be taken to have assumed responsibility as in the case of warranty, and (2) a defendant with an economic interest in the transaction into which the plaintiff enters so that defendant expects to gain some economic benefit."[6] The policy behind strict responsibility misrepresentation is that the speaker should know the pertinent

facts of which he or she is speaking or else the speaker should not speak.[7]

The doctrine of strict responsibility misrepresentation has primarily been utilized in cases involving property transactions,[8] such as where there has been a representation as to the identification, boundaries, quantity and quality of the land, and existence of certain improvements upon the land, all of which were untrue. As discussed below, the creation of the economic loss doctrine (ELD) in 1989 has greatly impacted common-law claims involving property transactions.

Negligent Misrepresentation

The elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it.[9] Negligence for misrepresentation, like other actions for negligence, requires a duty of care, or a voluntary assumption of duty.

Measurement of Damages

Wisconsin has adopted the "benefit-of-the-bargain" measure of damages for intentional[10] and strict responsibility[11] claims. The "benefit-of-the-bargain" gives the difference between the fair market value of the property in the condition when purchased and the fair market value of the property as it was represented.[12] The "out-of-pocket" rule, which gives the difference between what the plaintiff gave as consideration and what the plaintiff actually received, is utilized in cases of negligent misrepresentation.[13]

Economic Loss Doctrine

In 1989, the Supreme Court established the ELD, which requires transacting parties in Wisconsin to pursue only their contractual remedies when asserting an economic loss claim.[14] Its purpose is threefold: (1) to "maintain the fundamental distinction between tort and contract law;" (2) to "protect[] . . . 'parties' freedom to allocate economic risk by contract;' " and (3) to "encourage[] 'the party best situated to assess the risk [of] economic loss, the . . . purchaser, to assume, allocate, or insure against that risk.'"[15]

The ELD bars negligence and strict liability claims arising from consumer goods transactions.[16] The Supreme Court also has considered whether the ELD bars common law claims for intentional misrepresentation that occur "in the context of residential or noncommercial, real estate transactions."[17] The court concluded that, whether a buyer is a "commercial" or "residential" buyer, the ELD still bars the intentional misrepresentation claim.[18]

The Supreme Court has noted in other cases that the ELD does not apply if the contract was for a "service[]" rather than a "product."[19] Nor does the ELD apply to statutory claims, such as false advertising claims under Wis. Stat. § 100.18 or fraudulent misrepresentation claims under Wis. Stat. § 895.446.[20] One may recover "pecuniary" damages, costs, and reasonable attorney fees upon proof of a § 100.18 violation and "actual damages," all costs of litigation, and exemplary damages upon proof of a § 895.446 violation.[21]

The Supreme Court has recognized exceptions to the ELD.[22] First, the ELD "does not

bar a commercial purchaser's claims based on personal injury."[23] Second, the ELD "does not bar . . . claims based on . . . damage to property other than the product, or economic claims that are alleged in combination with noneconomic losses."[24] Third, the court has recognized a so-called "fraud in the inducement" exception.[25]

Regarding the first and second exceptions, the ELD merely bars "the recovery of purely economic losses . . . through tort remedies where the only damage is to the product purchased by the consumer."[26] So damage to a person or "other property" is not barred by the ELD.[27]

The Supreme Court has established a "two part test" to determine whether the other property exception applies.[28] First, if the "defective product and the damaged product are part of an 'integrated system' " the exception does not apply.[29] "If the product and damaged property are part of such a system, then any damage to that property is considered to be damage to the product itself."[30] Stated otherwise, "once a part becomes integrated into a completed product or system, the entire product or system ceases to be 'other property' for purposes of the economic loss doctrine."[31] So if the defective product is a "component of an integrated system," damage to the integrated system is non- compensable.[32] Examples of components in integrated systems include: (1) "cement in a concrete paving block;" (2) "a window in house;" (3) "a gear in a printing press," (4) "a generator connected to a turbine;" and (5) "a drive system in a helicopter."[33] Second, "[i]f the damaged property and the defective product are not part of an integrated system" courts apply the

"disappointed expectations" test.[34] The crux of the test is "whether the purchaser should have foreseen that the product could cause the damage at issue. When claimed damages are merely the result of disappointed expectations of a product's performance, the exception will not apply and the economic loss doctrine will bar recovery in tort."[35]

In 2003, the Supreme Court adopted a "narrow" fraud in the inducement exception to the ELD to promote "honesty, good faith and fair dealing during contract negotiations."[36] The exception applies if the plaintiff establishes three elements: (1) "that the defendant engaged in an intentional misrepresentation;" (2) "that the misrepresentation occurred before the contract was formed;" and (3) "that the alleged misrepresentation was extraneous to the contract."[37] To state the third element differently, the misrepresentation must be "extraneous to, rather than interwoven with, the contract;"[38] the misrepresentation "must 'concern[] matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract.'"[39]

Verdict

The verdict should be presented in alternatives if the evidence would permit findings on more than one of the three theories. The instructions on damages must indicate clearly to the jury which measure of damages to apply in connection with each finding.

NOTES:

1. Van Lare v. Vogt, Inc., 2004 WI 110, ¶32, 274 Wis. 2d 631, 683 N.W.2d 46.

2. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156

3. Id., ¶18. In Malzewski, the buyers waived their right to inspect the home despite the real estate condition report disclosing potential defects. The court found that the Malzewskis' reliance on the condition report was not justified to support a claim for intentional misrepresentation. Id.

4. Id., ¶19.

5. Id., ¶19.

6. Gauerke v. Rozga, 112 Wis. 2d 271, 280, 332 N.W.2d 804 (1983); see also Stevenson v. Barwineck, 8 Wis. 2d 557, 99 N.W.2d 690 (1959).

7. Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988).

8. Gauerke, 112 Wis. 2d 271; Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Lee v. Bielefeld, 176 Wis. 225, 186 N.W. 587 (1922); Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 692 (1921); First Nat'l Bank v. Hackett, 159 Wis. 113, 149 N.W. 703 (1914); Arnold v. National Bank of Waupaca, 126 Wis. 362, 105 N.W. 828 (1905); Matteson v. Rice, 116 Wis. 328, 92 N.W. 1109 (1903); Davis v. Nuzum, 72 Wis. 439, 40 N.W. 497 (1888); Bird v. Kleiner, 41 Wis. 134 (1876).

9. Malzewski, 296 Wis. 2d 98, ¶20. A claim based on "negligent misrepresentation inquires whether the buyer was negligent in relying upon the representation." Lambert v. Hein, 218 Wis. 2d 712, 731, 582 N.W.2d 84 (Ct. App. 1998). See also, Beuttler v. Marquardt Management Services, Inc., 2022 WI App 33, 404 Wis.2d 116,¶30, 978 N.W.2d 237 concerning the use of circumstantial evidence used to establish actual reliance upon the representation.

10. Anderson v. Tri State Home Improvement Co., 268 Wis. 455, 67 N.W.2d 853 (1954); Chapman v. Zakzaska, 273 Wis. 64, 76 N.W.2d 537 (1956).

11. Harweger v. Wilcox, 16 Wis.2d 526, 114 N.W.2d 818 (1962); Neas, 10 Wis.2d 47; Anderson v. Tri State Home Improvement Co., 268 Wis. 455.

12. See WIS JI-CIVIL 2405.

13. Gyldenvand v. Schroeder, 90 Wis. 2d 690, 280 N.W.2d 235 (1979).

14. Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶29, 389 Wis. 2d 669, 937 N.W.2d 37 (citing Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 148 Wis. 2d 910, 437 N.W.2d 213 (1989)).

15. Id., ¶29 (quoting Van Lare v. Vogt, Inc., 2004 WI 110, ¶17, 274 Wis. 2d 631, 683 N.W.2d 46) (third modification in the original).

16. State Farm Mutl. Auto Ins. V. Ford Motor Co., 225 Wis. 2d 305, 592 N.W.2d 201 (1999).

17. Below v. Norton, 2008 WI 77, ¶20, 310 Wis. 2d 713, 751 N.W.2d 351 (2008).

18. Id., ¶23.

19. See 1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 2006 WI 94,293 Wis. 2d 410, 716 N.W.2d 822; Linden v. Cascade Stone Co., 2005 WI 113, 283 Wis. 2d 60, 699 N.W.2d 189; Ins. Co. of N. Am. v. Cease Elec. Inc., 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462.

20. Hinrichs, 389 Wis. 2d 669, ¶55; Ferris v. Location 3 Corp., 2011 WI App 134, ¶12, 337 Wis. 2d 155, 804 N.W.2d 822.

21. See Wis JI-Civil 2418 & 2419.

22. Hinrichs, 389 Wis. 2d 669, ¶32 (citing John J. Laubmeier, Demystifying Wisconsin's Economic Loss Doctrine, 2005 Wis. L. Rev. 225, 228).

23. Id., ¶40 (quoting Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 402, 573 N.W.2d 842 (1998)).

24. Id., (quoting Daanen & Janssen, Inc., 216 Wis. 2d at 402).

25. See generally Id.

26. Hinrichs, 389 Wis. 2d 669, ¶40 (quoting State Farm Fire & Cas. Co. v. Hague Quality Water, Int'l, 2013 WI App 10, ¶6, 345 Wis. 2d 741, 826 N.W.2d 412).

27. Id., ¶40–41.

28. Id.

29. Id.

30. Id.

31. Id. (quoting Selzer v. Brunsell Bros., Ltd., 2002 WI App 232, ¶38, 257 Wis. 2d 809, 652 N.W.2d 806).

32. Id., ¶46.

33. Id.

34. Id., ¶41.

35. Id.

36. Digicorp, Inc. v. Ameritech Corp., 2003 WI 54, ¶34, 262 Wis. 2d 32, 662 N.W.2d 652.

37. Hinrichs, 389 Wis. 2d 669, ¶35.

38. Id., ¶35 (quoting Kaloti Enterprises v. Kellogg Sales Co., 2005 WI 111, ¶42, 283 Wis. 2d 555,

699 N.W.2d 205).

39. Id. (quoting Kaloti, 283 Wis. 2d 555, ¶42) (modifications in the original).

COMMENT

This Law Note was approved in 2018. The comment was revised in 2021. This revision was approved by the Committee in September 2022; it added to the notes.

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2401 MISREPRESENTATION: INTENTIONAL

To constitute intentional misrepresentation, there are five elements[1] which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts of conduct on the part of (defendant) [,or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties[2]].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter, such as quality, value, authenticity and the like, does not constitute a representation of fact.[3] However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support the speaker's opinion, may, in your discretion, be determined by you to be a representation of fact.[4] In making your determination, you may consider the form and manner of expression[5] [or the disparity of knowledge between the parties of the underlying facts;[6] or the existence of a trust or confidence relationship between the parties[7]].

Second, that the representation of fact was untrue.

Third, that such untrue representation was made by (defendant) knowing the

representation was untrue or recklessly without caring whether it was true or false. Representations made by a person who knows that he or she has no sufficient basis of information to justify them are reckless.[8]

Fourth, that (defendant) made the representation with intent to deceive and induce (plaintiff) to act upon it to (plaintiff)'s damage.[9]

Fifth, that (plaintiff) believed such representation to be true and relied on it.[10] [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.[11]] Representations are to be tested by their actual influence on the person to whom they are made [not upon the probable effect of such representation upon some other person[12]]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (plaintiff) would have acted in the absence of the representation.[13] It is not necessary that you find that such reliance was the sole and only motive inducing (plaintiff) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.[14]

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be untrue, then there can be no justifiable reliance as no one has the right to rely upon representation that he or she knew was untrue.[15]

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (plaintiff) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.[16]

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.[17]

SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?

(State the ultimate facts alleged to be relied on.)

Answer: _____

Yes or No

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

Was the representation untrue?

Answer: _____

Yes or No

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

Did (defendant) make the representation knowing it was untrue or recklessly without caring whether it was true or untrue?

Answer: _____

Yes or No

Question 4: If you answered "yes" to question 3, answer this question:

Did (defendant) make the representation with the intent to deceive and induce (plaintiff) to act upon it?

