# OFFICE OF JUDICIAL EDUCATION
# 11/2025

November 2025

TO: Consumers of Wisconsin Jury Instructions – Civil

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 59 for the 1981 edition of Wis JI-Civil. The release contains material approved by the Wisconsin Civil Jury Instructions Committee through October 2025.

The following material is included in Release No. 59:

New Instructions

| | | |
|---|---|---|
| 52A | 52B | 1023.5C |
| 2792A | 2792B | 2793A |
| 2793B | 2794A | 2794B |
| 2794C | 2795 | 2796 |
| 2797A | 2797B | 2798A |
| 2798B | 2799A | 2799B |
| 2784 | 2785 | 2786 |

Revised Instructions

| | | | |
|---|---|---|---|
| 410 | 1023 | 2004 | 2005 |
| 2006 | 2006.2 | 2750 | 3094 |
| 3095 | | | |

Renumbered

1023.5 to 1023.5A

1023.5A to 1023.5B

2005.5 to 2005.1

2007 to 2005.2

2006.5 to 2006.1

2008 to 2006.3

**Content.** The 11/2025 supplement updates the publication on legislative actions and judicial decisions through October 2025.

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

# Wis JI-Civil

## (Release No. 59 – November 2025)

## Filing Instructions

| Remove Old Pages Titled | Insert New Pages Titled |
|---|---|

**Volume I:**

| | |
|---|---|
| Title Page (2/2025) | Title Page (11/2025) Supplement |
| 2/2025 Supplement with (Release No. 58) in the right corner | (Release No. 59) in the right corner |
| Committee List (2/2025) | Committee List (11/2025) |
| Summary of Contents (2/2025) | Summary of Contents (11/2025) |
| Table of Contents (2/2025) | Table of Contents (11/2025) |
| _____ | AFTER (JI-50) 52A (11/2025) |
| _____ | AFTER (JI-52A) 52B (11/2025) |
| 410 (2015) | 410 (11/2025) |
| 1023 (2022) | 1023 (11/2025) |
| 1023.5 (2022) | RENUMBERED 1023.5A (11/2025) |
| 1023.5A (1997) | RENUMBERED 1023.5B (11/2025) |
| _____ | AFTER (JI-1023.5B) 1023.5C (11/2025) |

**Volume II:**

| | |
|---|---|
| Title Page (2/2025) | Title Page (11/2025) Supplement |
| 2/2025 Supplement with (Release No. 58) in the right corner | (Release No. 59) in the right corner |
| Table of Contents (2/2025) | Table of Contents (11/2025) |

2004 (2011).....2004 (11/2025)

2005 (2011).....2005 (11/2025)

_____.....2005.1 (11/2025) (Renumbered from 2005.5)

_____.....2005.2 (11/2025) (Renumbered from 2007)

2005.5 (2015) ..... REMOVE (Renumbered 2005.1)

2006 (2013).....2006 (11/2025)

_____.....2006.1 (11/2025) (Renumbered from 2006.5)

2006.2 (2016).....2006.2 (11/2025)

_____.....2006.3 (11/2025) Renumbered from 2008

2006.5 (2013) ..... REMOVE (Renumbered 2006.1)

2007 (2011) ..... REMOVE (Renumbered 2005.2)

2008 (2002) ..... REMOVE (Renumbered 2006.3)

2750 (7/2024).....2750 (11/2025)

_____ ..... AFTER (JI-2780) 2784 (11/2025)

_____ ..... AFTER (JI-2784) 2785 (11/2025)

_____ ..... AFTER (JI-2785) 2786 (11/2025)

_____ ..... AFTER (JI-2791) 2792A (11/2025)

_____ ..... AFTER (JI-2792A) 2792B (11/2025)

_____ ..... AFTER (JI-2792B) 2793A (11/2025)

_____ ..... AFTER (JI-2793A) 2793B (11/2025)

_____ ..... AFTER (JI-2793B) 2794A (11/2025)

_____ ..... AFTER (JI-2794A) 2794B (11/2025)

_____ ..... AFTER (JI-2794B) 2794C (11/2025)

_____ ..... AFTER (JI-2794C) 2795 (11/2025)

_____ ..... AFTER (JI-2795) 2796 (11/2025)

_____ ..... AFTER (JI-2796) 2797A (11/2025)

_____ ..... AFTER (JI-2797A) 2797B (11/2025)

_____ ..... AFTER (JI-2797B) 2798A (11/2025)

_____ ..... AFTER (JI-2798A) 2798B (11/2025)

_____ ..... AFTER (JI-2798B) 2799A (11/2025)

_____ ..... AFTER (JI-2799A) 2799B (11/2025)

3094 (2020).....3094 (11/2025)

3095 (2013) .....3095 (11/2025)

**Volume III:**

Title Page (2/2025).....Title Page (11/2025) Supplement

2/2025 Supplement with (Release No. 58) in the right corner .....(Release No. 59) in the right corner

Table of Contents (2/2025).....Table of Contents (11/2025)

Table of Cases Cited (2/2025).....Table of Cases Cited (11/2025)

Index (2/2025).....Index (11/2025)

11/2025 Supplement filed by _____, _____.
initials date

FOR QUESTIONS:

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

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OFFICE OF JUDICIAL EDUCATION

11/2025

# WISCONSIN JURY INSTRUCTIONS

# CIVIL

# VOLUME I

**Wisconsin Civil Jury Instructions Committee**

- 11/2025 Supplement (Release No. 59)

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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
Hon. Kevin Martens, Milwaukee County
Hon. Eugene Gasiorkiewicz, Racine County

## FORMER MEMBERS

Hon. Helmuth F. Arps (1959-1962)
Hon. M. Eugene Baker (1959-1975)
Hon. Michael J. Barron (1983-1996)
Hon. Dennis J. Barry (1994-1997)
Chief Justice Bruce F. Beilfuss (1959-1964)
Hon. Herbert A. Bunde (1962-1963)
Hon George A. Burns, Jr. (1976-1994)
Hon. Lewis J. Charles (1962-1976)
Hon. William E. Crane (1978-1994)
Hon. Richard J. Dietz (1997-2006)
Hon. Daniel Dillon, (2007-2018)
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 (2013-2018)
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)

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

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# WIS JI-CIVIL

## SUMMARY OF CONTENTS


**Tributes**
**Memorials**
**1981 Foreword**
**1978 Preface**
**1960 Introduction**

**GENERAL INSTRUCTIONS**
- Right to a Jury Trial 1
- Comment: Gender-Neutral Language 5
- Suggested Order 10
- Preliminary Instructions 50-66
- Jurors' Duties 100-197
- Evidence, Burdens, and Presumptions 200-358
- Witnesses 400-425
- Accrual of Action 950

**NEGLIGENCE**
- Standard of Care Required 1000-1029
- Duties of Persons in Specific Situations 1030-1413
- Cause 1500-1511
- Comparative Negligence 1580-1595
- Imputed Negligence 1600-1610
- Damages 1700-1897
- Safe Place 1900.2-1911
- Nuisance 1920-1932

**INTENTIONAL TORTS**
- Assault and Battery 2000-2020
- False Imprisonment 2100-2115
- Federal Civil Rights 2151-2155
- Conversion 2200-2201
- Misrepresentation 2400-2420
- Defamation 2500-2552
- Misuse of Procedure 2600-2620
- Trade Practices 2720-2722
- Domestic Relations 2725
- Business Relations 2750-2799
- Civil Conspiracy; Injury to Business 2800-2822
- Tort ImmunityBLaw Note 2900

**CONTRACTS**
- General 3010-3095
- Insurance 3100-3118
- Breach of Warranty 3200-3230
- Duties of Manufacturers and Sellers 3240-3310
- Damages 3700-3760

**AGENCY; EMPLOYMENT; BUSINESS ORGANIZATIONS** 4000-4080
**PERSONS** 5001-7070
**PROPERTY**
- General 8012-8065
- Eminent Domain 8100-8145

**TABLE OF CASES CITED**
**INDEX**

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# FOREWORD

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

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

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

**(September 2021)**

**Bryce Pierson**
**Legal Advisor & Committee Reporter**
**Office of Judicial Education**

# COMMITTEE HISTORY

## Foundation of the Wisconsin Civil Jury Instructions

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

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

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

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

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

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

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

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

**Development of the Original Model Instructions**

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

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

## Court Reorganization and Publication Incorporation into the Wisconsin Court System

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

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

## Characteristics of the Wis JI-Civil Model

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

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

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

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

# How to Use the Model Jury Instructions[5]

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

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

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

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

# INQUIRIES AND SUGGESTIONS

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

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

Civil Jury Instructions Committee

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

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

Hon. Francis Wasielewski
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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# TABLE OF CONTENTS

# VOLUME I

## GENERAL INSTRUCTIONS

### Jurors' Duties


**Inst. No.**

1 Right to a Jury Trial: Law Note for Trial Judges (2017)
5 Comment: Gender-Neutral Language (7/2024)
10 Suggested Order of Instructions: Negligence Cases (2018)
50 Preliminary Instruction: Before Trial (7/2024)
52A Preliminary Instruction: Bifurcated Proceedings: Explanation of First Phase Proceedings (11/2025)
52B Preliminary Instruction: Bifurcated Proceedings: Explanation of Second Phase Proceedings and Standard of Proof (11/2025)
57 Juror Questioning of Witnesses (2014)
60 Notetaking Not Allowed (2011)
61 Notetaking Permitted (2011)
63 Transcripts Not Available for Deliberations; Reading Back Testimony (2011)
65 Preliminary Instruction: Use of an Interpreter for a Witness (2011)
66 Preliminary Instruction: Use of an Interpreter for a Juror (2011)
80 Recording Played to the Jury (1/2023)
100 Opening (2013)
103 Summary Exhibit (2013)
106 Submission on General Verdict (2010)
107 Submission on Ultimate Fact Verdict [Withdrawn 2011]
108 Submission on Ultimate Fact Verdict When Court Finds One or More Parties at Fault [Withdrawn 2011]
110 Remarks and Arguments of Counsel (2011)
115 Objections of Counsel (2015)
120 Ignoring Judge's Demeanor (2011)
125 Counsel's Reference to Insurance Company (2011)
130 Stricken Testimony (2011)
145 Special Verdict Questions: Interrelationship (2016)
150 Damage Question Answered by the Court (2005)
152 View of Scene (2011)

155 Question Answered by the Court (2011)
180 Five-Sixths Verdict (2017)
190 Closing: Short Form (2011)
191 Closing: Long Form (2017)
195 Supplemental Instruction Where Jury is Unable to Agree (2003)
197 Instruction after Verdict is Received (2010)

## Evidence, Burdens, and Presumptions

200 Burden of Proof: Ordinary (2004)
202 Burden of Proof: Ordinary: Compensatory Damages (2005)
205 Burden of Proof: Middle (2016)
210 Burden of Proof Where Verdict Contains a Middle Standard Question [Withdrawn 1998]
215 Credibility of Witnesses; Weight of Evidence (2011)
220 Jury Not to Speculate [Withdrawn 1990]
230 Circumstantial Evidence (2011)
255 Driver's Manual: Use by Jury [Withdrawn 2011]
260 Expert Testimony (2/2025)
261 Medical or Scientific Treatise in Evidence (1989)
265 Expert Testimony: Hypothetical Questions (2/2025)
268 Opinion of a Nonexpert Witness (2013)
305 Measurements (1989)
315 Negative Testimony (2016)
325 Physical Facts (1989)
349 Presumptions and Permissive Inferences - Law Note for Trial Judges (2017)
350 Presumptions: Conflict as to Existence of Basic Fact; Evidence Introduced from Which Nonexistence of Presumed Fact May Be Inferred (2013)
352 Presumptions: Existence of Basic Fact Uncontradicted; Evidence Introduced from Which Nonexistence of Presumed Fact May Be Inferred (2013)
353 Presumptions: Deceased Person was Not Negligent (2003)
354 Presumptions: Conflict as to Existence of Basic Fact; No Evidence Introduced from Which Nonexistence of Presumed Fact Could Be Inferred (1991)
356 Permissive Inferences; e.g., Res Ipsa Loquitur (1989)
358 Subsequent Remedial Measures (2021)

## Witnesses

400 Spoliation: Inference (2022)
405 Falsus in Uno (2018)

410 Witness: Absence (11/2025)
415 Witness: Prior Conviction (2011)
420 Impeachment of Witnesses: Prior Inconsistent or Contradictory Statements (1981)
425 Witness Exercising Privilege Against Self-Incrimination (2011)
430 A Party's Presence Not Required At Trial (7/2023)
950 Reasonable Diligence in Discovery of Injury (Statute of Limitations) (2016)

# NEGLIGENCE

## Standard of Care Required

1000 Unavoidable Accident (1989)
1001 Negligence: Fault: Ultimate Fact Verdict (2004)
1002 Gas Company, Duty to Customer (1989)
1003 Negligence, Gas Company, Duty in Installing Its Pipes, Mains, and Meters (1989)
1004 Negligent Versus Intentional Conduct (1995)
1005 Negligence: Defined (2016)
1006 Gross Negligence: Defined (2016)
1007 Contributory Negligence: Defined (2015)
1007.5 Contributory Negligence: Rescue Rule (2016)
1008 Intoxication: Chemical Test Results [Reflects Changes in 2003 Wisconsin Act 30] (2022)
1009 Negligence: Violation of Safety Statute (2010)
1010 Negligence of Children (2014)
1011 Attractive Nuisance: Ultimate Fact Question [Renumbered JI-Civil 8025 (2013)]
1012 Parents' Duty to Protect Minor Child (1989)
1013 Parent's Duty to Control Minor Child (2006)
1014 Negligent Entrustment (2017)
1014.5 Negligent Entrustment to an Incompetent Person (2017)
1015 Negligence in an Emergency [Renumbered JI-Civil-1105A 1995]
1019 Negligence: Evidence of Custom and Usage (1995)
1020 Negligence: Under Special Circumstances [Withdrawn 2011]
1021 Negligence of Mentally Disabled (2006)
1021.2 Illness Without Forewarning (2002)
1022.2 Negligence of General Contractor: Increasing Risk of Injury to Employee of Subcontractor (2020)
1022.4 Negligence: Building Contractor (2016)
1022.6 Liability of One Employing Independent Contractor (2015)

