OFFICE OF JUDICIAL EDUCATION
2023

July 2023

TO: Consumers of Wisconsin Jury Instructions – Civil

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 55 for the 1981 edition of Wis JI-Civil. The release contains material approved by the Wisconsin Civil Jury Instructions Committee through May 2023.

The following material is included in Release No. 55:

New Instructions	Revised Instructions				
430	1090	1153	1155	1157	1158
	1160	1165	1190	1191	1192
	1195	1225	1354	3028	8060

Content. The 7/2023 supplement updates the publication on legislative actions and judicial decisions through May 2023.

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

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Wis JI-Civil

(Release No. 55 – July 2023)

Filing Instructions

Remove Old Pages Titled	Insert New Pages Titled
Volume I:	
Title Page (1/2023)	Title Page (7/2023) Supplement
1/2023 Supplement with (Release No. 54) in the right corner	(Release No. 55) in the right corner
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Summary of Contents (1/2023)	Summary of Contents (7/2023)
Introduction (1/2023)	Introduction (7/2023)
Memorials and Dedications (various dates)	Memorials and Dedications (7/2023)
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7/2023 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

- 7/2023 Supplement (Release No. 55)

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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

FORMER MEMBERS

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. 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 (2013-2018)
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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)

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

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SUMMARY OF CONTENTS

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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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IN TRIBUTE
TO PROFESSOR JOHN E. CONWAY

The Wisconsin Civil Jury Instructions Committee would be remiss in its acknowledgments if it failed to give public recognition to the contributions made by Professor John E. Conway in the development and success of the Wisconsin book of civil instructions. We applaud the dedicatory salutes to him by his peers on his outstanding career as a teacher, lecturer, writer, and promoter of the highest ideals of jurisprudence and focusing their direction to their most practical and professional application. (See 1980 Wis. L. Rev., Vol. 2.)

There was presented to the Board of Circuit Judges, at its 1958 meeting, a proposal to establish a permanent committee of its members to initiate, develop, and publish a book of uniform civil jury instructions. The proposal was accepted, and in June 1959, the Board sponsored two seminars at the University of Wisconsin Law School on the subject. Professor Conway of the Law School and Professor William Bradford Smith of the Extension, Department of Law, joined and cooperated to produce the organizational and administrative foundation upon which the project was based. The committee members became the author of the book; UW-Extension, Department of Law, became the sponsor and publisher; and Professor Conway was named the editor. He retained his position as editor until his retirement in early summer of 1980, except for a brief self-imposed hiatus during his tenure of more than 20 years.

As editor, Professor Conway assumed a heavy and continuing assignment. It was his function to review submissions for legal conformity, to prepare the comments, to support the proposed instruction, and to edit, redraft, and conform it in the language of the rule of "clear, concise, and correct" expression of the law.

His position as editor elicited his great talents in the field of civil law and to its practice, proceedings, and procedures. His expression of them were always tempered by his virtues of patience, composure, modesty, and conciliation. He was after all a law professor in a den of resilient circuit judges. However, even omniscient judges are sometimes swayed by proper argument supported by correct interpretation of the law. He was formidable in debate and discussion and always insistent that the basic and true issue surface and be expressed in simple, direct, and understandable language.

His broad knowledge of the law and his extensive experience in all phases of its origin and application made him exceptionally qualified to serve as an arbitrator and editor in this collegial attempt to produce a worthy and durable

product. That it has succeeded to this point and has been accepted by Bench and Bar as an indispensable tool in the trial of civil actions is due in great part to the ability, tenacity, and dedication of Professor Conway. His expertise in the law, his capacity to expound and express it, and his intuitive aptitude to apply it to its correct and greatest effect made him an outstanding editor.

COMMITTEE ON CIVIL JURY
INSTRUCTIONS

IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE ANDREW W. PARNELL

No acknowledgment or tribute to those who have given so much to the successful creation of uniform civil jury instructions would be complete without recognition of the first chairman of the Civil Jury Instructions Committee. This committee, therefore, wishes to take the exceptional step of paying tribute to Judge Andrew W. Parnell. Judge Parnell died in 1988.

Judge Parnell was appointed Circuit Court Judge of the 10th Judicial Circuit (Outagamie, Shawano, Menominee, and Langlade Counties) in 1952 where he presided until his retirement in 1972. Homage has often been paid him for his many accomplishments, and he earned a national reputation as an outstanding jurist. His achievements are legion and cannot all be recounted here. But, to name a few, he served as chairman of The National Conference of State Trial Judges and as chairman of The Wisconsin Board of Circuit Judges, was a lecturer of national renown, and a leader in judicial education.

The idea for, and the motivating force behind, the uniform civil jury instructions came from Judge Parnell. His was the guiding hand in forming the first committee and in assuring the successful completion of its task.

His contribution went beyond the leadership he displayed in forming and guiding the committee at its inception. He continuously resolved the most complex legal problems with his wisdom, understanding, and experience.

We acknowledge Judge Parnell's guidance and initiative and we sincerely appreciate the thousands of hours of labor he contributed in this area. If there is a father of the Wisconsin Civil Jury Instructions, it is Judge Parnell whose effort, tenacity, and intelligence have made this work possible.

COMMITTEE ON CIVIL JURY
INSTRUCTIONS

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IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE HELMUTH F. ARPS

Judge Helmuth F. Arps served as Circuit Court Judge for the 3rd Judicial Circuity (Calumet and Winnebago Counties) from April 1948 until his retirement in May 1962. Judge Arps died January 24, 1964.

In 1959, while serving as chairman of the Board of Circuit Judges, Judge Arps became associated with the Wisconsin Civil Jury Instructions Committee and later served as a committee member.

Judge Arps, who stood 6'5" and of imposing appearance, was affectionately known as "Shorty" to his colleagues and friends. A lifelong resident of Calumet County, he graduated from New Holstein High School and later pursued further scholastic endeavors at the University of Wisconsin in Madison and the University of Michigan Law School.

