OFFICE OF JUDICIAL EDUCATION
2/2025

February 2025

TO: Consumers of Wisconsin Jury Instructions – Civil

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 58 for the 1981 edition of Wis JI-Civil. The release contains material approved by the Wisconsin Civil Jury Instructions Committee through January 2025.

The following material is included in Release No. 58:

New Instructions

1133A 2418A

Revised Instructions

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1930 1932 2418 2780 7060
8035 8060

Renumbered

2418 to 2418B

Content. The 2/2025 supplement updates the publication on legislative actions and judicial decisions through January 2025.

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

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OFFICE OF JUDICIAL EDUCATION
2/2025

Wis JI-Civil

(Release No. 58 – February 2025)

Filing Instructions

Remove Old Pages Titled	Insert New Pages Titled

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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

2/2025

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME I

Wisconsin Civil Jury Instructions Committee

- 2/2025 Supplement (Release No. 58)

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WISCONSIN CIVIL JURY INSTRUCTIONS COMMITTEE (1959-2025)

CURRENT MEMBERS

Hon. Michael Waterman, St. Croix County (Chair)
Hon. William Pocan, Milwaukee County
Hon. Sarah Harless, Eau Claire County
Hon. Michael Aprahamian, Waukesha County
Hon. Emily Lonergan, Outagamie County
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Hon. Patrick Willis (2006-2016)

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

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WIS JI-CIVIL

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

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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 2025

Judges

Hon. Michael Waterman, Chair	St. Croix Co.
Hon. William Pocan	Milwaukee Co.
Hon. Sarah Harless	Eau Claire Co.
Hon. Michael Aprahamian	Waukesha Co.
Hon. Emily Lonergan	Outagamie Co.
Hon. Kevin Martens	Milwaukee Co.
Hon. Eugene Gasiorkiewicz	Racine Co.

Emeritus Members

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Hon. Daniel Dillon
Hon. Lisa Stark
Hon. Emily Mueller
Hon. Dennis Moroney
Hon. Michael Schumacher
Hon. Paul Reilly
Hon. Barbara Key
Hon. Michael Fitzpatrick
Hon. William Sosnay

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. Michael Fitzpatrick	(2014-2023)
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. William Sosnay	(2013-2023)
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 preparation of 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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260 [EXPERT][1] OPINION TESTIMONY

Usually, witnesses can testify only to facts they know. But, a witness with (expertise)[2] (specialized knowledge) in a (particular field) (specialty) may give an opinion in that (field) (specialty). In determining the weight to be given an opinion, you should consider the qualifications and credibility of the expert[3] and whether reasons for the opinion are based on facts in the case. Opinion evidence was admitted in this case to help you reach a conclusion. You are not bound by any expert's[4] opinion.

[CONTINUE WITH THE FOLLOWING IF OPINION WITNESSES HAVE GIVEN CONFLICTING TESTIMONY.]

[In resolving conflicts in opinion testimony, weigh the different opinions against each other and consider the qualifications and credibility of the witness and the reasons and facts supporting their opinions.]

NOTES

1. The brackets around the word "expert" in the title signify that its inclusion is optional. The Committee suggests omitting the term from the title of the written instruction provided to the jury to reduce the potential risk of "judicial vouching." See note 2.

2. To mitigate the risk of "judicial vouching"—the concern that a jury might place undue weight on testimony from a witness labeled as an "expert" by the judge—the Committee recommends that trial judges minimize any declarations or references to a witness's expertise in the jury's presence. This recommendation is based in part on Professor Daniel Blinka's assessment that, under current rules of evidence, asking the court to make a formal finding of expertise before the jury is both inappropriate and unnecessary.

As explained by Professor Blinka:

> There is no set procedure for qualifying an expert witness. Traditionally, the proponent elicits the witness's education, training, and experience at the start of the direct examination. Under common law practice, the proponent then asked the court

> to make a "finding" that the witness was an expert in an identified field. If the witness's credentials were dubious, the court might allow the opponent to voir dire the witness regarding qualifications. Before any questions were put to the witness regarding the facts of the case, the trial judge had to find that he or she was an "expert."

Daniel Blinka, Wisconsin Practice: Wisconsin Evidence § 702.601 (3d ed.2011).

Under Wis. Stat. § 907.02, the common-law procedure is both inappropriate and unnecessary, partly because a formal finding of expertise could be mistaken by the jury for the judge's endorsement of the witness's testimony. Although the judge must determine the witness's qualifications under Wis. Stat. § 901.04(1)(a), that finding need not be revealed to the jury.

This issue of qualifying an expert witness was discussed in State v. Schaffhausen, **an unpublished decision** of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see, the report of the National Commission on Forensic Science titled "Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

3. See note 2, supra.

4. See note 2, supra.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986, 1991, and 2011. The comment was updated in 1982, 1986, 1988, 1991, 2011, 2012, and 2017. This revision was approved by the Committee in January 2025. It provided for the omission the use of the word "expert" in the text of the instruction and added footnote 2 to address the risk of "judicial vouching."

Wis. Stat. §§ 907.02 and 907.03; Black v. General Elec. Co., 89 Wis.2d 195, 212-13, 278 N.W.2d 224 (1979); Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 203 N.W.2d 135 (1973); Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969); Andersen v. Andersen, 8 Wis.2d 278, 283, 99 N.W.2d 190, 193 (1959); Anderson v. Eggert, 234 Wis. 348, 361, 291 N.W. 365, 371 (1940).

In Wisconsin, the general rule is that a nonexpert owner of property may testify concerning the property's value. Perpignani v. Vonasek, 139 Wis.2d 695, 408 N.W.2d 1 (1987).

For Expert Testimony: Hypothetical, see Wis JI-Civil 265.

For expert testimony in a medical malpractice trial, see Wis JI-Civil 1023; Weborg v. Jenny, 2012 WI 67 (Paragraph 73), 341 Wis.2d 668, 816 N.W.2d 191 and Seifert v. Balink, 2017 WI 2, 372 Wis.2d 525, 888 N.W.2d 816.

265 [EXPERT][1] OPINION TESTIMONY: HYPOTHETICAL QUESTIONS

During the trial, a witness with (expertise)[2] (specialized knowledge) in a (particular field) (specialty) was told to assume certain facts and asked for an opinion based upon the assumed facts. This is called a hypothetical question. Consider the opinion in answer to the question only if you believe the assumed facts upon which it is based. If you find that the assumed facts in the hypothetical question have not been proved, do not give any weight to the opinion.

NOTES

1. The brackets around the word "expert" in the title signify that its inclusion is optional. The Committee suggests omitting the term from the title of the written instruction provided to the jury to reduce the potential risk of "judicial vouching." See note 2.

2. To mitigate the risk of "judicial vouching"—the concern that a jury might place undue weight on testimony from a witness labeled as an "expert" by the judge—the Committee recommends that trial judges minimize any declarations or references to a witness's expertise in the jury's presence. This recommendation is based in part on Professor Daniel Blinka's assessment that, under current rules of evidence, asking the court to make a formal finding of expertise before the jury is both inappropriate and unnecessary.

As explained by Professor Blinka:

> There is no set procedure for qualifying an expert witness. Traditionally, the proponent elicits the witness's education, training, and experience at the start of the direct examination. Under common law practice, the proponent then asked the court to make a "finding" that the witness was an expert in an identified field. If the witness's credentials were dubious, the court might allow the opponent to voir dire the witness regarding qualifications. Before any questions were put to the witness regarding the facts of the case, the trial judge had to find that he or she was an "expert."

Daniel Blinka, Wisconsin Practice: Wisconsin Evidence § 702.601 (3d ed.2011).

Under Wis. Stat. § 907.02, the common-law procedure is both inappropriate and unnecessary, partly because a formal finding of expertise could be mistaken by the jury for the judge's endorsement of the witness's testimony. Although the judge must determine the witness's qualifications under Wis. Stat. § 901.04(1)(a), that finding need not be revealed to the jury.

This issue was discussed in State v. Schaffhausen, **an unpublished decision** of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see, the report of the National Commission on Forensic Science titled "Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986, 1991, and 2010. The comment was updated in 1982 and 1986. This revision was approved by the Committee in January 2025. It provided for the omission the use of the word "expert" in the text of the instruction and added footnote 2 to address the risk of "judicial vouching."

Wis. Stat. § 907.03; a hypothetical question during the trial may be based on facts not yet in evidence. Novitzke v. State, 92 Wis.2d 450, 285 N.W.2d 868 (1979). See also Schulz v. St. Mary's Hosp., 81 Wis.2d 638, 652, 260 N.W.2d 783 (1978), and Rabata v. Dohner, 45 Wis.2d 111, 126, 172 N.W.2d 409 (1969).

Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 866, 203 N.W.2d 135 (1973).

McGaw v. Wassman, 263 Wis. 486, 492, 57 N.W.2d 920, 922 (1953).

For Expert Testimony: General, see Wis JI-Civil 260.

1049 PEDESTRIAN, NEGLIGENCE: SIDEWALK DEFECT OR INSUFFICIENCY

A pedestrian has a duty to exercise ordinary care to observe the sidewalk (roadway) and its immediate surroundings to discover any dangerous condition or defect that would be discoverable by an ordinarily prudent pedestrian under like or similar circumstances.

The exercise of such care requires the efficient use of one's eyes, faculties, and opportunities for observation that an ordinarily prudent person would use under like circumstances in order to become aware of the dangers naturally incident to the situation or to see unsafe conditions that are in plain sight.

COMMENT

This instruction was approved in 1974. This revision was approved by the Committee in October 2024. It added to the comment regarding the decision in Sojenhomer LLC v. Village of Egg Harbor, 2024 WI 25, 412 Wis. 2d 244, 7 N.W.3d 455, which addressed the scope of the terms "sidewalk" and "pedestrian way."

Wis. Stat. §§ 81.15, 66.615. LeMay v. Oconto, 229 Wis. 65, 281 N.W. 688 (1938), held that Wis. Stat. § 81.15 applies to defects of sidewalks, as well as roads and streets.

See, generally, Hales v. Wauwatosa, 275 Wis. 445, 82 N.W.2d 301 (1957); Paulson v. Madison Newspapers, 274 Wis. 355, 80 N.W.2d 421 (1957); Pumorlo v. Merrill, 125 Wis. 102, 103 N.W.464 (1905); Hoffman v. North Milwaukee, 118 Wis. 278, 95 N.W. 274 (1903).

Knowledge of the defect does not conclusively establish contributory negligence. Hales v. Wauwatosa, supra; Zoellner v. Fond du Lac, 147 Wis. 300, 133 N.W. 35 (1911).

Sidewalk and Pedestrian Way. In Sojenhomer LLC v. Village of Egg Harbor, 2024 WI 25, ¶23, 412 Wis. 2d 244, 7 N.W.3d 455, the Supreme Court of Wisconsin clarified the legal distinction between "sidewalks" and "pedestrian ways" as they pertain to condemnation claims under Wis. Stat. §§ 32.05(5) and 32.015. The Court held that the statutory definition of "sidewalk" in Wis. Stat. § 340.01(58) is distinct

from, and does not overlap with, the definition of "pedestrian way" in Wis. Stat. § 346.02(8)(a). Specifically, Wis. Stat. § 340.01(58) defines a "sidewalk" as "a portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for use by pedestrians." In contrast, Wis. Stat. § 346.02(8)(a) defines a "pedestrian way" as "a walk designated for the use of pedestrian travel."

The Court explained that "while sidewalks are, by definition, part of the adjoining highway, a pedestrian way may be established independently by designating a separate path or road as such" Id. at ¶23. This distinction emphasizes that sidewalks are inherently connected to roadways within a highway system, whereas pedestrian ways can exist independently as designated paths exclusively for pedestrian use (e.g., recreational trails, urban walking paths, and footbridges).

Regarding claims outside the context of condemnation, the law appears to remain unsettled. In Crowbridge v. Village of Egg Harbor, 179 Wis. 2d 565, 508 N.W.2d 15 (1993), the Wisconsin Court of Appeals did conclude that a pier does not qualify as a "sidewalk" under Wis. Stat. § 81.15. However, the Committee was unable to locate any other direct authority that clarifies the scope or interrelation of the terms "sidewalk" and "pedestrian way." This lack of additional authoritative guidance leaves the precise definitions and boundaries between those terms, outside the context of condemnation, uncertain.

1133 SCHOOL BUS: EQUIPPED WITH FLASHING RED WARNING LIGHTS AND WITHOUT AMBER WARNING LIGHTS [FOR A BUS EQUIPPED WITH FLASHING RED AND AMBER LIGHTS, SEE WIS JI-CIVIL 1133A]

A Department of Transportation regulation provides that a school bus shall be equipped with a 360-degree flashing white strobe light having a flashrate of 60 to 120 per minute and either flashing red warning lights or flashing red and amber warning lights.

A safety statute provides that the operator of a school bus equipped with flashing red warning lights but no amber warning lights shall activate the lights at least 100 feet before stopping to load or unload pupils or other authorized passengers and shall not extinguish the lights until loading or unloading is completed and persons who must cross the highway are safely across.

A failure to comply with the regulation and safety statute is negligence.

COMMENT

This instruction and comment were approved in 1977 and revised in 2008. The comment was updated in 1990. This revision was approved by the Committee in September 2024; it modified the instruction based on 2013 Wisconsin Act 96 [effective date: December 15, 2013].