1023 Medical Negligence (11/2025)
1023.1 Professional Negligence: Medical: Duty of Physician to Inform a Patient: Special Verdict (2015)
1023.2 Professional Negligence: Medical: Duty of Physician to Inform a Patient (2015)
1023.3 Professional Negligence: Medical: Duty of Physician to Inform a Patient: Cause (2015)
1023.4 Professional Negligence: Medical: Duty of Physician to Inform a Patient: Contributory Negligence (2015)
1023.5 Professional Negligence: Legal—Status of Lawyer as a Specialist is Not in Dispute [Renumbered JI-Civil 1023.5A] (11/2025)]
1023.5A Professional Negligence: Legal—Status of Lawyer as Specialist is in Dispute [Renumbered JI-Civil 1023.5B] (11/2025)]
1023.5A Professional Negligence: Legal—Status of Lawyer with Claimed Expertise Not in Dispute (11/2025)
1023.5B Professional Negligence: Legal – Dispute as To Status of Lawyer Having Claimed Expertise (11/2025)
1023.5C Professional Negligence: Legal – No Claim of Lawyer as Having Claimed Expertise (11/2025)
1023.6 Negligence of Insurance Agent (2021)
1023.7 Professional Negligence: Registered Nurses and Licensed Technicians Performing Skilled Services (2016)
1023.8 Professional Negligence: Chiropractor-Treatment (2016)
1023.9 Professional Negligence: Chiropractor-Determining Treatability by Chiropractic Means (1999)
1023.14 Professional Negligence: Dental (2016)
1023.15 Professional Negligence: Chiropractor, Dentist, Optometrist, or Podiatrist: Duty to Inform a Patient: Special Verdict (2015)
1023.16 Professional Negligence: Chiropractor, Dentist, Optometrist, or Podiatrist: Duty to Inform a Patient (2015)
1023.17 Professional Negligence: Chiropractor, Dentist, Optometrist, or Podiatrist: Duty to Inform a Patient: Cause (2015)
1024 Professional Negligence: Medical: Res Ipsa Loquitur (7/2024)
1025 Negligence of a Common Carrier (2006)
1025.5 Bailment: Defined (2009)
1025.6 Duty of Bailor for Hire (1992)
1025.7 Bailment: Duty of Bailee under a Bailment for Mutual Benefit (2009)
1025.8 Bailment: Liability of a Gratuitous Bailor (2009)
1026 Bailment: Negligence of Bailee May Be Inferred (2005)
1026.5 Bailment: Negligence of Carrier Presumed (2005)
1027 Duty of Owner of Place of Amusement: Common Law [Renumbered JI-Civil

8040 1985]
1027.5 Duty of a Proprietor of a Place of Business to Protect a Patron from Injury Caused by Act of Third Person [Renumbered JI-Civil 8045 1986]
1027.7 Duty of Hotel Innkeeper [Renumbered JI-Civil 8050 1986]
1028 Duty of Owner of a Building Abutting on a Public Highway [Renumbered JI-Civil 8030 1986]
1029 Highway or Sidewalk Defect or Insufficiency [Renumbered JI-Civil 8035 1986]

## Duties of Persons in Specific Situations

1030 Right to Assume Due Care by Highway Users (1992)
1031 Conditional Privilege of Authorized Emergency Vehicle Operator (2016)
1032 Defective Condition of Automobile: Host's Liability (1992)
1035 Voluntary Intoxication: Relation to Negligence (2004)
1045 Driver's Duty When Children Are Present (1992)
1046 Contributory Negligence of Passenger: Placing Self in Position of Danger (1992)
1047 Contributory Negligence of Guest: Riding with Host (1992)
1047.1 Negligence of Guest: Active: Management and Control (1992)
1048 Driver, Negligence: Highway Defect or Insufficiency (1992)
1049 Pedestrian, Negligence: Sidewalk Defect or Insufficiency (2/2025)
1050 Duty of Persons with Physical Disability (2005)
1051 Duty of Worker: Preoccupation in Work Minimizes Duty (1995)
1051.2 Duty of Worker: When Required to Work in Unsafe Premises (1992)
1052 Equipment and Maintenance of Vehicles: General Duty (2008)
1053 Equipment and Maintenance of Vehicles: Headlights (2008)
1054 Equipment and Maintenance of Vehicles: Brakes (2008)
1055 Lookout (1997)
1056 Lookout: Camouflage (2013)
1060 Lookout: Backing (2008)
1065 Lookout: Entering or Crossing A Through Highway (2003)
1070 Lookout: Failure to See Object in Plain Sight (1992)
1075 Lookout: Guest (1996)
1076 Lookout: Guest's Duty to Warn (1992)
1080 Lookout: Limited Duty on Private Property (1992)
1090 Driver on Arterial Approaching Intersection: Lookout; Right of Way; Flashing Yellow Signal (7/2023)
1095 Lookout: Pedestrian (2008)
1096 Duty to Sound Horn (2008)
1105 Management and Control (2008)

1105A Management and Control–Emergency (2016)
1107 Racing (2008)
1112 Operation of Automobile Following Another (2015)
1113 Duty of Preceding Driver: Slowing or Stopping: Signaling (2008)
1114 Duty of Preceding Driver to Following Driver: Lookout (2008)
1115 Parking: Stopping: Leaving Vehicle Off the Roadway (2008)
1120 Parking: Stopping: Leaving Vehicle On the Roadway (2008)
1125 Parking: Stopping: Leaving Vehicle On or Off the Roadway: Exception to Prohibition (2008)
1132 Stopped School Bus: Position on Highway (2008)
1133 School Bus: Flashing Red Warning Lights (2/2025)
1133A School Bus: Equipped with Flashing Red and Amber Warning Lights (2/2025)
1135 Position on Highway on Meeting and Passing (2008)
1140 Position on Highway on Meeting and Passing; Violation Excused (2008)
1141 Passing: Vehicles Proceeding in Same Direction (2008)
1142 Passing: Vehicles Proceeding in Same Direction: Obstructed View (2008)
1143 Passing: Vehicles Proceeding in Same Direction: In No Passing Zone or Where Overtaken Vehicle Turning Left (2008)
1144 Passing: Vehicles Proceeding in Same Direction (2015)
1145 Res Ipsa Loquitur (7/2024)
1153 Right of Way: At Intersection with Through Highway (7/2023)
1155 Right of Way: At Intersections of Highways (7/2023)
1157 Right of Way: At Intersection of Highways: Ultimate Verdict Question (7/2023)
1158 Right of Way: To Pedestrian Crossing at Controlled Intersection (7/2023)
1159 Right of Way: Pedestrian Control Signal: Walk Signal (2022)
1160 Right of Way: To Pedestrian at Intersections or Crosswalks on Divided Highways or Highways Provided with Safety Zones (7/2023)
1161 Right of Way: Pedestrian Crossing Roadway at Point Other Than Crosswalk (1982)
1165 Right of Way: To Pedestrian at Uncontrolled Intersection or Crosswalk (7/2023)
1170 Right of Way: Blind Pedestrian on Highway (2022)
1175 Right of Way: Entering Highway from an Alley or Nonhighway Access Point (2022)
1180 Right of Way: Funeral Processions; Military Convoys (2022)
1185 Right of Way: Green Arrow (2022)
1190 Right of Way: Green Signal (7/2023)
1190.5 Plaintiff and Defendant Each Claims Green Light in Their Favor (2022)
1191 Duty of Driver Entering Intersection with Green Light in Driver's Favor: Lookout (7/2023)

1192 Duty of Driver Approaching Intersection When Amber Light Shows (7/2023)
1193 Red Traffic Control Light Signaling Stop (2022)
1193.5 Flashing Red Traffic Control Light (2022)
1195 Right of Way: Left Turn at Intersection (7/2023)
1200 Right of Way: Livestock (2008)
1205 Right of Way: Moving from Parked Position (2022)
1210 Right of Way: On Approach of Emergency Vehicle (2022)
1220 Right of Way: Pedestrian's Duty: At Pedestrian Control Signal (2022)
1225 Right of Way: Pedestrian's Duty: Crossing at Controlled Intersection or Crosswalk (7/2023)
1230 Right of Way: Pedestrian's Duty: Crossing Roadway at Point Other than Crosswalk (2022)
1235 Right of Way: Pedestrian's Duty: Divided Highways or Highways with Safety Zones (2022)
1240 Right of Way: Pedestrian's Duty: Facing Green Arrow (2022)
1245 Right of Way: Pedestrian's Duty: Facing Red Signal (2022)
1250 Right of Way: Pedestrian's Duty: Standing or Loitering on Highway (2022)
1255 Right of Way: Pedestrian's Duty at Uncontrolled Intersection or Crosswalk; Suddenly Leaving Curb or Place of Safety (2022)
1260 Position on Highway: Pedestrian's Duty; Walking on Highway (2022)
1265 Right of Way: Persons Working on Highway (2022)
1270 Right of Way: When Vehicle Using Alley or Nonhighway Access to Stop (2022)
1275 Right of Way: When Yield Sign Installed (2022)
1277 Safety Belt: Failure to Use (2009)
1278 Safety Helmet: Failure to Use (2009)
1280 Skidding (2008)
1285 Speed: Reasonable and Prudent; Reduced Speed (2008)
1290 Speed: Fixed Limits (2008)
1295 Speed: Special Restrictions for Certain Vehicles (2008)
1300 Speed: Impeding Traffic (2008)
1305 Speed: Failure to Yield Roadway (2015)
1310 Speed: Obstructed Vision (2008)
1315 Speed: Obstructed Vision: Nighttime (2008)
1320 Speed: Camouflage (1992)
1325 Stop at Stop Signs (2008)
1325A Stop at Stop Signs [Alternate] (2008)
1330 Stop: Emerging from an Alley (2008)
1335 Emerging from a Private Driveway or Other Nonhighway Access (2008)
1336 Railroad Crossing: Driver's Duty (2008)

1337 Stop: All Vehicles at Railroad Crossing Signals (2015)
1337.5 Stop: Pedestrian Crossing Railroad Tracks (2015)
1338 Stop: Nonoperation of Railroad Crossing Signals (2008)
1339 Stop: Special Vehicles at Railroad Crossing (2008)
1340 Stop: For School Bus Loading or Unloading Children (2/2025)
1350 Turn or Movement: Signal Required (2008)
1352 Turn: Position and Method When Not Otherwise Marked or Posted (2008)
1354 Turn or Movement: Ascertainment that Turn or Movement Can Be Made with Reasonable Safety: Lookout (7/2023)
1355 Deviation from Traffic Lane: Clearly Indicated Lanes (2008)

## Other Negligence

1380 Negligence: Teacher: Duty to Instruct or Warn (2020)
1381 Negligence: Teacher: Duty to Supervise Students (2016)
1383 Employer Negligence: Negligent Hiring, Training, or Supervision (2019)
1384 Duty of Hospital: Granting and Renewing Staff Privileges (Corporate Negligence) (7/2024)
1385 Negligence: Hospital: Duty of Employees: Performance of Routine Custodial Care Not Requiring Expert Testimony (1999)
1385.5 Negligence: Hospital: Duty of Employees: Suicide or Injury Resulting from Escape or Attempted Suicide (2006)
1390 Injury by Dog (2017)
1391 Liability of Owner or Keeper of Animal: Common Law (7/2024)
1393 Participation in Rec. Act (2022)
1395 Duty of Public Utility: Highway Obstructions: Nonenergized Facilities (1989)
1397 Negligence: Voluntary Assumption of Duty to a Third Person (2014)

## RAILROADS

1401 Railroads: Duty to Ring Engine Bell Within Municipality (2007)
1402 Railroads: Duty to Ring Engine Bell Outside Municipality (2007)
1403 Railroads: Duty to Blow Train Whistle Within Municipality [Withdrawn 2007]
1405 Railroads: Duty of Train Crew Approaching Crossing (2006)
1407 Railroads: Speed: Fixed Limits (2006)
1408 Railroads: Speed: No Limit (2006)
1409 Railroads: Negligent Speed, Causation (2006)
1410 Railroads: Duty to Maintain Crossing Signs (2006)
1411 Railroads: Duty to Maintain Open View at Crossings (2006)
1412 Railroads: Duty to Have Proper Headlights (2006)

1413 Railroads: Ultrahazardous or Unusually Dangerous Crossings: Increased Duty (2006)

# VOLUME II

# NEGLIGENCE (Continued)

1500 Cause (2021)
1501 Cause: Normal Response (1998)
1505 Cause: Where Cause of Death is in Doubt (1998)
1506 Cause: Relation of a Medical Procedure to the Accident (1998)
1510 Negligent Infliction of Severe Emotional Distress (Bystander Claim) (2014)
1511 Personal Injuries: Negligent Infliction of Severe Emotional Distress (Separate or Direct Claim) (1/2024)