Answer: _____

Yes or No

Question 5: If you answered all the preceding questions "yes," answer this question:

Did (plaintiff) believe such representation to be true and justifiably rely on it to (his) (her) financial damage?

Answer: _____

Yes or No

Question 6: If you answered all the preceding questions "yes," answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

Answer: $ _____

NOTES:

1. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156.

2. John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶42, 303 Wis. 2d 34, 734 N.W. 2d 827; Van Lare v. Vogt, 2004 WI 110, ¶33, 274 Wis.2d 631, 683 N.W. 2d 46; Novell v. Migliaccio, 2010 WI App 67, ¶10, 325 Wis. 2d 230, 783 N.W. 2d 897 (Ct App 2010); Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am.Jur. Fraud and Deceit §§ 144-147 (1941); Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).

3. Bentley v. Foyas, 260 Wis. 177, 5 N.W.2d 404 (1952). See also United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

4. 37 Am.Jur.2d Fraud and Deceit §§ 49, 77 (1968); "Opinions may be statements of fact if the representee may rely on them without being guilty of a want of ordinary care and prudence." Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).

5. J. H. Clark Co. v. Rice, 127 Wis. 451,106 N.W. 231 (1906).

6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934); Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).

7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916); Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶ 13.

8. Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Bachman v. Salzer, 168 Wis. 277, 169 N.W. 279 (1919); Prosser, Law of Torts (3d) § 102 at 716 (1964); Tietsworth v. Harley-Davidson, Inc., supra, ¶ 13.

9. Malzewski v. Rapkin, supra note 1; Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Cluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966).

10. Household Finance Corp. v. Christian, supra note 9.

11. Miranovitz v. Gee, supra note 7.

12. Neas v. Siemens, supra note 6.

13. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297,64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

14. Household Finance Corp. v. Christian, supra note 9; First National Bank of Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1964).

15. Household Finance Corp. v. Christian, supra note 9.

16. Prosser, Law of Torts (3d) § 103 at 731 (1964). Plaintiff must give ordinary attention to facts easily within his purview, Kraft v. Wodill, 17 Wis.2d 425, 430, 117 N.W.2d 261 (1962); Plaintikow v. Wolk, 190 Wis. 218, 222, 208 N.W. 922 (1926). To succeed on a claim for fraudulent misrepresentation, the representation must be a fact and made by the defendant, the representation must have been false, and the plaintiff must have believed the representation was true and relied on it to his damage. Foss v. Madison Twentieth Century Theaters, 203 Wis.2d 210, 551 N.W.2d 862 (Ct. App. 1996), citing Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969). In Foss, the court said that the law will not permit a person to predicate damage upon statements which he or she does not believe to be true, for if he or she knows they are false, it cannot be said that he or she is deceived by them. Citing First Credit Corp. v. Behrend, 45 Wis.2d 243, 172 N.W.2d 668 (1969). The court said no one has the right to rely on representations he or she knows to be untrue.

17. Restatement, Second, Torts, §§ 540, 541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74,13 N.W.2d 534 (1944); 152 A.L.R. 459 (1944).

COMMENT

This instruction and comment were approved by the Committee in 1969. The comment was revised in 1997, 2001, 2004, 2014, 2016, 2017, and 2018. This revision was approved by the Committee in September 2022; it added to the comment.

For burden of proof, see Wis JI-Civil 205.

For punitive damages, see Wis JI-Civil 1707.1.

Short form of ultimate fact (as used in Combined Verdict: Deceit or Negligence) was approved in Rud v. McNamara, 10 Wis.2d 41, 47, 102 N.W.2d 248 (1960), because: "Too many inquiries tend to confuse juries."

Intentional Misrepresentation to Induce Continued Employment. The Wisconsin Supreme Court has refused to recognize a new cause of action for intentional misrepresentation to induce continued employment. Mackensie v. Miller Brewing Co., 2001 WI 23, ¶ 21, 241 Wis.2d 700, 623 N.W.2d 739.

Rescission. Rescission is a remedy for intentional misrepresentation claims. Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969); Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451. The misrepresentation must be material. Bank of Sun Prairie v. Esser, 155 Wis.2d 724, 456 N.W.2d 585 (1990); Mueller, supra.

Pecuniary. The Committee changed "pecuniary" to "financial" for plain language purposes.

Circumstantial evidence used to establish actual reliance. Wisconsin law does not require direct evidence to prove elements of every cause of action. See WIS JI—CIVIL 230. Furthermore, Wisconsin law permits the use of circumstantial evidence to establish actual reliance upon the representation as required by element five. See Beuttler v. Marquardt Management Services, Inc., 2022 WI App 33, 404 Wis.2d 116, ¶30, 978 N.W.2d 237. The burden of proof on summary judgment "…can also be met by reasonable inferences drawn from circumstantial evidence." Techworks, LLC v. Wille, 2009 WI App 101, 318 Wis. 2d 488, ¶2, 770 N.W.2d 727.

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2402 MISREPRESENTATION: STRICT RESPONSIBILITY

To constitute strict responsibility misrepresentation in this case, there are five elements which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of (defendant) [, or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing;[1] or where there is a relationship of trust or confidence between the parties[2]].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter such as quality, value, authenticity and the like, does not constitute a representation of fact.[3] However, a statement of opinion may, in your discretion, be determined by you to be a representation of fact.[4] In making your determination, you may consider the form and manner of expression[5] [or the disparity of knowledge between the parties of the underlying facts;[6] or the existence of a trust or confidence relationship between the parties[7]].

Second, that the representation of fact was untrue.

Third, that (defendant) made the representation as a fact based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of the statement. (Plaintiff) must prove that (defendant)

represented the fact from (his) (her) personal knowledge, or was so situated that (he) (she) either had particular means of ascertaining the pertinent facts, or (his) (her) position made possible complete knowledge and (his) (her) statements fairly implied that (he) (she) had it.[8]

Fourth, that (defendant) had an economic interest in the transaction, or, in other words, that (defendant) stood to make a financial gain if (plaintiff) entered into the transaction.[9] It is immaterial whether (defendant) in good faith believed such representation to be true.[10] Likewise, it is immaterial whether (defendant) had any intent to deceive (plaintiff).[11]

Fifth, that (plaintiff) believed such representation to be true and relied on it.[12] [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.[13]] Representations are to be tested by their actual influence on the person to whom made, [not upon the probable effect of such representation upon some other person[14]]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation.[15] It is not necessary that you find that such reliance was the sole and only motive inducing (him) (her) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.[16]

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be false, then there can be no justifiable reliance as no one has the right to rely upon a representation that he or she knew was untrue.[17]

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (he) (she) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.[18]

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.[19]

SUGGESTED SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?

(State the ultimate facts alleged to be relied on.)

ANSWER: _____

Yes or No

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

Was the representation untrue?

ANSWER: _____

Yes or No

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

question:

Did (defendant) make the representation as a statement based on (his) (her) personal knowledge or in circumstances in which (he) (she) necessarily ought to have known the truth or untruth of such a representation?

ANSWER: _____

Yes or No

Question 4: If you answered "yes" to both questions 1, 2, and 3, then answer this question:

Did (defendant) have an economic interest in the transaction?

ANSWER: _____

Yes or No

Question 5: If you answered "yes" to questions 1, 2, 3 and 4, then answer this question:

Did (plaintiff) believe the representation to be true and justifiably rely on it to (his)(her) financial damage?

ANSWER: _____

Yes or No

Question 6: If you answered all the preceding questions "yes," then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $_____

NOTES:

1. Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am. Jur. Fraud and Deceit §§ 144-147 (1941).

2. Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).

3. Bentley v. Foyas, 260 Wis. 177, 50 N.W.2d 404 (1952).

4. 37 Am. Jur. Fraud and Deceit § 77 (1941). Prosser, Law of Torts (3d) § 104 at 742 (1964).

5. J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906).

6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934).

7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).

8. Gauerke v. Rozga, 112 Wis. 2d 271, 332 N.W.2d 804 (1983); Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (Ct. App. 1988); Fowler and Harper, "A Synthesis of the Law of Misrepresentation," 22 Minn. L. Rev. 987-88 (1938).

9. Gauerke v. Rozga, supra note 8; Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Malzewski v. Rapkin, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156.

10. Ohrmundt v. Spiegelhoff, 175 Wis. 214, 184 N.W. 69 (1921).

11. Haentz v. Toehr, 233 Wis. 583, 390 N.W. 163 (1940).

12. Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Malzewski v. Rapkin, supra note 9.

13. Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916).

14. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960).

15. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297, 64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

16. Household Finance Corp. v. Christian, supra note 12.

17. Malzewski v. Rapkin, supra note 9; First National Bank in Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1961).

18. Prosser, supra § 103 at 731.

19. Restatement, Second, Torts, §§ 540,541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74, 13 N.W.2d 543 (1944); 152 A.L.R. 459 (1944).

COMMENT

This instruction and comment were approved by the Committee in 1969 and revised in 2018. This revision was approved by the Committee in September 2022; it added to the comment.

See Law Note Wis JI-Civil 2400 for a discussion of the economic loss doctrine.

For burden of proof, see Wis JI-Civil 205.

Circumstantial evidence used to establish actual reliance. Wisconsin law does not require direct evidence to prove elements of every cause of action. See WIS JI—CIVIL 230. Furthermore, Wisconsin law permits the use of circumstantial evidence to establish actual reliance upon the representation as required by element five. See Beuttler v. Marquardt Management Services, Inc., 2022 WI App 33, 404 Wis.2d 116, ¶30, 978 N.W.2d 237. The burden of proof on summary judgment "…can also be met by reasonable inferences drawn from circumstantial evidence." Techworks, LLC v. Wille, 2009 WI App 101, 318 Wis. 2d 488, ¶2, 770 N.W.2d 727.

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2403 MISREPRESENTATION: NEGLIGENCE

To constitute negligent misrepresentation in this case, there are four elements which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of (defendant)[, or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter such as quality, value, authenticity and the like, does not constitute a representation of fact. However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support (his) (her) opinion, may in your discretion, be determined by you to be a representation of fact. In making your determination, you may consider the form and manner of expression [or the disparity of knowledge between the parties of the underlying facts; or the existence of a trust or confidence relationship between the parties].

Second, that the representation of fact was untrue.

Third, that (defendant) was negligent in making this representation. The word

"negligence" has the same meaning as the phrase, "failure to exercise ordinary care." A person fails to exercise ordinary care when, without intending to do any wrong, (he) (she) makes a misrepresentation under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such misrepresentation will subject the interests of another person to an unreasonable risk of damage. [A person in a particular business or profession owes a duty to exercise the care that is usually exercised by persons of ordinary intelligence and prudence engaged in a like kind of business or profession.]

The making of a misrepresentation, even though made with an honest belief in its truth, is negligence if there was a lack of reasonable care in ascertaining the facts [or if it was made without the skill or competence required in a particular business or profession].

Fourth, (plaintiff) believed the representation to be true and relied on the representation to (his) (her) damage. The question is whether the representation actually misled (plaintiff) and materially affected (his) (her) conduct. In determining whether (plaintiff) actually relied upon the representation, the test is whether (he) (she) would have acted in the absence of the representation. It is not necessary that you find that such reliance was the sole and only motive inducing (him) (her) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.

If you are called upon to answer the question as to whether (plaintiff) was negligent, then the question presented to you is whether (plaintiff) failed to exercise that care and caution which a person of ordinary intelligence and prudence usually exercised in a like or

similar situation. In other words, (plaintiff) was negligent if (he) (she) failed to exercise that degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances to ascertain the truth or untruth of the representation. [You are cautioned that the definition of "negligence" is different than the instruction on reliance previously given to you. The test here is the effect of the representation upon a person of ordinary intelligence and prudence and not the test of how the representation affected (plaintiff).]

The last question is the comparative negligence question. By your answer to this question you will determine how much or to what extent each party is to blame for the damages, if any, that (plaintiff) suffered. You will weigh the respective contributions of these parties to such damages, if any, and considering the conduct of the parties named in the question, considered as a whole, determine whether one made the same or a larger contribution than the other, and, if so, to that extent it exceeds that of the other. (Plaintiff) has the burden of proving the percentage attributable to (defendant). (Defendant) has the burden of proving the percentage attributable to (plaintiff).