This instruction is drafted for an operator of a school bus equipped with only flashing red warning lights as specified in § 347.25(2). For an instruction addressing an operator of a school bus equipped with both flashing red and amber warning lights, as specified in § 347.25(2), see Wis JI-Civil 1133A.

Wis. Adm. Code Trans § 300.16(6); Wis. Stat. § 346.48(2)(a)1; Alden v. Matz, 8 Wis.2d 485, 99 N.W.2d 757 (1959); Verbeten v. Huettl, 253 Wis. 510, 34 N.W.2d 803 (1948).

If the bus was stopped in a special school bus loading area where the bus is entirely off of the traveled

portion of the highway, or it is stopped in a residence or business district when passengers are to be loaded or unloaded where a sidewalk and curb are laid on both sides of the road, no flashing red warning lights are required to be activated as provided in Wis. Stat. § 346.48(2)(b)1, 2. If the bus stopped in an excepted place, some consideration should be given to instructing on the absence of the requirement of activating the flashing lights to negate any possibility that a juror could conclude that the driver was negligent because he or she was not displaying his or her flashing lights.

1133A SCHOOL BUS: EQUIPPED WITH FLASHING RED AND AMBER WARNING LIGHTS [FOR A BUS EQUIPPED WITH FLASHING RED WARNING LIGHTS AND WITHOUT AMBER WARNING LIGHTS, SEE WIS JI-CIVIL 1133]

A Department of Transportation regulation provides that a school bus shall be equipped with a 360-degree flashing white strobe light having a flashrate of 60 to 120 per minute and either flashing red warning lights or flashing red and amber warning lights.

A safety statute provides that the operator of a school bus equipped with flashing red and amber warning lights shall do all of the following when stopping to load or unload pupils or other authorized passengers:

First, actuate the flashing amber warning lights at least 300 feet before stopping in a 45 miles per hour or greater speed zone or at least 100 feet before stopping in a less than 45 mile per hour speed zone.

Second, at the point of loading or unloading, bring the bus to a stop, extinguish the flashing amber warning lights, and actuate the flashing red warning lights.

Third, after loading or unloading is completed and persons who must cross the highway are safely across, extinguish the flashing red warning lights.

A failure to comply with the regulation and safety statute is negligence.

COMMENT

This instruction and comment were approved in September 2024.

This instruction is drafted for an operator of a school bus equipped with flashing red and amber warning lights as specified in s. 347.25 (2). For an instruction addressing operators of a school buses equipped with only flashing red warning lights as specified in s. 347.25(2), see Wis JI-Civil 1133.

For the statutory section authorizing municipalities to create an ordinance regulating the use of flashing red or amber warning lights by school bus operators, see Wis. Stat. § 349.21, "Authority to regulate school bus warning lights."

Wis. Adm. Code Trans § 300.16(6); Wis. Stat. § 346.48(2)(a)(b); Alden v. Matz, 8 Wis.2d 485, 99 N.W.2d 757 (1959); Verbeten v. Huettl, 253 Wis. 510, 34 N.W.2d 803 (1948).

If the curb and sidewalk are laid on one side of the road only, the operator shall use the flashing red or flashing red and amber warning lights when loading or unloading passengers from either side. Wis. Stat. § 346.48(2)(a)(3).

If the bus was stopped in a special school bus loading area where the bus is entirely off of the traveled portion of the highway, or it is stopped in a residence or business district when passengers are to be loaded or unloaded where a sidewalk and curb are laid on both sides of the road, no flashing red warning lights are required to be activated as provided in Wis. Stat. § 346.48(2)(b)1, 2. If the bus stopped in an excepted place, some consideration should be given to instructing on the absence of the requirement of activating the flashing lights to negate any possibility that a juror could conclude that the driver was negligent because he or she was not displaying his or her flashing lights.

1340 STOP: FOR SCHOOL BUS LOADING OR UNLOADING CHILDREN

The driver of a vehicle that approaches from the front or rear of any school bus that has stopped on a street or highway when the bus[1] is displaying flashing red warning lights shall stop the vehicle not less than 20 feet from the bus and shall remain stopped until the bus resumes motion or the bus driver extinguishes the flashing red warning lights.

NOTES

1. This instruction only applies when the bus is equipped with a 360-degree flashing white strobe light having a flashrate of 60 to 120 per minute and either flashing red warning lights or flashing red and amber warning lights as provided in § 347.25(2).

COMMENT

The instruction and comment were approved by the Committee in 1980. It was revised in 1989 and 2008. This revision was approved by the Committee in September 2024; it modified the instruction based on 2013 Wisconsin Act 96 [effective date: December 15, 2013].

For the statutory section authorizing municipalities to create an ordinance regulating the use of flashing red or amber warning lights by school bus operators, see Wis. Stat. § 349.21, "Authority to regulate school bus warning lights."

Per Wis. Stat. § 346.48(3)

> "If the operator of a motor vehicle overtakes a school bus which is stopped and is loading or unloading pupils or other authorized passengers at an intersection on the right side of a roadway in a business or residence district in which the display of the flashing red or amber warning lights on the school bus is not permitted, the operator shall pass at a safe distance to the left of the school bus and shall not turn to the right in front of the school bus at that intersection."

If the bus stopped in an excepted place, some consideration should be given to instructing on the absence of the requirement of stopping and remaining stopped to negate any possibility that a juror could conclude that the driver was negligent because he or she overtook a stopped school bus.

See Wis. Stat. § 346.48(1) and (2) for the duty of the school bus driver to:

(1) stop and display lights when approaching another school bus,
(2) actuate lights at least 100 feet before stopping to load or unload,
(3) not to use red flashing lights.

See Wis. Stat. § 346.48(1) for the obligation of an operator of a vehicle proceeding in the opposite direction on a divided highway.

OFFICE OF JUDICIAL EDUCATION

2/2025

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME II

Wisconsin Civil Jury Instructions Committee

- 2/2025 Supplement (Release No. 58)

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1920 NUISANCE: LAW NOTE

The Wisconsin Supreme Court has addressed nuisance law in a number of decisions issued since the Committee last revised the nuisance jury instructions.[1] As a result, the Committee has developed a series of six instructions which follow this Note. (These instructions all pertain to nuisance actions for damages; actions seeking injunctive relief to abate a nuisance are equitable actions which the courts have jurisdiction to decide without a jury trial.[2])

"NUISANCE" DEFINED

The term "nuisance" refers to a condition or activity which unduly interferes with the use of land or a public place.[3] In the legal sense, it is important to keep in mind that "nuisance" does not refer to the conduct that causes the harm, but to the type of harm caused by the conduct.[4] Also, "nuisance" does not describe a cause of action for the interference, but rather a type of harm that may or may not be actionable. "(I)t is imperative to distinguish between a nuisance and liability for a nuisance, as it is possible to have a nuisance and yet no liability. A nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm."[5]

CLASSIFICATION OF NUISANCES

Nuisances can be classified based on the type of interference involved and the nature of the conduct which is alleged to give rise to liability for the nuisance.

Nuisances are divided into two types, depending on the nature of the interference: private or public. A private nuisance is a nontrespassory invasion of or interference with an interest in the private use and enjoyment of land.[6] As long as the interference is unreasonable and substantial, rather than petty or trifling, virtually any disturbance of the enjoyment of the property may amount to a nuisance.[7] For example, invasions by noxious odors, smoke, and noise can rise to the level of a nuisance.[8]

A public nuisance is a condition or activity which unreasonably interferes with the use of a public place or with the activities of an entire community.[9] "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."[10]

Although the type of harm suffered in the case of a private nuisance is different than that suffered where there is a public nuisance, the prerequisites to liability in either case are virtually identical.[11] In either case, the plaintiff must demonstrate that the interference resulted in significant harm.[12] "Significant harm" means "more than slight inconvenience or petty annoyance.... [T]here must be a real and appreciable invasion of the plaintiff's interests before he or she can have an action for" a nuisance.[13] There can be situations in

which a plaintiff has a cause of action for both a private nuisance and a public nuisance arising out of the same conduct.[14]

After determining that a nuisance is present and the harm is substantial, it must be established whether conduct liable for creating the nuisance also exists. Liability is founded on the wrongful act of creating or maintaining the nuisance.[15] Specifically, creating a nuisance is referred to as liability for an "act," while maintaining a nuisance is described as liability for a "failure to act."[16]

The conduct giving rise to liability for creating or maintaining a nuisance can be either intentional or unintentional. A nuisance is the result of intentional conduct if the defendant either (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his or her conduct. It is not necessary that the defendant act with a malicious intent to harm the plaintiff; the defendant need only realize that the nuisance is substantially certain to result from his or her conduct, even if the conduct itself has a laudable purpose.[17] When a nuisance is alleged to fall under the second category of intentional conduct, "the 'knowledge' requirement refers to knowledge that the condition or activity is causing harm to another's interest in the use and enjoyment of land."[18]

In cases where the defendant engages in intentional conduct that severely affects a neighbor's peaceful use and enjoyment of their property, a finding of intentional but unreasonable conduct—even if lawful—is sufficient.[19] Conduct is considered unreasonable if: (a) the gravity of the harm[20] outweighs the utility of the defendant's

conduct[21], or (b) the harm caused by the conduct is serious, and the financial burden of compensating for this and similar harm would not render the continuation of the conduct infeasible.[22]

Liability can also arise from unintentional conduct. Where the plaintiff alleges the defendant unintentionally maintained or failed to abate a nuisance, the traditional rules for liability based on negligent conduct apply.[23] Additionally, the plaintiff must show that the defendant had notice of the nuisance.[24] The usual defenses in a negligence action are also available to the defendant.[25]

There are situations where unintentional conduct can subject the defendant to strict liability regardless of the defendant's negligence. The Restatement describes these cases as arising out of conduct which is "abnormally dangerous."[26] Wisconsin court decisions suggest these types of nuisances are those unintentionally "created" as opposed to "maintained" by the defendant[27] Examples of what the Restatement and Wisconsin reported decisions refer to by these types of nuisances include a tannery or slaughter-house in a residential area, ownership of a vicious dog and blasting activities in an inappropriate place. In these cases, liability "does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care."[28] In such situations, the defendant is subject to strict liability[29] and "no question of negligence or want of liability is involved."[30]

The Committee determined there should be a total of six separate instructions covering

the various claims for liability based on nuisance. The appropriate classification of nuisances is shown in the following table:

CLASSIFICATION OF NUISANCES					
PRIVATE			PUBLIC		
INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT		INTENTIONAL CONDUCT	UNINTENTIONAL CONDUCT	
	Created by/ abnormally dangerous activity	Negligence		Created by/ abnormally dangerous activity	Negligence

The instructions differentiate between claims for private and public nuisance. Within each of those classifications, there are separate instructions depending on whether the conduct involved is alleged to be intentional or unintentional. Finally, the instructions involving unintentional conduct differentiate between claims alleging negligence and claims alleging the conduct of an abnormally dangerous activity for which the defendant is strictly liable.

PERMANENT VS. CONTINUING NUISANCES

Within the broader classifications of "public" and "private" nuisances, two distinct types are recognized: permanent and continuing. Determining whether a nuisance claim is permanent or continuing is a question of law, not of fact.[31] Although the Wisconsin courts have not extensively addressed the distinction between these types, the Wisconsin Court of Appeals has provided some guidance, drawing on decisions from other jurisdictions.[32]

A permanent nuisance is defined as one "of a type where 'by one act a permanent

injury is done,' and damages are assessed once for all."[33] Furthermore, "Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence."[34] Examples of permanent nuisances include solid structures such as a building encroaching on the plaintiff's land, a steam railroad operating over the plaintiff's land, or a street regrade for a rail system.[35] To recover for a permanent nuisance, plaintiffs ordinarily are required to bring one action for all past, present and future damage within the statutory period.

Continuing nuisances, on the other hand, involve ongoing or repeated disturbances or harm. The "appropriate factors to consider in deciding whether a nuisance is continuing are: (1) whether it constitutes an ongoing or repeated disturbance or harm, and (2) whether it can be discontinued or abated."[36] If both factors are present, a nuisance is deemed to be continuing. An example of a continuing nuisance is one caused by noise, vibration, or foul odor. If a nuisance is a disturbance or harm that may be discontinued at any time, it is considered continuing in character. Persons harmed by it may bring successive actions for damages until the nuisance is abated.

STATUTE OF LIMITATIONS

The applicable statute of limitations to recover damages for a personal injury requires that an action must be commenced within three years, as stated in Wis. Stat. § 893.54. Similarly, an action to recover damages for an injury to real or personal property must be

commenced within six years after the cause of action accrues, as outlined in Wis. Stat. § 893.52(1). Wis. Stat. § 893.04 states that "[a] period of limitation within which an action may be commenced is computed from the time that the cause of action accrues until the action is commenced." Under the discovery rule, all tort actions accrue on the date the injury is discovered, or with reasonable diligence should have been discovered, whichever occurs first.[37]

Whether a nuisance claim is barred by applicable statutes of limitations depends on whether the alleged nuisance is considered permanent or continuing. An action for a permanent nuisance must be filed within the applicable statute of limitations period. In contrast, although it is "well settled that every continuance of a nuisance is, in law, a new nuisance," an action for a continuing nuisance may be maintained even beyond the ordinary statute of limitations.[38]

NOTES

1. See, e.g., Physicians Plus v. Midwest Mutual, 254 Wis.2d 77 (2002); Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635 (2005); City of Milwaukee v. NL Industries, 315 Wis.2d 443 (2008).