The judge was admitted to the Bar in 1916. After serving as district attorney for Calumet County, he served as Calumet County Judge from November 1923 until 1936. He was appointed Circuit Judge of the 3rd Judicial Circuit in 1948 by Governor Oscar Rennebohm and was thereafter elected by the people of Winnebago and Calumet Counties in two elections.

While serving on the Bench and as a member of the instructions committee, Judge Arps established an excellent reputation as a trial judge and student of the law. He was known to his colleagues as "the pipe smoking philosopher," slow to voice his opinion but when pronounced, his opinions were deliberate and sound.

Judge Arps enjoyed his work on the instructions committee, respected his colleagues, and along with them contributed to clarifying the law for the benefit of the Bench and Bar.

His contributions to the committee are reflected in the pages of the civil instructions book and will remain as a tribute to his memory.

COMMITTEE ON CIVIL JURY
INSTRUCTIONS

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IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE M. EUGENE BAKER

In October 1959, Judge M. Eugene Baker, then the presiding Judge of the 1st Judicial Circuit, comprising the counties of Kenosha and Walworth, was named as one of the six original appointees to the Wisconsin Civil Jury Instructions Committee. His appointment reflected a recognition of his outstanding judicial qualifications and his scholastic ability to articulate and translate his knowledge and experience into a project that would portend to well serve the state judiciary and the Bar.

He was referred to in the committee as the "Counsel" for the committee. His tenure endured until his death in May 1975. He served with distinction, devotion, and dedication. He was held in high esteem by the members, blessed as he was with dignified composure, radiant and friendly personality, and outstanding qualities as a judge.

When his health failed, he tendered his resignation, but the committee refused to accept it. This was an explicit acknowledgment of his value to the committee and the great contribution he had made towards its success. It was rightly felt that his long and priceless relationship to the committee entitled him to the tribute of continuing and permanent membership.

It is impossible to single out his particular work because the end product of the committee's work is the result of collegial effort. It must be recorded, however, that when a difficult problem of evidence or law surfaced, it was generally referred to Judge Baker to resolve. This he would do with meticulous care, producing a scholarly, legally refined and correct report. In a group such as ours, it is natural that often divergent and disparate views develop on any given legal subject. Judge Baker was not one to throw himself into the arena of debate. He abided his time patiently and when called to express his views would calmly, logically, and analytically respond and bring to focus and light the issue presented and the answer to it. When arguments and discussions detracted from or obscured the real point at issue, Judge Baker would, by his ingenious art of approach, appraisal, and persuasion, bring us back to a point of clarification and suggest the language which clearly expressed what was intended.

Judge Baker will long live in our memory. His work on the committee will be perpetuated in the pages of our book and make us all realize that the particular gifts by which some judge is favored can be translated in form to produce an enlightening endowment to those who follow.

COMMITTEE ON CIVIL JURY
INSTRUCTIONS

IN MEMORIAM
TO HONOR THE MEMORY OF JUDGE EDWARD M. DUQUAINE

The Honorable Edward M. Duquaine served as Circuit Court Judge for the 14th Judicial Circuit (Brown, Door, and Kewaunee Counties) from 1946 until his retirement in January 1962. Judge Duquaine died on the 8th of November of 1969. In October 1959, he was selected to serve on the original committee formed for the purpose of drafting uniform civil jury instructions and continued to serve until his retirement from the Bench.

He was an asset to what he called "the most prestigious committee;" He was a student of the law. His power of concentration was immense. Nothing hurried him. He had a sense of humor, but it never upset his dignity. He thoroughly reviewed every suggested instruction and commented at length on each. He was firm in his convictions and usually was right. If Judge Baker was the "Counsel" to the committee, then surely Judge Duquaine was the "Advocate" in the group.

While the work of the committee represented a dedicated collegial effort, Judge Duquaine will be remembered by his colleagues for having persuaded the committee to adopt the standard "this burden is to satisfy you, to a reasonable certainty, by the greater weight of the credible evidence," instead of "preponderance of the evidence" which was being used by a large majority of the state trial judges at the time.

His contributions to the committee are freely distributed in the pages of this book of instructions and will remain as permanent memories to his great mind and talents.

COMMITTEE ON CIVIL JURY
INSTRUCTIONS

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FOREWORD
TO THE 1981 EDITION

The 1981 edition of the Wisconsin Jury Instructions-Civil is published with great pride by the Department of Law, University of Wisconsin-Extension.

This new edition contains both physical changes in its format and substantive changes in its content. The pages are larger and easier to read. They are similar in size to papers commonly used by judges and lawyers. Additionally, the large format shortens the Department's printing time and, thus, allows for more timely supplementation. In terms of substantive changes, approximately 70 new or revised instructions have been added. Moreover, the comments to approximately 100 instructions have been updated. Material which was not revised or updated is republished without change. Thus, the 1981 edition contains all of the presently approved material produced over the 22-year history of the project.

The approval date for content published thorough 1978 is indicated by the copyright at the bottom of the page. For new and revised items approved since 1978, the first paragraph of the comment indicates the year of Committee approval.

Prefaces from two earlier editions are included because they are important. In the preface to the 1978 supplement, Professor John E. Conway, then editor of the project, described the format and made recommendations for its use. Also included in its entirety is the introduction which was written in 1960 by Judge Andrew W. Parnell and accompanied the original edition. Special note should be made of the claims and disclaimers so eloquently set out by Judge Parnell, for they are as timely for this new edition as they were originally.

The Wisconsin Jury Instructions-Civil is the product of a cooperative effort between the Civil Jury Instructions Committee and the Department of Law, University of Wisconsin-Extension. This joint enterprise has continued without interruption since 1959 when the Board of Circuit Judges established the Circuit Judges Civil Jury Instructions Committee. Following the reorganization of the Wisconsin judicial system in 1978, the Committee's name was changed to the Civil Jury Instructions Committee. The first edition of Wisconsin Jury Instructions-Civil was published in December 1960, and there have been twelve supplements.