SUGGESTED SPECIAL VERDICTS

Question 1: Did (defendant) make the representation of fact as to _____? (State the ultimate facts alleged to be relied on.)

ANSWER: _____
Yes or No

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

Was the representation untrue?

ANSWER:_____
Yes or No

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

Was (defendant) negligent in making the representation?

ANSWER:_____
Yes or No

Question 4: If you answered "yes" to question 3, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it?

ANSWER:_____
Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER:_____
Yes or No

Question 6: If you answered "yes" to both questions 3 and 5, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

100 %

Question 7: If you answered "yes" to question 4, then answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) out-of-pocket loss?

ANSWER: $ _____

COMBINED VERDICT: DECEIT OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact, knowing it was untrue, or recklessly without caring whether it was untrue, and with the intent to deceive and induce (plaintiff) to act upon it?

ANSWER:_____
Yes or No

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

[In view of all of the evidence, including (plaintiff)'s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

ANSWER:_____
Yes or No

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

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damages?

ANSWER: $ _____

If you answered "no" to either or both questions 1 and 2, then answer the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to (plaintiff)?

ANSWER:_____

Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it to (his) (her) financial damage?

ANSWER:_____

Yes or No

Question 6: If you answered "yes" to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER:_____

Yes or No

Question 7: If you answered "yes" to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

100 %

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER:$_____

COMBINED VERDICT: STRICT RESPONSIBILITY OR NEGLIGENCE

Question 1: Did (defendant) make an untrue representation of fact as based on (his) (her) own personal knowledge, or in circumstances in which (he) (she) necessarily ought to have known the facts?

ANSWER:_____
Yes or No

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

[In view of all of the evidence, including (plaintiff)'s education, background, and right to rely without independent investigation,] Did (plaintiff) believe the representation to be true and justifiably rely on it to (his) (her) financial damage?

ANSWER:_____
Yes or No

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

What sum of money will fairly and reasonably compensate (plaintiff) for (his) (her) financial damage?

ANSWER: $ _____

If you answered "no" to either or both questions 1 and 2, then answer the following questions:

Question 4: Did (defendant) negligently make an untrue representation of fact to the (plaintiff)?

ANSWER:_____
Yes or No

Question 5: If you answered "yes" to question 4, then answer this question:

Did (plaintiff) believe the representation to be true and rely on it to

(his) (her) financial damage?

ANSWER:_____
Yes or No

Question 6: If you answered "yes" to questions 4 and 5, then answer this question:

Was (plaintiff) negligent in relying upon the representation?

ANSWER:_____
Yes or No

Question 7: If you answered "yes" to questions 4 and 6, then answer this question:

Assuming the total negligence which caused the injury to be 100%, what percentage of the negligence do you attribute to:

(a) (Defendant)?

ANSWER: _____%

(b) (Plaintiff)?

ANSWER: _____%

100 %

Question 8: What sum of money would fairly and reasonably compensate (plaintiff) for (his) (her) out-of-pocket loss?

ANSWER: $_____

COMMENT

This instruction and comment were approved by the Committee in 1969. The instruction was revised in 2018. The comment was revised in 2014, 2017, and 2018. This revision was approved by the Committee in September 2022; it added to the comment.

For burden of proof, see Wis JI-Civil 200

See Grube v. Daun, 173 Wis.2d 30, 496 N.W.2d 106 (Ct. App. 1992).

For a discussion of puffery as a question of fact, see United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

For a discussion of the effect of "as is" provisions, see Grube v. Daun, supra.

Circumstantial evidence used to establish actual reliance. Wisconsin law does not require direct evidence to prove elements of every cause of action. See WIS JI—CIVIL 230. Furthermore, Wisconsin law permits the use of circumstantial evidence to establish actual reliance upon the representation as required by element five. See Beuttler v. Marquardt Management Services, Inc., 2022 WI App 33, 404 Wis.2d 116, ¶30, 978 N.W.2d 237. The burden of proof on summary judgment "…can also be met by reasonable inferences drawn from circumstantial evidence." Techworks, LLC v. Wille, 2009 WI App 101, 318 Wis. 2d 488, ¶2, 770 N.W.2d 727.

2500 DEFAMATION: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

The three basic components of a defamatory communication are:

a. the statement is false,
b. the statement is communicated by speech, conduct, or in writing to a person other than the person defamed, and
c. the communication is unprivileged and tends to harm one's reputation as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.

1. **Elements**. The elements of a common law action for defamation are: (1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. Ladd v. Uecker, 2010 WI App 28, 323 Wis.2d 798, 780 N.W.2d 216; Laughland v. Beckett, 2015 WI App 70, 365 Wis.2d 148, 870 N.W.2d 466.

2. **Libel or Slander**. A defamation action can be founded upon either libel or slander. Martin v. Outboard Marine Corp., 15 Wis.2d 452, 113 N.W.2d 135 (1962).

3. **Truth**. Substantial truth of the statement is an absolute defense to a defamation claim. Schaefer v. State Bar of Wis., 77 Wis.2d 120, 252 N.W.2d 343 (1977); DeMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973). "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

4. **Publication**. Actionable defamation requires publication or communication. The required parts of this element are: (a) the words must be intentionally or negligently communicated to a person other than the person defamed, and (b) the communication must identify the person defamed expressly or by reasonable inference. Ranous v. Hughes, 30 Wis.2d 452, 461-62, 141 N.W.2d 251 (1966); Schoenfeld v. Journal Co., 204 Wis. 132, 235 N.W. 442 (1931); Wis. Stat. § 802.03(6); Restatement, Second, Torts § 577 (1977).

5. **Opinion**. Generally, the defamatory communication must be a statement of fact. An expression of opinion generally cannot be the basis of a defamation action. However, where the defamer departs from expressing "pure opinion" and communicates what the courts have described as "mixed opinion," then liability may result. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), the Supreme Court stated that there can be no such thing as a "false idea." "Mixed opinion" is a communication which blends an expression of opinion with a statement of fact. This type of a communication is actionable if it implies the assertion of undisclosed defamatory facts as the basis of the opinion. Restatement, Second, Torts § 566 (1977). Communications are not made nondefamatory as a matter of law merely because they are phrased as opinions, suspicions, or beliefs. Converters Equip. Corp. v. Condes Corp., 80 Wis.2d 257, 263-64, 258 N.W.2d 712 (1977); Laughland v. Beckett, 2015 WI App 70.

6. **Privilege**. Some defamatory statements are protected by privileges created by common law, state and federal constitutions, or by statute. These privileges are discussed on pages 7 and 8 of this law note.

KEY DEFINITIONS

1. **Defamatory**. Wisconsin has adopted the definition of "defamatory" stated in Restatement, Second, Torts § 559 (1977):

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement, 3 Torts, p. 156, sec. 559; Ranous v. Hughes, 30 Wis.2d 452, 460 (1966).

2. **Implied Malice**. Wisconsin law applies a strict liability theory to the communication of a defamatory falsehood by a private defendant about a private plaintiff when there is no conditional privilege involved. The law implies "malice" in the communication and no showing of "malice" is required to recover compensatory damages. Denny v. Mertz, 106 Wis.2d 637, 657, 318 N.W.2d 141 (1982).

3. **Express Malice**. Express malice arises from ill will, bad intent, or malevolence towards the defamed party. Such malice exists when slanderous words are uttered or libelous words are published from motives of ill will, envy, spite, revenge, or other bad motives against the person defamed. Polzin v. Helmbrecht, 54 Wis.2d 578, 587, 196 N.W.2d 685 (1972). This type of malice is sometimes referred to as "common-law" malice. See page 4 for a discussion of the difference between actual and express malice.

4. **Actual Malice**. Actual malice exists when there is a statement made with knowledge that it is false or with reckless disregard of whether such statement is false or not. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Polzin, supra at 587-88. See page 4 for a discussion of the difference between actual and express malice.

5. **Public Figure**. The court in Denny v. Mertz, supra at 649-50, adopted the following test based on Gertz v. Robert Welch, Inc., supra, to determine whether an individual is a public figure:

> Analyzing the above cases, we consider the following criteria applicable to whether a defamation plaintiff may be considered a public controversy. First, there must be a public controversy. While courts are not well-equipped to make this determination as pointed out in Gertz, the nature, impact, and interest in the controversy to which the communication relates has a bearing on whether a plaintiff is a public figure. Secondly, the court must look at the nature of the plaintiff's involvement in the public controversy to see whether he has voluntarily injected himself into the controversy so as to influence the resolution of the issues involved. Factors, relevant to this test are whether the plaintiff's status gives him access to the media so as to rebut the defamation and whether a plaintiff should be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Gertz, 418 U.S. at 344-45.

The status of the plaintiff as a public figure or public official is significant in determining the level of "fault" the plaintiff must show to recover. A public figure suing a defendant protected by a conditional constitutional privilege must show actual malice instead of simple negligence.

TRIAL COURT'S INQUIRY ON WHETHER THE STATEMENT IS DEFAMATORY

The initial inquiry in a defamation action is usually whether the words at issue in the lawsuit are capable of a defamatory meaning. This inquiry is for the trial judge and is normally presented on a motion to dismiss. On a motion to dismiss, it is the function of the court to determine whether a communication is capable of a defamatory meaning. If the communication is capable of a defamatory as well as a nondefamatory meaning, then a jury question is presented. Only if the communication cannot reasonably be understood as defamatory should the motion be granted. Starobin v. Northridge Lakes, 91 Wis.2d 1, 287 N.W.2d 747 (1980). See also Denny v. Mertz, supra; Westby v. Madison Newspapers, Inc., 81 Wis.2d 1, 5, 259 N.W.2d 691 (1977); Schaefer v. State Bar of Wis., supra; DiMiceli v.

Klieger, supra; Polzin v. Helmbrecht, supra; Lathan v. Journal Co., 30 Wis.2d 146, 140 N.W.2d 417 (1966). The question to the jury is whether the communication made was reasonably understood in a defamatory sense by the persons to whom it was published. Schaefer, supra at 124-25.

The legal standard for determining whether a statement is capable of conveying a defamatory meaning is whether the language is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one. Meier v. Meurer, 8 Wis.2d 24, 29, 98 N.W.2d 411 (1959). In Frinzi v. Hanson, 30 Wis.2d 271, 276, 140 N.W.2d 259 (1966), the court said:

> The words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered.

Thus, Wisconsin applies the "reasonable interpretation" test. The trier of fact should not give the statement a "strained" or "unstructured construction," and the statement should be evaluated in context. Schaefer v. State Bar of Wis., supra. On a motion to dismiss, how does this "reasonable interpretation" standard relate to the requirement that complaints are to be liberally construed? Wis. Stat. § 802.03(6) governs pleadings in an action for libel or slander:

> (6) LIBEL OR SLANDER. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

MALICE IN DEFAMATION ACTIONS

Wisconsin defamation law recognizes three types of malice: implied malice, actual malice, and express malice.

1. Implied Malice. The element of malice creates some confusion in analyzing the various types of defamation actions. As a general principle, Wisconsin tort law holds that malice is an element of actionable defamation. Denny v. Mertz, supra at 657. However, the supreme court has implied the existence of such malice from the publication of a defamatory statement itself unless a conditional privilege applies. Polzin v. Helmbrecht, supra; Denny v. Mertz, supra at 657.

2. Actual Malice and Express Malice. In cases where a constitutional privilege is involved or where punitive damages are being sought, the difference between actual and

express malice is important. The definitions of these two types of malice are contained in the following passage from Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975):

"Actual malice" in defamation cases refers to a constitutional standard that is something other than malice as such. As this court said in Polzin v. Helmbrecht (1972), 54 Wis.2d 578, 587, 588, 196 N.W.2d 685:

At the outset it is important to note that there are two types of malice: "Express malice" is that malice described in the jury instruction used in this case, that is "ill will, envy, spite, revenge," etc.; the supreme court in Rosenbloom also referred to this type of malice as "common law malice." "Actual malice" (referred to in the New York Times case) is not malice at all, rather it is knowledge that a statement was false or published with reckless disregard of whether it was false or not. "Actual malice" is what is required for a constitutional determination of libel under New York Times.