2. United States v. Richards, 201 Wis. 130 (1930).

3. Physicians Plus v. Midwest Mutual, 254 Wis.2d 77, 102 (2002).

4. Restatement (Second) of Torts § 821A, Comment b (1979).

5. Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 656 (2005).

6. "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." Milwaukee Metropolitan Sewerage District v. City of

Milwaukee, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D. While the definition of a private nuisance in Restatement (Second) of Torts § 821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin case law consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts § 821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." Physicians Plus v. Midwest Mutual, 254 Wis.2d 77, 102 (2002).

7. Krueger v. Mitchell, 112 Wis. 2d 88, 106, 332 N.W.2d 733 (1983).

8. Sohns v. Jensen, 11 Wis. 2d 449, 460-61, 105 N.W.2d 818 (1960). See also McCann v. Strang, 97 Wis. 551, 553, 72 N.W. 1117 (1897).

9. "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' Physicians Plus, 254 Wis.2d 77, ¶ 21. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. See also Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured but the character of the injury and of the right impinged upon.' Costas v. City of Fond du Lac, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). See also Physicians Plus, 254 Wis.2d 77, ¶ 21; Schiro v. Oriental Realty Co., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' Costas, 24 Wis. 2d at 413-14. See also Restatement (Second) of Torts § 821B cmt. h (accord)." Id. at 658-659.

10. Restatement (Second) of Torts § 821C(1) (1979).

11. "However, since the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical." Milwaukee Metropolitan Sewerage District, supra, at 668.

"But as the tort action came into the picture, the use of the single word 'nuisance' to describe both the public and the private nuisance, led to the application in public nuisance cases, both criminal and civil, of

an analysis substantially similar to that employed for the tort action for private nuisance." Restatement (Second) of Torts § 821B, comment e (1979).

12. "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts § 821F.

13. Krueger, supra, at 107.

14. Restatement (Second) of Torts § 821B, Comment h (1979).

15. Milwaukee Metropolitan Sewerage District, supra, at 671.

16. Id. at 672.

17. Milwaukee Metropolitan Sewerage District, supra, at 663; Restatement (Second) of Torts § 825 (1979).

18. Milwaukee Metropolitan Sewerage District, supra, at 663.

19. Milwaukee Metropolitan Sewerage District, supra, at 661.

20. In Enz v. Duke Energy Renewable Services, Inc., 2023 WI App 24, ¶75, 407 Wis.2d 728, 991 N.W.2d 423, the court of appeals provided the following:

"In determining the gravity of the harm, it is important to consider:

(a) The extent of the harm involved;
(b) the character of the harm involved;
(c) the social value that the law attaches to the type of use or enjoyment invaded;
(d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
(e) the burden on the person harmed of avoiding the harm."

See also, Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, 129 Wis. 2d 129, 139, 384 N.W.2d 692 (1986).

21. In Enz v. Duke Energy Renewable Services, Inc., 2023 WI App 24, ¶75, 407 Wis.2d 728, 991 N.W.2d 423, the court of appeals provided the following:

"In determining the utility of the conduct, it is important to consider:

(a) the social value that the law attaches to the primary purpose of the conduct;
(b) the suitability of the conduct to the character of the locality; and
(c) the impracticability of preventing or avoiding the invasion."

See also Crest, supra, at 145; RESTATEMENT (SECOND) OF TORTS § 828 (AM. L. INST. 1979)

22. Crest, supra, at 139 (quoting RESTATEMENT (SECOND) OF TORTS § 826 (AM. L. INST. 1979)).

23. Milwaukee Metropolitan Sewerage District, supra, at 667-668; Restatement (Second) of Torts § 822 (1979).

24. Milwaukee Metropolitan Sewerage District, supra, at 661.

25. Milwaukee Metropolitan Sewerage District, supra, at 668.

26. Restatement (Second) of Torts § 822 (1979). See, also, Restatement (Second) of Torts § 519, 520 and Comments.

27. "[I]n those cases where the nuisance is created by the defendant, no question of negligence or want of ordinary care is involved. As we explained in Brown, this rule applies in cases such as 'a tannery or a slaughter-house in the midst of a residential area, where the mere act of using the plant creates the nuisance.' Id." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 661 (2005), quoting from Brown v. Milwaukee Terminal Rwy. Co., 199 Wis 575, 589 (1929). This quoted language from Brown appears to square with language in the comments to Restatement (Second) of Torts § 822, though the Restatement uses different terminology. Comment c to Restatement of Torts § 822 describes the bases for nuisance liability as follows:

> "An invasion of a person's interest in the private use and enjoyment of land by any type of liability-forming conduct is private nuisance. The invasion that subjects a person to liability may be either intentional or unintentional. A person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case, and he is subject to liability for an unintentional invasion when his conduct is negligent, reckless or abnormally dangerous. These are the types of conduct that are stated in this Chapter as subjecting a person to liability for invasions of interests in the private use and enjoyment of land." (emphasis added). Restatement (Second) of Torts § 822, Comment c (1979).

The Comment makes clear that an unintentional invasion is actionable not only if the defendant's conduct is negligent or reckless, but also if it is "abnormally dangerous." The language in Milwaukee Metropolitan Sewerage District referencing the holding in Brown, supra, that no question of negligence is involved where the defendant created the nuisance, appears to contemplate the same type of conduct which the Comment in the Restatement characterizes as "abnormally dangerous." Brown gives as an example a "tannery or slaughter-house in a residential area." Comment j to § 822 gives the following examples:

> "The last basis for liability for a private nuisance is the defendant's abnormally dangerous activity, enterprise or maintained condition, under the rules stated in Chapters 20 and 21. Thus a dog known by the owner to be vicious may create a private nuisance when it interferes with the use or enjoyment of the land next door, and the owner may be subject to strict liability because of his knowledge of the dog's propensities. So likewise, blasting activities or the storage of a large quantity of explosives in an inappropriate place may create a private nuisance because of the resulting interference with the use and enjoyment of land in the vicinity."

Thus, although there has been no reported Wisconsin decision explicitly involving nuisance liability predicated on abnormally dangerous behavior, the Committee believes the court's discussion of nuisances

"created by" the defendant in Milwaukee Metropolitan Sewerage District is intended to describe what the Restatement regards as abnormally dangerous behavior. (For specific recognition that Wisconsin recognizes intentional conduct, negligence and abnormally dangerous activity as the three grounds for maintaining a nuisance claim, see, Physicians Plus, supra, at 145-146, J. Bradley concurring.) The Committee also believes "abnormally dangerous activity" is a better description of the conduct which triggers strict liability than the reference to a nuisance "created" by the defendant for a number of reasons. First, "abnormally dangerous activity" is a more precise description the type of conduct necessary to trigger strict liability. Second, use of the term "created" to describe situations where strict liability applies appears to have its origins from a time when a nuisance itself was considered actionable without any underlying tortious conduct. The Brown decision includes the following language: "'Negligence of the defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in creating or maintaining it, and the negligence of the defendant, unless in exceptional cases, is not material.' Lamming v. Galusha, 135 N.Y. 239, 242, 31 N.E. 1024. See, also, Joyce, Nuisances, 80." (emphasis added) Brown, supra, at 589. While Milwaukee Metropolitan Sewerage District quotes Brown for the proposition that negligence need not be proved where the defendant created a nuisance, Brown itself concludes that negligence need not be demonstrated where the defendant maintained a nuisance either. Lamming, the New York case cited for this proposition in Brown, was decided in 1892. Lamming itself quoted the language from Congreve v. Smith, 18 N. Y. 79, an 1858 New York appeals court decision. As noted in Restatement (Second) of Torts §822, Comment b:

> "In early tort law the rule of strict liability prevailed. An actor was liable for the harm caused by his acts whether that harm was done intentionally, negligently or accidentally. In course of time the law came to take into consideration not only the harm inflicted but also the type of conduct that caused it, in determining liability. This change came later in the law of private nuisance than in other fields."

Whether the quoted language from Brown represents the current state of the law or is a remnant from the days when there was liability for a nuisance without tortious conduct is open to question. However, the relatively recent evolution of nuisance liability rules is another reason the Committee concludes that "abnormally dangerous activity" is a better description than a nuisance "created" by the defendant when referring to a situation that gives rise to strict liability.

28. Milwaukee Metropolitan Sewerage District, supra, at 661, quoting from Brown v. Milwaukee Terminal Rwy. Co., 199 Wis 575, 589 (1929).

29. Restatement (Second) of Torts § 822, Comment a (1979).

30. Brown v. Milwaukee Terminal Rwy. Co., 199 Wis 575, 589 (1929).

31. Sunnyside Feed Co., Inc. v. City of Portage, 222 Wis. 2d 461, 467, 588 N.W.2d 278 (Ct. App. 1998).

32. Sunnyside, supra, at 469, citing Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 868, 218 Cal.Rptr. 293, 705 P.2d 866, 870 (1985).

33. Baker, supra, at 870.

34. Id. as 870.

35. Sunnyside, supra, at 469.

36. Sunnyside, supra, 470. See also Munger v. Seehafer, 2016 WI App 89, ¶38, 372 Wis. 2d 749, 890 N.W.2d 22.

37. John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶20, 303 Wis. 2d 34, 734 N.W.2d 827.

38. See Sunnyside, supra, at 467. See also Andersen v. Village of Little Chute, 201 Wis. 2d 467, 487, 549 N.W.2d 737 (Ct. App. 1996).

COMMENT

This law note was approved by the committee in 2009. The comment was updated in 2019. This revision was approved by the Committee in September 2024. It expanded on how to determine whether a nuisance is permanent or continuing and the impact such a designation has on the applicable statute of limitations.

Filing a Written Notice of Injury. Each alleged nuisance causing action constitutes a separate "event" for the purposes of filing a written notice of injury. See The Yacht Club at Sister Bay Condominium Ass'n, Inc. v. Village of Sister Bay, 2019 WI 4, 922 N.W.2d 95, 101 (2019), reversing in part and remanding 378 Wis.2d 742, 905 N.W.2d 844 (Ct. App. 2017). Future nuisance actions are not barred if the written notice of injury pertaining to the new "event" giving rise to the claim is filed within 120 days after the happening of the event. Wis. Stat. § 893.80 (1d)(a).

Anticipated Nuisance Claim. Under Wisconsin case law, "anticipated private nuisance" claims are recognized claims. Krueger v. AllEnergy Hixton, LLC., 384 Wis.2d 127, 132, 918 N.W. 2d 458 (2018). Such an action may be brought when the alleged anticipated nuisance "will necessarily result from the contemplated act or thing which it is [s]ought to enjoin." See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51 (1923). A claim for anticipated nuisance must include factual allegations that, if true, would support each of the following conclusions:

- the defendant's proposed conduct will 'necessarily' or 'certainly' create a nuisance; and
- the resulting nuisance will cause the claimant harm that is 'inevitable and undoubted.'" See Wergin, 179 Wis. at 606-07.

Although Kruger focuses on an anticipated private nuisance claim, the most pertinent Wisconsin case also contemplates anticipated public nuisance claims. See Wergin v. Voss, 179 Wis 603, 606, 192 N.W. 51 (1923). While the court in Kruger used the term "anticipated" nuisance, synonymous terms include "threatened" nuisance, "prospective" nuisance, and "anticipatory" nuisance. See Wergin, 179 Wis at 606.

Activities qualifying for protection from nuisance claims. Wis. Stat. § 823.08, known as the "Right to Farm Law," protects two categories of agricultural activities from nuisance claims: agricultural uses and agricultural practices. "Agricultural use" is defined in Wis. Stat. § 91.01(2) as a series of activities carried out for the purpose of generating income or livelihood. Similarly, "agricultural practice" is broadly defined under § 823.08(2)(a) as any activity associated with an agricultural use.

The Right to Farm Law mandates the dismissal of a nuisance claim related to an agricultural use or practice if both of the following criteria are met:

1. The agricultural use or practice alleged to be a nuisance is conducted on land that has been in continuous agricultural use without substantial interruption prior to the plaintiff's use of the property, which the plaintiff claims was interfered with by the agricultural activity.

2. The agricultural use or practice does not pose a substantial threat to public health or safety.

WIS. STAT. § 823.08(3)(a).

To satisfy the elements of this exception, a defendant must establish three prerequisites under § 823.08. First, the plaintiff's claim must involve a nuisance arising from an agricultural use or practice. Second, the land on which the alleged nuisance occurred must have been in continuous agricultural use, without substantial interruption, prior to the plaintiff's commencement of the specific use of their property that is claimed to be interfered with by the defendant's agricultural use or practice. Third, the defendant's agricultural use or practice, alleged to constitute a nuisance, must not pose a substantial threat to public health or safety.

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1922 PRIVATE NUISANCE: NEGLIGENT CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) was negligent.[5] A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, (does something) (fails to do something) that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with

another's use or enjoyment of property.

[WHERE NUISANCE IS PREDICATED UPON FAILURE TO ABATE, ADD THE FOLLOWING: A person is not negligent for failing to abate a private nuisance unless the nuisance existed long enough that (defendant) knew or should have known of the nuisance and could have remedied it within a reasonable period of time.][6]

Fourth, (defendant)'s negligence caused the private nuisance. This does not mean that (defendant)'s negligence was "*the* cause" but rather "*a* cause" because a private nuisance may have more than one cause. Someone's negligence caused the private nuisance if it was a substantial factor in producing the nuisance. [A private nuisance may be caused by one person's negligence or by the combined negligence of two or more people.]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____

(Yes/No)

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

Did the nuisance result in significant harm to (plaintiff)?[7]

ANSWER: _____

(Yes/No)

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

Was (defendant) negligent?