## Comparative Negligence

1580 Comparative Negligence: Plaintiff and One or More Defendants (2011)
1582 Comparative Negligence: Adult and Child (1990)
1585 Comparative Negligence: Plaintiff-Guest and Host-Defendant Negligent (1992)
1590 Comparative Negligence: Plaintiff-Guest Passively Negligent; Host (Or Other Driver) Negligent (2003)
1591 Comparative Negligence: Guest Passively Negligent; Claims Against and Among Drivers; Apportionment from One Comparative Negligence Question (2015)
1592 Comparative Negligence: Guest Passively Negligent; Claims Against and Among Drivers; Apportionment of Comparative Negligence from Two Questions (2003)
1595 Comparative Negligence: Where Negligence or Cause Question Has Been Answered by Court (1990)

## Imputed Negligence

1600 Servant: Driver of Automobile (Presumption from Ownership of Vehicle) (2003)
1605 Driver: Scope of Employment (2014)
1610 Joint Adventure (Enterprise): Automobile Cases (1990)

# Damages

1700 Damages: General (2016)
1705 Damages: Burden of Proof in Tort Actions: Future Damages [Withdrawn 2001]
1707 Punitive Damages: Nonproducts Liability [For Actions Commenced Before May 17, 1995] (1996)
1707A Punitive Damages: Products Liability [For Actions Commenced Before May 17, 1995] (1996)
1707.1 Punitive Damages: Nonproducts Liability (2018)
1707.2 Punitive Damages: Products Liability (2008)
1708 Battery: Punitive Damages: Mitigation by Provocation [Withdrawn © 2010]
1710 Aggravation of Injury Because of Medical Negligence (2015)
1715 Aggravation of Pre-existing Injury (1990)
1720 Aggravation or Activation of Latent Disease or Condition (1992)
1722 Damages from Nonconcurrent or Successive Torts (1992)
1722A Damages from Nonconcurrent or Successive Torts (To be used where several tortfeasors are parties) (1996)
1723 Enhanced Injuries (2009)
1725 Further Injury in Subsequent Event (2003)
1730 Damages: Duty to Mitigate: Physical Injuries (2012)
1731 Damages: Duty to Mitigate: Negligence or Breach of Contract (2012)
1732 Damages: Duty to Mitigate: Intentional Tort (2012)
1735 Damages: Not Taxable as Income (1990)
1740 Damages: Common Scheme or Plan; Concerted Action (Wis. Stat. § 895.045(2)) (2009)
1741 Personal Injuries: Negligence in Informing the Patient (2015)
1742 Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages for Negligence in Informing the Patient (2015)
1749 Personal Injuries: Conversion Table for 1998 Revision of Damage Instructions (1998)
1750.1 Personal Injuries: Subdivided Question as to Past and Future Damages (1998)
1750.2 Personal Injuries: Past and Future: One Verdict Question (Except Past Loss of Earnings and Past Medical Expenses) (1998)
1754 Personal Injury: One Subdivided Question as to Past Damages [Withdrawn © 1998]
1756 Personal Injuries: Past Health Care Expenses (2015)
1757 Personal Injuries: Past Health Care Expenses (Medical Negligence Cases) (Negligence of Long-Term Care Provider): Collateral Sources (2013)
1758 Personal Injuries: Future Health Care Expenses (2010)
1760 Personal Injuries: Past Loss of Earning Capacity (2016)

1762 Personal Injuries: Future Loss of Earning Capacity (2022)
1766 Personal Injuries: Past Pain, Suffering, and Disability (Disfigurement) (2009)
1767 Personal Injuries: Future Pain, Suffering, and Disability (Disfigurement) (1999)
1768 Personal Injuries: Past and Future Pain, Suffering, and Disability (Disfigurement) (1998)
1770 Personal Injuries: Severe Emotional Distress (2006)
1780 Personal Injuries: Loss of Business Profits [Withdrawn 1998]
1785 Personal Injuries: Past Loss of Professional Earnings [Withdrawn 1998]
1788 Loss of Earnings: Delay in Obtaining Degree [Withdrawn 1999]
1795 Personal Injury: Life Expectancy and Mortality Tables (1992)
1796 Damages: Present Value of Future Losses (2003)
1797 Damages: Effects of Inflation (1993)
1800 Property: Loss of Use of Repairable Automobile (1997)
1801 Property: Loss of Use of Nonrepairable Automobile (1997)
1803 Property: Destruction of Property (2010)
1804 Property: Damage to Repairable Property (2010)
1805 Property: Damage to Nonrepairable Property (2010)
1806 Property: Damage to a Growing Crop (1997)
1810 Trespass: Nominal Damages (2013)
1812 Quantum Meruit: Measure of Services Rendered (1992)
1815 Injury to Spouse: Loss of Consortium (2012)
1816 Injury to Spouse: Past Loss of Earning Capacity: Household Services (1993)
1817 Injury to Spouse: Future Loss of Earning Capacity: Household Services (2001)
1820 Injury to Spouse: Nursing Services: Past and Future (1992)
1825 Injury to Wife: Medical and Hospital Expenses [Withdrawn 1995]
1830 Injury to Wife: Medical and Hospital Bills: Dispute over Ownership of Claim [Withdrawn 1995]
1835 Injury to Minor Child: Parent's Damages for Loss of Child's Earnings and Services: Past and Future (2001)
1837 Injury to Minor Child: Parent's Damages for Loss of Society and Companionship (2001)
1838 Injury to Parent: Minor Child's Damages for Loss of Society and Companionship (2001)
1840 Injury to Minor Child: Parents' Damages for Medical Expenses: Past and Future (1996)
1845 Injury to Child: Parents' Damages for Services Rendered to Child: Past and Future (1992)
1850 Estate's Recovery for Medical, Hospital, and Funeral Expenses (2016)
1855 Estate's Recovery for Pain and Suffering (2018)
1860 Death of Husband: Pecuniary Loss [Withdrawn 1992]

1861 Death of Spouse (Domestic Partner): Pecuniary Loss (2010)
1865 Death of Wife: Pecuniary Loss [Withdrawn 1992]
1870 Death of Spouse: Surviving Spouse's Loss of Society and Companionship (2019)
1875 Death of Spouse: Medical, Hospital, and Funeral Expenses (1992)
1880 Death of Parent: Pecuniary Loss (2016)
1885 Death of Adult Child: Pecuniary Loss (2001)
1890 Damages: Death of Minor Child: Premajority Pecuniary Loss (2001)
1892 Damages: Death of Minor Child: Postmajority Pecuniary Loss (2001)
1895 Death of Child: Parent's Loss of Society and Companionship (2019)
1897 Death of Parent: Child's Loss of Society and Companionship (2019)

## Safe Place

1900.2 Safe-Place Statute: Duty of Employer (1992)
1900.4 Safe-Place Statute: Injury to Frequenter: Negligence of Employer or Owner of a Place of Employment (2022)
1901 Safe-Place Statute: Definition of Frequenter (1996)
1902 Safe-Place Statute: Negligence of Plaintiff Frequenter (2004)
1904 Safe-Place Statute: Public Buildings: Negligence of Owner (1990)
1910 Safe-Place Statute: Place of Employment: Business (1990)
1911 Safe-Place Statute: Control (1992)

## Nuisance

1920 Nuisance: Law Note (2/2025)
1922 Private Nuisance: Negligent Conduct (2/2025)
1924 Private Nuisance: Abnormally Dangerous Activity: Strict Liability (2/2025)
1926 Private Nuisance: Intentional Conduct (2/2025)
1928 Public Nuisance: Negligent Conduct (2/2025)
1930 Public Nuisance: Abnormally Dangerous Activity: Strict Liability (2/2025)
1932 Public Nuisance: Intentional Conduct (2/2025)

# INTENTIONAL TORTS

## Assault and Battery

2000 Intentional Tort: Liability of Minor (2014)
2001 Intentional Versus Negligent Conduct (1995)

2004 Assault (11/2025)
2005 Battery (11/2025)
2005.5 Battery: Offensive Bodily Contact (2015) [Renumbered JI-Civil 2005.1] (11/2025)
2005.1 Battery: Offensive Bodily Contact (11/2025)
2005.2 Battery: Liability of an Aider and Abettor (11/2025)
2006 Battery: Self-Defense (11/2025)
2006.1 Battery: Defense of Property (11/2025)
2006.2 Battery: Self-Defense; Defendant's Dwelling, Motor Vehicle, Place of Business; Wis. Stat. § 895.62 (11/2025)
2006.3 Battery: Excessive Force in Arrest (11/2025)
2006.5 Battery: Defense of Property [Renumbered JI-Civil 2006.1] (11/2025)
2007 Battery: Liability of an Aider and Abettor [Renumbered JI-Civil 2005.2] (11/2025)
2008 Battery: Excessive Force in Arrest [Renumbered JI-Civil 2006.3] (11/2025)
2010 Assault and Battery: Offensive Bodily Contact [Renumbered JI-Civil- 2005.5 2011]
2020 Sports Injury: Reckless or Intentional Misconduct (1/2023)

## False Imprisonment

2100 False Imprisonment: Definition (2014)
2110 False Imprisonment: Compensatory Damages (2014)
2115 False Arrest: Law Enforcement Officer; Without Warrant (1993)

## Federal Civil Rights

2150 Federal Civil Rights: §§ 1981 and 1982 Actions (1993)
2151 Federal Civil Rights: § 1983 Actions [Withdrawn 2014]
2155 Federal Civil Rights: Excessive Force in Arrest (in Maintaining Jail Security) [Withdrawn 2014]

## Conversion

2200 Conversion: Dispossession (2014)
2200.1 Conversion: Refusal to Return Upon Demand (Refusal by Bailee) (1993)
2200.2 Conversion: Destruction or Abuse of Property (1991)
2201 Conversion: Damages (2016)

## Misrepresentation

2400 Misrepresentation: Bases for Liability and Damages - Law Note for Trial Judges (1/2023)
2401 Misrepresentation: Intentional Deceit (1/2023)
2402 Misrepresentation: Strict Responsibility (1/2023)
2403 Misrepresentation: Negligence (1/2023)
2405 Intentional Misrepresentation: Measure of Damages in Actions Involving Sale [Exchange] of Property (Benefit of the Bargain) (2018)
2405.5 Strict Responsibility: Measure of Damages in Actions Involving Sale [Exchange] of Property (Benefit of the Bargain) (2018)
2406 Negligent Misrepresentation: Measure of Damages in Actions Involving Sale [Exchange] of Property (Out of Pocket Rule) (2014)
2418 Unfair Trade Practice: Untrue, Deceptive, or Misleading Representation: Wis. Stat. § 100.18(1) (2021) [Renumbered JI-Civil-2418B 2/2025]
2418A Unfair Trade Practice: Untrue, Deceptive, or Misleading Representation: Wis. Stat. § 100.18(11)(b)2 (2/2025)
2418B Unfair Trade Practice: Untrue, Deceptive, or Misleading Representation: Wis. Stat. § 100.18(1) (2/2025)
2419 Property Loss Through Fraudulent Misrepresentation: Wis. Stat. § 895.446 (Based on Conduct (Fraud) Prohibited by Wis. Stat. § 943.20) (2018)
2420 Civil Theft: Wis. Stat. § 895.446 (Based on Conduct (Theft) Prohibited by Wis. Stat. § 943.20(1)(a)) (2019)

## Defamation

2500 Defamation - Law Note for Trial Judges (7/2024)
2501 Defamation: Private Individual Versus Private Individual, No Privilege (1/2023)
2505 Defamation: Truth as a Defense (Nonmedia Defendant) (1/2023)
2505A Defamation: Truth of Statement (First Amendment Cases) (1/2023)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege (1/2024)
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard) (2003)
2510 Defamation: Truth as Defense Where Plaintiff Charged with Commission of a Crime [Withdrawn 1993]
2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice) (7/2024)
2512 Defamation: Truth as Defense Where Plaintiff Not Charged with Commission of a Crime [Withdrawn 1993]

2513 Defamation: Express Malice (1/2023)
2514 Defamation: Effect of Defamatory Statement or Publication [Withdrawn 1993]
2516 Defamation: Compensatory Damages (1991)
2517 Defamation: Conditional Privilege: Abuse of Privilege [Renumbered JI-Civil 2507 1993]
2517.5 Defamation: Public Official: Abuse of Privilege [Renumbered JI-Civil 2511 1993]
2518 Defamation: Express Malice [Renumbered JI-Civil 2513 1993]
2520 Defamation: Punitive Damages (2003)
2550 Invasion of Privacy (Publication of a Private Matter) Wis. Stat. § 995.50(2)(c) (1/2024)
2551 Invasion of Privacy: Highly Offensive Intrusion; Wis. Stat. § 995.50(2)(a) (1/2024)
2552 Invasion of Privacy: Publication of a Private Matter: Conditional Privilege (2003)

## Misuse of Procedure

2600 Malicious Prosecution: Instituting a Criminal Proceeding (2022)
2605 Malicious Prosecution: Instituting a Civil Proceeding (2022)
2610 Malicious Prosecution: Advice of Counsel: Affirmative Defense (Criminal Proceeding) (2015)
2611 Malicious Prosecution: Advice of Counsel: Affirmative Defense (Civil Proceeding) (2015)
2620 Abuse of Process (2013)

## Trade Practices

2720 Home Improvement Practices Act Violation; Wisconsin Administrative Code Chapter ATCP 110; Wis. Stat. § 100.20 (2013)
2722 Theft by Contractor (Wis. Stat. § 779.02(5)) (1/2023)

## Domestic Relations

2725 Intentional Infliction of Emotional Distress (2020)

## Business Relations

2750 Employment Relations: Wrongful Discharge - Public Policy (11/2025)
2760 Bad Faith by Insurance Company (Excess Verdict Case) (2003)