"Express" and "actual" malice are very different concepts.

The term "actual malice" arises when there has been an abuse of a constitutional conditional privilege, i.e., where one makes a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan (1964), 376 U.S. 254, 279, 280 84 Sup. Ct. 710, 11 L.Ed.2d 686; 95 A.L.R.2d 1412.

The problem of actual malice arises in the cases involving first amendment protections afforded to the media, such as newspapers, television and radio, or comments made about public officers or public figures.

DEFENSES TO A DEFAMATION CLAIM

1. Truth. As stated earlier, the "substantial truth" of the alleged defamatory statement is an absolute defense to the claim. Schaefer v. State Bar of Wis., supra. In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). The holding in Philadelphia Newspapers, Inc. appeared to be in contrast, at least in cases involving a media defendant, to Wisconsin common, law which placed the burden of proving that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982). The resulting uncertainty as to whether Denny v. Mertz applied to defamation actions involving non-

media defendants was resolved in Laughland v. Beckett, 365 Wis. 2d 148, ¶¶23, 26 (Ct. App. 2015). There, the Court held that when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true. Id. at ¶¶23, 26. Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege.

2. **Privilege**. Wisconsin law recognizes certain privileges which protect the communicator of a defamatory statement from liability. These privileges have been created to allow citizens, public officials, and media personnel to engage in communications which are useful to society with some protection from liability for the consequences which result from the communications. The most litigated of these privileges involve conditional privileges.

a. Absolute privilege

This type of privilege protects participants in judicial and legislative proceedings. Spoehr v. Mittlestadt, 34 Wis.2d 653, 150 N.W.2d 502 (1967); Hartman v. Buerger, 71 Wis.2d 393, 398-400, 238 N.W.2d 505 (1976); Restatement, Second, Torts §§ 583-92 (1977). As a general rule, this privilege protects the communicator of the defamatory statement if the statement has some relation to the matter involved in the proceeding.

b. Conditional privileges created by common law

Wisconsin law recognizes that some communications are conditionally privileged. In Lathan v. Journal Co., supra at 152, the court stated:

There are also certain occasions where a defamation is conditionally privileged. Conditional privileges or immunities from liability for defamation are based on public policy which recognizes the social utility of encouraging the free flow of information in respect to certain occasions and persons, even at the risk of causing harm by the defamation.

At common law, a person is privileged to make a statement about another person even though it is defamatory, so long as he or she is making the statement to protect certain defined interests and he or she did not abuse the privilege.

The types of communications that are protected by a conditional privilege are those statements (1) to protect the communicator's interest; (2) to protect the interest of the recipient or a third person; (3) to protect a common interest or a family relationship; and (4) statements to a person who may act in the public interest. Restatement, Second, Torts

§§ 594-98 (1977).

When the defamatory communication is privileged, the law will not imply or impute malice. Hett v. Ploetz, 20 Wis.2d 55, 121 N.W.2d 270 (1963). If the privilege is abused, the communicator of the defamatory statement is not protected. In earlier case law, the court had held that this type of privilege is "conditional" because the statement must be reasonably calculated to accomplish the privileged purpose and must be made without "malice." Hett v. Ploetz, supra. Later, in Ranous v. Hughes, supra, the court recognized that the word "malice" expressed in the Hett decision was "probably unfortunate." 30 Wis.2d at 468. The court, instead of retaining the "malice" concept from Hett, adopted the Restatement approach which speaks in terms of "abuse of privilege." The court then recognized the five conditions contained in Restatement, Second, Torts which may constitute an abuse of the privilege: (1) because of the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter (see §§ 600-602); (2) because the defamatory matter is published for some purpose other than that for which the particular privilege is given (see § 603); (3) because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege (see § 604); (4) because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged (see § 605); or (5) the publication includes unprivileged matter as well as privileged matter (see § 605A).

A finding of express malice, i.e., ill will, spite, etc., will also constitute an abuse of the conditional privilege. Calero, supra; Polzin, supra at 584; Ranous v. Hughes, supra at 469; Restatement, Second, Torts § 603 Comment a (1977).

Subsequent to the decision of the United States Supreme Court in Gertz v. Robert Welch, Inc., supra, the Restatement substituted a new test of abuse of privilege, namely: "actual knowledge of falsity or reckless disregard as to truth or falsity."

C. Conditional privileges created by the United States Constitution

A constitutional conditional privilege refers to the protection afforded media sources (and also to nonmedia persons, where the statement involves a matter of a public interest or concern) under the first amendment. The principal case establishing this constitutional privilege is New York Times Co. v. Sullivan, supra. The effect of the constitutional conditional privilege is that the court will require some finding of "fault" on the part of the defendant instead of allowing the strict liability which exists at common law where malice is implied. The degree of "fault" required by this privilege depends on the nature of the plaintiff. Where the plaintiff is a private individual, only negligence by the defendant media

source or individual is required to be shown. Denny v. Mertz, supra. However, where the plaintiff is a public official or public figure, a higher level of fault must be shown. In this type of case, the plaintiff must show that the defamatory statement was published with "actual malice," i.e., actual knowledge or with reckless disregard of whether the statement was true or false. In discussing the Gertz decision, the court, in Denny v. Mertz, explained the rationale in Gertz for permitting a less rigorous showing of "fault" when a private plaintiff was seeking recovery. The court, in Denny, supra at 645, stated:

The [Gertz] court justified divergent standards for public figures and private individuals on the ground that public figures had greater access to the media and so could more effectively counteract defamations. It also reasoned that public figures had, by seeking prominent roles for themselves, assumed a risk of being libeled, which was not true of private individuals. 418 U.S. at 344.

In Gertz v. Robert Welch, Inc., supra, the United States Supreme Court permitted the states to adopt the degree of protection to be afforded statements involving private persons so long as the states did not impose liability without fault. The Wisconsin Supreme Court, in response to Gertz, stated that in a defamation action involving a private plaintiff in a matter of private concern, the required showing of fault is simple negligence. Denny v. Mertz, supra.

D. Statutory privilege

Wisconsin statutes create an absolute privilege which protects persons reporting legislative, judicial, or other public official proceedings. Wis. Stat. § 895.05(1) states:

Damages in Actions For Libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication of such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

TYPES OF DEFAMATION ACTIONS

Generally, an action for defamation will fall into one of four categories according to

the nature of the parties. At the end of this law note, there is a chart which compares the various types of defamation actions. These categories are:

a. Private individual versus a private individual with no conditional privilege applicable.

b. Private individual versus a private individual with a conditional nonconstitutional privilege applicable.

c. Private individual versus a media defendant which will always involve a conditional constitutional privilege.

d. Public official or public figure versus a media or nonmedia defendant which will always involve a conditional constitutional privilege.

In each of these categories, the requisite showing of "fault" is different.

1. When the action is brought by a private individual against another private individual, with no privilege involved, existence of malice is implied from the libelous matter itself. Denny, supra at 657.

2. When the action is brought by a private individual against another private individual, with a conditional nonconstitutional privilege involved, liability can be established by proof of the defamatory statement, Calero v. Del Chemical Corp., supra at 500, and abuse of the conditional privilege, Ranous, supra at 468.

3. When the action is brought by a private individual against a media defendant, thereby involving a conditional constitutional privilege, liability is established by proof that the media defendant was negligent in broadcasting or publishing the defamatory statement. Denny, supra at 654.

4. In a case involving a public official or public figure, as defined in Denny, against a media defendant or a nonmedia individual, thereby involving a conditional constitutional privilege, the plaintiff must prove actual malice. New York Times Co., supra at 726; Calero, supra at 500; Polzin, supra at 586; see also Dalton v. Meister, 52 Wis.2d 173, 188 N.W.2d 494 (1971).

BURDEN OF PROOF TO ESTABLISH CAUSE OF ACTION

1. In a case involving a private individual against another private individual, with no

privilege involved, existence of malice is implied. The burden of proof of showing the defamatory statement was made is the ordinary burden. Denny, supra at 657.

2. In the case involving a private individual versus a private individual, with a conditional nonconstitutional privilege involved, the plaintiff has the ordinary burden of proof to show the defamatory statement was made; i.e., greater weight of the credible evidence to a reasonable certainty. Calero, supra at 500. The defendant has the ordinary burden to prove privilege as a defense to the action. Calero, supra at 499.

3. In the case involving a private individual versus a media defendant, the plaintiff has the ordinary burden of proof; i.e., the greater weight of the credible evidence to a reasonable certainty. There is no Wisconsin case directly stating that the plaintiff has the ordinary burden of proof. However, the Gertz decision permits individual states to define for themselves the appropriate standard of liability in such cases. The court in Denny, supra at 654, established for Wisconsin that a private individual need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. With negligence as the standard, the Committee concluded that ordinary burden of proof applies.

4. In cases involving a public official or a public figure versus a media defendant or private individual, the plaintiff has the middle burden of proof, i.e.; by evidence that is clear, satisfactory, and convincing to a reasonable certainty. Polzin, supra at 586; Calero, supra at 500.

RECOVERY OF COMPENSATORY DAMAGES

It is not necessary in libel actions to plead or prove actual damages of a pecuniary nature, called special damages. Dalton v. Meister, supra; Lawrence v. Jewell Companies, Inc., 53 Wis.2d 656, 193 N.W.2d 695 (1972). If the writing alleged to be libelous is determined by the court to be capable of a defamatory meaning, an allegation of general damages is sufficient. Slanderous statements may, in certain instances, be classified as defamatory and slanderous per se, and, in such instances, the plaintiff may plead and recover general damages. Starobin v. Northridge Lakes Co., supra. Oral statements imputing certain crimes, a loathsome disease, or affecting the plaintiff in his business, trade, profession, or office, or of unchastity to a woman are actionable without proof of special damages. All other slander not falling into these seemingly artificial categories is not actionable without alleging and proving special damages. Martin v. Outboard Marine Corp., supra.

In Denny v. Mertz, supra, the court stated that items of damage recoverable in libel

and slander actions in Wisconsin are set forth in Wis JI-Civil 2516.

The burden of proof is the ordinary civil burden.

RECOVERY OF PUNITIVE DAMAGES

In cases involving a private individual against a private individual, whether or not a conditional unconstitutional privilege is involved, the plaintiff must establish express malice to recover punitive damages. Calero supra at 506; Dalton v. Meister, supra at 179. In cases involving a private individual against a media defendant, the plaintiff must prove actual malice to recover punitive damages. Gertz, supra; Denny, supra at 659.

In cases involving a public official or public figure against a media defendant or nonmedia individual, the plaintiff can only recover punitive damages upon a showing of express malice.

It should finally be noted that in a case such as this where the New York Times standards apply and where punitive damages are sought, there must be a finding of both express and actual malice to support an award of punitive damages: "Express malice" to meet the criteria for awarding punitive damages and "actual malice" to meet the constitutional requirements for liability at all. Polzin at 588.

The decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), establishes the standard for the required degree of proof to be applied to punitive damage claims. In Wangen, the court held that the middle burden of proof shall apply to punitive damage claims. Therefore, the plaintiff must establish its punitive damage claims to a reasonable certainty by evidence that is clear, satisfactory, and convincing. This burden of proof applies to all types of defamatory actions, whether involving conditional privileges or not.

ADDITIONAL REFERENCE MATERIAL

For additional discussion of defamation law in Wisconsin, see Brody, "Defamation Law of Wisconsin," 65 Marq. L. Rev. 505 (1982).

TYPES OF DEFAMATION ACTIONS - CHART

The following page compares the different types of defamation actions as to elements and burdens of proof.