Since its inception in 1959, this project has benefited from the valuable and enthusiastic contributions by the members of the Committee who are listed on page iii. The Department expresses its appreciation to them.

Additionally, the Committee wishes to specially recognize the valuable

work of nine individuals: Judges M. Eugene Baker, Helmuth F. Arps, Edward M. Duquaine, Bruce F. Beilfuss, Andrew W. Parnell, Harvey L. Neelen, Richard W. Orton, William I. O'Neill and Professor John E. Conway.

The Extension Law Department is proud of the staff support it has contributed to the project. Currently, Attorney Scott C. Minter of this Department provides research support for the Committee and Roger P. Bruesewitz, publications editor, performs the copy and technical editing tasks. In the past, Professors William Bradford Smith, Frank Mallare, August Eckhardt, and Amon Allen assisted in the initial years of the project. Professor John Kidwell of the Law School assisted as advisor in the drafting of the contracts instructions. Under the chairmanship of Arnon Allen, the Department continued its close partnership with the Committee. Editing and production responsibilities were handled by Barbara Muckler from 1966 until 1978.

It is the continuing goal of the Committee and the University of Wisconsin-Extension that this publication remain a valuable resource for civil litigation in this state. The original Committee's dedication and commitment to this publication continues to be the model for present efforts.

Stuart G. Gullickson
Professor and Chairman
Extension Law Department

March 1981

PREFACE
TO THE 1978 SUPPLEMENT

It must be emphasized that in very few cases will it be possible to use these instructions verbatim. They are fundamentally models, or checklists, or minimum standards. A distinction must be drawn between general instructions, which might be used unchanged in many cases, and the substantive law instructions, which could hardly ever be used unchanged. 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." For the purpose of clarity, a particular instruction is 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.

The general instructions are broken down into descriptive categories and presented in the logical order in which they are usually given within each c ategory. 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 which are alternatives bear the same number, with one having a "A" suffixed 1325 and 1325A). Time taken to consult the index is always well spent.

The user should always read the "Comment" appearing below the instruction in order to learn of any special conditions prerequisite to its use or other cautionary or explanatory material. In the body of the instructions will appear editorial directions enclosed in brackets and centered upon the page. Such directions tell the user to, for example, select a proper paragraph, or to insert a paragraph from a different instruction, or to read the verdict question with which the instruction deals.

When there are alternative words or phrases which may be employed, the user is alerted by italics, parentheses, or brackets. Alternative paragraphs are denoted by brackets at the beginning and end of each alternative paragraph.

The book itself may be cited as "Wis JI-Civil," adding the appropriate number, "Wis JI-Civil 405." However, it is hoped that attorneys will not refer to any of these instructions by citation in any of their requested instructions unless they are requesting the court to give the instruction verbatim as it appears in the book. It is suggested that if an attorney drafts an instruction of his own, adapting one of these instructions to his particular case, he should refer the judge to the model instruction by writing beneath his draft: "See Wis JI-Civil ____ "

This book is published in loose-leaf form to facilitate its expansion at minimum publishing expense and to permit revision of instructions and comments as necessary. The usefulness will be materially increased if the members of the Bench and Bar who make use of this book will promptly report any errors they may find, either typographical or in expression of the law. We welcome your corrections or suggestions and ask only that you give us applicable citations wherever possible.

John E. Conway
Editor

March 1978

INTRODUCTION
TO THE 1960 EDITION

I have been asked to write an introduction to this book. I am pleased and proud to do so. I have lived intimately with this project for two years and I have seen it develop and grow from the embryo of an idea to this stage of its present debut; and I hope, in discussing it, I can confine my anticipation of its prospects within the bounds of modest proprieties.

In January of 1959, still in the wake of a wave of enthusiasm that engulfed me following my attendance at a panel discussion on uniform jury instructions in civil cases, I delivered a paper on uniform instructions to the Board of Circuit Judges. The panel was sponsored by the Judicial Administration Section of the American Bar Association at its annual convention at Los Angeles, in August of the preceding year, presented by four Superior Court judges and two trial attorneys of Los Angeles County.

California has been a pioneer in this work and has set up a standard that challenges its followers and defies its imitators. Its published works on civil and criminal instructions have national distribution and have been accorded a reception and acceptance that befit their quality.

To my knowledge, at least three of our neighboring states - Illinois, Iowa, and Minnesota - spurred by the California example, have undertaken similar projects and are in various stages of progress with respect to it.

In my paper to the Board I made certain recommendations to it, urging its action to initiate a like undertaking in our state. The Board was reminded 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 cooperation with Professor William Bradford Smith, of the University of Wisconsin Extension Law Department, and Professor John E. Conway, of the University of Wisconsin Law School, the Board of Circuit Judges organized and conducted two seminars on jury instructions in June of 1959. These seminars did not produce immediate or recognizable results but presented excellent forums for the

discussion and appraisal of the need and merits of the uniform jury instructions in our state. The interest, desire, and enthusiasm of the participating members ignited the inspirational spark that launched the program. It soon became apparent during the course of the seminars, from the discussions had, the ideas expressed, the questions asked, and the details suggested, that some overall plan would have to be formulated to bring organization, direction, and production to this mass of helpful but nebulous intentions to produce a book worthy of the efforts expended in its preparation, production, and distribution.

Following the seminars, several meetings were held, by the chairmen and the executive committee of each seminar group, with Professor Smith and Professor Conway. At these meetings, the preliminary details of sponsoring, publishing, authoring, and editing were tentatively resolved.

The results of the seminars and the subsequent meetings were duly reported by the respective chairmen to the Board at its fall meeting. By proper resolutions, the Board created a permanent committee on jury instructions and approved the preliminary agreements that the committee would constitute the authoring personnel, Professor Conway would serve as editor, and the Extension Law Department would be the sponsor and publisher, with all rights and profits reserved to it, on its moral commitment that the prospective profits, if any, would be employed by it to the furtherance of better judicial administration in our state.