2761 Bad Faith by Insurance Company: Assured's Claim (2012)
2762 Bad Faith by Insurance Company: Third Party Employee Claim Against Worker's Compensation Carrier [Withdrawn] (2009)
2769 Wisconsin Fair Dealership Law: Existence of Dealership (2020)
2770 Wisconsin Fair Dealership Law: Good Cause for Termination, Cancellation, Nonrenewal, Failure to Renew, or Substantial Change in Competitive Circumstances (Wis. Stat. § 135.03) (2022)
2771 Wisconsin Fair Dealership Law: Adequate Notice by Grantor (Wis. Stat. § 135.04) (2005)
2772 Wisconsin Fair Dealership Law: Special Verdict (2005)
2780 Intentional Interference with Contractual Relationship (2/2025)
2784 Breach of Fiduciary Duty (11/2025)
2785 Breach of Fiduciary Duty: Damages (11/2025)
2786 Breach of Fiduciary Duties: Special Verdict (11/2025)
2790 Trade Name Infringement (2022)
2791 Trade Name Infringement: Damages (2010)
2792A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(a) (11/2025)
2792B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(b) (11/2025)
2793A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditor – Wis. Stat. § 242.05(1) (11/2025)
2793B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditor – Wis. Stat. § 242.05(2) (11/2025)
2794A Transfer: Defined – Wis. Stat. § 242.01(12) (11/2025)
2794B Insider: Defined – Wis. Stat. § 242.01(7) (11/2025)
2794C Insolvency: Defined – Wis. Stat. § 242.02(2) (11/2025)
2795 Presumption of Insolvency – Wis. Stat. § 242.02(3) (11/2025)
2796 Reasonably Equivalent Value: Definition (11/2025)
2797A Affirmative Defense: Good Faith – Wis. Stat. § 242.08 (11/2025)
2797B Affirmative Defense: Statute of Limitations – Wis. Stat. § 242.09 (11/2025)
2798A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(a): Special Verdict (11/2025)
2798B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(b): Special Verdict (11/2025)
2799A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditors – Wis. Stat. § 242.05(1): Special Verdict (11/2025)
2799B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditors – Wis. Stat. § 242.05(2): Special Verdict (11/2025)

## Civil Conspiracy

2800 Conspiracy: Defined (2018)
2802 Conspiracy: Proof of Membership (2003)
2804 Conspiracy: Indirect Proof (2003)
2806 Conspiracy to be Viewed as a Whole (1993)
2808 Conspiracy between Affiliated Corporations [Withdrawn 2009]
2810 Conspiracy: Overt Acts (2003)
2820 Injury to Business: (Wis. Stat. § 134.01) (2008)
2822 Restraint of Will (Wis. Stat. § 134.01) (2003)

## Tort Immunity

2900 Tort Immunity: Immunities Abrogated - Law Note for Trial Judges (1993)

# CONTRACTS

## General

3010 Agreement (2011)
3012 Offer: Making (1993)
3014 Offer: Acceptance (1993)
3016 Offer: Rejection (1993)
3018 Offer: Revocation (1993)
3020 Consideration (1993)
3022 Definiteness and Certainty (1993)
3024 Implied Contract: General (1993)
3026 Implied Contract: Promise to Pay Reasonable Value (1993)
3028 Contracts Implied in Law (Unjust Enrichment) (7/2023)
3030 Modification by Mutual Assent (1993)
3032 Modification by Conduct (1993)
3034 Novation (1993)
3040 Integration of Several Writings (1993)
3042 Partial Integration: Contract Partly Written, Partly Oral (1993)
3044 Implied Duty of Good Faith (Performance of Contract) (2007)
3045 Definitions – "Bona Fide" (1993)
3046 Implied Promise of No Hindrance (1993)
3048 Time as an Element (2016)
3049 Duration (2016)
3050 Contracts: Subsequent Construction by Parties (1993)

3051 Contracts: Ambiguous Language (2012)
3052 Substantial Performance (1994)
3053 Breach of Contract (2007)
3054 Demand for Performance (2014)
3056 Sale of Goods: Delivery or Tender of Performance (1993)
3057 Waiver (2018)
3058 Waiver of Strict Performance (1993)
3060 Hindrance or Interference with Performance (1993)
3061 Impossibility: Original (1993)
3062 Impossibility: Supervening (1993)
3063 Impossibility: Partial (1993)
3064 Impossibility: Temporary (1993)
3065 Impossibility: Superior Authority (1993)
3066 Impossibility: Act of God (1993)
3067 Impossibility: Disability or Death of a Party (1993)
3068 Voidable Contracts: Duress, Fraud, Misrepresentation (2016)
3070 Frustration of Purpose (2020)
3072 Avoidance for Mutual Mistake of Fact (2014)
3074 Estoppel: Law Note for Trial Judges (2018)
3076 Contracts: Rescission for Nonperformance (2001)
3078 Abandonment: Mutual (1993)
3079 Termination of Easement by Abandonment (2022)
3082 Termination of Servant's Employment: Indefinite Duration (1993)
3083 Termination of Servant's Employment: Employer's Dissatisfaction (1993)
3084 Termination of Servant's Employment: Additional Consideration Provided by Employee (1993)

## Real Estate

3086 Real Estate Listing Contract: Validity: Performance (2019)
3088 Real Estate Listing Contract: Termination for Cause (1993)
3090 Real Estate Listing Contract: Broker's Commission on Sale Subsequent to Expiration of Contract Containing "Extension" Clause (1993)
3094 Residential Eviction: Possession of Premises (11/2025)
3095 Landlord - Tenant: Constructive Eviction (11/2025)

# VOLUME III

# CONTRACTS (Continued)

## Insurance

3100 Insurance Contract: Misrepresentation or Breach of Affirmative Warranty by the Insured (1998)
3105 Insurance Contract: Failure of Condition or Breach of Promissory Warranty (1994)
3110 Insurance Contract: Definition of "Resident" or "Member of a Household" (2022)
3112 Owner's Permission for Use of Automobile (1993)
3115 Failure of Insured to Cooperate (2016)
3116 Failure to Cooperate: Materiality (2016)
3117 Failure to Give Notice to Insurer (1994)
3118 Failure to Give Notice to Insurer: Materiality (2002)

## Breach of Warranty

3200 Products Liability: Law Note (2021)
3201 Implied Warranty: Merchantability Defined (2009)
3202 Implied Warranty: Fitness for Particular Purpose (1994)
3203 Implied Warranty: By Reason of Course of Dealing or Usage of Trade (1994)
3204 Implied Warranty: Sale of Food (1994)
3205 Implied Warranty: Exclusion or Modification (2009)
3206 Implied Warranty: Exclusion by Reason of Course of Dealing or Usage of Trade (1994)
3207 Implied Warranty: Use of Product after the Defect Known (2009)
3208 Implied Warranty: Failure to Examine Product (2009)
3209 Implied Warranty: Susceptibility or Allergy of User (2009)
3210 Implied Warranty: Improper Use (1994)
3211 Implied Warranty: Notice of Breach (1993)
3220 Express Warranty: General (1994)
3222 Express Warranty: No Duty of Inspection (1994)
3225 Express Warranty: Statement of Opinion (1994)
3230 Express Warranty under the Uniform Commercial Code (1994)

## Duties of Manufacturers and Sellers

3240 Negligence: Duty of Manufacturer (2007)
3242 Negligence: Duty of Manufacturer (Supplier) to Warn (2020)
3244 Negligence: Duty of Manufacturer (Seller) to Give Adequate Instructions as to Use of a Complicated Machine (Product) (1994)
3246 Negligence: Duty of Manufacturer (Seller) Who Undertakes to Give Instruction as to the Use of a Machine (Product) (1994)
3248 Negligence: Duty of Restaurant Operator in Sale of Food Containing Harmful Natural Ingredients (1994)
3250 Negligence: Duty of Seller: Installing (Servicing) Product (1994)
3254 Duty of Buyer or Consumer: Contributory Negligence (2015)
3260 Strict Liability: Duty of Manufacturer to Ultimate User (For Actions Commenced Before February 1, 2011) (2014)
3260.1 Product Liability: Wis. Stat. § 895.047 (For Actions Commenced after January 31, 2011) (1/2024)
3262 Strict Liability: Duty of Manufacturer (Supplier) to Warn (For Actions Commenced Before February 1, 2011) (2014)
3264 Strict Liability: Definition of Business (1994)
3268 Strict Liability: Contributory Negligence (2015)
3290 Strict Products Liability: Special Verdict (For Actions Commenced Before February 1, 2011) (2014)
3290.1 Product Liability: Wis. Stat. § 895.047: Verdict (For Actions Commenced after January 31, 2011) (2014)
3294 Risk Contribution: Negligence: Verdict (For Actions Commenced Before February 1, 2011) (2014)
3295 Risk Contribution: Negligence Claim (For Actions Commenced Before February 1, 2011) (2014)
3296 Risk Contribution: Negligence: Verdict (Wis. Stat. § 895.046) (For Actions Commenced after January 31, 2011) (2014)

## Lemon Law

3300 Lemon Law Claim: Special Verdict (2016)
3301 Lemon Law Claim: Nonconformity (2001)
3302 Lemon Law Claim: Four Attempts to Repair: Same Nonconformity (1999)
3303 Lemon Law Claim: Out of Service Warranty Nonconformity (Warranty on or after March 1, 2014) (2016)
3304 Lemon Law Claim: Failure to Repair (Relating to Special Verdict Question 6) (2006)

3310 Magnuson–Moss Claim (2020)

## Damages

3700 Damages: Building Contracts: Measure of Damages (2012)
3710 Consequential Damages for Breach of Contract (2018)
3720 Damages: Incidental (1994)
3725 Damages: Future Profits (2008)
3735 Damages: Loss of Expectation (1994)
3740 Damages: Termination of Real Estate Listing Contract (Exclusive) by Seller; Broker's Recovery (1994)
3750 Damages: Breach of Contract by Purchaser (1994)
3755 Damages: Breach of Contract by Seller (1994)
3760 Damages: Attorney Fees (1994)

# AGENCY; EMPLOYMENT; BUSINESS ORGANIZATION

4000 Agency: Definition (2019)
4001 General Agent: Definition (1994)
4002 Special Agent: Definition (1994)
4005 Agency: Apparent Authority (1994)
4010 Agency: Implied Authority (1994)
4015 Agency: Ratification (1994)
4020 Agent's Duties Owed to Principal (1994)
4025 Agency: Without Compensation (2005)
4027 Agency: Termination: General (1994)
4028 Agency: Termination: Notice to Third Parties (1994)
4030 Servant: Definition (2015)
4035 Servant: Scope of Employment (2020)
4040 Servant: Scope of Employment; Going to and from Place of Employment (2014)
4045 Servant: Scope of Employment While Traveling (2020)
4050 Servant: Master's Ratification of Wrongful Acts Done Outside Scope of Employment (1994)
4055 Servant: Vicarious Liability of Employer (2005)
4060 Independent Contractor: Definition (2005)
4080 Partnership (2009)

# PERSONS

5001 Paternity: Child of Unmarried Woman (2021)
7030 Child in Need of Protection or Services [Withdrawn 2014]
7039 Involuntary Termination of Parental Rights: Child in Need of Protection or Services: Preliminary Instruction [Withdrawn 2014]
7040 Involuntary Termination of Parental Rights: Continuing Need of Protection or Services [Withdrawn 2014]
7042 Involuntary Termination of Parental Rights: Abandonment under Wis. Stat. § 48.415(1)(a) 2 or 3 [Withdrawn 2014]
7050 Involuntary Commitment: Mentally Ill (2022)
7050A Involuntary Commitment: Mentally Ill: Recommitment Alleging Wis. Stat. § 51.20(1)(am) (1/2023)
7054 Petition for Guardianship of the Person: Incompetency; Wis. Stat. § 54.10(3)(a)2 (2019)
7055 Petition for Guardianship of the Estate: Incompetency; Wis. Stat. § 54.10(3)(a)3 (2009)
7056 Petition for Guardianship of the Estate: Spendthrift; Wis. Stat. § 54.10(2) (2009)
7060 Petition for Guardianship of Incompetent Person and Application for Protective Placement; Wis. Stat. § 54.10 and 55.08(1) (2/2025)
7061 Petition for Guardianship of Incompetent Person and Application for Protective Services; Wis. Stat. § 54.10 and 55.08(2) (2014)
7070 Involuntary Commitment: Habitual Lack of Self-Control as to the Use of Alcohol Beverages (2003)

# PROPERTY

## General

8012 Trespasser: Definition (2013)
8015 Consent of Possessor to Another's Being on Premises (2013)
8017 Duty of Hotelkeeper to Furnish Reasonably Safe Premises and Furniture for Guests (Renumbered JI-Civil 8051) (1994)
8020 Duty of Owner or Possessor of Real Property to Nontrespasser User (2020)
8025 Trespass: Owner's Duty to Trespasser; Duty to Child Trespasser (Attractive Nuisance) (2022)
8026 Trespass: Special Verdict (2016)
8027 Trespass: Child Trespasser (Attractive Nuisance): Special Verdict (2013)

8030 Duty of Owner of a Building Abutting on a Public Highway (2006)
8035 Highway or Sidewalk Defect or Insufficiency (2/2025)
8040 Duty of Owner of Place of Amusement: Common Law (1994)
8045 Duty of a Proprietor of a Place of Business to Protect a Patron from Injury Caused by Act of Third Person (2012)
8050 Duty of Hotel Innkeeper: Providing Security (1994)
8051 Duty of Hotelkeeper to Furnish Reasonably Safe Premises and Furniture for Guests (2020)
8060 Adverse Possession Not Founded on Written Instrument (Wis. Stat. § 893.25) (2/2025)
8065 Prescriptive Rights by User: Domestic Corporation, Cooperative Association, or Cooperative (Wis. Stat. § 893.28(2)) (1/2023)

## Eminent Domain

8100 Eminent Domain: Fair Market Value (Total Taking) (1/2023)
8101 Eminent Domain: Fair Market Value (Partial Taking) (2012)
8102 Eminent Domain: Severance Damages (2008)
8103 Eminent Domain: Severance Damages: Cost-To-Cure (2007)
8104 Eminent Domain: Unity of Use - Two or More Parcels (2007)
8105 Eminent Domain: Lands Containing Marketable Materials (2008)
8107 Eminent Domain: Severance Damages; Unity of Use (Renumbered JI-Civil 8104) (2008)
8110 Eminent Domain: Change in Grade (2022)
8111 Eminent Domain: Access Rights (1/2023)
8112 Eminent Domain: Air Rights (2007)
8113 Eminent Domain: Taking of a Limited Easement (1/2024)
8115 Eminent Domain: Special Benefits (2008)
8120 Eminent Domain: Comparable Sales Approach (2022)
8125 Eminent Domain: Inconvenience to Landowner [Withdrawn 2008]
8130 Eminent Domain: Income Approach (2008)
8135 Eminent Domain: Cost Approach (2008)
8140 Eminent Domain: Legal Nonconforming Use, Lot or Structure (Definitions) (2007)
8145 Eminent Domain: Assemblage (2007)

**Table of Cases Cited** (11/2025)
**Index** (11/2025)

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# 52A PRELIMINARY INSTRUCTION: BIFURCATED PROCEEDINGS: EXPLANATION OF FIRST PHASE PROCEEDINGS

In this case, the presentation of evidence and your deliberations may occur in two separate phases.[1] The second phase, if necessary, will occur immediately after the first phase. You will be asked to return a verdict at the conclusion of each phase. The same jury will decide (both) (all) phases of this case.