TYPES OF DEFAMATION ACTIONS IN WISCONSIN

Type of Plaintiff	Type of Defendant	Degree of "Fault" Necessary for Compensatory Damages	Burden of Proof for Compensatory Damages	Conduct Necessary for Punitive Damages	Burden of Proof for Punitive Damages
Private individual	Private with no confidential privilege	Defamatory statement only (malice is implied or imputed)	Ordinary Calero v. Del Chemical 68 Wis.2d 487, 500	Express malice Dalton v. Meister 52 Wis.2d 173, 179, Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Private with nonconstitutional conditional privilege	Defamatory statement and abuse of privilege Ranous v. Hughes, 30 Wis.2d 452, 468	Ordinary, Calero, supra at 500	Express malice Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, p. 183	Negligence Gertz v. Robert Welsh, Inc., 418 U.S. 323, 347, held that states establish the standard of liability; Denny v. Mertz, 106 Wis.2d 636, 654 established the negligence standard	Ordinary	Actual malice Denny, supra at 659 Gertz, supra at 350	Middle - Wangen, supra at 300
Public figure	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, supra at 183	Actual malice New York Times v. Sullivan, 376 U.S. 254, 279-280 Calero, supra at 500 Polzin v. Helmbrecht, 54 Wis.2d 578, 587-588	Middle Calero, supra at 500	Express malice Polzin, supra at 588	Middle - Wangen, supra at 300

DEFAMATION SERIES

The following list shows the instructions on substantive law and damages included in this defamation series.

2501 Defamation: Private Individual Versus Private Individual, No Privilege
2505 Defamation: Truth as a Defense (Nonmedia Defendant)
2505A Defamation: Truth of Statement (First Amendment Cases)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard)

2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice)
2513 Defamation: Express Malice
2516 Defamation: Compensatory Damages
2517.5 Defamation: Public Official: Abuse of Privilege
2520 Defamation: Punitive Damages

COMMENT

This law note was approved in 1987 and revised in 2016. The format was revised in 2002. This revision was approved by the Committee in September 2022.

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2501 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL, NO PRIVILEGE

Question 3 (2) asks whether the statement made (published) by (defendant) was defamatory.

A defamatory statement is one which: (1) is false, (2) is communicated (by speech) (by conduct) (in writing) to a third person, and (3) tends so to harm the reputation of another as to lower the person in the estimation of the community or deters others from associating or dealing with the person. If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.[1]

The action of defamation is based upon the principle that a person's reputation and good name is of great value. Once such reputation and good name have been damaged by statements of another person, restoration is virtually impossible.

It is not necessary that the defamatory statement be communicated to a large or even a substantial number of persons. It is enough if it is communicated to a single person other than the one defamed. Nor is it necessary that the statement be made (published) with the intention to defame, for the intention of the speaker (author) is not material.

In determining whether (defendant) made or published a defamatory statement, you should consider the whole context of the communication, giving the particular words of defamation their natural and ordinary meaning.

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the statement made (published) by (defendant) was defamatory.

(As to Question 4 (3), the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF, ORDINARY, WIS JI-CIVIL 200.)

(As to Question 5 (4), express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513.)

(As to Question 6 (5), punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

(As to Questions 5 (4) and 6 (5), give BURDEN OF PROOF, MIDDLE, WIS JI-CIVIL 205.)

SPECIAL VERDICT - TRUTH OF THE STATEMENT RAISED AS A DEFENSE:

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: _____

Yes or No

Question 2: If you answered "yes" to Question 1, then answer this question: Was such statement substantially true?

Answer: _____

Yes or No

[Note: In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, (1986). The holding

in Philadelphia Newspapers, Inc. appeared to be in contrast, at least in cases involving a media defendant, to Wisconsin common law, which placed the burden that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, 106 Wis.2d 636, 661 n. 35, 318 N.W.2d 141 (1982). The resulting uncertainty as to whether Denny v. Mertz applied to defamation actions involving non-media defendants was resolved in Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26. There, the Court held that when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true. Id. at ¶¶23, 26. Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege.]

Question 3: If you answered "no" to Question 2, then answer this question: Was such statement defamatory?

Answer: _____

Yes or No

Question 4: If you answered "yes" to Question 3, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

Question 5: If you answered "yes" to Question 3, then answer this question: Did (defendant) act with express malice in making (publishing) the defamatory statement?

Answer: _____

Yes or No

Question 6: If you answered "yes" to Question 5, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

SPECIAL VERDICT - TRUTH OF THE STATEMENT NOT RAISED AS A DEFENSE:

Question 1: Did (defendant) say (insert alleged statement, e.g., plaintiff is a thief)?

Answer: _____

Yes or No

Question 2: If you answered "yes" to Question 1, then answer this question: Was such statement defamatory?

Answer: _____

Yes or No

Question 3: If you answered "yes" to Question 2, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

Question 4: If you answered "yes" to Question 2, then answer this question: Did (defendant) act with express malice in making (publishing) the defamatory statement?

Answer: _____

Yes or No

Question 5: If you answered "yes" to Question 4, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

NOTES

1. "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

COMMENT

This instruction was originally approved in 1986 and revised in 1991. The comment was revised in 1987. This 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 September 2022.

Denny v. Mertz, 106 Wis.2d 636, 658, 318 N.W.2d 141 (1982); Martin v. Outboard Marine Corp. 15 Wis.2d 452, 462-63, 113 N.W.2d 135 (1962); Restatement, Second, Torts §§ 577, 558, 559 (1977).

See also Law Note, Wis JI-Civil 2500.

In all areas not protected by first amendment constitutional considerations, the burden of proof is the ordinary civil burden. Calero v. Del Chemical Corp. 68 Wis.2d 487, 500, 228 N.W.2d 737 (1975).

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2505 DEFAMATION: TRUTH AS A DEFENSE (NONMEDIA DEFENDANT)

(Defendant) claims that the statements (made) (published) are true (substantially true). Truth of a statement is a defense in a defamation action. In fact, it is enough if the statement (made) (published) is substantially true.

It is not necessary for (defendant) to establish the exact truth of the statement (made) (published). Slight inaccuracies of expression are immaterial provided that the statement is true in substance.

The burden of proof is upon (defendant) to establish the truth (substantial truth) of the statement.

COMMENT

This instruction was originally approved in 1986 and revised in 1988. The comment was revised in 1987, 2011, and 2014. The Committee approved this revision in September 2022; it added to the comment.

This instruction should be used in defamation cases where no constitutional conditional privilege exists.

Denny v. Mertz, 106 Wis.2d 636, 661 n.35, 318 N.W.2d 141 (1982); DiMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973); Restatement, Second Torts § 581A (1965). See also Terry v. Journal Broadcast Corp., 2013 WI App 130, 351 Wis.2d 479, 840 N.W.2d 255.

In Lathan v. Journal Co., 30 Wis.2d 146, 151, 140 N.W.2d 417 (1966), the court established the decision-making format for a defamation action. It stated:

> In an action for libel the court must first determine whether the writing complained of is defamatory. If it is not, that ends the matter. In the event of defamation, the court must consider the defenses alleged. A matter, though defamatory, is still not actionable if it is true, since truth is a complete defense. Williams v. Journal Co. (1933), 211 Wis. 362, 370, 247 N.W. 435.

In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). The holding in Philadelphia Newspapers, Inc. appeared to be in contrast, at least in cases involving a media defendant, to Wisconsin common law, which placed the burden of proving that the statement was true on

the defendant as an affirmative defense. Denny v. Mertz, supra. The resulting uncertainty as to whether Denny v. Mertz applied to defamation actions involving non-media defendants was resolved in Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26. There, the Court held that when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true. Id. at ¶¶23, 26. Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege.

In Denny v. Mertz, supra at 660-61 n.35, a 1982 decision, the Wisconsin Supreme Court reaffirmed earlier decisions which held that the defendant has the burden of proving as a defense the truthfulness of the alleged defamatory statement. The court strongly disagreed with cases from other jurisdictions that had put the burden of proving the falsity of the statement on the plaintiff. Following the decision in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), other jurisdictions held that the Gertz constitutional protections apply to both media and nonmedia defendants. Because the plaintiff, under Gertz, must establish "fault" on the part of the defendant, jurisdictions applying the constitutional protections to all defendants do not require the defendant to prove truthfulness as a defense and instead require the plaintiff to prove falsity. This major shift in evidentiary burden was strongly rejected by the Wisconsin Supreme Court in Denny v. Mertz, supra at 660-61, when it noted:

> The decision in Jacron (350 A.2d 688) also stated that "truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests upon the plaintiff." 350 A.2d at 698. We strongly disagree with this allocation of the burden of proving the truth of a statement and reaffirm the law of this state that if a defamation defendant relies on the truth of his statement to avoid liability, he must affirmatively prove such truthfulness as a defense, rather than forcing the plaintiff to prove that the statement is false. See, e.g., Schaefer, 77 Wis.2d at 125.

2505A DEFAMATION: TRUTH OF STATEMENT (FIRST AMENDMENT CASES)

(Defendant) claims that the statements (made) (published) are (true) (substantially true). Truth of a statement is a defense in a defamation action. In fact, it is enough if the statement (made) (published) is substantially true.

The burden of proof is upon (plaintiff) to establish that the statement is false[1]. If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

NOTES

1. "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

COMMENT

This instruction and comment were approved in 1988. This revision was approved by the Committee in September 2022; it added to the notes and comment.

See Comment, Wis JI-Civil 2505.

In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). The holding in Philadelphia Newspapers, Inc. appeared to be in contrast, at least in cases involving a media defendant, to Wisconsin common law, which placed the burden of proving that the statement was true on the defendant as an affirmative defense. Denny v. Mertz, supra. The resulting uncertainty as to whether Denny v. Mertz applied to defamation actions involving non-media defendants was resolved in Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26. There, the Court held that when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true. Id. at ¶¶23, 26. Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege.

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2507 DEFAMATION: PRIVATE INDIVIDUAL VERSUS PRIVATE INDIVIDUAL WITH CONDITIONAL PRIVILEGE

(As to Question 1, give the definition of "defamation" from Wis JI-2501.)

Question 2 asks whether (defendant), in making (publishing) the statements about (plaintiff), abused (his) (her) privilege.

Under certain circumstances, a person has a privilege to make (publish) defamatory statements about another. However, the privilege does not protect the speaker (author) if it is abused.

In this case, (defendant) had the privilege of making (publishing) statements about (plaintiff) for the reason that (insert the purpose for which the court has determined a conditional privilege exists - e.g., advising a prospective employer about the work capabilities of a former employee). However, it is for you to determine whether (defendant)'s privilege to make (publish) statements about (plaintiff) was abused under the circumstances of this case.

(Select the appropriate paragraphs.)

[1. An abuse of (defendant)'s privilege occurred if, at the time of (making) (publishing) the statements, (he) (she) knew that such statements were false or (made) (published) them in reckless disregard as to the truth or falsity of them. If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.[1]

(Give that portion of Wis JI-Civil 2511 that deals with reckless disregard of the truth

or falsity of defamatory statements.)]

[2. An abuse of (defendant)'s privilege occurred if (defendant) made the statements (made publication of the statements available) to persons who had no interest in or connection to (insert purpose).

In some cases, the statements, to be effective, must be made at a time and place even though third persons are present and likely to overhear the statements. That does not constitute an abuse of the privilege. However, the privilege is abused if the statements are unnecessarily made in the presence of third persons even though the information is given to the party who is entitled to receive it.]

[3. An abuse of (defendant)'s privilege occurred if (he) (she) did not reasonably believe that the making (publishing) of the statements was necessary to accomplish the purpose for which the privilege was given, that is (insert purpose).]

[The facts and circumstances available to (defendant) at the time the statements were made (published) must have been sufficient to cause a person of reasonable caution and prudence to believe that the information, in its entirety, was necessary to accomplish the purpose for which the privilege was given.]

[4. An abuse of (defendant)'s privilege occurred if (he) (she) made (published) statements necessary for the purpose (insert purpose - e.g., (plaintiff)'s work habits to a prospective employer) and then made additional defamatory statements not necessary to accomplish that purpose.]

[5. If the (defendant) made (published) statements believed by (him) (her) to be true

and then added statements known by (him) (her) to be false[2], the privilege would be abused.]

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (defendant) abused (his) (her) privilege in making (publishing) the statements.