The committee was appointed in October and, at the call of the chairman, held its first meeting in Madison the latter part of that month. The members of the supreme court were invited to join the committee at a noon luncheon, and our proposals were outlined to them. We neither asked nor expected their active participation but did invite their advice, approval, and encouragement, which we received in full measure.

We decided to ask the president of the State Bar and the chairman of the Board of County Judges to appoint committees from their respective groups so that we could obtain the benefit of outside and current criticisms of our work as it progressed. These committees were appointed, and the publisher furnished current material to their members and to each member of the Board of Circuit Judges. Their criticism were fully invited but two conditions were imposed: first, that they be in writing; and, second, that they be supported by pertinent cited authorities.

We also determined the time, frequency, and places of our meetings, the procedures to prepare the agenda of our meetings, the assignments for authorship, the manner and form of submission and approval, the editing details, and the circulation of our material.

The committee met nine times, on the last Friday of each month except December. The meetings were never less than one, frequently one and one-half, and sometimes two full days in duration. We met at Madison in October, at Oshkosh in November, at Milwaukee in January and February, at Wisconsin Rapids in March, at Green Bay in April, at Kenosha in May, at Lake Delton in June, and at Sturgeon Bay in July.

The attendance at our meetings was excellent and exceptional. Quite early in our undertaking, Judge Orton was temporarily lost to our committee because of illness; and Judge Arps was invited, and agreed, to join us. The members hope that the causes that kept Judge Orton from active participation will soon be removed so that we can again benefit from his persuasive and challenging criticisms and his competent insistence that what is right in substance and statement should be adopted, that which is not, rejected.

It might be of general and passing interest to relate the manner of our approach to our work and the procedure we followed in accomplishing it. We started out by reconsidering and reevaluating the two hundred or more instructions gathered for and submitted to the seminar groups by Professor Conway. Assignments of specific proposals for instructions were timely made to each member. The assigned member had the responsibility of preparing a draft of each proposed instruction, with an accompanying brief, as comments, supporting the principle of law sought to be enunciated. Copies of his preparations were mailed to the editor, the publisher, and each committee member prior to our meeting. At the meeting, the author was called upon to read his manuscript and be prepared to fend and defend against the analytical darts of criticisms bound to be aimed at the heart of his handiwork. If it survived the challenge, it was tentatively approved. If amendments or corrections were suggested, and adopted, it was approved as amended. If it failed both tests, it was reassigned. On tentative approval, the proposed instruction was submitted to the editor for editing and arrangement of comments, and, when completed, returned by him to the author for his approval and the eventual approval by the whole committee.

By taking full and strict account of the time allotted for our meetings, we were able to process an average of 17 instructions on each assignment, giving us, as a result of our first year's efforts, about 150 approved instructions.

I speak for the members of the committee, the editor, and the publisher and hope they will not be denied the indulgence of such pride in their work as they, and it, can in good grace and becoming humility enjoy.

We made claims and disclaimers about our work. We modestly claim that:

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, incomplete, or inaccurate submitted instructions at the close of the 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 instructional 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 is 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 preparation of instructions.

5. It has grown to the full stature of its possibilities.

6. It will lessen the duties of 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 its improvement.

9. It is as clear, concise, and correct as it can or ought to be.

We hope it will be accepted for what it is, a first-born issue, conceived in hope and inspiration, born of the labors of dedicated men, to be reared in the delicate and considerate atmosphere of parental attachments.

This is what we have produced within the bounds of our time and talents. We hope it will be received and accepted as a first effort which, if nurtured by industry, encouraged by support, and improved by the co-operative efforts of Bench and Bar, may in time approach the ideals of its kind.

Our joint appreciation is extended to our Board for the entrustment of this assignment to our committee; to the members of the supreme court for their interest and encouragement in our work; to the Extension Law Department of the University of Wisconsin for its help and faith in our undertaking; to Professor William Bradford Smith for his initiative, his industry, and his promotional ability; to Professor Allen; to the secretarial staff; and to Professor John E. Conway for his patience, his counsel, his knowledge, and his editorial skill.

I express my personal thanks to all of the members of the committee for their confidence, their fidelity, and the generous application of their time, efforts, and talents to this cause.

A. W. Parnell, Chairman
Jury Instructions
Committee

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430 A PARTY'S PRESENCE NOT REQUIRED AT TRIAL

(Name of party)'s personal appearance in this action is not required. Instead, (he) (she) may appear through (his) (her) attorney.

COMMENT

This instruction and comment were approved by the Committee in May 2023.

Wisconsin Supreme Court Rule 11.02 (2002) governs appearances by attorneys on behalf of their clients. It provides:

> (1) Authorized. Every person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions, or may prosecute or defend the action or proceeding in person.
> SCR 11.02(1) (2002).

Under SCR 11.02, a party in a civil action does "'appear' at trial by the fact that ... counsel appeared." Sherman v. Heiser, 85 Wis.2d 246, 254-55, 270 N.W.2d 397 (1978).

A party is entitled to appear by counsel in a civil matter pursuant to WIS. CONST. art. I, § 21, which governs the rights of suitors. Section 21 provides:

> "In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice." Id., § 21(2).

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1090 DRIVER ON ARTERIAL APPROACHING INTERSECTION: LOOKOUT; RIGHT OF WAY; FLASHING YELLOW SIGNAL

While a driver upon a through highway may assume (until the contrary becomes apparent or in the exercise of ordinary care should be apparent) that other users of the highway will obey the statutory rules of the road to stop and yield the right of way, a driver must, nevertheless, use ordinary care to maintain a reasonably careful lookout for vehicles entering upon such through highway so as to enable the driver to take reasonable precautions to avoid injury to the driver or others.

The user of a through highway, having the right to assume the driver on an intersecting highway will stop and yield the right of way, is not bound to so reduce speed at each intersection as to be able to stop at any time it becomes apparent that the other driver is not stopping. Such a requirement would defeat the purpose of the through highway.