**NOTES**

1. If the trial is trifurcated, this instruction should be modified accordingly (e.g., refer to "three separate phases").

**COMMENT**

This instruction was approved in September 2025.

This instruction may be used in any case where issues are bifurcated for trial. See Wis. Stat. § 805.05(2) (allowing separate trials) and § 805.09(2) (same jurors must agree on all questions); see also Waters v. Pertzborn, 2001 WI 62, ¶¶18–24.

Depending on the specific facts of the case, the instruction may need to be tailored to reflect the precise issue being resolved in the first phase—such as "negligence" rather than the broader term "liability" in a personal injury action. For example, the court may instruct the jury: The presentation of evidence will occur in two phases. In the first phase, you will decide the issue of negligence. If necessary, the second phase—concerning damages—will begin immediately after the first concludes.

For a more in-depth discussion of the bifurcation process and the types of issues suitable for bifurcated proceedings, see Wis JI–Civil 53 Law Note: Bifurcation Proceedings.

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# 52B PRELIMINARY INSTRUCTION: BIFURCATED PROCEEDINGS: EXPLANATION OF SECOND PHASE PROCEEDINGS AND STANDARD OF PROOF

I will now explain to you the rules of law that apply to determining (insert second phase issue). When I finish with these instructions, the parties will present additional evidence. You should consider this additional evidence along with the evidence already presented in phase 1. [You must decide (insert second phase issue) by (insert standard of proof)[1]][2] [Define standard of proof].

The fact that a second phase is occurring does not mean you should doubt or reconsider the first-phase answers. Accept the phase 1 findings as established, and use all evidence from both phases only to decide the new issues in phase 2.

**NOTE**

1. The bracketed language is optional and may be included at the discretion of the trial court. Its purpose is to highlight the burden of proof during the preliminary instruction phase, rather than limiting its discussion to the substantive instruction. The decision to include or omit the bracketed language rests with the trial court, depending on the needs of the case.

2. The purpose of this language is not to permit the parties to relitigate, through new evidence or argument, the threshold question, determined in the first phase of the proceeding. Rather, this instruction is designed to inform the jury that, during the second phase, evidence and argument may be presented to help the jury decide second phase questions.

**COMMENT**

This instruction was approved in September 2025.

This instruction should be given at the beginning of the second phase of a bifurcated trial (and adapted for any third phase). Use the optional bracketed language to emphasize any change in the burden of proof for phase 2.

The purpose of this preliminary instruction is to orient the jury to the second phase without retrying the first. The jury may need to be told not to reexamine issues already decided in phase 1. All findings from phase 1 remain in effect, and phase 2 is for new issues (such as amount of damages, insurance coverage, bad faith, punitive damages, etc.).

If the case involves a first-party insurance bad faith claim joined with a contract claim (UIM, etc.), Wisconsin law requires bifurcation and a stay of the bad faith claim until the contract claim is resolved. See Majorowicz v. Allied Mut. Ins. Co., 212 Wis. 2d 513, 569 N.W.2d 472 (Ct. App. 1997). In such a scenario, this instruction would be used at the start of the bad faith phase (phase 2) after the contract phase is completed. See Dahmen v. American Family Mut. Ins. Co., 2001 WI App 198, ¶¶1–8, 247 Wis. 2d 541, 635 N.W.2d 1.

For a more in-depth discussion of the bifurcation process and the types of issues suitable for bifurcated proceedings, see Wis JI-Civil 53 Law Note: Bifurcation Proceedings.

## 410 WITNESS: ABSENCE

If a party fails to call a material witness within (his) (her) control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

**COMMENT**

The instruction and comment were originally published in 1967. The instruction was revised in 1985. The comment was updated in 1997, 2012, 2013, 2014, and 2015. This revision was approved in May 2025. It added a note advising that the instruction is intended solely for use in civil proceedings and should not be adapted for criminal trials.

Kochanski v. Speedway SuperAmerica LLC, 2014 WI 72, 356 Wis.2d 1, 850 N.W.2d 160; State ex rel. Park Plaza Shopping Center, Inc. v. O'Malley, 59 Wis.2d 217, 207 N.W.2d 622 (1973); Thoreson v. Milwaukee & Suburban Transp. Corp., 56 Wis.2d 231, 237, 201 N.W.2d 745 (1972); Carr v. Amusement, Inc., 47 Wis.2d 368, 177 N.W.2d 388 (1970); Schemenauer v. Travelers Indem. Co., 34 Wis.2d 299, 149 N.W.2d 644 (1966); Ballard v. Lumbermen's Mut. Casualty Co., 33 Wis.2d 601, 148 N.W.2d 65 (1966); Kink v. Combs, 28 Wis.2d 65, 74, 135 N.W.2d 789 (1965); Dodge v. Dobson, 21 Wis.2d 200, 205, 124 N.W.2d 97 (1963); Lubner v. Peerless Ins. Co., 19 Wis.2d 364, 371, 120 N.W.2d 54 (1963); Booth v. Frankenstein, 209 Wis. 362, 245 N.W. 191 (1932); Bowen v. Industrial Comm'n, 239 Wis. 306, 1 N.W.2d 77 (1941). See also Lobermeier v. General Tel. Co. of Wis., 119 Wis.2d 129, 349 N.W.2d 466 (1984); D.L. by Friederichs v. Huebner, 110 Wis.2d 581, 329 N.W.2d 890 (1983); Bode v. Buchman, 68 Wis.2d 276, 228 N.W.2d 718 (1975); Coney v. Milwaukee & Suburban Transp. Corp., 8 Wis.2d 520, 99 N.W.2d 713 (1959).

The Wisconsin Supreme Court has stated that a party to a lawsuit does not have the burden, at his or her peril, of calling every possible witness to a fact, lest the failure to do so will result in an inference against him or her. The requirements of the absent material witness instruction should be narrowly construed to be applicable only to those to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth. Ballard, supra at 615-16. Valiga v. National Food Co., 58 Wis.2d 232, 206 N.W.2d 377 (1973). See also Featherly v. Continental Ins. Co., 73 Wis.2d 273, 282, 243 N.W.2d 806 (1976); Victorson v. Milwaukee & Suburban Transp. Corp., 70 Wis.2d 336, 355, 234 N.W.2d 332 (1975); City of Milwaukee

v. Allied Smelt Corp., 117 Wis.2d 377, 344 N.W.2d 523 (Ct. App. 1983).

**Note**: The Committee recommends that Wisconsin Jury Instruction–Civil 410 be reserved exclusively for civil proceedings and not adapted for use in criminal trial matters.

**Trial Court Discretion**. There is an area of trial court discretion as to whether the "missing witness" instruction should be given to the jury. Roeske v. Diefenbach, 75 Wis.2d 253, 249 N.W.2d 555 (1977); for example, the age of the witness is a "material consideration" in the trial court's decision not to give the instruction. Dawson v. Jost, 35 Wis.2d 644, 151 N.W.2d 717 (1967). Where the testimony of the witness will be cumulative, the court is proper in refusing to give the instruction. Ballard v. Lumbermen's Mut. Casualty Co., supra.

In Kochanski, supra, the Wisconsin Supreme Court ruled the trial judge erred by giving this instruction where there was no evidence that the absent witnesses were: material, within the control of the defendant, or that it was more natural for the defendant to call them.

Refusal to give the instruction was not error where plaintiff did not put his dentist on the stand, but the dentist's bill was in the record. Lundquist v. Western Casualty & Surety Co., 30 Wis.2d 159, 167, 140 N.W.2d 241 (1966).

**Inference**. The absent witness instruction does not create a presumption. Instead, it describes a permissible inference. Kochanski, supra. A court may give the instruction only if there are facts in the record that would allow the jury to reasonably draw a negative inference from the absence of a particular material witness. Kochanski, supra; Thoreson, supra. The inference is persuasive rather than probative and, standing alone, would not support plaintiff's case or defendant's defense. Carr v. Amusement, Inc., supra, at 376.

**Alternative Access to the Testimony.** In a bad faith by insurer action, the trial judge gave the jury an absent witness instruction after the insurer failed to call one of its field agents who had investigated the plaintiff's claim. On appeal, the insurer complained that the trial court should not have given the instruction because the investigator's potential testimony was available to the plaintiff because the plaintiff had deposed the investigator during discovery. The insurer argued that the plaintiff could have read to the jury whatever information he wanted from the deposition transcripts. The insurer also contended that an earlier supreme court case, Bode v. Buchman, 68 Wis.2d 276, 228 N.W.2d 718 (1975), established a bright-line rule against giving the absent witness instruction whenever the requesting party had alternative access to the missing witness' testimony. The court of appeals disagreed that a bright-line rule had been previously established. It held that while the party requesting the instruction in Bode had deposed the missing witness, the requesting party's earlier access to the missing witness' testimony was not the basis for the conclusion that the instruction was not warranted. Instead, it said, in Bode, the court held that the instruction was not appropriate because the party who should have called the absent witness did not have a "special relationship" with the witness. DeChant v. Monarch Life Ins. Co., 204 Wis.2d 137, 554 N.W.2d 225 (Ct. App. 1996).

**Availability of a Witness**. The test of availability of the witness involves the question of whether it is more natural for one party to call the witness than the other party. Thoreson, supra, p. 238. The Wisconsin Supreme Court has held that it is improper to give the absent-witness instruction when the witness is equally available to both parties. Capello v. Janeczko, 47 Wis.2d 76, 176 N.W.2d 395 (1970); Thoreson, supra.

## 1023 MEDICAL NEGLIGENCE

In ((treating) (diagnosing)) (plaintiff)'s ((injuries) (condition)), (defendant) was required to use the degree of care, skill, and judgment which reasonable ((specify type of health care providers)[1] who are in general practice) (specialists who practice the specialty which (specify type of health care providers) practices)) would exercise in the same or similar circumstances, having due regard for the state of medical science at the time (plaintiff) was (treated) (diagnosed). A (specify type of health care provider) who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (defendant) was negligent.

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

[**Use this paragraph only if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable**: If you find from the evidence that more than one method of (treatment for) (diagnosing) (plaintiff)'s (injuries) (condition)

was recognized as reasonable given the state of medical knowledge at that time, then (defendant) was at liberty to select any of the recognized methods. (Defendant) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnostic) methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method.]

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

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

[The cause question asks whether there was a causal connection between negligence on the part of (defendant) and (plaintiff)'s (injury) (condition). A person's negligence is a

cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause." The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition) or (an injury) (a condition) can be the result of the natural progression of (the injury) (the condition). In addition, the (injury) (condition) can be caused jointly by a person's negligence and also the natural progression of the (injury) (condition).]

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

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

**(Insert appropriate damage instructions.)**

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

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

**NOTES**

1. Per Chapter 655, "health care provider" extends to:

    - Physicians (MD/DO) licensed under ch. 448
    - Nurse anesthetists and advanced practice nurse prescribers licensed under ch. 441
    - Hospitals (licensed under ch. 50)
    - Ambulatory surgery centers
    - Partnerships/corporations/LLCs comprised of those providers
    - Employees of those providers acting within scope of employment

    Wis. Stat. § 655.001(8)–(10).

    Effective September 1, 2026, 2025 Wisconsin Act 17 revises the definition of "health care provider" under Wis. Stat. ch. 655 to include "advanced practice registered nurses" who meet the qualifications set forth in § 655.001(1g). This framework formally recognizes four distinct roles: nurse

practitioner, certified nurse-midwife, clinical nurse specialist, and certified registered nurse anesthetist.