(As to Question 3, the damage question, give COMPENSATORY DAMAGES, WIS JI-CIVIL 2516, and BURDEN OF PROOF: ORDINARY, WIS JI-CIVIL 200.)

(As to Question 4, express malice, give EXPRESS MALICE, WIS JI-CIVIL 2513, and BURDEN OF PROOF: MIDDLE, WIS JI-CIVIL 205.)

(As to Question 5, punitive damages, give PUNITIVE DAMAGES, WIS JI-CIVIL 2520.)

SPECIAL VERDICT: (Proof of falsity assumed)

Question 1: Were the statements made (published) by (defendant) defamatory?

Answer: _____

Yes or No

Question 2: If you answered "yes" to Question 1, then answer this question: In making (publishing) the statements, did (defendant) abuse (his) (her)

privilege?

Answer: _____

Yes or No

Question 3: If you answered "yes" to Question 2, then answer this question: What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statements?

Answer: $ _____

Question 4: If you answered "yes" to Question 2, then answer this question: Did (defendant) act with express malice in making (publishing) the statements?

Answer: _____

Yes or No

Question 5: If you answered "yes" to Question 4, then answer this question: What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $ _____

NOTES

1. "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

2. See note 1, supra.

COMMENT

This instruction was approved in 1986 and revised in 2002. The comment was updated in 2003 and 2020. This revision was approved by the Committee in September 2022; it added to the notes.

See Restatement, Second, Torts § 619 (1977).

Whether a privilege exists at all is a question for the court. If the facts are in dispute, the jury determines the issues of fact, and the court decides whether the facts found by the jury make the publication privileged.

The jury determines whether the defendant abused the privilege.

For occasions in which a conditional privilege would arise, see Restatement, Second, Torts §§ 594-598A, (1977).

In Ranous v. Hughes, 30 Wis.2d 452, 468, 141 N.W.2d 251 (1966), the supreme court listed the four conditions which constituted an abuse of conditional privilege under the Restatement rules. Since that time, the Restatement had changed the wording of the first abuse of privilege from:

> (1) The defendant either did not believe in the truth of the defamatory matter or, if believing the defamatory matter to be true had no reasonable grounds for so believing; . . . Ranous, at 468.

to:

(a) knows the matter to be false; or
(b) acts in reckless disregard as to its truth or falsity. Restatement, Second, Torts § 600 (1977).

In addition, the Restatement, Second, Torts § 605A (1977), has added a fifth rule constituting an abuse of conditional privilege. See also Restatement, Second, Torts Appendix, § 605, p. 117, Reporter's Note.

The five occasions giving rise to abuse of conditional privilege, as stated in the Restatement, Second, Torts §§ 600, 603-605A (1977) are:

1. The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity.

2. The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege.

3. The defamatory matter is published for some purpose other than for which the privilege is given.

4. The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given.

5. The publication includes unprivileged matter as well as privileged matter.

Every person has a lawful right to act for the protection of his or her (own bodily security, property, business or profession). When so acting, a person has the privilege, if such privilege is not abused, of making statements about another which may later turn out to be false and defamatory without being subjected to liability for the making of such statements. This privilege, however, is a conditional privilege which, if abused, does not shield a defendant from the liability imposed upon one who makes false and defamatory statements about another. Also, a person has a right to act for the protection of a third person, when either the life or property of such third person is imperiled by a threatened serious crime. When so acting, a person has the privilege, if such privilege is not abused, of making statements which may later turn out to be false and defamatory without being subjected to liability for the making of such statements.

A person also has a lawful right to act with respect to a matter which affects an important public interest when such public interest requires the communication of defamatory matter to a public officer or private citizen.

Employee References: Statutory Privilege Under Wis. Stat. § 895.487(2) for Employers. Wisconsin courts have long recognized a common law conditional privilege that protects communications that enable a prospective employer to evaluate an employee's qualifications. See Hett v. Ploetz, 20 Wis.2d 55, 59, 121 N.W.2d 270 (1963). The Wisconsin legislature has also codified this privilege under Wis. Stat. § 895.487, which permits an employer to make statements about a former employee. This statute reads:

> An employer who, on the request of an employee or a prospective employer of the employee, provides a reference to that prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference. The presumption of good faith under this subsection may be rebutted only upon a showing by clear and convincing evidence that the employer knowingly provided false information in the reference, that the employer made the reference maliciously or that the employer made the reference in violation of s. 111.322. (Emphasis added.)

In Gibson v. Overnite Transportation Company, 2003 WI App 210, ¶11, 267 Wis.2d 429, 671 N.W.2d 388 the employer/defendant argued that, to abuse the statutory privilege, statements by the employer must be made with actual malice, i.e. with knowledge of falsity or with reckless disregard for the truth. The court of appeals concluded that the Wisconsin Legislature intended to keep the same standard of malice as existed in the common law-express malice and, therefore, actual malice is not required. The court said:

> § 17. Our conclusion is further supported by the jury instructions. See State v. Olson, 175 Wis.2d 628, 642 n. 10, 498 N.W.2d 661 (1993) ("[W]hile jury instructions are not precedential, they are

of persuasive authority."). Like Wis. Stat. § 895.487(2), Wis JI-Civil 2507 lists ways in which the jury can find that an employer abused its privilege to make statements about former employees. First, the jury may find that the defendant made the statements knowing that they were false or in reckless disregard as to the truth or falsity of them. This is actual malice. However, the jury may also find defamation where the defendant made statements solely from spite or ill will. This is express malice, which is what the jury found here. Actual malice is not required.

In this context, "express malicious" requires a "showing of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed." Gibson v. Overnite Transportation Company, supra, at ¶11.

In Hussain v. Ascension Sacred Heart – St. Mary's Hosp., No. 18-cv-00529-wmc, 2019 WL 5310677 (W.D. Wisc. October 21, 2019), the plaintiff appeared to argue that malice should be inferred from the mere fact that the "forever letter" evaluation drafted by his employer was overall negative. The court, however, concluded that such an argument "not only falls short of the legal standard for malice, it would also read out of existence any privilege extended in section 895.487(2)." Hussain, supra.

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2511 DEFAMATION: PUBLIC FIGURE VERSUS MEDIA DEFENDANT OR PRIVATE FIGURE WITH CONSTITUTIONAL PRIVILEGE (ACTUAL MALICE)

(As to question 1, give the definition of "Defamation," from Wis JI-Civil 2501.)

Because of protections afforded a defendant such as (defendant) under the First Amendment of the Constitution, (plaintiff) must prove that any defamatory statements made (published) by (defendant) were made (published) with actual malice.

Your answers to questions 2 and 3 of the verdict will determine whether (defendant) acted with actual malice in making (publishing) the alleged defamatory statements.

A person acts with actual malice when such person (makes) (publishes) a defamatory statement knowing that the statement is false[1] or with reckless disregard of whether it is false or not.[2] If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

To find that (defendant) acted with reckless disregard of the truth or falsity of the statement, you must determine that (defendant) had serious doubts as to the truth of the statement or had a high degree of awareness that the statement was probably false.[3]

Reckless conduct is not measured by whether a reasonably prudent person would have made (published) the statement or would have investigated the facts more thoroughly before making (publishing) it.[4] It is not enough to show that (defendant) made (published) the statement from feelings of ill will or a desire to injure (plaintiff).[5] There must be

sufficient evidence to permit the conclusion that (defendant) in fact entertained serious doubts as to the truth of the statement made (published). Making (publishing) a statement with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.[6]

In the course of your deliberations, you need not accept as conclusive (defendant)'s testimony that (he) (she) believed the statement to be true or had no serious doubt as to the truth of the statement. You may consider such factors as whether there were obvious reasons for (defendant) to doubt the veracity of (his) (her) information or whether the statement is so inherently improbable that only a reckless person would have made (published) it.[7]

(Plaintiff) has the burden of proof to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (defendant) made (published) the statement knowing it was false or with reckless disregard of whether it was false or not.[8]

(As to question 4, the damage question, give Wis JI-Civil 2516.)

(As to question 5, express malice, give Wis JI-Civil 2513.)

(As to question 6, punitive damages, give Wis JI-Civil 2520.)

(As to questions 4, 5, and 6, give Wis JI-Civil 205.)

SPECIAL VERDICT

Question 1: Was the statement made (published) by (defendant) (insert statement, e.g., that John Jones took a bribe) defamatory?

Answer: _____

Yes or No

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

Did (defendant) make (publish) such statement knowing that it was false?

Answer: _____

Yes or No

Question 3: If you answered "no" to question 2, answer this question:

Did (defendant) make (publish) such statement with reckless disregard of its truth or falsity?

Answer: _____

Yes or No

Question 4: If you answered "yes" to either of questions 2 or 3, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) because of such defamatory statement?

Answer: $_____

Question 5: If you answered "yes" to either of questions 2 or 3, answer this question:

Did (defendant) act with express malice in making (publishing) such statement?

Answer: _____

Yes or No

Question 6: If you answered "yes" to question 5, answer this question:

What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $

NOTES

1. "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

2. The term "actual malice" was defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and cited by Wisconsin in Polzin v. Helmbrecht, 54 Wis.2d 578 (1972), and Calero v. Del Chemical Corp., 68 Wis.2d 487 (1975). See also Wis JI-Civil 2500, Law Note.

3. Restatement, Second, Torts § 580A, Comment d (1977); Garrison v. State of Louisiana, 379 U.S. 64 (1964).

4. Restatement, Second, Torts § 580A, Comment d (1977); St. Amant v. Thompson, 390 U.S. 727 (1968).

5. Restatement, Second, Torts § 580A, Comment d (1977).

6. St. Amant, 88 S. Ct. 1325.

7. St. Amant, 88 S. Ct. 1326.

8. Calero, supra note 1, at 500.

COMMENT

This instruction and comment were approved in 1986. Nonsubstantive editorial changes were made to the instruction in 1993. The comment was updated in 1997. This 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 September 2022; it added to the notes.

The question of whether a person is a limited purpose public figure is an issue left solely to the court to decide as a matter of law, not an issue of fact to be decided by the jury. Lewis v. Coursolle Broadcasting of Wisconsin, Inc., 127 Wis.2d 105, 110, 377 N.W.2d 166 (1985). The court of appeals has said, that while the ultimate question of whether a plaintiff is a limited purpose public figure is a question of law, material factual disputes on this issue can arise. These factual disputes are not to be left to the jury at trial but should be resolved by the trial court, after an evidentiary hearing solely on that issue. Bay View Packing Co. v. Taff, 198 Wis.2d 653, 543 N.W.2d 522 (Ct. App. 1995).

There is an obvious problem of proof when the case is based upon reckless disregard of whether the defamatory statement is false or not. This problem was recognized by the U.S. Supreme Court in St. Amant v. Thompson, 390 U.S. 727, 88 St. Ct. 1323 (1968):

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes or case law. 88 S. Ct. 1325.

2513 DEFAMATION: EXPRESS MALICE

Express malice exists when a defamatory statement is (made) (published) concerning a person from motives of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives against the person defamed.

Express malice cannot be inferred solely from the fact that the statement was false[1] and injurious to (plaintiff). If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

In determining whether (defendant) acted with express malice in (making) (publishing) the statement, you will take into consideration the words used and all other facts and circumstances existing at the time the statement was made (published).

NOTES

1. "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

COMMENT

This instruction and comment were approved by the Committee in 1985. Nonsubstantive editorial changes were made to the instruction in 1993. This revision was approved by the Committee in September 2022, it added to the notes.

The definition of express malice as here used was adopted by the Wisconsin Supreme Court in Polzin v. Helmbrecht, 54 Wis.2d 578, 587-88, 196 N.W.2d 685 (1972), and approved in Calero v. Del Chemical

Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975).

In Reed v. Keith, 99 Wis. 672, 675, 75 N.W 392 (1898), the supreme court held that the malice which must be proved to support an award of punitive damages could not be inferred solely from the fact that the words were false and injurious to the plaintiff. Express malice could be implied from that fact along with all other facts and circumstances, including inferences drawn from the utterance of slanderous words.