When the operator of the vehicle on a through highway observes that the operator of the vehicle on an intersecting highway is not going to yield the right of way, then the driver on the through highway is under a duty to exercise reasonable care to avoid collision or injury, even though the other driver is in the wrong in his or her course of conduct.

(A flashing yellow traffic signal is intended to warn the driver on the through highway of the presence of an intersecting highway that carries an unusual amount of traffic. While the driver on the through highway is not required to stop for such a signal, the driver, to measure up to the standard of ordinary care, must use a higher degree of vigilance before

entering upon and crossing such an intersection than would be required at an intersection at which there was no flashing yellow signal.)

COMMENT

This instruction and comment were approved in 1974. The comment was reviewed without change in 1989. Editorial changes were made in 1992 to address gender references in the instruction. No substantive changes were made to the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

See Wis JI-Civil 1030, Right to Assume Due Care by Highway Users, and Wis JI-Civil 1191, Duty of Driver Entering Intersection with Green Light in his Favor.

As to the duty of the driver on the arterial highway to the driver on the nonarterial highway, see generally Lundquist v. Western Casualty & Sur. Co., 30 Wis.2d 159, 163, 140 N.W.2d 241 (1966); Schlueter v. Grady, 20 Wis.2d 546, 553-55, 123 N.W.2d 458 (1963); Gaspord v. Hecht, 13 Wis.2d 83, 87, 108 N.W.2d 137 (1961). The motorist on the arterial highway may have to stop even though he has the right of way. Seitz v. Seitz, 35 Wis.2d 287, 298, 151 N.W.2d 86 (1967).

The operator of an automobile having the right of way on an arterial highway must still maintain a proper lookout. Puhl v. Milwaukee Automobile Ins. Co., 8 Wis.2d 343, 348, 99 N.W.2d 163, 166 (1959); Crye v. Mueller, 7 Wis.2d 182, 189, 96 N.W.2d 520 (1959); Gibson v. Streeter, 241 Wis. 600, 602, 6 N.W.2d 662, 663 (1943).

As to the duty of the driver on a through highway, when the driver observes that the driver of the vehicle on an intersecting highway is not going to yield the right of way, see Ashley v. American Auto Ins. Co., 19 Wis.2d 17, 21, 119 N.W.2d 359 (1963); Lawrence v. E. W. Wylie Co., 267 Wis. 239, 244, 64 N.W. 820 (1954); Roeske v. Schmitt, 266 Wis. 557, 569, 64 N.W.2d 394 (1954).

A driver approaching a flashing yellow light or an arterial highway must exercise a higher degree of caution than is required of an arterial driver approaching an intersection without such a signal. Ide v. Wamser, 22 Wis.2d 325, 332, 126 N.W.2d 59 (1964).

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

1153 RIGHT OF WAY: AT INTERSECTION WITH THROUGH HIGHWAY

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

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

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

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

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

NOTES

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

3. Wis. Stat. § 340.01(67).

COMMENT

This instruction and comment were originally published in 1966. The comment was revised in 1983, and the instruction was revised in 2008. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

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

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

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

Where the issue is presented as to the negligence of the operator of a vehicle on a through highway

with respect to management and control or lookout, see Wis JI-Civil 1030, 1090, 1190, and 1191.

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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

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

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

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1155 RIGHT OF WAY: AT INTERSECTIONS OF HIGHWAYS

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

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

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

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

NOTES

1. Wis. Stat. § 346.18(1).

2. Wis. Stat. § 340.01(51).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 2002 and 2008. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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

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

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

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

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

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

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

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.18(1).

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

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

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

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

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

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

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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1158 RIGHT OF WAY: TO PEDESTRIAN CROSSING AT CONTROLLED INTERSECTION

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

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

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

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.18(1).

COMMENT

This instruction and comment were approved in 1977. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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

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

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

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

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

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

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

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

NOTES

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

COMMENT

This instruction and comment were approved in 1977. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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

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

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

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

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

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

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

(defendant).

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.24(1).

COMMENT

This instruction was approved in 1978 and revised in 1989. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

1190 RIGHT OF WAY: GREEN SIGNAL

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

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

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

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

NOTES

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

COMMENT

This instruction and comment were approved in 1978. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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

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

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

COMMENT

The instruction and comment were originally published in 1972, and editorial changes were made in 1992 to address gender references in the instruction. The comment was updated in 2008. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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

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

1192 DUTY OF OPERATOR APPROACHING INTERSECTION WHEN AMBER LIGHT SHOWS

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

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

NOTES

1. Wis. Stat. § 346.37(1)(b).

COMMENT

The instruction and comment were originally published in their present form in 1966. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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1195 RIGHT OF WAY: LEFT TURN AT INTERSECTION

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

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

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

NOTES

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

COMMENT

The instruction and comment were originally published in their present form in 1967. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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

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

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

NOTES

1. Wis. Stat. § 340.01(51).

2. Wis. Stat. § 346.23(1).

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

COMMENT

The instruction and comment were originally published in their present form in 1972. This comment was updated in 1989 and 2008. The instruction was revised in 1992 and 2008. Editorial changes were made in 1992 to address gender references in the instruction. This revision was approved by the Committee in January 2023; it added to the comment.

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

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

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

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

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

1354 TURN OR MOVEMENT: ASCERTAINMENT THAT TURN OR MOVEMENT CAN BE MADE WITH REASONABLE SAFETY: LOOKOUT

A safety statute provides that no person shall (turn his or her vehicle at an intersection) (turn into a private road or driveway) (turn from a direct course or move right or left upon a roadway) unless and until the movement can be made with reasonable safety.

This statute requires the driver of the turning vehicle to use ordinary care to make an efficient lookout. This calls for the driver to use ordinary care to determine the presence, location, distance, and speed of any vehicle that might be affected by the driver's turn or movement. After having made these observations, the driver must also use reasonable judgment in calculating the time required to safely turn or move without interfering with other vehicles within or approaching the vehicle's course of travel.