ANSWER: _____

(Yes/No)

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

Was (defendant's) negligence a cause of the private nuisance?

ANSWER: _____

(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

Question No. 5: Was (plaintiff) negligent?

ANSWER: _____

(Yes/No)

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

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____

(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this

question; otherwise do not answer it:

Taking the total negligence which caused the harm suffered to be 100%, what percentage of the total negligence do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

NOTES

1. See, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

2. Insert appropriate tense depending on the facts of the case.

3. "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, §821. (citations omitted)." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. See, Restatement (Second) of Torts §821D, Comment d. "A trespass is an invasion of the interest in the exclusive possession

of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Id.

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." Physicians Plus v. Midwest Mutual, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

4. "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F. The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

5. This portion of the instruction is patterned after JI 1005 Negligence: Defined. "(a)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent . . . conduct.'" Restatement (Second) of Torts §822, quoted in Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 667 (2005).

6. Liability can arise from the failure to abate a nuisance, even if the condition causing the nuisance did not originate with the defendant. If the trial judge concludes a jury instruction further explaining the meaning of "failed to abate" would be helpful, see, e.g., Restatement (Second) of Torts §839 for an explanation of the concept.

Where liability is premised on the failure to abate a nuisance, the plaintiff must prove the defendant had notice of the nuisance. "Here, MMSD alleges that the City was negligent in failing to repair the water main before it broke. As discussed supra, in Brown we specifically stated that when liability for a nuisance is predicated upon a failure to act (failure to abate a nuisance), notice of the defective condition is a prerequisite to liability. Brown, 199 Wis. at 589-90. The Restatement (Second) of Torts §824 provides that no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act - that is, unless he has knowledge or notice of the nuisance condition. Further, in Schiro, 272 Wis. at 546-47, we noted that when a nuisance is premised on negligent conduct, failing to allow the defendant the same defenses as he would have in a negligence action would render liability dependent on the label the plaintiff used on the pleading and not the defendant's underlying conduct. We therefore conclude that notice is a necessary part of the plaintiff's proof in an action for nuisance when liability is predicated upon the defendant's alleged negligent failure to act, regardless of whether the nature of the harm is public or private." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 669-670 (2005).

The defendant is entitled to a reasonable time within which to remedy the interference after receiving

notice of it. Restatement (Second) of Torts §839(c) and Comment 1.

7. In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

8. "Since proof of negligence is essential to a negligence-based nuisance claim, our courts have repeatedly held that when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable. See, e.g., Vogel, 201 Wis. 2d at 425; Stunkel, 229 Wis. 2d at 669-70." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 668(2005). In cases involving nuisance resulting from negligent conduct, the plaintiff's contributory negligence is a defense to the same extent as in other cases founded on negligence. Restatement (Second) Torts §840B.

COMMENT

This instruction was approved by the committee in 2009. This revision was approved by the Committee in September 2024; it added to the comment.

Permanent vs. continuing nuisances. Whether a private nuisance claim is barred by the applicable statute of limitations depends on whether the nuisance is permanent or continuing. For more information on determining whether a nuisance is permanent or continuing, see Wis JI-Civil 1920.

1924 PRIVATE NUISANCE: ABNORMALLY DANGEROUS ACTIVITY: STRICT LIABILITY[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) engaged in an abnormally dangerous activity.[5] In determining whether an activity is abnormally dangerous, you should consider the following factors:

(a) existence of a high degree of risk of some harm to another's interest in the private use and enjoyment of land;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Fourth, (defendant)'s conduct caused the private nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a private nuisance may have more than one cause. Someone's conduct caused the private nuisance if it was a substantial factor in producing the nuisance. [A private nuisance may be caused by one person's conduct or by the combined conduct of two or more people.][6]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____

(Yes/No)

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

Did the nuisance result in significant harm to (plaintiff)?[7]

ANSWER: _____

(Yes/No)

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

Did (defendant) engage in an abnormally dangerous activity?

ANSWER: _____

(Yes/No)

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

Was (defendant's) abnormally dangerous activity a cause of the private nuisance?

ANSWER: _____

(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

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

Was (plaintiff) negligent?

ANSWER: _____

(Yes/No)

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

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____

(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Assuming (defendant's) abnormally dangerous activity and (plaintiff's) negligence caused 100% of the harm to (plaintiff), what percentage do you attribute to:

Plaintiff -Percentage:_____%

Defendant -Percentage:_____%

Total: 100%

Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

NOTES

1. See, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

This instruction is to be used where the plaintiff alleges the nuisance was the result of an abnormally dangerous activity conduct by the defendant. In such cases the defendant is subject to strict liability even in the absence of negligent conduct. *See*, JI 1920, note 16.

2. Insert appropriate tense depending on the facts of the case.

3. "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. *See,* Restatement (Second) of Torts §821D, Comment d (1979). "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Id.

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d (1979). "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." Physicians Plus v. Midwest Mutual, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion,"

though there may be instances in which the use of both terms is appropriate.

4. "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F (1979). The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

5. The criteria for determining whether an activity is abnormally dangerous are set forth in Restatement (Second) of Torts §520:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

§520 has been recognized as a part of the common law in Wisconsin. Fortier v. Flambeau Plastics Co., 164 Wis.2d 639, 667 (Ct. App 1991).

Comment 1to Restatement (Second) Torts §520 (1979) provides that the determination of whether the actions of the defendant constitute an abnormally dangerous activity is to be made by the court, not the jury:

> 1. *Function of court*. Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

Wisconsin caselaw clearly agrees that the determination of whether an activity is abnormally dangerous is one for the court when the facts are undisputed. "If the facts are undisputed, whether an activity is abnormally dangerous 'is to be determined by the court, upon consideration of all the factors listed in [sec. 520], and the weight given to each that it merits upon the facts in evidence.' Section 520, comment 1." Fortier v. Flambeau Plastics Co., supra, at 668. While Fortier quotes comment l with approval, the decision limits that approval to cases where the facts are undisputed. Whether the question is one for the court or the jury when the facts are disputed has yet to be specifically addressed by any reported Wisconsin

decision. The Committee believes that in the absence of any authority allowing the court to make the determination, the question should be put to the jury as would be any other question of fact.

6. This language is patterned after WIS JI 1500, which relates to cause in a negligence action. However, the wording is changed to refer to the defendant's "conduct" rather than the defendant's "negligence" because where the nuisance is caused by the defendant's engagement in an abnormally dangerous activity, negligence is not a prerequisite to liability.

7. In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

8. In an appropriate case, the defendant may be entitled to a comparative negligence instruction and verdict question. The Wisconsin Supreme Court has held, in the context of strict liability arising out of a defective product, that contributory negligence on the part of the plaintiff can reduce defendant's liability under the comparative negligence statute:

> "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence. . . .
>
> It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .
>
> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." Dippel v. Sciano, 37 Wis.2d 443, 461-462 (1967).

Restatement (Second) of Torts §840B (1979) requires a higher level of negligence on the part of the plaintiff before the jury can consider a claim of contributory negligence. Specifically, §840B(3) provides that "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm." The Committee believes that the holding in Dippel applies to a strict liability nuisance claim and a defendant in Wisconsin is not required to meet the higher burden of Restatement (Second) of Torts §840B(3) in order to support a claim of contributory negligence.

COMMENT

This instruction was approved by the committee in 2009. This revision was approved by the Committee in September 2024; it added to the comment.

Permanent vs. continuing nuisances. Whether a private nuisance claim is barred by the applicable statute of limitations depends on whether the nuisance is permanent or continuing. For more information on determining whether a nuisance is permanent or continuing, see Wis JI-Civil 1920.

1926 PRIVATE NUISANCE: INTENTIONAL CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a private nuisance exist(s)(ed)[2]. A private nuisance is an (invasion of or) interference with (plaintiff's) interest in the private use and enjoyment of (his) (her) (their) land.[3]

Second, the (invasion or) interference resulted in significant harm.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the (invasion or) interference is significant. If ordinary persons living in the community would regard the (invasion or) interference as substantially offensive, seriously annoying or intolerable, then the (invasion or) interference is significant. If not, then the (invasion or) interference is not significant. Rights and privileges to use and enjoy land are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) intentionally caused the private nuisance. A person's conduct caused the private nuisance if it was a substantial factor in producing the nuisance.

A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct.[5]

Fourth, (defendant's) conduct in causing the nuisance was unreasonable.[6] An

intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the cost of compensating for this and similar harm to others would still make it feasible for (defendant) to continue the conduct.[7]

VERDICT

Question No. 1: Did [Does] a private nuisance exist?

ANSWER: _____

(Yes/No)

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

Did the nuisance result in significant harm to (plaintiff)?[8]

ANSWER: _____

(Yes/No)

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

Did (defendant) intentionally cause the private nuisance?

ANSWER: _____

(Yes/No)

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

Was (defendant's) conduct in causing the nuisance unreasonable?

ANSWER: _____

(Yes/No)

Question No. 5: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

NOTES

1. *See*, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.
2. Insert appropriate tense depending on the facts of the case.

3. "Wisconsin has explicitly adopted the definition of private nuisance found in the Restatement (Second) of Torts, § 821. (citations omitted)." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 656 [footnote 4] (2005). The Restatement defines "private nuisance" as follows: "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. The definition provided for the jury here does not include the term "nontrespassory" because the Committee believes it is unnecessary to draw a distinction for the jury between a trespass and nontrespassory nuisance when the case does not involve an alleged trespass. There is, of course, a legal distinction between a trespass and a nuisance. See, Restatement (Second) of Torts §821D, Comment d. "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . . A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Id.

While the definition of a private nuisance in Restatement (Second) of Torts §821 refers to an "invasion" without mentioning an "interference," both the Restatement and Wisconsin caselaw consistently use the term "interference" with one's use and enjoyment of land as describing the essence of a private nuisance. "A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession." Restatement (Second) of Torts §821D, Comment d. "The essence of a private nuisance is an interference with the use and enjoyment of land." Prosser and Keeton on Torts § 87, at 619. Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra, at 657. "A nuisance is a condition or activity which unduly interferes with the use of land or of a public place." Physicians Plus v. Midwest Mutual, 254 Wis.2d 77, 102 (2002). In most cases the Committee believes the jury will find the term "interference" an easier concept to apply than the term "invasion," though there may be instances in which the use of both terms is appropriate.

4. "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts §821F (1979). The explanation in the instruction of what is meant by significant harm is derived from the description of the concept in the Comments to Restatement (Second) of Torts §821F.

5. Restatement (Second) of Torts §825.

6. "In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability." Restatement (Second) of Torts §821D, Comment d.

7. Restatement (Second) of Torts §826.

8. In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

COMMENT

This instruction was approved by the committee in 2009. This revision was approved by the Committee in September 2024; it added to the comment.

Permanent vs. continuing nuisances. Whether a private nuisance claim is barred by the applicable statute of limitations depends on whether the nuisance is permanent or continuing. For more information on determining whether a nuisance is permanent or continuing, see Wis JI-Civil 1920.

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1928 PUBLIC NUISANCE: NEGLIGENT CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [select or modify as applicable] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one.

Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) was negligent.[5] A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, (does something) (fails to do something) that a reasonable person would recognize as creating an unreasonable risk of (invading or) interfering with another's use or enjoyment of property.

[WHERE NUISANCE IS PREDICATED UPON FAILURE TO ABATE, ADD THE FOLLOWING: A person is not negligent for failing to abate a public nuisance unless the nuisance existed long enough that (defendant) knew or should have known of the nuisance and could have remedied it within a reasonable period of time.][6]

Fourth, (defendant)'s negligence caused the public nuisance. This does not mean that (defendant)'s negligence was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's negligence caused the public nuisance if it was a substantial factor in producing the public nuisance. [A public nuisance may be caused by one person's negligence or by the combined negligence of two or more people.][7]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____

(Yes/No)

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

Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[8]

ANSWER: _____
(Yes/No)

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

Was (defendant) negligent?

ANSWER: _____
(Yes/No)

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

Was (defendant's) negligence a cause of the harm suffered by (plaintiff) as a result of the public nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][9]

Question No. 5: Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

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

Was (plaintiff's) negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Taking the total negligence which caused the harm suffered to be 100%, what percentage of the total negligence do you attribute to:

Plaintiff - Percentage:_____%

Defendant - Percentage:_____%
Total: 100%

Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

NOTES

1. See, JI 1920 Law Note for Trial Judges before selecting the appropriate nuisance jury instruction.

2. Insert appropriate tense depending on the facts of the case.

3. "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' Physicians Plus, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. See, also, Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' Costas v. City of Fond

du Lac, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). See also Physicians Plus, 254 Wis.2d 77, ¶ 21; *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' Costas, 24 Wis. 2d at 413-14. See also Restatement (Second) of Torts § 821B cmt. h (accord)." Id. at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in Physicians Plus characterized its definition of a public nuisance as consistent with this Restatement definition. Physicians Plus, supra, at 102 and footnote 15. Restatement (Second) of Torts §821B Comment e points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

4. "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." Id., Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. See Comments b and c to Restatement 2d Torts, §821C.

5. This portion of the instruction is patterned after JI 1005 Negligence: Defined. "(a)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent . . . conduct.'" Restatement (Second) of Torts §822, quoted in Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 667 (2005). While this quoted language applies in the case of a private nuisance, the rule applies to public nuisances as well. "However, since the principal difference between a public and private nuisance lies in the nature of the interest violated or affected by the wrongful conduct, the elements required to establish liability for either are virtually identical." Milwaukee Metropolitan Sewerage District, supra, at 668.