2550 INVASION OF PRIVACY: PUBLICATION OF A PRIVATE MATTER: WIS. STAT. § 995.50(2)(c)

Every person in Wisconsin enjoys a right of privacy. In this case, the plaintiff, (_____), contends that (his) (her) right of privacy was violated by the defendant, (_____), publicizing a matter concerning (his) (her) private life, namely (here describe the alleged publication).

For (plaintiff) to establish that (his) (her) right of privacy was violated, (he) (she) must prove four separate elements:

1. (Defendant) made a public disclosure of true facts concerning (plaintiff) and that the facts were communicated either to the public at large or a sufficient number of persons to insure that the facts become a matter of public knowledge.

2. The facts disclosed must be private facts. The term "private facts" suggests that the subject matter concerns something that (plaintiff) would not ordinarily disclose to anybody but (his) (her) family or close personal friends. It does not include information about a person that is already available to the public as a matter of public record.

3. The private matter must be one that would be highly sensitive to a reasonable person of ordinary sensibilities. In this regard, you may consider the information disclosed about (plaintiff) in relation to the customs of the time and place where the disclosure was made, [(plaintiff)'s occupation], and the habits of neighbors and fellow citizens. Only if the facts disclosed are such that a reasonable person would be seriously aggrieved by their

disclosure is this element satisfied.

4. (Defendant), in disclosing the facts, acted either recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts disclosed, or (defendant) actually knew that the public had no legitimate interest in knowing the facts.

If you conclude that the disclosure of the facts concerns a matter of legitimate public concern, then there is no invasion of privacy.

[Burden of Proof: Ordinary, see Wis JI-Civil 200]

SPECIAL VERDICT

1. Did (defendant) violate (plaintiff)'s right of privacy by _____?

Answer:

Yes or No

COMMENT

This instruction and comment were approved by the Committee in 1993. The instruction was revised in 2006. The comment was updated in 1995, 2006, 2009, 2014, and 2015. This revision was approved by the Committee in September 2022; it added to the comment.

This instruction addresses one of the four possible invasions of privacy set forth in Wis. Stat. § 995.50(2), namely § 995.50(2)(c). The four types of invasions are:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

(c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed.

It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

(d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.

Public Disclosure. In Zinda v. Louisiana Pacific Corp., 149 Wis.2d 913, 929, 440 N.W.2d 548, (1988), the Wisconsin Supreme Court interpreted the first element under § 995.50(2)(am)3 as requiring "publicity," meaning that "the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." See also Restatement 2d, Torts, sec. 652D, Comment a. at 384."

Therefore, "publicity" differs from "publication"—as the term "publication" is used "in connection with liability for defamation"—in that a "publication" "includes any communication by the defendant to a third person." RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a. "The distinction, in other words, is one between private and public communication," Id., with only the defendant's public communication being actionable under § 995.50(2)(am)3., Zinda, 149 Wis. 2d at 929. Moreover, a communication to the public at large necessarily means that the information **reaches the public**. See Id.; see also RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a.

For a discussion of the "public disclosure" sufficient to support a claim under subsection (c), see Hillman v. Columbia County, 164 Wis.2d 376, 395 n. 10, 474 N.W.2d 913 (Ct. App. 1991); Olson v. Red Cedar Clinic, 2004 WI App. 102, 273 Wis.2d 728, 681 N.W.2d 306. See also Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

In Pachowitz v. LeDoux, 2003 WI App 120, 265 Wis.2d 631, 666 N.W.2d 88, the court of appeals rejected the appellant's assertion that a disclosure of private information to one person can never constitute "publicity." Further, the court said it was not persuaded that the use of the term "persons" opposed to "person" in the 2003 version of this jury instruction requires a disclosure to more than one person. The court concluded "that disclosure of private information to one person or to a small group does not, as a matter of law in all cases, fail to satisfy the publicity element of an invasion of privacy claim. Rather, whether such a disclosure satisfies the publicity element depends upon the facts of the case and the nature of plaintiff's relationship to the audience who received the information." Pachowitz v. LeDoux, supra, at ¶ 19-25.

Privileges. Section 995.50(3) states that the right of privacy is to be interpreted in accordance with the "developing common law of privacy, including defenses of absolute and qualified privilege . . ." For the treatment of a conditional privilege, see Wis. JI-Civil 2507.

Section 995.50(2)(a) and (b) describe invasions of privacy which do not warrant a standard instruction in that the subject matter of these subparagraphs are self-explanatory and in most instances, liability under these two sections will be decided by one fact question which contains a description of the privacy invasion set out in the statute. For a claim under subsection (d), see Wis JI-Criminal 1396.

A quasi-judicial officer and court-appointed expert witness enjoy absolute immunity so long as the statements "bear a proper relationship to the issues." Snow v. Koeppl, 159 Wis.2d 77, 464 N.W.2d 215 (Ct. App. 1990).

Elements. The Committee believes that a claim based on a violation of § 995.50(2)(c), which is embodied in the foregoing instruction, requires a more detailed jury instruction in light of Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 440 N.W.2d 548 (1989), wherein our supreme court discusses the necessary elements to prove a cause of action under this subparagraph. See also Hillman v. Columbia County, 164 Wis.2d 376, 474 N.W.2d 913 (Ct. App. 1991).

2722 THEFT BY CONTRACTOR (Wis. Stat. § 779.02(5); § 779.16)[1]

Theft by contractor, is committed by one who, under an agreement for the improvement of land, receives money from the owner, and who, without consent of the owner, contrary to his or her authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims are paid [in full] [proportionally in case of a deficiency].[2]

To sustain a claim based on theft by contractor, the plaintiff must prove the following elements:

First, (defendant) entered into an oral or written agreement for the improvement of land. (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an improvement of land.

Second, (defendant) received money from the owner under the agreement for the improvement of land. ["Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.[3]]

Third, (Defendant) [intentionally][4] (used) (retained) (concealed) part or all of the money for a purpose other than the payment of claims due or to become due from (defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency].[5] [In deciding whether this element has been proved, you may consider whether the claim was subject to a bona fide dispute. A "bona

fide" claim arises from a dispute that is real, actual, genuine, and in fact exists and is not merely pretextual or feigned on the part of the party in an attempt to avoid his or her obligations under the law.][6]

[You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.][7]

Fourth, the use of the money was without the consent of the owner of the land and contrary to (defendant)'s authority.

Fifth, (plaintiff) suffered a monetary loss as a result of (defendant)'s use of the money.

It is your duty to find whether the plaintiff has proven the elements by a preponderance of the credible evidence.[8]

[Burden of Proof: Ordinary, see Wis JI-Civil 200]

[Note: In cases where exemplary damages are requested, the trial judge serves as gatekeeper and must determine whether the issue goes to the jury.]

[If you find that questions concerning exemplary damages are appropriate, add the following:

Exemplary damages are an issue in this case. Exemplary damages may be awarded, in addition to compensatory damages, if you find that the defendant committed theft by contractor. The purpose of exemplary damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Exemplary damages

are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to exemplary damages as a matter of right. Even if you find that the defendant committed theft by contractor, you do not have to award exemplary damages. Exemplary damages may be awarded or withheld at your discretion under these instructions and the evidence in this case. You may not, however, award exemplary damages unless you have awarded compensatory damages.[9]

(Plaintiff) must satisfy you by a preponderance of the credible evidence that exemplary damages should be awarded. If you believe that you should assess exemplary damages against (defendant) by way of punishment and as a warning to others, then you should award such damages as you deem just and proper. Otherwise, you will insert the word "zero" in answer to question eight.[10]]

VERDICT

Question No. 1: Did (Defendant) enter into an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered "yes" to Question 1, then answer this question:

Did (Defendant) receive money from the owner under an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 3: If you answered "yes" to Question 2, then answer this question:

Did (Defendant) [intentionally] (use) (retain) (conceal) part or all of the money for a purpose other than the payment of claims due or to become due from (Defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency]?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered "yes" to Question 3, then answer this question:

Was (Defendant)'s use of the money without the consent of the owner of the land and contrary to the (Defendant)'s authority?

ANSWER: _____

(Yes/No)

Question No. 5: If you answered "yes" to Question 4, then answer this question:

Did (Plaintiff) suffer a monetary loss as a result of (Defendant)'s use of the money?[11]

ANSWER: _____

(Yes/No)

Question No. 6: If you answered "yes" to Question 5, then answer this question:

What is the amount of the monetary loss suffered by (Plaintiff) as result of (Defendant)'s use of the money?

ANSWER: $_____

[IF THE PLAINTIFF REQUESTS EXEMPLARY DAMAGES UNDER §895.446, ADD THE FOLLOWING QUESTIONS:

Question No. 7: If you answered "yes" to Question 4, then answer this question:

Did (Defendant) know that the use of the money was without the consent of the owner of the land and contrary to the (Defendant)'s authority?

ANSWER: _____

(Yes/No)[12]

Question No. 8: If you answered "yes" to Question 7, then answer this question:

What sum of money, if any, do you assess against (Defendant) as exemplary damages for theft by contractor?

$ _____]

NOTES

1. The jury instruction for a criminal violation of Wis. Stat. § 779.02(5) and § 779.16 is WIS JI-CRIMINAL 1443. Although §779.02(5) applies to private construction projects and § 779.16 applies to public improvement projects, this instruction is applicable to both situations. Where relevant, this instruction follows and is consistent with WIS JI-CRIMINAL 1443. As discussed more fully in Note 6, there may be cases in which a civil recovery is warranted without the criminal intent necessary to support a criminal conviction.

2. § 779.02(5) prohibits a contractor's use of moneys paid for purposes other than the payment of claims until the claims have been paid in full "or proportionally in cases of a deficiency." The deficiency situation is discussed in State v. Keyes, 2008 WI 54, 309 Wis.2d 516, 750 N.W.2d 30 at ¶¶20-34. Use the language in the second set of brackets in the case of a deficiency.

3. This definition is based on the definition of "Owner" in Wis. Stat. §779.01(2)(c).

4. A showing of wrongful intent is not required to establish civil liability under §779.02(5). See Burmeister Woodwork Co. v. Friedel, 65 Wis. 2d 293, 302, 222 N.W.2d 647 (1974). However, to qualify for treble damages under Wis. Stat. § 895.80, the elements of both the civil and the criminal statutes,

including the specific criminal intent element required by § 943.20, must be proven to the civil preponderance burden of proof. See Wis. Stat. §779.02(5). See also Tri-Tech Corp. of America v. Americomp Services, Inc., 2002 WI 88, ¶30, 254 Wis. 2d 418, 646 N.W.2d 822.

5. The criminal jury instruction note on this element points out that "The third element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): 'The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust.' No further intent – to defraud or to permanently deprive – is required."

6. See Kansas City Star Co. v. DILHR, 60 Wis. 2d 591, 601, 211 N.W.2d 488 (1973).

7. Include the bracketed language if the claim seeks exemplary damages. See footnote 4, supra.

8. Wis. Stat. § 895.446(2) provides the following:

> The burden of proof in a civil action under sub. (1) is with the person who suffers damage or loss to prove a violation of s….943.20…by a preponderance of the credible evidence.

9. Compensatory damages must be awarded before punitive damages can be given. Widemshek v. Fale, 17 Wis.2d 337, 340, 117 N.W.2d 275 (1962); Bachand v. Connecticut Gen. Life Ins. Co., 101 Wis.2d 617, 633, 305 N.W.2d 149 (Ct. App. 1981). However, if the compensatory damages are nominal, that is - six cents, punitive damages cannot be awarded. Barnard v. Cohen, 165 Wis. 417, 162 N.W. 480 (1917); Wussow v. Commercial Mechanisms, Inc., 90 Wis.2d 136, 140, 279 N.W.2d 503 (Ct. App. 1979).

10. **Limitation on damages**. Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater. See Wis. Stat. § 895.043(6).

11. If the plaintiff is proceeding on other causes of action such as breach of contract, the verdict questions on damages will have to be integrated. Because damages for theft by contractor may be eligible for actual costs and exemplary damages under §895.446, it will be necessary to differentiate such damages from damages based on other claims.