**COMMENT**

This instruction was approved by the Committee in 1963. It was revised in 1966, 1974, 1984, 1987, 1988, 1989, 1990, 1991, 1992, 1995, 1996, 1998, 2002, 2009, 2011, and 2012. The comment was updated in 1990, 1992, 1996, 2001, 2002, 2003, 2004, 2005, 2006, 2009, 2011, 2012, 2016, 2017, 2019, 2021 and 2022. The 2009 revision added "(diagnosis)" throughout the instruction to the alleged negligence. This revision was approved by the Committee in October 2025. It amended the instruction pursuant to 2025 Wisconsin Act 17 by permitting the insertion of the specific type of 'health care provider' into the body of the instruction.

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

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

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

For negligence claims against registered nurses and licensed technicians performing skilled services (who are not included in the ch. 655 definition of "health care provider"), see Wis JI-Civil 1023.7.

**Standard of Care**. This instruction reflects the changes recommended by the Wisconsin Supreme Court in Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996). The former version of this instruction was based on prevailing case law which measured ordinary care based on what an "average" physician would have done. The court in Nowatske said "the standard of care applicable to physicians in Wisconsin can not be conclusively established either by a reflection of what the majority of practitioners do or by a sum of the customs which those practitioners follow." Instead, the court said "it must be established by a determination of what it is reasonable to expect of a professional given the state of medical knowledge at the time of the treatment." Nowatske, supra, at 438-39. See also the comment to Wis JI-Civil 1005.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Expert Testimony**. Expert testimony is needed to support a finding of negligence on the part of the doctor. Kuehnemann v. Boyd, 193 Wis. 588, 214 N.W. 326 (1927); Holton v. Burton, supra; Lindloff v. Ross, 208 Wis. 482, 243 N.W. 403 (1932); Ahola v. Sincock, 6 Wis.2d 332, 94 N.W.2d 566 (1959); Froh v. Milwaukee Medical Clinic, S.C., 85 Wis.2d 308, 270 N.W.2d 83 (Ct. App. 1978); McManus v. Donlin, 23 Wis.2d 289, 127 N.W.2d 22 (1964); Treptau v. Behrens Spa, Inc., supra.

The degree of care and skill (of a physician) can only be proved by the testimony of experts. Without such testimony, the jury has no standard which enables it to determine whether the defendant failed to exercise the degree of care and skill required of him or her. Kuehnemann v. Boyd, supra; Holton v. Burton,

supra; Lindloff v. Ross, supra. In 2011, the Committee added language which instructs the jury that in determining the weight of an expert's testimony, it should consider the qualifications and credibility of the expert and whether the reasons for the opinion are based on facts in the case. The jury is further instructed that it is not bound by any expert's opinion. See Weborg v. Jenny, 2012 WI 67 ¶73, 341 Wis.2d 668, 816 N.W.2d 191.

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

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

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

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

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

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

> which is usually exercised in the same or similar circumstances' by the average physician in that class.

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

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

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

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

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

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

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

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

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

**Determination of Future Economic Damages**. In a claim based on injury from any treatment or operation performed by, or from any omission by, a person who is a health care provider, the determination

of future economic damages must reflect present value, life expectancy, and the effects of inflation. Specifically, Wis. Stat. § 893.55(4)(e) states:

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

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

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

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

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

**Answering Special Verdict Questions; Possibility of Inconsistent Verdicts**. In medical negligence cases, allowing the jury to award damages regardless of how it answered negligence and cause verdict questions can lead to inconsistent verdicts under Runjo v. St. Paul Fire & Marine Ins. Co., 197 Wis.2d 594,

541 N.W.2d 173 (Ct. App. 1995); LaCombe v. Aurora Medical Group, Inc., 2004 WI App 119, 274 Wis.2d 771, 683 N.W.2d 532; Hegarty v. Beauchaine, 2006 WI App 248, 297 Wis.2d 70, 727 N.W.2d 857. In Runjo, the jury was instructed to answer the damage questions only if it affirmatively answered the negligence and cause questions.

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

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

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## 1023.5A PROFESSIONAL NEGLIGENCE: LEGAL—STATUS OF LAWYER WITH CLAIMED EXPERTISE[1] NOT IN DISPUTE

Lawyers who hold themselves out as having expertise, that is specialized experience, knowledge, or skill in a particular area of law, are held to the standard of care, skill, and judgment that reasonably prudent lawyers with similar expertise in this state would exercise under like or similar circumstances. A failure to meet this standard constitutes negligence. The plaintiff has the burden of proving that the lawyer was negligent.

You must determine whether (lawyer) was negligent in representing (plaintiff) by considering the facts and circumstances that (lawyer) knew or should have discovered at the time the legal services were provided. A lawyer is negligent if he or she fails to exercise the skill, knowledge, and care that reasonably prudent lawyers would exercise under like or similar circumstances—whether failing to investigate or research; or by overlooking or misapplying relevant facts or legal principles; or by committing acts or omissions that fall below this standard. A lawyer is not negligent because the outcome of the representation was not favorable, as long as the lawyer's actions were consistent with what reasonably prudent lawyers with similar experience, knowledge, or skill may have taken under like or similar circumstances.

During this trial, you heard testimony from lawyers who appeared as expert witnesses. Their testimony was necessary because the level of care, skill, and judgment that a reasonably prudent lawyer with the claimed experience, knowledge, or skill would exercise

is not a matter within the common knowledge of non-lawyers. This standard falls within the special expertise of the legal field and must be established through expert testimony. Therefore, you may not speculate or guess about what that standard is. Instead, you must base your determination on the expert testimony presented in this trial.

[Also Give Wis JI-Civil 265]

**SPECIAL VERDICT**

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

Answer:_____
Yes or No

**NOTES**

1. The Committee chose to adopt the phrase "claimed expertise" in place of "specialist" to avoid confusion with the formally regulated term "specialist" under Supreme Court Rule 20:7.4, which generally prohibits lawyers from using that designation except in the fields of admiralty and patent law. This substitution also aligns with the holding in Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995), which imposes a heightened standard of care on attorneys who represent that they possess superior skill or knowledge, regardless of whether the restricted title "specialist" is used.

**COMMENT**

This instruction and comment were approved in 1997. The comment was updated in 1998, 2002, 2003, 2016, 2020, 2021, and 2022. This revision was approved by the Committee in September 2025. It renumbered the instruction previously designated as Wis JI-Civil 1023.5. The term "specialist" was replaced with "claimed expertise," in the body of the instruction, and the comment was updated.

This instruction is designed for use when there is no dispute concerning the status of the lawyer as having claimed expertise, and the lawyer is being held to the heightened standard of care.

If the status of the lawyer as having claimed expertise is in dispute, use Wis JI-Civil 1023.5B.

If there is no claim that the lawyer is subject to the heightened standard of care, use Wis JI-Civil 1023.5C.

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

**Specialists**. The court of appeals has adopted the heightened standard of care for lawyers who represent themselves as having claimed expertise in Duffey Law Office S.C. v. Tank Transport, Inc., 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995). The Committee recommends use of the heightened standard of care when the trial court finds that there is credible evidence of such representation by the lawyer. Since most areas of practice do not have State Bar sanctioned specialty certification, these cases will generally present a question of fact concerning whether the lawyer held himself or herself out as having claimed expertise to the public or to the particular client. (Patent and admiralty practice have recognition as specialists by policy and tradition in federal courts.) The Committee chose not to use the term "specialist" to avoid conflating it with the meaning assigned to the term under Supreme Court Rule 20:7.4, which governs its use for ethical purposes.

Specialist status does not expand duties beyond a valid limited-scope retainer; the retainer's scope controls the lawyer's duties. See Duffey Law Office v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (1995); Freude v. Berzowski, 2024 WI App 53, ¶¶11–16.

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

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

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

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

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

Wisconsin law permits an attorney to enter into a reasonable limited-scope representation agreement, under which the lawyer's duties are confined to the services expressly agreed upon. Freude v. Berzowski, 2024 WI App 53, ¶¶11–16, 22, 413 Wis. 2d 644, 12 N.W.3d 893. When a subject matter is expressly excluded in the retainer agreement, the attorney owes no duty to advise the client regarding that subject. Id. ¶14. Consistent with SCR 20:1.2(c), a limited-scope engagement must be reasonable and based on the client's informed consent; when no challenge is raised as to the agreement's validity or the client's informed consent, courts will generally enforce the stated scope.

As a matter of public policy, an attorney has no duty to advise on claims expressly excluded by a valid limited-scope agreement, absent a contrary statute, regulation, or controlling judicial decision. However, when a retainer merely identifies the included scope of work without expressly excluding related or closely associated claims, the existence of a duty may become a litigated issue. In contrast, clear and specific exclusions, i.e., express carve-outs, eliminate any such duty. Id.

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

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

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

Whether (lawyer) has discharged (his) (her) duty depends on the purpose for which (lawyer) was retained or agreed to provide representation. The purpose (or scope) of the representation for which the

(lawyer) was retained is for you to determine from the evidence. It is irrelevant to the determination of the lawyer's negligence whether the lawyer was paid.

**Contributory Negligence**. The contributory negligence of a client can be a defense in a legal malpractice action. Gustavson v. O'Brien, 87 Wis. 2d 193, 204, 274 N.W.2d 627 (1979).

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

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

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

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

> Question no. _____ asks whether (Plaintiff) is innocent of the charge of _____. This charge consists of the following elements: (Here explain the elements of the offense from the appropriate instruction in Wisconsin Jury Instructions-Criminal.)

(Plaintiff) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) is innocent.

[Give JI-Civil 200, Ordinary Burden of Proof]

The suggested question for the special verdict is:

Was Plaintiff innocent of the charge of _____?

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

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

The court of appeals later relied on the actual innocence rule adopted by Hicks in Tallmadge v. Boyle, 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173. In this decision, the court stated that the public policy considerations supporting the actual innocence rule require that the criminal malpractice plaintiff must "prove that 'but for' that defense counsel's actions, the convicted criminal would be free." Id. at ¶22. This principle was later refined in Skindzelewski v. Smith, 2020 WI 57, 392 Wis. 2d 117, 944 N.W.2d 575. In that case, the claimant conceded his guilt to the underlying offense but advocated for an exception to the actual innocence rule because his attorney had negligently failed to raise a statute of limitations defense that would have precluded his conviction. Stating that such an exception would be contrary to public policy considerations and would reward criminality, the court in Skindzelewski explained that even if an attorney's negligence results in a conviction that is unauthorized by law, there is no applicable exception to the actual innocence rule if the error does not negate a guilty defendant's culpability. Id. at 128. The court concluded that "[T]he law bars such legal malpractice claims because even if an attorney's negligence harms a defendant by adversely affecting the outcome of the case, attorney error does not negate a guilty defendant's culpability." Id. at 130.

**Split innocence**. In order to establish a claim for legal malpractice, a criminal malpractice plaintiff who claims "split innocence" need only show that they are actually innocent of the convictions that form the basis of their complaint of legal malpractice. See Jama v. Gonzalez, 2021 WI App 3, 395 Wis. 2d 655, ¶¶43-44, 954 N.W.2d 1 (affirmed by an equally divided court in Jama v. Gonzalez, 2021 WI 79, 399 Wis. 2d 392, 965 N.W.2d 458). The split innocence exception adopted in Jama is distinct from the exception to the actual innocence rule requested and denied in Skindzelewski, supra.

**Nonliability of an Attorney to a Non-Client**. A longstanding rule in Wisconsin is that an attorney is not liable to a non-client for "acts committed in the exercise of his [or her] duties as an attorney." See Auric

v. Continental Casualty Co., 111 Wis. 2d 507, 512, 331 N.W.2d 325 (1983). However, there are exceptions to this rule in the context of estate planning. The "Auric exception," established in Auric, holds that the beneficiary of a will may maintain an action against an attorney who negligently drafted or supervised the execution of a will even though the beneficiary is a third-party not in privity with the attorney. In general, this exception allows a named beneficiary to sue an attorney for malpractice when the beneficiary can show that he or she was harmed by attorney negligence that frustrated the intent of the attorney's client.

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

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

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

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## 1023.5B PROFESSIONAL NEGLIGENCE: LEGAL – DISPUTE AS TO STATUS OF LAWYER HAVING CLAIMED EXPERTISE[1]

When providing legal services to a client, a lawyer must exercise the degree of care, skill, and judgment that reasonably prudent lawyers in this state would use under comparable circumstances. A lawyer is negligent if he or she fails to exercise the skill, knowledge, and care that reasonably prudent lawyers would exercise under comparable circumstances, whether by failing to investigate or research; or by overlooking or misapplying relevant facts or legal principles; or by committing acts or omissions that fall below the applicable standard. However, lawyers who present themselves to the public or their clients as having claimed expertise–that is specialized experience, knowledge, or skill in a particular area of law–are held to a different standard of care, that being the standard of care that reasonably prudent lawyers with that expertise would exercise. This is the heightened standard of care. The plaintiff has the burden of proving that the lawyer was negligent.

It is for you to decide, based on the evidence, whether (lawyer) presented (himself) (herself) as having expertise in the relevant area of law. If your answer to question ___ is "yes," indicating that (lawyer) held (himself) (herself) out as having expertise, you must apply the heightened standard of care when answering question ___. If your answer to question ___ is "no," you should apply the general standard of care that reasonably prudent lawyers in this state would exercise under comparable circumstances.

You must decide whether (lawyer) was negligent in representing (plaintiff) based on the facts and circumstances that (lawyer) knew or should have discovered when providing legal services to (plaintiff). Under either standard of care, a lawyer is not negligent simply because the outcome of the representation was not favorable, as long as the lawyer's actions were consistent with the applicable standard of care.