6. Liability can arise from the failure to abate a nuisance, even if the condition causing the nuisance did not originate with the defendant. If the trial judge concludes a jury instruction further explaining the meaning of "failed to abate" would be helpful, see, e.g., Restatement (Second) of Torts §839 for an explanation of the concept.

Where liability is premised on the failure to abate a nuisance, the plaintiff must prove the defendant had notice of the nuisance. "Here, MMSD alleges that the City was negligent in failing to repair the water main before it broke. As discussed supra, in Brown we specifically stated that when liability for a nuisance is predicated upon a failure to act (failure to abate a nuisance), notice of the defective condition is a prerequisite to liability. Brown, 199 Wis. at 589-90. The Restatement (Second) of Torts § 824 provides that no liability for nuisance can attach based on a failure to act unless the actor was under a duty to act - that is, unless he has knowledge or notice of the nuisance condition. Further, in Schiro, 272 Wis. at 546-47, we noted that when a nuisance is premised on negligent conduct, failing to allow the defendant the same defenses as he would have in a negligence action would render liability dependent on the label the plaintiff used on the pleading and not the defendant's underlying conduct. We therefore conclude that notice is a necessary part of the plaintiff's proof in an action for nuisance when liability is predicated upon the defendant's alleged negligent failure to act, regardless of whether the nature of the harm is public or private." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 669-670 (2005).

The defendant is entitled to a reasonable time within which to remedy the interference after receiving notice of it. Restatement (Second) of Torts §839(c) and Comment 1.

7. This paragraph is taken from JI 1500 Cause, as part of the rule that "when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, supra, at 668.

8. In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

9. "Since proof of negligence is essential to a negligence-based nuisance claim, our courts have repeatedly held that when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable. *See, e.g.*, Vogel, 201 Wis. 2d at 425; Stunkel, 229 Wis. 2d at 669-70." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 668(2005). In cases involving

nuisance resulting from negligent conduct, the plaintiff's contributory negligence is a defense to the same extent as in other cases founded on negligence. Restatement (Second) Torts §840B.

COMMENT

This instruction was approved by the committee in 2009. This revision was approved by the Committee in September 2024; it added to the comment.

Permanent vs. continuing nuisances. Whether a private nuisance claim is barred by the applicable statute of limitations depends on whether the nuisance is permanent or continuing. For more information on determining whether a nuisance is permanent or continuing, see Wis JI-Civil 1920.

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1930 PUBLIC NUISANCE: ABNORMALLY DANGEROUS ACTIVITY: STRICT LIABILITY[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable,

then the interference is significant. If not, then the interference is not a significant one. Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) engaged in an abnormally dangerous activity.[5] In determining whether an activity is abnormally dangerous, you should consider the following factors:

(a) existence of a high degree of risk of some harm to another's interest in the private use and enjoyment of land;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Fourth, (defendant)'s conduct caused the public nuisance. This does not mean that (defendant)'s conduct was "*the* cause" but rather "*a* cause" because a public nuisance may have more than one cause. Someone's conduct caused the public nuisance if it was a substantial factor in producing the public nuisance. [A public nuisance may be caused by one person's conduct or by the combined conduct of two or more people.][6]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____
(Yes/No)

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

Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject of interference?[7]

ANSWER: _____
(Yes/No)

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

Did (defendant) engaged in an abnormally dangerous activity?

ANSWER: _____
(Yes/No)

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

Was (defendant)'s abnormally dangerous activity a cause of the public nuisance?

ANSWER: _____
(Yes/No)

[INSERT QUESTIONS 5, 6 AND 7 IF THERE IS EVIDENCE OF NEGLIGENCE ON THE PART OF THE PLAINTIFF][8]

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

Was (plaintiff) negligent?

ANSWER: _____
(Yes/No)

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

Was (plaintiff)'s negligence a cause of the harm suffered by the plaintiff?

ANSWER: _____
(Yes/No)

Question No. 7: If you answered "Yes" to both Questions 4 and 6, then answer this question; otherwise do not answer it:

Assuming (defendant)'s abnormally dangerous activity and (plaintiff)'s negligence caused 100% of the harm to (plaintiff), what percentage do you attribute to:

Plaintiff - Percentage:_____%

Defendant - Percentage:_____%

Total: 100%

Question [No. 5] [No. 8]: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

NOTES

1. See, JI 1920 Law Note for Trial Judges before selecting the appropriate Nuisance jury instruction.

This instruction is to be used where the plaintiff alleges the nuisance was the result of an abnormally dangerous activity conduct by the defendant. In such cases the defendant is subject to strict liability even in the absence of negligent conduct. See, JI 1920, note 16.

2. Insert appropriate tense depending on the facts of the case.

3. "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' Physicians Plus, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. See, also, Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' Costas v. City of Fond du Lac, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). See also Physicians Plus, 254 Wis.2d 77, ¶21; Schiro v. Oriental Realty Co., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury

to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' Costas, 24 Wis. 2d at 413-14. See also Restatement (Second) of Torts § 821B cmt. h (accord)." Id. at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in Physicians Plus characterized its definition of a public nuisance as consistent with this Restatement definition. Physicians Plus, supra, at 102 and footnote 15. Restatement (Second) of Torts §821B Comment *e* points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

4. "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." Id., Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. *See* Comments b and c to Restatement 2d Torts, §821C.

5. The criteria for determining whether an activity is abnormally dangerous are set forth in Restatement (Second) of Torts §520:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

§520 has been recognized as a part of the common law in Wisconsin. Fortier v. Flambeau Plastics Co., 164 Wis.2d 639, 667 (Ct. App 1991).

Comment l to Restatement (Second) Torts §520 (1979) provides that the determination of whether the actions of the defendant constitute an abnormally dangerous activity is to be made by the court, not the jury:

l. Function of court. Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury. The standard of the hypothetical reasonable man is essentially a jury standard, in which the court interferes only in the clearest cases. A jury is fully competent to decide whether the defendant has properly driven his horse or operated his train or guarded his machinery or repaired his premises, or dug a hole. The imposition of strict liability, on the other hand, involves a characterization of the defendant's activity or enterprise itself, and a decision as to whether he is free to conduct it at all without becoming subject to liability for the harm that ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place or whether such an activity as blasting is to be permitted without liability in the center of a large city.

Wisconsin caselaw clearly agrees that the determination of whether an activity is abnormally dangerous is one for the court when the facts are undisputed. "If the facts are undisputed, whether an activity is abnormally dangerous 'is to be determined by the court, upon consideration of all the factors listed in [sec. 520], and the weight given to each that it merits upon the facts in evidence.' Section 520, comment 1." Fortier v. Flambeau Plastics Co., supra, at 668. While Fortier quotes comment l with approval, the decision limits that approval to cases where the facts are undisputed. Whether the question is one for the court or the jury when the facts are disputed has yet to be specifically addressed by any reported decision. The Committee believes that in the absence of any authority allowing the court to make the determination, the question should be put to the jury as would be any other question of fact.

6. This language is patterned after WIS JI 1500, which relates to cause in a negligence action. However, the wording is changed to refer to the defendant's "conduct" rather than the defendant's "negligence" because where the nuisance is caused by the defendant's engagement in an abnormally dangerous activity, negligence is not a prerequisite to liability.

7. In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

8. In an appropriate case, the defendant may be entitled to a comparative negligence instruction and verdict question. The Wisconsin Supreme Court has held, in the context of strict liability arising out of a defective product, that contributory negligence on the part of the plaintiff can reduce defendant's liability under the comparative negligence statute:

> "At this juncture we find no reason why acts or failure on the part of the user or consumer of defective products which constitute a failure to exercise reasonable care for one's own safety and might ordinarily be designated assumption of risk cannot be considered contributory negligence. . . .
>
> It might be contended that the strict liability of the seller of a defective product is not negligence and therefore cannot be compared with the contributory negligence of the plaintiff. The liability imposed is not grounded upon a failure to exercise ordinary care with its necessary element of foreseeability; it is much more akin to negligence per se. . . .
>
> [A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." Dippel v. Sciano, 37 Wis.2d 443,461-462 (1967).

Restatement (Second) of Torts §840B (1979) requires a higher level of negligence on the part of the plaintiff before the jury can consider a claim of contributory negligence. Specifically, §840B(3) provides that "When the nuisance results from an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected himself to the risk of harm." The Committee believes that the holding in Dippel applies to a strict liability nuisance claim and a defendant in Wisconsin is not required to meet the higher burden of Restatement (Second) of Torts §840B(3) in order to support a claim of contributory negligence.

COMMENT

This instruction was approved by the committee in 2009. This revision was approved by the Committee in September 2024; it added to the comment.

Permanent vs. continuing nuisances. Whether a private nuisance claim is barred by the applicable statute of limitations depends on whether the nuisance is permanent or continuing. For more information on determining whether a nuisance is permanent or continuing, see Wis JI-Civil 1920.

1932 PUBLIC NUISANCE: INTENTIONAL CONDUCT[1]

To sustain a claim of nuisance in this case, (plaintiff) must prove the following four elements:

First, a public nuisance exist(s)(ed).[2] A public nuisance is a condition or activity which unreasonably interfere(s)(ed) with the use of a public place or with the activities of an entire community. In determining whether an interference was unreasonable, you should consider [*select or modify as applicable*] (whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience) (whether the conduct is proscribed by a statute, ordinance or administrative regulation) (whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.)[3]

Second, the interference resulted in harm to the plaintiff that was both (1) significant, and (2) different from the harm suffered by other members of the public exercising the common right that was the subject of interference.[4] "Significant harm" means harm involving more than a slight inconvenience or petty annoyance. When the interference involves personal discomfort or annoyance, it is sometimes difficult to determine whether the interference is significant. If ordinary persons living in the community would regard the interference in question as substantially offensive, seriously annoying or intolerable, then the interference is significant. If not, then the interference is not a significant one.

Rights are based on the general standards of ordinary persons in the community and not on the standards of persons who are more sensitive than ordinary persons.

Third, (defendant) intentionally caused the public nuisance. A person's conduct caused the public nuisance if it was a substantial factor in producing the nuisance.

A nuisance is intentional if the person acts for the purpose of causing the nuisance or knows that the nuisance is resulting or is substantially certain to result from the person's conduct.[5]

Fourth, (defendant's) conduct in causing the nuisance was unreasonable.[6] An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the cost of compensating for this and similar harm to others would still make it feasible for (defendant) to continue the conduct.[7]

VERDICT

Question No. 1: Did [Does] a public nuisance exist?

ANSWER: _____
(Yes/No)

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

Did the nuisance result in significant harm to (plaintiff) that was different from the harm suffered by other members of the public exercising the common right that was the subject

of interference?[8]

ANSWER: _____
(Yes/No)

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

Did (defendant) intentionally cause the public nuisance?

ANSWER: _____
(Yes/No)

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

Was (defendant)'s conduct in causing the nuisance unreasonable?

ANSWER: _____
(Yes/No)

Question No. 5: Regardless of how you answered any of the other questions, answer this question:

What sum of money will reasonably compensate (plaintiff) for harm suffered?

ANSWER: $_____

NOTES

1. See, JI 1920 Law Note for Trial Judges before selecting the appropriate nuisance jury instruction.
2. Insert appropriate tense depending on the facts of the case.

3. "In contrast [to a private nuisance], '[a] public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community.' Physicians Plus, 254 Wis.2d 77, 102. In other words, '[a] public nuisance is an unreasonable interference with a right common to the general public.' Restatement (Second) of Torts § 821B. See, also, Prosser and Keeton on Torts § 86, at 618 (accord). Therefore, the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land.' Restatement (Second) of Torts § 821B cmt. h." Milwaukee Metropolitan Sewerage District v. City of Milwaukee, 277 Wis.2d 635, 658 (2005).

A public nuisance is not determined by the number of persons affected, but by the nature of the injury involved. "It should be stressed that the distinction between a private and public nuisance is 'not the number of persons injured *but the character of the injury and of the right impinged upon*.' Costas v. City of Fond du Lac, 24 Wis.2d 409, 414, 129 N.W.2d 217 (1964) (emphasis added). See also Physicians Plus, 254 Wis.2d 77, ¶21; Schiro v. Oriental Realty Co., 272 Wis. 537, 546, 76 N.W.2d 355 (1956). 'Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right.' Restatement (Second) of Torts § 821B cmt. g. Since the term public nuisance refers to a broader set of invasions than private nuisance, '[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance.' Costas, 24 Wis. 2d at 413-14. See also Restatement (Second) of Torts § 821B cmt. h (accord).a" Id. at 658-659.

It should be noted that the definition of a public nuisance differs from the definition of a private nuisance in Instructions 1922, 1924 and 1926 not only in the description of the interference involved, but by the characterization of the interference as "unreasonable." The unreasonableness of the interference is a part of the definition of a public nuisance itself. Restatement (Second) of Torts § 821B(2) provides the following guidance in determining whether or not an interference may be said to be unreasonable:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The court in Physicians Plus characterized its definition of a public nuisance as consistent with this Restatement definition. Physicians Plus, supra, at 102 and footnote 15. Restatement (Second) of Torts §821B Comment e points out that the list of circumstances in §821B(2) is not exclusive. If the evidence suggests the interference was unreasonable in some other respect, the instruction may have to be tailored to conform to that evidence.