COMMENT

The instruction and comment were originally published in 1966 and revised in 1980, 1992, and 2009. This revision was approved by the Committee in January 2023; it added to the comment.

Wis. Stat. § 346.34(1).

See also Wis JI-Civil 1350, Turn or Movement: Signal Required, and Wis JI-Civil 1352, Turn: Position and Method.

A jury question based on § 346.34(1) and another question based on lookout would result in duplicity. "When an inquiry is made in the form of the verdict of a statutory duty [ascertaining that turn can be made with reasonable safety] which includes several elements of conduct, one of those elements should not also be made the subject of a separate inquiry." Grana v. Summerford, 12 Wis.2d 517, 107 N.W.2d 463 (1961).

"There is no duty to keep a lookout ahead independently of making the observation required under § 85.175(1) [now § 346.34(1)]. It is one and the same duty." Grana, supra at 524. However, questions on lookout and on position on the highway when turning would not be duplicitous.

If the evidence shows that the left-turning motorist failed to see approaching traffic, there was a failure

as to lookout, and there is no need to instruct on calculation. Zartner v. Scopp, 28 Wis.2d 205, 214, 137 N.W.2d 107 (1965).

Cases involving vehicles approaching from rear are Schweidler v. Caruso, 269 Wis. 438, 69 N.W.2d 611 (1955); J.W. Cartage Co. v. Laufenberg, 251 Wis. 301, 28 N.W.2d 925 (1947).

Cases involving vehicles approaching from opposite directions are Schwarz v. Winter, 272 Wis. 303, 74 N.W.2d 447 (1956); Mezera v. Pahmeier, 258 Wis. 229, 45 N.W.2d 620 (1951).

Cases involving reasonable judgment are Plog v. Zolper, 1 Wis.2d 517, 85 N.W.2d 492 (1957); DeBaker v. Austin, 233 Wis. 39, 287 N.W.2d 720 (1939).

Casual negligence in a proper lookout. "While negligence in failing to keep a proper lookout is usually causal, it is not always so." Powers v. Joint School Dist. No. 3 of Price County, 2 Wis.2d 556, 561, 87 N.W.2d 275 (1958). See also, Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952); Oelke v. Earle, 271 Wis. 479, 74 N.W.2d 336 (1956); and Crye v. Mueller, 7 Wis. 2d 182, 96 N.W.2d 520 (1959).

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3028 CONTRACTS IMPLIED IN LAW (UNJUST ENRICHMENT)

This case involves a claim based upon alleged unjust enrichment.

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

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

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

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

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

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

not entitled to recover in whole or in part.]

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

COMMENT

This instruction was originally approved by the Committee in 1979 and revised in 2015, 2020, and 2021. This revision was approved by the Committee in May 2023.

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

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

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

Subject matter covered in contract and alternative claims. If the parties entered into a valid, enforceable contract and the subject matter of that contract covers the aspects of a plaintiff's unjust enrichment claim, the doctrine of unjust enrichment does not apply. Mohns, Inc. v. BMO Harris Bank, 2021 WI 8, ¶48, 395 Wis. 2d 421, 954 N.W.2d 339. See also Continental Cas. Co. v. Wisconsin Patients Comp. Fund, 164 Wis. 2d 110, 118 473 N.W.2d 584.

However, under the "total business relationship exception," Wisconsin law allows a party to seek equitable relief for a conferred benefit if it "falls outside the scope of the parties' contractual relationship." Meyer v. Laser Vision Inst., LLC, 2006 WI App 70, 290 Wis. 2d 764, 781, 714 N.W.2d 223, quoting Northern Crossarm Co., Inc. v. Chemical Specialties, Inc., 318 F.Supp.2d 752).

In addition, a party may plead claims for relief in the alternative, such as claiming both breach of contract and unjust enrichment, even if these claims are inconsistent. If a contract is found to exist, the plaintiff may recover under the contract but not in equity, as the law prohibits awarding both legal and equitable damages based on the same conduct. See Mohns, supra, at ¶¶52-53.

If a contract is determined to exist, and the jury awards damages for breach of the contract, any award for damages based on unjust enrichment must be set aside. Allowing both awards to stand would create a legal paradox, as a contract cannot simultaneously exist and not exist. Consequently, a plaintiff may recover the amount awarded for breach of contract but cannot recover for unjust enrichment or receive punitive damages. See Mohns, supra, at ¶48.

Preventing overlapping damages: crafting a special verdict form. Since the law prohibits awarding both legal and equitable damages based on the same conduct, it is essential to design a special verdict form that prevents overlapping damages. As emphasized in Mohns, a verdict form may incorporate questions regarding both breach of contract and unjust enrichment, but unjust enrichment damages are only permissible if the jury finds no contract existed. See Mohns, supra, at ¶54.

Issue triable of right by a jury. Recovery based on unjust enrichment is sometimes referred to as an action for "quasi contract," Watts v. Watts, 137 Wis.2d 506, 530-531, 405 N.W.2d 303 (1987). This doctrine has been well-recognized and long-accepted as part of Wisconsin law since 1844. See Rogers v. Bradford, 1 Pinney Wis. 418 (1844). Quasi-contracts are legal obligations in the sense that they originated in the courts of law and are enforced by legal remedies. Graf v. Neith Co-op. Dairy Products Association, 216 Wis. 519, 257 N.W. 618, 619 (1934). See also Arjay Investment Co. v. Kohlmetz, 9 Wis.2d 535, 539, 101 N.W.2d 700 (1960), Watts, supra, at 530, and Lawlis, supra, at 496. Because actions on the theory of quasi-contract are actions at law, they are triable as of right to a jury. See State v. Schweda, 2007 WI 100, ¶20, 303 Wis.2d 353, 736 N.W.2d 49 (2007).