You have heard testimony in this trial from lawyers who appeared as expert witnesses. Their testimony was necessary because the degree of care, skill, and judgment that a reasonably prudent lawyer under the applicable standard of care would exercise is not a matter within the common knowledge of non-attorneys. Instead, this standard is within the specialized knowledge of legal experts and can be established only through expert testimony. Therefore, you must not speculate or guess about this standard when deciding the case; you must determine it based on the expert testimony presented during this trial.

[Also Give Wis JI-Civil 265.]

**SPECIAL VERDICT - STATUS OF HAVING CLAIMED EXPERTISE IN DISPUTE**

1. Did (lawyer) present (himself) (herself) to the public or (plaintiff) as having special experience, knowledge, or skill in (insert claimed area of expertise, e.g., personal injury law)?

Answer: _____
Yes or No

**If your answer to question 1 is yes, you should apply the heightened standard of care in considering question 2. If your answer to question 1 is no, you should apply the general standard of care in considering question 2.**

2. Was (lawyer) negligent in (his) (her) representation of (plaintiff)?

Answer: _____
Yes or No

**NOTES**

1. The Committee chose to adopt the phrase "claimed expertise" in place of "specialist" to avoid confusion with the formally regulated term "specialist" under Supreme Court Rule 20:7.4, which generally prohibits lawyers from using that designation except in the fields of admiralty and patent law. This substitution also aligns with the holding in Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995), which imposes a heightened standard of care on attorneys who represent that they possess superior skill or knowledge, regardless of whether the restricted title "specialist" is used.

**COMMENT**

This instruction and comment were approved in 1997. This revision was approved by the Committee in September 2025. It renumbered the instruction previously designated as Wis JI-Civil 1023.5A. The term "specialist" was replaced with "claimed expertise," in the body of the instruction, and the comment was updated.

See Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 675, 535 N.W.2d 91 (Ct. App. 1995), and DeThorne v. Bakken, 196 Wis. 2d 713, 539 N.W.2d 695 (1995).

This instruction is designed for use when the status of the lawyer having claimed expertise is in dispute.

If there is no claim that the lawyer is subject to the heightened standard of care, use Wis JI-Civil 1023.5C.

If there is no dispute concerning the status of the lawyer, but the lawyer is being held to the heightened standard of care, use Wis JI-Civil 1023.5A.

If there is a dispute concerning the nature or scope of the representation, add this paragraph:

Whether a lawyer has discharged (his)(her) duty depends on the purpose for which the lawyer was retained or agreed to provide representation. The purpose of the representation for which

the lawyer was retained is for you to determine from the evidence.

When a retainer agreement expressly excludes a particular subject, that exclusion negates any duty to advise the client on the excluded matter. Freude v. Berzowski, 2024 WI App 53, ¶15, 413 Wis. 2d 644, 12 N.W.3d 893. Courts will enforce reasonable limited-scope representation agreements when there is no challenge to their validity or to the client's informed consent, as required by SCR 20:1.2(c). Id. ¶¶11–13. Absent a contrary statute, regulation, or controlling judicial decision, public policy does not impose duties beyond those defined in a valid limited-scope agreement. Id. ¶¶22–24.

**Specialists**. The court of appeals has adopted the heightened standard of care for lawyers who represent themselves as having claimed expertise in Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995). The Committee recommends use of the heightened standard of care instruction when the trial court finds that there is credible evidence of such representation by the lawyer. See also Wis JI-Civil 1023.5A. Since most areas of practice do not have State Bar sanctioned specialty certification, these cases will generally present a question of fact concerning whether the lawyer held himself or herself out as having claimed expertise to the public or to the particular client. (Patent and admiralty practice have recognition as specialists by policy and tradition in federal courts.) The Committee chose not to use the term "specialist" to avoid conflating it with the meaning assigned to the term under Supreme Court Rule 20:7.4, which governs its use for ethical purposes.

## 1023.5C PROFESSIONAL NEGLIGENCE: LEGAL – NO CLAIM OF LAWYER AS HAVING CLAIMED EXPERTISE[1]

When providing legal services to a client, a lawyer must exercise the degree of care, skill, and judgment that reasonably prudent lawyers in this state would use under comparable circumstances. Failing to meet this standard is negligence. The plaintiff has the burden of proving that the lawyer was negligent.

You must determine whether (lawyer) was negligent in representing (plaintiff) based on the facts and circumstances that (lawyer) knew or should have discovered when providing legal services to (plaintiff). A lawyer is negligent if he or she fails to exercise the skill, knowledge, and care that reasonably prudent lawyers would exercise under comparable circumstances, whether by failing to investigate or research; or by overlooking or misapplying relevant facts or legal principles; or by committing acts or omissions that fall below this standard. A lawyer is not negligent because the outcome of the representation was not favorable, as long as the lawyer's actions were consistent with what reasonably prudent lawyers may have taken under comparable circumstances.

You have heard testimony in this trial from lawyers who appeared as expert witnesses. Their testimony was necessary because the degree of care, skill, and judgment that a reasonably prudent lawyer would exercise is not a matter within the common knowledge of non-lawyers. Instead, this standard is within the specialized knowledge of legal experts and can be established only through expert testimony. Therefore, you must not speculate or guess about this standard when deciding the case; you must determine it based on the

expert testimony presented during this trial.

**NOTES**

1. The Committee chose to adopt the phrase "claimed expertise" in place of "specialist" to avoid confusion with the formally regulated term "specialist" under Supreme Court Rule 20:7.4, which generally prohibits lawyers from using that designation except in the fields of admiralty and patent law. This substitution also aligns with the holding in Duffey Law Office, S.C. v. Tank Transport, Inc., 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995), which imposes a heightened standard of care on attorneys who represent that they possess superior skill or knowledge, regardless of whether the restricted title "specialist" is used.

**COMMENT**

This instruction and comment were approved in September 2025.

This instruction is designed for use when there is no claim that the lawyer is subject to the heightened standard of care. As such, it refers only to the general standard.

If the status of the lawyer as having claimed expertise is in dispute, see Wis JI-Civil 1023.5B.

If there is no dispute concerning the status of the lawyer, but the lawyer is being held to the heightened standard of care, see Wis JI-Civil 1023.5A.

Wisconsin law permits an attorney to enter into a reasonable limited-scope representation agreement, under which the lawyer's duties are confined to the services expressly agreed upon. Freude v. Berzowski, 2024 WI App 53, ¶¶11–16, 22, 413 Wis. 2d 644, 12 N.W.3d 893. When a subject matter is expressly excluded in the retainer agreement, the attorney owes no duty to advise the client regarding that subject. Id. ¶14. Consistent with SCR 20:1.2(c), a limited-scope engagement must be reasonable and based on the client's informed consent; when no challenge is raised as to the agreement's validity or the client's informed consent, courts will generally enforce the stated scope.

As a matter of public policy, an attorney has no duty to advise on claims expressly excluded by a valid limited-scope agreement, absent a contrary statute, regulation, or controlling judicial decision. However, when a retainer merely identifies the included scope of work without expressly excluding related or closely associated claims, the existence of a duty may become a litigated issue. In contrast, clear and specific exclusions—i.e., express carve-outs—eliminate any such duty. Id.

OFFICE OF JUDICIAL EDUCATION

11/2025

# WISCONSIN JURY INSTRUCTIONS

# CIVIL

# VOLUME II

**Wisconsin Civil Jury Instructions Committee**

- 11/2025 Supplement (Release No. 59)

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# TABLE OF CONTENTS

# VOLUME II

## NEGLIGENCE (Continued)

1500 Cause (2021)
1501 Cause: Normal Response (1998)
1505 Cause: Where Cause of Death is in Doubt (1998)
1506 Cause: Relation of a Medical Procedure to the Accident (1998)
1510 Negligent Infliction of Severe Emotional Distress (Bystander Claim) (2014)
1511 Personal Injuries: Negligent Infliction of Severe Emotional Distress (Separate or Direct Claim) (1/2024)

## Comparative Negligence

1580 Comparative Negligence: Plaintiff and One or More Defendants (2011)
1582 Comparative Negligence: Adult and Child (1990)
1585 Comparative Negligence: Plaintiff-Guest and Host-Defendant Negligent (1992)
1590 Comparative Negligence: Plaintiff-Guest Passively Negligent; Host (Or Other Driver) Negligent (2003)
1591 Comparative Negligence: Guest Passively Negligent; Claims Against and Among Drivers; Apportionment from One Comparative Negligence Question (2015)
1592 Comparative Negligence: Guest Passively Negligent; Claims Against and Among Drivers; Apportionment of Comparative Negligence from Two Questions (2003)
1595 Comparative Negligence: Where Negligence or Cause Question Has Been Answered by Court (1990)

## Imputed Negligence

1600 Servant: Driver of Automobile (Presumption from Ownership of Vehicle) (2003)
1605 Driver: Scope of Employment (2014)
1610 Joint Adventure (Enterprise): Automobile Cases (1990)

# Damages

1700 Damages: General (2016)
1705 Damages: Burden of Proof in Tort Actions: Future Damages [Withdrawn 2001]
1707 Punitive Damages: Nonproducts Liability [For Actions Commenced Before May 17, 1995] (1996)
1707A Punitive Damages: Products Liability [For Actions Commenced Before May 17, 1995] (1996)
1707.1 Punitive Damages: Nonproducts Liability (2018)
1707.2 Punitive Damages: Products Liability (2008)
1708 Battery: Punitive Damages: Mitigation by Provocation [Withdrawn © 2010]
1710 Aggravation of Injury Because of Medical Negligence (2015)
1715 Aggravation of Pre-existing Injury (1990)
1720 Aggravation or Activation of Latent Disease or Condition (1992)
1722 Damages from Nonconcurrent or Successive Torts (1992)
1722A Damages from Nonconcurrent or Successive Torts (To be used where several tortfeasors are parties) (1996)
1723 Enhanced Injuries (2009)
1725 Further Injury in Subsequent Event (2003)
1730 Damages: Duty to Mitigate: Physical Injuries (2012)
1731 Damages: Duty to Mitigate: Negligence or Breach of Contract (2012)
1732 Damages: Duty to Mitigate: Intentional Tort (2012)
1735 Damages: Not Taxable as Income (1990)
1740 Damages: Common Scheme or Plan; Concerted Action (Wis. Stat. § 895.045(2)) (2009)
1741 Personal Injuries: Negligence in Informing the Patient (2015)
1742 Personal Injuries: Medical Care: Offsetting Benefit from Operation Against Damages for Negligence in Informing the Patient (2015)
1749 Personal Injuries: Conversion Table for 1998 Revision of Damage Instructions (1998)
1750.1 Personal Injuries: Subdivided Question as to Past and Future Damages (1998)
1750.2 Personal Injuries: Past and Future: One Verdict Question (Except Past Loss of Earnings and Past Medical Expenses) (1998)
1754 Personal Injury: One Subdivided Question as to Past Damages [Withdrawn © 1998]
1756 Personal Injuries: Past Health Care Expenses (2015)
1757 Personal Injuries: Past Health Care Expenses (Medical Negligence Cases) (Negligence of Long-Term Care Provider): Collateral Sources (2013)
1758 Personal Injuries: Future Health Care Expenses (2010)
1760 Personal Injuries: Past Loss of Earning Capacity (2016)

1762 Personal Injuries: Future Loss of Earning Capacity (2022)
1766 Personal Injuries: Past Pain, Suffering, and Disability (Disfigurement) (2009)
1767 Personal Injuries: Future Pain, Suffering, and Disability (Disfigurement) (1999)
1768 Personal Injuries: Past and Future Pain, Suffering, and Disability (Disfigurement) (1998)
1770 Personal Injuries: Severe Emotional Distress (2006)
1780 Personal Injuries: Loss of Business Profits [Withdrawn 1998]
1785 Personal Injuries: Past Loss of Professional Earnings [Withdrawn 1998]
1788 Loss of Earnings: Delay in Obtaining Degree [Withdrawn 1999]
1795 Personal Injury: Life Expectancy and Mortality Tables (1992)
1796 Damages: Present Value of Future Losses (2003)
1797 Damages: Effects of Inflation (1993)
1800 Property: Loss of Use of Repairable Automobile (1997)
1801 Property: Loss of Use of Nonrepairable Automobile (1997)
1803 Property: Destruction of Property (2010)
1804 Property: Damage to Repairable Property (2010)
1805 Property: Damage to Nonrepairable Property (2010)
1806 Property: Damage to a Growing Crop (1997)
1810 Trespass: Nominal Damages (2013)
1812 Quantum Meruit: Measure of Services Rendered (1992)
1815 Injury to Spouse: Loss of Consortium (2012)
1816 Injury to Spouse: Past Loss of Earning Capacity: Household Services (1993)
1817 Injury to Spouse: Future Loss of Earning Capacity: Household Services (2001)
1820 Injury to Spouse: Nursing Services: Past and Future (1992)
1825 Injury to Wife: Medical and Hospital Expenses [Withdrawn 1995]
1830 Injury to Wife: Medical and Hospital Bills: Dispute over Ownership of Claim [Withdrawn 1995]
1835 Injury to Minor Child: Parent's Damages for Loss of Child's Earnings and Services: Past and Future (2001)
1837 Injury to Minor Child: Parent's Damages for Loss of Society and Companionship (2001)
1838 Injury to Parent: Minor Child's Damages for Loss of Society and Companionship (2001)
1840 Injury to Minor Child: Parents' Damages for Medical Expenses: Past and Future (1996)
1845 Injury to Child: Parents' Damages for Services Rendered to Child: Past and Future (1992)
1850 Estate's Recovery for Medical, Hospital, and Funeral Expenses (2016)
1855 Estate's Recovery for Pain and Suffering (2018)
1860 Death of Husband: Pecuniary Loss [Withdrawn 1992]