4. "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) Torts, §821F. "The rule stated in this Section is applicable to both public and private nuisances." Id., Comment a.

In a public nuisance action, the plaintiff must demonstrate not only that the harm suffered was significant, but that it was different than the type of harm suffered by other members of the public affected by the defendant's actions. "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference." Restatement 2d Torts, §821C(1). If there is an issue as to whether the harm allegedly suffered by the plaintiff was different in kind and degree from that suffered by the public, additional guidance to the jury on the issue may be required. See Comments b and c to Restatement 2d Torts, §821C.

5. Restatement (Second) of Torts §825.

6. The concept of unreasonableness described in the first element involves the unreasonableness of the interference with the use of a public place or the activities of an entire community and is an inherent part of the definition of a public nuisance itself. This fourth element requires the jury to find, in addition, that the particular actions of the defendant in creating the unreasonable interference were unreasonable themselves.

The standard in the instruction for evaluating the reasonableness of the defendant's conduct is taken from Restatement (Second) of Torts §826. Additional guidance in applying the standard can be found in Restatement (Second) of Torts §§827-831.

7. Restatement (Second) of Torts §826.

8. In order to be entitled to any recovery, the plaintiff must prove significant harm. There may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm. There may be other cases, however, in which the damage amount alone does not conclusively demonstrate whether the jury believed the harm suffered was or was not significant. Including the significant harm question in the verdict provides a clear answer as to whether jury believes the harm found is or is not significant.

COMMENT

This instruction was approved by the committee in 2009. This revision was approved by the Committee in September 2024; it added to the comment.

Permanent vs. continuing nuisances. Whether a private nuisance claim is barred by the applicable statute of limitations depends on whether the nuisance is permanent or continuing. For more information on determining whether a nuisance is permanent or continuing, see Wis JI-Civil 1920.

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2418A UNFAIR TRADE PRACTICE: UNTRUE, DECEPTIVE, OR MISLEADING REPRESENTATION: WIS. STAT. § 100.18(11)(b)2 [FOR CLAIMS BROUGHT BY PRIVATE PARTIES][1]

To constitute an untrue, deceptive, or misleading representation in this case, there are three elements[2] which must be proved by (plaintiff).

First, (defendant) made, published, or placed before one or more members of the public an advertisement, announcement, statement, or representation concerning the (sale) (hire) (use) (lease) (distribution) of _____ [**Note**: indicate nature of the sales promotion]. An advertisement, announcement, statement, or representation can be oral or written. It can appear in a newspaper, magazine, or other publication or it can be made by telephone or over radio or television. It may take the form of a notice, handbill, circular, pamphlet, letter, or any other means of (publishing) (disseminating) (circulating) it. [It may also take the form of a face-to-face communication.]

Second, the advertisement or announcement contained a(n) (assertion) (representation) (statement) that was untrue, deceptive, or misleading. A(n) (assertion) (representation) (statement) is untrue if it is false, erroneous, or does not state or represent things as they are. A(n) (assertion) (representation) (statement) is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief. The (assertion) (representation) (statement) need not be made with knowledge as to its falsity or with an intent to defraud or deceive so long as it was made with the intent to (sell)

(distribute) the _____ [product or item] or with the intent to induce the (purchase) (use) of the_____ [product or item].

Third, (plaintiff) sustained a monetary loss as a result of the (assertion) (representation) (statement). In determining whether (plaintiff)'s loss was caused by the (assertion) (representation) (statement), the test is whether (plaintiff) would have acted in its absence. Although the (assertion) (representation) (statement) need not be the sole or only motivation for (plaintiff)'s decision to (buy) (rent) (use) the_____ [product or item], it must have been a material inducement. That is, the (assertion) (representation) (statement) must have been a significant factor contributing to (plaintiff)'s decision. [You may consider the reasonableness of (plaintiff)'s reliance on the (assertion) (representation) (statement) by (defendant) in determining whether the (assertion) (representation) (statement) materially induced (plaintiff) to sustain a monetary loss.]

(Give Wis JI-Civil 200.)

NOTES

1. The bracketed language "FOR CLAIMS BROUGHT BY PRIVATE PARTIES" is included in the title to inform the user that this instruction addresses claims that differ from those brought by the State under Wis. Stat. § 100.18(1). The Committee recommends that this bracketed language not be included in the written instructions provided to the jury.

2. This instruction is specifically drafted for private party lawsuits brought under Wis. Stat. §

100.18(11)(b)2, which require three elements: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was "untrue, deceptive, or misleading," and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff.

In contrast, actions brought by the State under Wis. Stat. § 100.18(1) and (10r) do not require proof of monetary loss due to the misleading representation. For claims under § 100.18(1) and (10r), see Wis JI-Civil 2418B.

COMMENT

This instruction and comment were approved by the Committee in September 2024.

Elements. There are two elements to a claim made under § 100.18(1) and 100.18(10r): (1) the defendant made a representation to the public with the intent to induce an obligation, and (2) the representation was "untrue, deceptive or misleading." A third element requiring that the representation materially induced (caused) a pecuniary loss to the plaintiff is necessary in actions brought under Wis. Stat. § 100.18(11)(b)2. K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 & 49.

Reliance; Cause. In Novell v. Migliaccio, 2008 WI 44, 309 Wis.2d 132, 749 N.W.2d 544, the supreme court held that a plaintiff is not required to prove reasonable reliance as an element of a § 100.18 claim. However, the court said "reasonableness of a plaintiff's reliance may be relevant in considering whether the misrepresentation materially induced (caused) the plaintiff to sustain a loss." See also K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792.

In K&S Tool & Die Corp., the court contrasted § 100.18 claims with common law misrepresentation claims and concluded that unlike common law causes of action for misrepresentation, reasonable reliance is not the standard for a § 100.18 claim because the legislature created a distinct cause of action.

The reasonableness of a person's actions in relying on representations is a "defense" and may be considered by a jury in determining cause. Novell, supra, ¶49. A jury may consider the reasonableness of a person's reliance on a representation in determining whether there had been a material inducement. Novell, supra, ¶ 50; K & S Tool & Die, supra, ¶36.

Economic Loss Doctrine. In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the supreme court held that the economic loss doctrine bars common law claims for "intentional misrepresentation" in residential real estate transactions. It also held that a plaintiff in such a transaction would still have "statutory and contractual remedies," noting in particular that the plaintiffs § 100.18 claim was still viable because it had been remanded to the trial court. See also Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶6, 389 Wis. 2d 669, 937 N.W.2d 37 (concluding "that the economic loss doctrine does not serve as a bar to claims made under Wis. Stat. § 100.18").

Burden of Proof Under Wis. Stat. § 100.20 (5). In Benkoski v. Flood, 2001 WI App 84, ¶17, 242 Wis.2d 652, 626 N.W.2d 851, the court said the application of the ordinary civil burden of proof fosters the remedial purposes and policies underlying § 100.20(5).

Pecuniary Loss in Wis. Stat. § 100.20(5). The court of appeals has said that the "pecuniary loss" concept set out in Wis. Stat. § 100.20(5) is similar to the concept explained in JI-Civil 3735, Damages: Loss of

Expectation. Benkoski v. Flood, 2001 WI App 84, ¶32, 242 Wis.2d 652, 626 N.W.2d 851. See also Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451, where the court of appeals discusses this instruction.

Silence. A non-disclosure does not constitute an "assertion, representation or statement of fact" under Wis. Stat. § 100.18(1). Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶4, 39, and 40. Silence is insufficient to support a claim.

Members of the Public. When there is an issue whether the plaintiff was a "member of the public" under § 100.18, see K & S Tool & Die Corp., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 and State v. Automatic Merchandisers of America, Inc., 64 Wis.2d 659, 221 N.W.2d 683 (1974). Whether the plaintiff is a member of the public presents a question of fact. K & S Tool & Die Corp., supra. See also Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶¶64–71, 389 Wis. 2d 669, 937 N.W.2d 37 (declining to overrule Automatic Merchandisers and noting cases subsequent to Automatic Merchandisers "consistently and coherently followed it").

Puffery. See United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.

Advertisements. The court of appeals has held that the plain language of Wis. Stat. § 100.18 "shows that statements or representations may be actionable even when contained in bills or other documents not traditionally considered 'advertisements.'" MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2013 WI App 14, 346 Wis.2d 173, 828 N.W.2d 575. Applying this holding to the facts of the case, the court concluded that phone bills and representations in the bills that induced the plaintiff to pay for services it did not authorize are among the kind of misleading representations that Wis. Stat. § 100.18 prohibits.

Voluntary Payment Doctrine. The court in MBS, supra, also held that the voluntary payment doctrine does not apply to claims under Wis. Stat. § 100.18, 100.207, or the Wisconsin Organized Crime Control Act (Wis. Stat. §§ 946.80-946.88).

Under the common law voluntary payment doctrine, a party cannot bring an action to recover payments that were paid voluntarily with full knowledge of the material facts, and absent fraud or wrongful conduct inducing payment. See MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2012 WI 15, 338 Wis.2d 647, 809 N.W.2d 857.

Rescission. In 2014, the court of appeals held that Wis. Stat. § 100.18 permits plaintiffs, in some instances, to recover a refund of the purchase price. However, the statute which permits recovery only for "pecuniary loss," does not permit rescission as a remedy. A plaintiff can receive rescission as a remedy for intentional misrepresentation when the misrepresentation is material. Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451; see Wis JI-Civil 2405.

As-Is Clause. In Fricano v. Bank of America, 2016 WI App 11, 366 Wis.2d 748, 875 N.W.2d 143, the court said an "as is" and exculpatory clauses in the parties' contract did not relieve the bank/seller of liability under Wis. Stat. § 100.18 for its deceptive representation in the contract which induced agreement to such terms. The trial court in Fricano, instructed the jury on the "as is" clause as follows:

An 'as is' clause does not relieve the defendant, Bank of America, from a duty to disclose a material adverse fact about the property.

The buyer still has the burden of proof to prove that Bank of America had knowledge of the condition of the property and failed to disclose it. The buyer is entitled to rely upon a statement by the defendant, Bank of America, that it has no knowledge about the property. Bank of America may not use an as-is clause to relieve the bank of its responsibility to disclose conditions about the condition of the property. In these situations, the exculpatory clause still may have evidentiary value for the purpose of showing that no representations were relied upon.

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2418B UNFAIR TRADE PRACTICE: UNTRUE, DECEPTIVE, OR MISLEADING REPRESENTATION: WIS. STAT. § 100.18(1) [FOR CLAIMS BROUGHT BY THE STATE][1]

To constitute an untrue, deceptive, or misleading representation in this case, there are two elements[2] which must be proved by (plaintiff).

First, (defendant) made, published, or placed before one or more members of the public an advertisement, announcement, statement, or representation concerning the (sale) (hire) (use) (lease) (distribution) of _____ [**Note**: indicate nature of the sales promotion]. An advertisement, announcement, statement, or representation can be oral or written. It can appear in a newspaper, magazine, or other publication or it can be made by telephone or over radio or television. It may take the form of a notice, handbill, circular, pamphlet, letter, or any other means of (publishing) (disseminating) (circulating) it. [It may also take the form of a face-to-face communication.]

Second, the advertisement or announcement contained a(n) (assertion) (representation) (statement) that was untrue, deceptive, or misleading. A(n) (assertion) (representation) (statement) is untrue if it is false, erroneous, or does not state or represent things as they are. A(n) (assertion) (representation) (statement) is deceptive or misleading if it causes a reader or listener to believe something other than what is in fact true or leads to a wrong belief. The (assertion) (representation) (statement) need not be made with knowledge as to its falsity or with an intent to defraud or deceive so long as it was made with the intent to (sell)

(distribute) the _____ [product or item] or with the intent to induce the (purchase) (use) of the_____ [product or item].

(Give Wis JI-Civil 200.)

NOTES

1. The bracketed language "FOR CLAIMS BROUGHT BY THE STATE" is included in the title to inform the user that this instruction addresses claims that differ from those brought by the private parties under Wis. Stat. § 100.18(11)(b)2. The Committee recommends that this bracketed language not be included in the written instructions provided to the jury.

2. This instruction is specifically drafted for actions brought by the State under Wis. Stat. § 100.18(1) and (10r), which require only two elements: (1) the defendant made a representation to the public with the intent to induce an obligation, and (2) the representation was "untrue, deceptive, or misleading."

Previous versions of this instruction included a third element requiring proof of pecuniary loss due to the misleading representation. However, in State v. Talyansky, 2023 WI App 42, 409 Wis.2d 57, ¶¶41-42, 995 N.W.2d 277, the court clarified that proof of monetary loss is required only in private party lawsuits brought under Wis. Stat. § 100.18(11)(b)2.

For private party claims under Wis. Stat. § 100.18(11)(b)2, which require proof of monetary loss, see Wis JI-Civil 2418A.

COMMENT

This instruction and comment were approved in 1998. The instruction was revised in 2009. The comment was updated in 2001, 2004, 2008, 2009, 2014, 2016, 2017, and 2021. A reporter's note was removed in 2014. This instruction was renumbered in 2025 from Wis JI-Civil 2418. This revision was approved by the Committee in September 2024. It eliminated a previously included third element requiring proof of monetary loss due to the misleading representation, to more accurately reflect the required elements under Wis. Stat. § 100.18(1) and (10r). For matters involving Wis. Stat. § 100.18(11)(b)2, which requires proof of monetary loss, see Wis JI-Civil 2418A.