Deceptive advertising and unjust enrichment. In cases where an unjust enrichment claim is based on allegations of deceptive or misleading advertising, the plaintiff must demonstrate that the advertisement contained deceptive or misleading statements in violation of the relevant advertising laws, such as WIS. STAT. § 100.18(1) and (9). See Meyer v. Laser Vision Inst., LLC, 2006 WI App 70, 290 Wis. 2d 764, ¶7, 714 N.W.2d 223. The mere presence of profit motives or commission-based sales representatives does not automatically lead to a finding of unjust enrichment or violation of advertising laws. See Meyer, supra, at ¶11.

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8060 ADVERSE POSSESSION NOT FOUNDED ON WRITTEN INSTRUMENT (WIS. STAT. § 893.25)

(Name of adverse possessor) claims ownership of real estate based on adverse possession. To claim ownership of real estate based on adverse possession, a person, together with his or her predecessors in interest, must have had uninterrupted adverse possession of the real estate for at least 20 years. Real estate is adversely possessed when the person claiming adverse possession (together with (his) (her) predecessors in interest) has had actual continued occupation of the real estate under a claim of title, exclusive of any other right, and the real estate claimed and occupied is either protected by a substantial enclosure or is usually cultivated or improved.

[In determining whether real estate is adversely possessed, you must look at the physical character of the possession. The physical possession must be open, notorious, exclusive, continuous, and hostile for at least 20 years.]

[The adverse possession must be sufficiently open and obvious to have apprised (title holder) of both the fact of the possession and the intent to exclude others from possession. Exclusive possession does not mean absolutely exclusive but rather the kind of possession that would characterize an owner's use.]

[Note: The following paragraph should be given where the use claimed to be continuous is seasonal in nature: Where the adverse possession is seasonal in character, the requirement of continuity of possession is satisfied by the use of the real estate

according to the existing seasonal uses, needs, requirements, and limitations, taking into consideration the location and the adaptability of the real estate for the seasonal use.]

["Hostile" does not mean a deliberate, willful, or unfriendly intent. If the characteristics of open, notorious, exclusive, and continuous possession are satisfied, the law presumes the element of hostile intent. "Hostile" means that the person in actual possession of the land claims exclusive right to it.]

[Land is "actually occupied" when it is used in a way it is ordinarily capable of being used and in such a manner as an owner would use it. Actual occupation is not limited to structural encroachment, although that is a common physical characteristic of possession.]

The requirement of "substantial enclosure" must alert a reasonable person of a dispute over the land. "Usually cultivated or improved" means the one in possession has put the land to the same kind of use that a title holder might generally put the land.

(Title holder) is presumed to be in possession of the land claimed by (adverse possessor). Therefore, the burden is on (adverse possessor) to establish (his) (her) claim. Finally, (adverse possessor) has the burden of proof to clearly define the area of land claimed to be adversely possessed. While absolute precision or utilization of a surveyor is not required to establish lines of occupancy, the evidence must provide a reasonably accurate basis upon which to determine the boundary of the land adversely possessed.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1996. The comment was updated in 2011, 2015, 2016, and 2018. The instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. This revision was approved by the Committee in January 2023; it added to the comment.

Elements. To constitute adverse possession, "the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." Pierz v. Gorski, 88 Wis.2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979) (citations omitted); see also Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280. "Hostile" does not mean a deliberate and unfriendly animus; rather, the law presumes the element of hostile intent if the other requirements of open, notorious, continuous, and exclusive use are satisfied. Burkhardt v. Smith, 17 Wis.2d 132, 139, 115 N.W.2d 540 (1962). Kruckenberg v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164. "Both the fact of possession and its real adverse character" must be sufficiently open and obvious to "apprize the true owner in the exercise of reasonable diligence of the fact and of an intention to usurp the possession of that which in law is his own." Allie v. Russo, 88 Wis.2d 334, 343-44, 276 N.W.2d 730 (1979) (citations omitted). The size and nature of the disputed area are relevant in deciding if the use is sufficient to apprise the true owner of an adverse claim. See Pierz, 88 Wis.2d at 139.

In 2017, the Wisconsin Legislative Council published an information memorandum, IM-2017-04, which provides background information on the law of adverse possession and provides an overview of relevant court decisions and statutes.

Tacking. The Judicial Council Committee's note following Wis. Stat. § 893.25 indicates that the phrase "in connection with his or her predecessors in interest" expresses the doctrine of "tacking" together periods of possession by adverse possessors in privity with each other.

Presumption of Hostile Possession. In Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280, the Wisconsin Supreme Court held that evidence regarding a possessor's subjective intent to claim title may be relevant in an adverse possession claim to rebut the presumption of hostility that arises when all other elements of adverse possession are satisfied. The court said the circuit court properly considered the predecessors in interest subjective intent and concluded that the adverse possession claimants failed to establish adverse possession for the requisite statutory period. The question presented in this case was whether the plaintiffs could establish that they adversely possessed the disputed property when their predecessors in interest expressly disclaimed ownership of it and sought permission to use the property from an entity that they mistakenly believed was its true owner.

Actual Continued Occupation. Wisconsin case law has defined "Actual occupancy" as "the ordinary use of which the land is capable and such as an owner would make of it." Burkhardt v. Smith, 17 Wis. 2d 132, 138, 115 N.W.2d 540 (1962). The ordinary use of which the land is capable depends on the size and nature of the land in question. Id. at 138. "Actual occupancy," including property without enclosure, does not require a constant physical occupation of the land. Id. at 137. Further, the performance of ordinary seasonal activities, consistent with the needs of the land, can amount to "actual occupancy." Id.