12. This verdict question addresses the element of criminal intent, which is not necessary to sustain a simple claim for civil damages under §779.02(5) or 779.16, but is necessary to sustain a claim for exemplary damages and litigation costs under §895.446. The Wisconsin Supreme Court decision in Tri-Tech v. Americomp, 254 Wis.2d 418 (2002) contemplates the possibility of a civil claim based on a violation of Wis. Stat. §779.02(5) which would not qualify for treble damages if the violation was not the result of the requisite criminal intent:

> Because Wis. Stat. §943.20 is one of the offenses that qualifies for the treble damages remedy of Wis. Stat. §895.80 [now renumbered to §895.446], we agree with the court of appeals' conclusion that treble damages are available for theft by contractor under Wis. Stat. § 779.02(5), provided, however, that the elements of both the civil and the criminal statutes are proven, albeit to the civil preponderance burden of proof. Stated differently, the basis of liability for criminal theft by contractor is a violation of the trust fund provisions of Wis. Stat. §779.02(5), plus the criminal intent required by Wis. Stat. § 943.20(1)(b). 254 Wis.2d at 430.

What exactly is it the plaintiff must prove to demonstrate criminal intent? The court in Tri-Tech explained the requirement as follows:

> Accordingly, to sustain a cause of action for treble damages under Wis. Stat. § 895.446 for theft by contractor under Wis. Stat. § 943.20, the plaintiff must prove, by a preponderance of the credible evidence, the elements of the criminal offense, including that the defendant knowingly retained, concealed, or used contractor trust funds without the owner's consent, contrary to his authority, and with intent to convert such funds to his own use or the use of another. Id. at 433.

The Criminal Jury Instructions Committee discusses the required level of intent in its footnote 8 to WIS JI-CRIMINAL 1443:

> In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractors requires only "criminal intent" and not "intent to defraud." Hess seems to indicate the "criminal intent" boils down to knowledge that the defendant is in the position of trustee and that he intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).
>
> The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on "personal use." The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is "personal use" and thus the sixth element in the 1976 instruction was redundant.
>
> This note was cited with apparent approval in State v. Sobkowiak, . . .
>
> In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the "six elements" of theft by contractor without referring to this instruction or to State v. Sobkowiak, . . . The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

As a result of the holding in Tri-Tech, the Civil Jury Instructions Committee believes that the intent described in WIS JI-Criminal 1443 is what is necessary to sustain a civil claim for treble damages. This position was seemingly affirmed in Century Fence Company v. American Sewer Services, Inc., 2021 WI App 75, 399 Wis.2d 742, ¶9, 967 N.W.2d 32. In Century, the court of appeals cited Tri-Tech's conclusion that "…the elements of Wis. Stat. §§ 779.02(6) and 943.20 must be proven" in order to sustain the plaintiff's cause of action for treble damages.

Century also clarified that with regard to element three, absent evidence of a demand and refusal to pay, a defendant's admission to depositing payment into an account encumbered by a security interest "is

insufficient by itself to establish a prima facie case of specific criminal intent." Century, supra, at ¶11 citing Tri-Tech, 254 Wis. 2d 418, ¶32.

Verdict Question No. 7 mirrors the fifth and final element of Wis JI-Criminal 1443**.**

COMMENT

This instruction was approved in 2015. This revision was approved by the Committee in October 2022; it clarified the required burden of proof and added to the comment. See also Wis JI-Criminal 1443.

OFFICE OF JUDICIAL EDUCATION

2023

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME III

Wisconsin Civil Jury Instructions Committee

- 1/2023 Supplement (Release No. 54)

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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?

[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.]

However, since this is a recommitment proceeding and therefore there may not be proof of recent acts or omissions demonstrating that (respondent) is dangerous, 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 described above, A through E, if treatment were withdrawn. This alternate avenue of showing dangerousness does not change the elements or quantum of proof required. It merely acknowledges that an individual may still be dangerous despite the absence of recent acts, omissions, or behaviors exhibiting dangerousness because they are currently receiving medication or treatment.[1] 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.

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).]

NOTES

1. The language provided in the two sentences preceding the footnote is derived from the opinion in Matter of Commitment of C.J.A., 2022 WI App 36, ¶14, 404 Wis.2d 1978 N.W.2d 493 2022 WI App 36, citing Matter of Commitment of J.W.K., 2019 WI 54, ¶24, 386 Wis.2d 672, 927 N.W.2d 509.

COMMENT

This instructions and comment were approved by the Committee in September 2021. This revision was approved by the Committee in October 2022; it expanded on the note following question 3.

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.

8065 PRESCRIPTIVE RIGHTS BY USER: DOMESTIC CORPORATION, COOPERATIVE ASSOCIATION, OR COOPERATIVE (WIS. STAT. § 893.28(2))

(Prescriptive easement user) claims that it is entitled to a nonexclusive use of (title holder)'s real estate for the purpose of (describe use, e.g., transmitting power or electric current). This is called a prescriptive easement. To establish a claim for a prescriptive easement, (prescriptive easement user) must prove the continuous use of (describe use, e.g., transmitting power or electric current) in real estate of another[1]; which was visible, open, and notorious; for ten years[2].

[A continuous use is one that is neither voluntarily abandoned by the party claiming a prescriptive right nor interrupted by an act of the landowner or a third party.][3]

[A visible, open, and notorious use is one that would put a reasonably diligent landowner on notice of the use.][4]

[Note: The following paragraph should be given where the use claimed to be continuous is seasonal in nature: Where the use is seasonal in character, the requirement of continuity 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.**]**

(Title holder) is presumed to be in possession of the real property claimed by (prescriptive easement user). Therefore, the burden is on (prescriptive easement user) to establish its claim. Finally, (prescriptive easement user) has the burden of proof to clearly

define the area of land over which it has continuously asserted use of rights for ten years. 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 proscriptive easement.

[Burden of Proof, Wis JI-Civil 200]

NOTES

1. As sub. (1) is written, it is more natural to read "of another" to modify "real estate," rather than "rights." That is, by continuous use, one may gain a prescriptive right in another's real estate. The real estate in which a right is gained must belong to another person. Hall v. Liebovich Living Trust, 2007 WI App 112, 300 Wis. 2d 725, 731 N.W.2d 649, 06-0040.

2. Except as provided by Wis. Stat. § 893.29.

3. See Red Star Yeast & Prods. Co. v. Merch. Corp., 4 Wis. 2d 327, 335, 90 N.W.2d 777 (1958); see also 25 Am. Jur. 2d Easements and Licenses § 51.

4. See Kurz v. Miller, 89 Wis. 426, 433-34, 62 N.W. 182 (1895).

COMMENTS

This instruction and comment were approved by the Committee in October 2022.

Common law elements. At common law, a party acquired a prescriptive right in another's real property upon: (1) an adverse use hostile and inconsistent with the exercise of the titleholder's rights; (2) which was visible, open, and notorious; (3) under an open claim of right; and (4) was continuous and uninterrupted for 20 years. Ludke v. Egan, 87 **Wis**. 2d 221, 230,274 N.W.2d 641 (1979).

Statutory elements. With respect to public utilities, the legislature replaced the common law with Wis. Stat. § 893.28(2). See § 28, ch. 323, Laws of 1979. Under § 893.28(2), a public utility "establishes the prescriptive right to continue [its] use" of rights in another's real property upon "[c]ontinuous use of [those] rights ... for at least 10 years." Additionally, § 893.28(2) eliminated the elements of adversity and claim of right as requirements for public utilities' establishment of prescriptive rights. See Bauer v. Wisconsin Energy Corporation, 2022 WI 11, ¶20, 400 Wis. 2d 592, 970 N.W.2d 243, 250. The abrogation of these two elements was meant to allow a permissive use to ripen into a prescriptive right. See Williams v. Am.

Transmission Co., LLC, 2007 WI App 246, ¶¶9-15, 306 Wis. 2d 181, 742 N.W.2d 882. § 893.28 also reduced the vesting period from 20 to 10 years.

Visible, open, and notorious element. § 893.28(2) contains no mention of the use being either "visible, open, and notorious."

Permissive use ripening into a prescriptive right. Unlike common law claims-of-right, that require an adverse use of rights in another's real property, Wis. Stat. § 893.28(2) "omits any mention of the use being 'adverse' or 'hostile and inconsistent with the exercise of the titleholder's rights.'" Bauer v. Wisconsin Energy Corporation, 2022 WI 11, ¶19, 400 Wis. 2d 592, 970 N.W.2d 243, 250. As the Court noted in Bauer, context makes clear that "the legislature drafted § 893.28(2) to allow a permissive use to ripen into a prescriptive right. See also, Williams v. American Transmission Co. LLC, 306 Wis.2d 181, ¶¶9-15, 742 N.W.2d 882. Therefore, the statute's omission of the adversary requirement allows permissive uses, such as licenses, to ripen into prescriptive rights. Id. The court did not decide whether the 'visible, open, and notorious' requirement that is generally a part of an adverse possession case applies to a claim brought under Wis. Stat. sec. 893.28(2), but did note that, "[s]uch a use is not inherently inconsistent with a permissive license." Bauer, supra, at ¶22.

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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, 2020, and 2022. The 2020 revision updated case law citations. This revision was approved by the Committee in October 2022. Both the January 2022 and October 2022 revisions 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.

[**Note**: In 118th Street, the Wisconsin Supreme Court assumed without deciding that a temporary limited easement was compensable under Wis. Stat. § 32.09(6g). However, in Backus v. Waukesha County, 2022 WI 55, ¶19, 402 Wis.2d 764, 976 N.W.2d 492, the court found that a "…reasonable reading of 32.09(6g) is that it applies only to easements that continue to exist beyond the completion of a public improvement project. Therefore, § 32.09(6g) does not apply to TLEs, which must instead be compensated under constitutional and common law principles."]

8111 EMINENT DOMAIN: ACCESS RIGHTS

The term "right of access" has been used during the trial. Right of access means a right of the owner to enter or leave his or her property by using an abutting street or highway, without obstruction.

COMMENT

This instruction and comment were approved in 2006. The comment was updated in 2015 and 2020. The 2020 revision updated case law citations. This revision was approved by the Committee in January October 2022; it added to the comment.

Wis. Stat. § 32.09(6)(b) and Wis. Stat. § 66.1035.

The following statutes and cases address one or more of the issues where access to a property is removed, modified, restricted or substituted and provide a basis from which a specific instruction may be drafted.

Wis. Stat. § 84.25; Wis. Stat. § 84.295; Wis. Stat. § 84.29; Wis. Stat. § 83.027; see National Auto Truckstop, Inc. v. WISDOT, 263 Wis. 2d 649, 665 N.W.2d 198 (2003); Narloch v. Department of Transportation, 115 Wis. 2d 419, 430, 340 N.W.2d 542 (1983); Seefeldt v. WISDOT, 113 Wis. 2d 212, 336 N.W.2d 182 (1983); Surety Savings & Loan Association v. WISDOT, 54 Wis. 2d 438, 195 N.W.2d 464 (1972); Schneider v. State of Wisconsin, 51 Wis. 2d 458, 187 N.W.2d 172 (1971); Hastings Realty Corp. v. Texas Co., 29 Wis. 2d 305, 313, 137 N.W.2d 79 (1965); Stephan Auto Body v. State Highway Comm., 21 Wis. 2d 363, 124 N.W.2d 319 (1963).

Loss of Direct Access; Temporary Limited Easement. For a decision involving the loss of direct access and for a temporary limited easement, see 118th Street Kenosha, LLC v. Wisconsin Dept. of Transportation, 2014 WI 125, 359 Wis.2d 30, 856 N.W.2d 486.

[**Note**: In 118th Street, the Wisconsin Supreme Court assumed without deciding that a temporary limited easement was compensable under Wis. Stat. § 32.09(6g). However, in Backus v. Waukesha County, 2022 WI 55, ¶19, 402 Wis.2d 764, 976 N.W.2d 492, the court found that a "…reasonable reading of 32.09(6g) is that it applies only to easements that continue to exist beyond the completion of a public improvement project. Therefore, § 32.09(6g) does not apply to TLEs, which must instead be compensated under constitutional and common law principles."]

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