Elements. There are two elements to a § 100.18 claim: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was "untrue, deceptive or misleading." State v. Talyansky, 2023 WI App 42, 409 Wis.2d 57, ¶42, 995 N.W.2d 277, citing State v. American TV & Appliance of Madison, Inc., 146 Wis. 2d 292, 295, 430 N.W.2d 709 (1988).

Recipient or Consumer Location. The plain language of Wis. Stat. § 100.18(1) does not require that

an advertisement or representation be made to a Wisconsin resident. State v. Talyansky, supra, ¶39. Therefore, the Deceptive Trade Practices Act may be enforced against Wisconsin businesses that reach consumers outside of state.

Economic Loss Doctrine. In Below v. Norton, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the Supreme Court held that the economic loss doctrine bars common law claims for "intentional misrepresentation" in residential real estate transactions. It also held that a plaintiff in such a transaction would still have "statutory and contractual remedies," noting in particular that the plaintiffs § 100.18 claim was still viable because it had been remanded to the trial court. See also Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶6, 389 Wis. 2d 669, 937 N.W.2d 37 (concluding "that the economic loss doctrine does not serve as a bar to claims made under Wis. Stat. § 100.18").

Burden of Proof Under Wis. Stat. § 100.20 (5). In Benkoski v. Flood, 2001 WI App 84, ¶17, 242 Wis.2d 652, 626 N.W.2d 851, the court said the application of the ordinary civil burden of proof fosters the remedial purposes and policies underlying § 100.20(5).

Pecuniary Loss in Wis. Stat. § 100.18(1) and (10r). The court of appeals has held that § 100.18(1) and (10r) do not require the State to prove pecuniary loss. State v. Talyansky, supra, ¶¶41-42. See Note 1 above. See also State v. American TV & Appliance of Madison, Inc., 146 Wis. 2d 292, 300, 430 N.W.2d 709

Silence. A non-disclosure does not constitute an "assertion, representation or statement of fact" under Wis. Stat. § 100.18(1). Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶4, 39, and 40. Silence is insufficient to support a claim.

Members of the Public. When there is an issue whether the plaintiff was a "member of the public" under § 100.18, see K & S Tool & Die Corp., 2007 WI 70, 301 Wis.2d 109, 732 N.W.2d 792 and State v. Automatic Merchandisers of America, Inc., 64 Wis.2d 659, 221 N.W.2d 683 (1974). Whether the plaintiff is a member of the public presents a question of fact. K & S Tool & Die Corp., supra. See also Hinrichs v. DOW Chemical Co., 2020 WI 2, ¶¶64–71, 389 Wis. 2d 669, 937 N.W.2d 37 (declining to overrule Automatic Merchandisers and noting cases subsequent to Automatic Merchandisers "consistently and coherently followed it").

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Voluntary Payment Doctrine. The court in MBS, supra, also held that the voluntary payment doctrine does not apply to claims under Wis. Stat. § 100.18, 100.207, or the Wisconsin Organized Crime Control Act (Wis. Stat. §§ 946.80-946.88).

Under the common law voluntary payment doctrine, a party cannot bring an action to recover

payments that were paid voluntarily with full knowledge of the material facts, and absent fraud or wrongful conduct inducing payment. See MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2012 WI 15, 338 Wis.2d 647, 809 N.W.2d 857.

Rescission. In 2014, the court of appeals held that Wis. Stat. § 100.18 permits plaintiffs, in some instances, to recover a refund of the purchase price. However, the statute which permits recovery only for "pecuniary loss," does not permit rescission as a remedy. A plaintiff can receive rescission as a remedy for intentional misrepresentation when the misrepresentation is material. Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451; see Wis JI-Civil 2405.

As-Is Clause. In Fricano v. Bank of America, 2016 WI App 11, 366 Wis.2d 748, 875 N.W.2d 143, the court said an "as is" and exculpatory clauses in the parties' contract did not relieve the bank/seller of liability under Wis. Stat. § 100.18 for its deceptive representation in the contract which induced agreement to such terms. The trial court in Fricano, instructed the jury on the "as is" clause as follows:

An 'as is' clause does not relieve the defendant, Bank of America, from a duty to disclose a material adverse fact about the property.

> The buyer still has the burden of proof to prove that Bank of America had knowledge of the condition of the property and failed to disclose it. The buyer is entitled to rely upon a statement by the defendant, Bank of America, that it has no knowledge about the property. Bank of America may not use an as-is clause to relieve the bank of its responsibility to disclose conditions about the condition of the property. In these situations, the exculpatory clause still may have evidentiary value for the purpose of showing that no representations were relied upon.

2780 INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

Question _____ of the Special Verdict asks whether (plaintiff) had a contractual relationship (prospective contractual relationship) with (3rd party).

[If there is an issue on whether the relationship amounts to a contract, use appropriate contract instructions.]

Question _____ of the Special Verdict asks whether (defendant) interfered with the (prospective) contractual relationship (plaintiff) had with (3rd party).

An interference may consist of any conduct or words conveying to (3rd party) the defendant's desire to influence (3rd party) to refrain from dealing with the plaintiff. It could be a simple request or persuasion, exerting only moral pressure, as well as threats or promises of some benefit to (3rd party). It does not require ill will or expression of malice towards the plaintiff.

Question ____ of the Special Verdict asks whether that interference on (defendant)'s part was intentional.

In determining (defendant)'s intent, you may consider (his) (her) actions and statements. Ordinarily, it is reasonable to infer that a person intends the natural and probable consequences of (his) (her) acts.

Although other reasons may appear, (plaintiff) must prove that (defendant)'s prime purpose was to interfere with the contractual relationship (plaintiff) had with (3rd party) or

(defendant) knew or should have known that such interference was substantially certain to occur as a result of the conduct.

[If knowledge (plaintiff)'s relationship with (3rd party) is an issue, add the following: It is not necessary that (defendant) had actual knowledge of this specific contract. It is sufficient that (defendant) had knowledge of facts which, if followed by inquiry ordinarily made by a reasonable and prudent person, would have led to a disclosure of the contractual relationship between (plaintiff) and (3rd party). This is sometimes referred to as "constructive knowledge."]

Question ____ asks whether a causal connection existed between the interference by (defendant) and the damages claimed by (plaintiff).

Before you can find that (defendant)'s conduct was a cause of the claimed damages, you must find that the defendant's conduct was a substantial factor; that is, it had a substantial influence in producing the damages claimed by the plaintiff. In other words, there must be a real causal connection between the defendant's conduct and the plaintiff's claimed damages.

Question ____ asks whether (defendant) was justified (or privileged) to interfere with the contractual relationship (plaintiff) had with (3rd party).

In determining whether (defendant)'s conduct was justified, you should weigh all the circumstances of the case. Among the factors you should consider are (1) the nature, type, duration, and timing of the conduct; (2) whether (defendant) had an improper motive; (3)

whether (defendant) was motivated by self-interest as opposed to a public interest; (4) the type of interest allegedly interfered with; (5) society's interest in protecting both freedom of action on (defendant)'s part and contractual relationship of parties; (6) the closeness or remoteness of (defendant)'s conduct to the alleged interference; (7) whether (plaintiff) and (defendant) are competitors; and (8) whether (defendant)'s conduct, even though intentional, was fair and reasonable under the circumstances.

A defendant's conduct may only be found justified if the means employed by the defendant were lawful. A person's conduct cannot be justified if the person acted from ill will or an improper motive towards the plaintiff. Some ill will does not preclude the possibility of justification so long as the defendant acted in substantial part with a proper motive in mind.

[**For privileges, see Comment**.]

The burden of proof as to questions one, two, three, four, and six is on (plaintiff). The burden of proof as to question five is on (defendant).[1]

SPECIAL VERDICT

First Question: Did (plaintiff) have a contract with (third party) at the time of (defendant)'s alleged interference?

Answer: _____
Yes or No

If you answered "Yes" to Question 1, then answer Question 2. If you answered "No,"

skip to [next cause of action/end].

[**Note**: In most cases, the first question can be answered by the court as a matter of law.]

Second Question: Did (defendant) interfere with (plaintiff)'s contract with (third party)?

Answer: _____
Yes or No

If you answered "Yes" to Question 2, then answer Question 3. If you answered "No," skip to [next cause of action/end].

Third Question: Was the interference on (defendant)'s part intentional?

Answer: _____
Yes or No

If you answered "Yes" to Question 3, then answer Question 4. If you answered "No," skip to [next cause of action/end].

Fourth Question: Was the interference on (defendant)'s part a cause of damages to (plaintiff)?

Answer: _____
Yes or No

If you answered "Yes" to Question 4, then answer Question 5. If you answered "No," skip to [next cause of action/end].

Fifth Question: Was the interference on (defendant)'s part justified?

Answer: _____
Yes or No

Answer Question 6 irrespective of how you answered Question 5.

Sixth Question: What amount of damages, if any, will compensate the (plaintiff) for (defendant's) interference?

$_____

NOTES

1. In Charolais v. FPC Securities, 90 Wis. 2d 97, 105-06 (Ct. App. 1979), Wisconsin adopted the Restatement (Second) of Torts, § 766, which concerns the cause of action of intentional interference with a contractual relationship. The Committee found no Wisconsin authority suggesting that the higher "clear and convincing evidence" standard should be applied to Questions 2, 3, and 4 in the special verdict. Other states that have adopted § 766 apply a preponderance of the evidence standard to prove such claims. Although rulings from these jurisdictions are not legally binding in Wisconsin, the Committee recommends using the same preponderance of the evidence standard for Questions 2, 3, and 4 of the special verdict form. This recommendation aims to maintain consistency with how other states implementing the Restatement handle these matters.

COMMENT

This instruction and comment were approved by the Committee in 1990. The instruction was revised in 2002 and 2005 as to the burden of proof language. The comment was updated in 1996, 2001, 2005, 2014, 2020, and 1/2024. The 1/2024 revision removed language concerning the standard of proof for the special

verdict questions, modified the special verdict, and added to the comment. This revision was approved by the Committee in January 2025. It added to the comment concerning disgorgement as a remedy.

In 2023, the Committee eliminated language from the instruction that described the burden of proof for special verdict questions one through five. Earlier versions of the instruction described the degree of proof required for questions 2, 3, and 4 as "clear, satisfactory, and convincing." However, upon review, the Committee could not find any Wisconsin authority to support the application of this elevated standard. For additional context, see note 1, supra.

Wisconsin adopted the 1939 version of the Restatement of Torts, § 766, in Mendelson v. Blatz Brewing Co., 9 Wis.2d 487, 101 N.W.2d 805 (1960). The updated 1979 version of this section of Restatement, Second, Torts was adopted in Charolais Breeding Ranches, Ltd. v. FPC Securities Corp., 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979).

Also actionable is preventing a party from performing a contract or causing performance to be more expensive or burdensome, § 766A, or interfering with a prospective contractual relationship, § 766B Restatement, Second, Torts; Cudd v. Crownhart, 122 Wis.2d 656, 659, 364 N.W.2d 158 (Ct. App. 1985) rev. den.

A plaintiff does not have to show malicious intent to sustain a claim. Foseid v. State Bank of Cross Plains, 197 Wis.2d 772, 541 N.W.2d 203 (Ct. App. 1995).

The plaintiff does not have the burden of proving a lack of privilege. Rather, proof by the plaintiff of intentional interference with the existing contractual relations of another is sufficient to establish liability. This shifts the burden of proving justification or privilege for any interference to the defendant. Finch v. Southside Lincoln-Mercury, Inc., 2004 WI App 110, 274 Wis.2d 719, 685 N.W.2d 154 (citing Chrysler Corp. v. Lakeshore Commercial Fin. Corp., supra, and Wis JI-Civil 2780). See also Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin, S.C., 2005 WI App 217, 287 Wis.2d 560, 706 N.W.2d 667.

Intent. Interference may also be found where the actor knows the interference is certain or substantially certain to occur as a result of his or her action. See Restatement, Second, Torts, § 766 cmt. j (1979). However, this section of the Restatement "applies only where 'it is apparent at the outset that the tortfeasor acted with the intention to interfere with the [prospective contract] or acted in such a fashion and for such purpose that he knew that the interference was 'certain, or substantially certain, to occur.' " Foseid, supra at 791 n.11, citing Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis.2d 207, 221, 249 N.W.2d 547, 554 (1977).

Defenses. Affirmative defenses include truthful information or honest advice within the scope of a request for advice by a defendant to a third party, Restatement, Second, Torts, § 772, and Liebe v. City Fin. Corp., 98 Wis.2d 10, 295 N.W.2d 16 (Ct. App. 1980) rev. den.; Hale v. Stoughton Hosp. Ass'n, Inc., 126 Wis.2d 267, 282, 376 N.W.2d 89 (Ct. App. 1985), and a free speech privilege to assert complaints. Augustine v. Anti-Defamation League B'nai Brith, 75 Wis.2d 207, 218, 249 N.W.2d 547 (1977).

A claim for intentional interference with contract based on disclosure of information is precluded by the First Amendment, where the broadcast was a "matter of public concern." Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

Another example would be where the defendant has a legally protected interest and believes his or her own interest would be impaired or destroyed by the performance of the contract; Restatement, Second, Torts, § 773, and Cudd v. Crownhart, supra at 662.

If the contract involved is one terminable at will, competition is not an improper basis for interference as long as no wrongful means are employed, no restraint of trade occurs, and the purpose of defendant's actions is to advance his or her own competitive interests; Restatement, Second, Torts, § 768, and Liebe v. City Fin. Co., supra; Pure Milk Prod. Coop. v. National Farmers' Org., 90 Wis.2d 781, 796, 280 N.W.2d 691 (1979).