Usual Cultivation and Improvement. Wis. Stat. § 893.25(2)(b)2. does not define "cultivation" or "improvement." However, pursuant to case law precedent, land is "usually cultivated and improved" when it is "put to the exclusive use of the occupant as the true owner might use such land in the usual course of events." Burkhardt, supra, 17 Wis. 2d at 138. Such use of the land must be sufficiently visible to give notice of exclusion to the true owner. Id. The size and nature of the disputed area are both relevant in deciding if the use is sufficient to apprise the true owner of the adverse claim. Peter H. and Barbara J. Stueck Living Trust v. Easley, 325 Wis. 2d 455, ¶14. Accordingly, what may not constitute cultivation or improvement of wild lands may be sufficient to constitute cultivation or improvement in a residential neighborhood. See Pierz v. Gorski, 88 Wis. 2d at 136-37 (citing Austin v. Holt, 32 Wis. 478, 490-91 (1873)). For example, in O'Kon v. Laude, 2004 WI App 200, 276 Wis. 2d 666, ¶¶16-17, 688 N.W.2d 747, the court of appeals concluded that an issue of material fact had been raised concerning the usual cultivation and improvement of a strip of land where the purported adverse possessors mowed the grass, planted raspberries, piled debris, and maintained a garden.

Burden of Proof. This instruction is similar to the one used by the trial court in Kruse v. Horlamus Indus., 130 Wis.2d 357, 387 N.W.2d 64 (1986). It also conforms with the supreme court's clarification in Kruse as to the burden of proof to be used in adverse possession cases. The court held that the civil burden, not the middle burden, of proof applies in adverse possession cases. Some older cases used the term "clear and positive" evidence regarding evidence of possession. The court stated at page 362:

> The confusion surrounding the phrase "clear and positive" derives from the word, "clear," which frequently appears in the middle burden of proof. Because of the confusion which this portion of the instruction may cause, we direct that the words, "must be clear and positive and," be omitted from the instruction. The amended instruction will therefore read, "The evidence of possession must be strictly construed against the claimant." The instruction as so modified comports with the presumption of § 893.30 Stats. that favors the holder of the legal title.

Titleholder. As suggested in a footnote in Kruse (p. 361), this instruction uses the term "title holder" as opposed to the term "true owner" to avoid possible confusion.

Seasonal Use. In both Laabs v. Bolger, 25 Wis.2d 17, 23, 130 N.W.2d 270 (1964) [involving a deer-hunting shack] and Kraus v. Mueller, 12 Wis.2d 430, 440, 107 N.W.2d 467 (1960) [involving a summer-cottage property], the court cites the A.L.R. annotation, "Adverse Possession: Sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes," 24 A.L.R. 2d 632, 633, for the rule that seasonal use can satisfy the continuity requirement under certain circumstances, with the annotation stating:

> The requirement of continuity of possession as one of the essential elements of adverse possession is satisfied, as regards activities which are seasonal in character (other than those relating to agriculture and logging), by the use of land commensurate with and appropriate to existing seasonal uses, needs, requirements, and limitations, having regard for the location and adaptability of the land to such uses.

Defining the Area Possessed. The requirement that the adverse possessor provides a reasonably accurate basis upon which a legal description of the occupied area can be based is stated in Droege v. Daymaker Cranberries, Inc., 88 Wis.2d 140, 146; 276 N.W.2d 356 (Ct. App. 1979). The trial court must be

provided with a reasonably accurate basis to determine the boundary. Otto v. Cornell, 119 Wis.2d 4, 11, 349 N.W.2d 703 (1984).

The court of appeals in Klinefelter v. Ditch, 161 Wis.2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991) notes:

> § 893.25 Stats. makes no distinction between "wild lands" and any others. Whether land is wild or not, a substantial enclosure plus "actual continued occupation" under a claim of right results in adverse possession if maintained for twenty years.

Permission. Hostile intent does not exist if the use is pursuant to the titleholder's permission. Northwoods Dev. Corp. v. Klement, 139 Wis.2d 695, 129 N.W.2d 121 (1964). See also Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280.

Substantial Enclosure. See Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Illinois Steel Co. v. Bilot, 109 Wis. 418, 444, 84 N.W.2d 855 (1901); Kruckenberg v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164.

Acquiescence. The adverse possessor may contend that, by tolerating his or her use, the titleholder was acquiescing in the use rather than permitting it, and argue that use by acquiescence is adverse. Allie v. Russo, 88 Wis.2d 334, 343, 276 N.W.2d 730 (1979). However, for the doctrine of acquiescence to apply, the adverse possessor's use of the disputed property must be exclusive. See Allie v. Russo, supra, at pp. 345-47, and cases cited therein.

The doctrine of acquiescence is a "supplement" to the older rule of adverse possession, which held that adverse intent was the first prerequisite of adverse possession. Chandelle Enters., LLC v. XLNT Dairy Farm, Inc., 2005 WI App 110, 282 Wis.2d 806, 699 N.W.2d 241. Northrop v. Opperman, 2010 WI App 80, 325 Wis.2d 445, 784 N.W.2d 736; Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631. Courts have developed the doctrine of acquiescence, which substitutes "mutual acceptance" for adverse or hostile intent. Buza v. Wojtalewicz, 48 Wis.2d 557, 562-63, 180 N.W.2d 556 (1970). See also Shrestha, Jessica, "Hey! That's My Land," Wisconsin Lawyer, Vol. 83, No. 3, March 2010 and Vol. 88, No. 7, June 2015.

All-or-nothing vs. portions of land theories. The way that a claimant pursues a theory of adverse possession can limit their ability to argue that the finder of fact should be offered an opportunity to find that portions of the land have been adversely possessed rather than an all-or-nothing choice. See Pierz v. Gorski, 88 Wis.2d 131, 134, 276 N.W.2d 352 (Ct. App. 1979) (allowing adverse possession "[o]nly to the extent" actual occupancy, along with other requirements, are proven); and Droege v. Daymaker Cranberries, Inc., 88 Wis.2d 140, 147, 276 N.W.2d 356 (Ct. App. 1979) (When "evidence was presented as to the extent of occupancy of only a portion of the land, only that portion may be awarded."). Per these two decisions, a rule that appears to emerge is that adverse possession claimants certainly can, and must generally be allowed to, pursue theories of adverse possession to portions within claims on larger parcels of property.

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