Other possible avoidances of liability involve situations where the defendant has a financial interest in the party induced, where the defendant is responsible for the welfare of another, or where the contract is an illegal one or contrary to public policy; Restatement, Second, Torts, §§ 769, 770, and 774.

Disgorgement as a remedy: In cases of tortious interference with contractual relationships, disgorgement is recognized as a proper remedy that seeks to deprive the defendant of any wrongful gain attributable to their interference with the plaintiff's contractual rights. Frey Construction & Home Improvement, LLC v. Hasheider Roofing & Siding, Ltd., 2025 WI App 4, ---Wis. 2d ---, --- N.W.2d ---. Unlike traditional compensatory damages, which aim to restore the plaintiff to their pre-interference position, disgorgement focuses on eliminating unjust enrichment resulting from the defendant's conduct.

Disgorgement is an equitable remedy that must be decided by the Court as a matter of law and therefore is not a question for the jury. Equitable issues—including whether an accounting is appropriate and, if so, its scope—remain within the Court's province and are to be addressed only after the jury has resolved any legal issues.

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OFFICE OF JUDICIAL EDUCATION

2/2025

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME III

Wisconsin Civil Jury Instructions Committee

- 2/2025 Supplement (Release No. 58)

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7060 PETITION FOR GUARDIANSHIP OF INCOMPETENT PERSON AND APPLICATION FOR PROTECTIVE PLACEMENT; WIS. STAT. § 54.10 AND 55.08(1)

(Insert Wis JI-Civil 100, Opening)

A petition has been filed to appoint a guardian for (individual) and for (his) (her) protective placement. The petition alleges that (individual) is an incompetent person by reason of (a developmental disability) (degenerative brain disorder) (serious and persistent mental illness) (or other like incapacities) and needs a guardian appointed and protective placement. A guardian is a person appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of an individual found incompetent. Protective placement means a placement that is made to provide for the care and custody of an individual.

The fact that a petition has been filed is not evidence that (individual) is incompetent or in need of protective placement. Every person is presumed to be competent. The burden of proving incompetency and the need for protective placement is upon (petitioner). The evidence must show the incompetence exists at the time of this hearing.

This is a civil, not a criminal case. While (individual) is not on trial to be punished for any offense, nevertheless, this trial and your verdict could result in a loss of personal liberty. Therefore, you should approach your task with a sense of serious duty.

Wis JI-Civil 110, Arguments of Counsel

Wis JI-Civil 115, Objections of Counsel

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Wis JI-Civil 260, Expert Testimony: General

Wis JI-Civil 265, Expert Testimony: Hypothetical Question

At the end of the trial, you will be given a special verdict consisting of three questions. You must answer them according to the evidence and to the instructions I will give you.

Wis JI-Civil 205, Burden of Proof: Middle

Wis JI-Civil 145, Special Verdict Questions: Interrelationship

Question 1 in the verdict reads: Is (individual) incompetent at the time of this hearing?

To answer question 1 "yes," you must find the following:

a. That (individual) is aged at least 17 years and 9 months; and

b. That (individual) suffers from ("a developmental disability") ("degenerative brain disorder") ("serious and persistent mental illness"), or ("other like incapacities"); and

c. That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that (he) (she) cannot (meet the essential requirements for (his) (her) physical health and safety).

"Meet the essential requirements for health or safety" means perform those actions

necessary to provide the healthcare, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur[1]; and

d. That (individual)'s need for assistance in decision-making or communication cannot be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

[A "developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, or autism or any other neurological conditions closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation which has continued or can be expected to continue indefinitely. The condition must substantially impair the individual so that he or she cannot adequately provide for his or her own care or custody; it must constitute a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder.]

["Degenerative brain disorder" means the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.]

["Serious and persistent mental illness" means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the

primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration. It includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or a primary diagnosis of a developmental disability or of alcohol or drug dependence.]

["Other like incapacities" means those conditions incurred at any age which are the result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition which substantially impairs an individual from providing for his or her own care or custody].

Unless (individual) is unable to communicate decisions effectively in any way, your determination of incompetency may not be based on mere old age, eccentricity, poor judgment, or physical disability.

Question 2 of the verdict reads: If you answer question 1 "yes," then answer this question: Is the condition permanent or likely to be permanent?

You should answer "yes" if (individual)'s incompetence is likely to continue for the balance of (his) (her) life.

Question 3 of the verdict reads: If you answer question 2 "yes," then answer this question: Is (individual) in need of protective placement?

A person is considered to be in need of protective placement if that person:

1. As a result of (insert incapacity), is so totally incapable of providing for (his) (her) own care or custody as to create a substantial risk of serious harm to (himself) (herself) or others; and
2. Has a primary need for residential care and custody.

Serious harm may be evidenced by overt acts or acts of omission.

If your answer to each of the questions in the Special Verdict is "yes," then the court may order a protective placement. However, a protective placement will be ordered only after (individual)'s needs have been comprehensively evaluated, and (individual) will be placed in the least restrictive environment consistent with (his) (her) needs.

Do not concern yourself with the length or nature of the protective placement.

Wis JI-Civil 180, Five-Sixths Verdict

Wis JI-Civil 190, Closing

SUGGESTED VERDICT

Question 1: Is (individual) incompetent?

Answer:

Yes or No

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

Is (his) (her) condition permanent or likely to be permanent?

Answer:

Yes or No

Question 3: If you answer question 2 "yes," then answer this question:

Is (individual) in need of protective placement?

Answer:

Yes or No

NOTES

1. Wis. Stat. § 54.01(19).

COMMENT

This instruction was approved in 2006 and revised in 2009 and 2019. The comment was updated in 2012 and 2019. This revision was approved by the Committee in January 2025.

A petition for guardianship of an incompetent person shall be heard prior to ordering protective placement or protective services. Wis. Stat. § 55.075(3).

The middle burden of proof (clear, satisfactory, and convincing) applies to the determination of incompetency and to the need for protective placement. Wis. Stat. § 54.44(2) and § 55.10(4)(d) .

The terms "individual found incompetent," "developmental disability," "degenerative brain disorder," "serious and persistent mental illness"), and "other like incapacities" are defined in Wis. Stat. §§ 54.01(16), 54.01(8), 54.01(6), 54.01(30), and 54.01(22) respectively.

The second and third verdict questions are based on the findings required to establish the need for protective placement. Wis. Stat. § 55.08(1).

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

8035 HIGHWAY OR SIDEWALK DEFECT OR INSUFFICIENCY

Every municipality has the duty to exercise ordinary care to construct, maintain, and repair its (highways) (sidewalks[1]) so that they will be reasonably safe for public travel. This duty does not require the municipality to guarantee the safety of its (highways) (sidewalks) or render them absolutely safe for all persons who travel upon them. It is sufficient if they are constructed (and) (maintained) so as to be reasonably safe.

A (highway) (sidewalk) is defective when it is not (constructed) (maintained) so as to be reasonably safe for anticipated public use.

(However, before you may find (municipality) negligent because of the existence of a defective condition, you must first find that (municipality) through its officers or employees had either actual notice of the defect, or constructive notice, because the defect had existed for such a length of time before the accident that the municipality through its officers and employees in the exercise of ordinary care should have discovered it in time to remedy the defect.)

You may consider the topography and development of the locality (the standard of sidewalk construction which this part of the municipality had attained), as well as the amount and character of traffic on the (highway) (sidewalk) and the intended use of the (highway) (sidewalk) by the public.

COMMENT

This instruction was approved in 1974 and numbered Wis JI-Civil 1029. It was renumbered in 1985. Editorial changes were made in 1994. The instruction was revised in 2004, 2015, and 2021. This revision was approved by the Committee in October 2024. It added to the comment regarding the decision in Sojenhomer LLC v. Village of Egg Harbor, 2024 WI 25, 412 Wis. 2d 244, 7 N.W.3d 455, which addressed the scope of the terms "sidewalk" and "pedestrian way."

The Committee believes that claims for insufficiency or want of repairs of a roadway remain viable under Wis. Stat. § 893.80(4) and Holytz v. Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962). However, governmental immunity, under Holytz, supra, may bar some claims. The Supreme Court has also intimated that in abolishing municipal tort immunity, Holytz, provides an independent basis for proceeding in these actions. Schwartz v. City of Milwaukee, 43 Wis.2d 119, 123, 168 N.W.2d 107 (1969); Schwartz v. City of Milwaukee, 54 Wis.2d 286, 288-89, 195 N.W.2d 480 (1972). The court stated, at 54 Wis.2d 288-89, that:

...sec.81.15 might as well be repealed by the legislature since its purported language creating a cause of action has been supplanted by Holytz v. Milwaukee . . .

This language was cited with approval in Morris v. Juneau County, 219 Wis.2d 543, 555, 579 N.W.2d 618 (1962).

Prior to being amended in 2012, Wis. Stat. § 893.83(1) (formerly numbered Wis. Stat. § 81.15) provided a separate standard for municipal liability for highway defect claims. The statute provided that a municipality may be held liable for damages of up to $50,000 that "happen to any person or his or her property by reason of the insufficiency or want of repairs of any highway that any town, city, or village is bound to keep in repair." Under this statutory provision, a municipality was not liable for damages sustained by reason of an accumulation of snow or ice upon a bridge or highway, unless the accumulation existed for three weeks or more. The court in Morris held that these types of claims were not subject to discretionary immunity.

However, in 2012, the legislature eliminated the separate standard for claims based on highway defects. Following the enactment of 2011 Wisconsin Act 132 [effective date: April 5, 2012], claims based on highway defects are subject to the grant of discretionary immunity found in Wis. Stat. 893.80, as well as all the procedures found in that statute. Additionally, the legislature has provided that highway defect claims may not go forward if they are based on an accumulation of snow or ice, unless that accumulation has existed for three weeks or more. The court of appeals has interpreted the amended § 893.83 as providing that snow and ice accumulations claims are absolutely barred if the accumulation existed for less than three weeks, and that they are subject to the grant of discretionary immunity found in Wis. Stat. § 893.80 if the accumulation existed for three weeks or more. Knoke v. City of Monroe, 2021 WI App 6, 395 Wis.2d 551, 953 N.W.2d 889.

Sidewalk and Pedestrian Way. In Sojenhomer LLC v. Village of Egg Harbor, 2024 WI 25, ¶23, 412 Wis. 2d 244, 7 N.W.3d 455, the Supreme Court of Wisconsin clarified the legal distinction between "sidewalks" and "pedestrian ways" as they pertain to condemnation claims under Wis. Stat. §§ 32.05(5) and 32.015. The Court held that the statutory definition of "sidewalk" in Wis. Stat. § 340.01(58) is distinct from, and does not overlap with, the definition of "pedestrian way" in Wis. Stat. § 346.02(8)(a). Specifically, Wis. Stat. § 340.01(58) defines a "sidewalk" as "a portion of a highway between the curb

lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for use by pedestrians." In contrast, Wis. Stat. § 346.02(8)(a) defines a "pedestrian way" as "a walk designated for the use of pedestrian travel."

The Court explained that "while sidewalks are, by definition, part of the adjoining highway, a pedestrian way may be established independently by designating a separate path or road as such" Id. at ¶23. This distinction emphasizes that sidewalks are inherently connected to roadways within a highway system, whereas pedestrian ways can exist independently as designated paths exclusively for pedestrian use (e.g., recreational trails, urban walking paths, and footbridges).

Regarding claims outside the context of condemnation, the law appears to remain unsettled. In Crowbridge v. Village of Egg Harbor, 179 Wis. 2d 565, 508 N.W.2d 15 (1993), the Wisconsin Court of Appeals did conclude that a pier does not qualify as a "sidewalk" under Wis. Stat. § 81.15. However, the Committee was unable to locate any other direct authority that clarifies the scope or interrelation of the terms "sidewalk" and "pedestrian way." This lack of additional authoritative guidance leaves the precise definitions and boundaries between those terms, outside the context of condemnation, uncertain.

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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, 2018, and 1/2023. 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 September 2024; 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.

Prescriptive Easements: "An easement 'is a permanent interest in another's land, with a right to enjoy it fully and without obstruction.'" Konneker v. Romano, 2010 WI 65, ¶25, 326 Wis. 2d 268, 785 N.W.2d 432. "It is a liberty, privilege, or advantage in lands, without profit, and existing distinct from the

ownership of the land. An easement creates two distinct property interests—the dominant estate, which enjoys the privileges as to other land granted by an easement, and the servient estate, which permits the exercise of those privileges." AKG Real Est., LLC v. Kosterman, 2006 WI 106, ¶3, 296 Wis. 2d 1, 717 N.W.2d 835.

To satisfy a claim for an easement by prescription, a person must prove the following elements by the greater weight of the credible evidence, to a reasonable certainty: (1) that the adverse use is hostile and inconsistent with the exercise of the titleholder's possessive rights; (2) that the adverse use is visible, open, and notorious; (3) that the adverse use is under an open claim of right; (4) and that the adverse use is continuous and uninterrupted for twenty years. Mushel v. Molitor, 123 Wis. 2d 136, 144, 365 N.W.2d 622 (1985), citing Ludke v. Egan, 87 Wis.2d 221, 230, 274 N.W.2d 641, 646 (1979). See also, Buchholz v. Schmidt, 2024 WI App 47, ¶¶90-93, 413 Wis.2d 308, 11 N.W.3d 212.

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