1861 Death of Spouse (Domestic Partner): Pecuniary Loss (2010)
1865 Death of Wife: Pecuniary Loss [Withdrawn 1992]
1870 Death of Spouse: Surviving Spouse's Loss of Society and Companionship (2019)
1875 Death of Spouse: Medical, Hospital, and Funeral Expenses (1992)
1880 Death of Parent: Pecuniary Loss (2016)
1885 Death of Adult Child: Pecuniary Loss (2001)
1890 Damages: Death of Minor Child: Premajority Pecuniary Loss (2001)
1892 Damages: Death of Minor Child: Postmajority Pecuniary Loss (2001)
1895 Death of Child: Parent's Loss of Society and Companionship (2019)
1897 Death of Parent: Child's Loss of Society and Companionship (2019)

## Safe Place

1900.2 Safe-Place Statute: Duty of Employer (1992)
1900.4 Safe-Place Statute: Injury to Frequenter: Negligence of Employer or Owner of a Place of Employment (2022)
1901 Safe-Place Statute: Definition of Frequenter (1996)
1902 Safe-Place Statute: Negligence of Plaintiff Frequenter (2004)
1904 Safe-Place Statute: Public Buildings: Negligence of Owner (1990)
1910 Safe-Place Statute: Place of Employment: Business (1990)
1911 Safe-Place Statute: Control (1992)

## Nuisance

1920 Nuisance: Law Note (2/2025)
1922 Private Nuisance: Negligent Conduct (2/2025)
1924 Private Nuisance: Abnormally Dangerous Activity: Strict Liability (2/2025)
1926 Private Nuisance: Intentional Conduct (2/2025)
1928 Public Nuisance: Negligent Conduct (2/2025)
1930 Public Nuisance: Abnormally Dangerous Activity: Strict Liability (2/2025)
1932 Public Nuisance: Intentional Conduct (2/2025)

# INTENTIONAL TORTS

## Assault and Battery

2000 Intentional Tort: Liability of Minor (2014)
2001 Intentional Versus Negligent Conduct (1995)
2004 Assault (11/2025)

2005 Battery (11/2025)
2005.5 Battery: Offensive Bodily Contact (2015) [Renumbered JI-Civil 2005.1] (11/2025)
2005.1 Battery: Offensive Bodily Contact (11/2025)
2005.2 Battery: Liability of an Aider and Abettor (11/2025)
2006 Battery: Self-Defense (11/2025)
2006.1 Battery: Defense of Property (11/2025)
2006.2 Battery: Self-Defense; Defendant's Dwelling, Motor Vehicle, Place of Business; Wis. Stat. § 895.62 (11/2025)
2006.3 Battery: Excessive Force in Arrest (11/2025)
2006.5 Battery: Defense of Property [Renumbered JI-Civil 2006.1] (11/2025)
2007 Battery: Liability of an Aider and Abettor [Renumbered JI-Civil 2005.2] (11/2025)
2008 Battery: Excessive Force in Arrest [Renumbered JI-Civil 2006.3] (11/2025)
2010 Assault and Battery: Offensive Bodily Contact [Renumbered JI-Civil- 2005.5 2011]
2020 Sports Injury: Reckless or Intentional Misconduct (1/2023)

## False Imprisonment

2100 False Imprisonment: Definition (2014)
2110 False Imprisonment: Compensatory Damages (2014)
2115 False Arrest: Law Enforcement Officer; Without Warrant (1993)

## Federal Civil Rights

2150 Federal Civil Rights: §§ 1981 and 1982 Actions (1993)
2151 Federal Civil Rights: § 1983 Actions [Withdrawn 2014]
2155 Federal Civil Rights: Excessive Force in Arrest (in Maintaining Jail Security) [Withdrawn 2014]

## Conversion

2200 Conversion: Dispossession (2014)
2200.1 Conversion: Refusal to Return Upon Demand (Refusal by Bailee) (1993)
2200.2 Conversion: Destruction or Abuse of Property (1991)
2201 Conversion: Damages (2016)

## Misrepresentation

2400 Misrepresentation: Bases for Liability and Damages - Law Note for Trial Judges (1/2023)
2401 Misrepresentation: Intentional Deceit (1/2023)
2402 Misrepresentation: Strict Responsibility (1/2023)
2403 Misrepresentation: Negligence (1/2023)
2405 Intentional Misrepresentation: Measure of Damages in Actions Involving Sale [Exchange] of Property (Benefit of the Bargain) (2018)
2405.5 Strict Responsibility: Measure of Damages in Actions Involving Sale [Exchange] of Property (Benefit of the Bargain) (2018)
2406 Negligent Misrepresentation: Measure of Damages in Actions Involving Sale [Exchange] of Property (Out of Pocket Rule) (2014)
2418 Unfair Trade Practice: Untrue, Deceptive, or Misleading Representation: Wis. Stat. § 100.18(1) (2021) ) [Renumbered JI-Civil-2418B 2/2025]
2418A Unfair Trade Practice: Untrue, Deceptive, or Misleading Representation: Wis. Stat. § 100.18(11)(b)2 (2/2025)
2418B Unfair Trade Practice: Untrue, Deceptive, or Misleading Representation: Wis. Stat. § 100.18(1) (2/2025)
2419 Property Loss Through Fraudulent Misrepresentation: Wis. Stat. § 895.446 (Based on Conduct (Fraud) Prohibited by Wis. Stat. § 943.20) (2018)
2420 Civil Theft: Wis. Stat. § 895.446 (Based on Conduct (Theft) Prohibited by Wis. Stat. § 943.20(1)(a)) (2019)

## Defamation

2500 Defamation - Law Note for Trial Judges (7/2024)
2501 Defamation: Private Individual Versus Private Individual, No Privilege (1/2023)
2505 Defamation: Truth as a Defense (Nonmedia Defendant) (1/2023)
2505A Defamation: Truth of Statement (First Amendment Cases) (1/2023)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege (1/2024)
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard) (2003)
2510 Defamation: Truth as Defense Where Plaintiff Charged with Commission of a Crime [Withdrawn 1993]
2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice) (7/2024)
2512 Defamation: Truth as Defense Where Plaintiff Not Charged with Commission of a Crime [Withdrawn 1993]

2513 Defamation: Express Malice (1/2023)
2514 Defamation: Effect of Defamatory Statement or Publication [Withdrawn 1993]
2516 Defamation: Compensatory Damages (1991)
2517 Defamation: Conditional Privilege: Abuse of Privilege [Renumbered JI-Civil 2507 1993]
2517.5 Defamation: Public Official: Abuse of Privilege [Renumbered JI-Civil 2511 1993]
2518 Defamation: Express Malice [Renumbered JI-Civil 2513 1993]
2520 Defamation: Punitive Damages (2003)
2550 Invasion of Privacy (Publication of a Private Matter) Wis. Stat. § 995.50(2)(c) (1/2024)
2551 Invasion of Privacy: Highly Offensive Intrusion; Wis. Stat. § 995.50(2)(a) (1/2024)
2552 Invasion of Privacy: Publication of a Private Matter: Conditional Privilege (2003)

## Misuse of Procedure

2600 Malicious Prosecution: Instituting a Criminal Proceeding (2022)
2605 Malicious Prosecution: Instituting a Civil Proceeding (2022)
2610 Malicious Prosecution: Advice of Counsel: Affirmative Defense (Criminal Proceeding) (2015)
2611 Malicious Prosecution: Advice of Counsel: Affirmative Defense (Civil Proceeding) (2015)
2620 Abuse of Process (2013)

## Trade Practices

2720 Home Improvement Practices Act Violation; Wisconsin Administrative Code Chapter ATCP 110; Wis. Stat. § 100.20 (2013)
2722 Theft by Contractor (Wis. Stat. § 779.02(5)) (1/2023)

## Domestic Relations

2725 Intentional Infliction of Emotional Distress (11/2025)

## Business Relations

2750 Employment Relations: Wrongful Discharge - Public Policy (7/2024)
2760 Bad Faith by Insurance Company (Excess Verdict Case) (2003)

2761 Bad Faith by Insurance Company: Assured's Claim (2012)
2762 Bad Faith by Insurance Company: Third Party Employee Claim Against Worker's Compensation Carrier [Withdrawn] (2009)
2769 Wisconsin Fair Dealership Law: Existence of Dealership (2020)
2770 Wisconsin Fair Dealership Law: Good Cause for Termination, Cancellation, Nonrenewal, Failure to Renew, or Substantial Change in Competitive Circumstances (Wis. Stat. § 135.03) (2022)
2771 Wisconsin Fair Dealership Law: Adequate Notice by Grantor (Wis. Stat. § 135.04) (2005)
2772 Wisconsin Fair Dealership Law: Special Verdict (2005)
2780 Intentional Interference with Contractual Relationship (2/2025)
2784 Breach of Fiduciary Duty (11/2025)
2785 Breach of Fiduciary Duty: Damages (11/2025)
2786 Breach of Fiduciary Duties: Special Verdict (11/2025)
2790 Trade Name Infringement (2022)
2791 Trade Name Infringement: Damages (2010)
2792A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(a) (11/2025)
2792B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(b) (11/2025)
2793A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditor – Wis. Stat. § 242.05(1) (11/2025)
2793B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditor – Wis. Stat. § 242.05(2) (11/2025)
2794A Transfer: Defined – Wis. Stat. § 242.01(12) (11/2025)
2794B Insider: Defined – Wis. Stat. § 242.01(7) (11/2025)
2794C Insolvency: Defined – Wis. Stat. § 242.02(2) (11/2025)
2795 Presumption of Insolvency – Wis. Stat. § 242.02(3) (11/2025)
2796 Reasonably Equivalent Value: Definition (11/2025)
2797A Affirmative Defense: Good Faith – Wis. Stat. § 242.08 (11/2025)
2797B Affirmative Defense: Statute of Limitations – Wis. Stat. § 242.09 (11/2025)
2798A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(a): Special Verdict (11/2025)
2798B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present or Future Creditors – Wis. Stat. § 242.04(1)(b): Special Verdict (11/2025)
2799A Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditors – Wis. Stat. § 242.05(1): Special Verdict (11/2025)
2799B Uniform Voidable Transactions: Transfer or Obligation Voidable as To Present Creditors – Wis. Stat. § 242.05(2): Special Verdict (11/2025)

## Civil Conspiracy

2800 Conspiracy: Defined (2018)
2802 Conspiracy: Proof of Membership (2003)
2804 Conspiracy: Indirect Proof (2003)
2806 Conspiracy to be Viewed as a Whole (1993)
2808 Conspiracy between Affiliated Corporations [Withdrawn 2009]
2810 Conspiracy: Overt Acts (2003)
2820 Injury to Business: (Wis. Stat. § 134.01) (2008)
2822 Restraint of Will (Wis. Stat. § 134.01) (2003)

## Tort Immunity

2900 Tort Immunity: Immunities Abrogated - Law Note for Trial Judges (1993)

# CONTRACTS

## General

3010 Agreement (2011)
3012 Offer: Making (1993)
3014 Offer: Acceptance (1993)
3016 Offer: Rejection (1993)
3018 Offer: Revocation (1993)
3020 Consideration (1993)
3022 Definiteness and Certainty (1993)
3024 Implied Contract: General (1993)
3026 Implied Contract: Promise to Pay Reasonable Value (1993)
3028 Contracts Implied in Law (Unjust Enrichment) (7/2023)
3030 Modification by Mutual Assent (1993)
3032 Modification by Conduct (1993)
3034 Novation (1993)
3040 Integration of Several Writings (1993)
3042 Partial Integration: Contract Partly Written, Partly Oral (1993)
3044 Implied Duty of Good Faith (Performance of Contract) (2007)
3045 Definitions – “Bona Fide” (1993)
3046 Implied Promise of No Hindrance (1993)
3048 Time as an Element (2016)
3049 Duration (2016)

3050 Contracts: Subsequent Construction by Parties (1993)
3051 Contracts: Ambiguous Language (2012)
3052 Substantial Performance (1994)
3053 Breach of Contract (2007)
3054 Demand for Performance (2014)
3056 Sale of Goods: Delivery or Tender of Performance (1993)
3057 Waiver (2018)
3058 Waiver of Strict Performance (1993)
3060 Hindrance or Interference with Performance (1993)
3061 Impossibility: Original (1993)
3062 Impossibility: Supervening (1993)
3063 Impossibility: Partial (1993)
3064 Impossibility: Temporary (1993)
3065 Impossibility: Superior Authority (1993)
3066 Impossibility: Act of God (1993)
3067 Impossibility: Disability or Death of a Party (1993)
3068 Voidable Contracts: Duress, Fraud, Misrepresentation (2016)
3070 Frustration of Purpose (2020)
3072 Avoidance for Mutual Mistake of Fact (2014)
3074 Estoppel: Law Note for Trial Judges (2018)
3076 Contracts: Rescission for Nonperformance (2001)
3078 Abandonment: Mutual (1993)
3079 Termination of Easement by Abandonment (2022)
3082 Termination of Servant's Employment: Indefinite Duration (1993)
3083 Termination of Servant's Employment: Employer's Dissatisfaction (1993)
3084 Termination of Servant's Employment: Additional Consideration Provided by Employee (1993)

## Real Estate

3086 Real Estate Listing Contract: Validity: Performance (2019)
3088 Real Estate Listing Contract: Termination for Cause (1993)
3090 Real Estate Listing Contract: Broker's Commission on Sale Subsequent to Expiration of Contract Containing "Extension" Clause (1993)
3094 Residential Eviction: Possession of Premises (11/2025)
3095 Landlord - Tenant: Constructive Eviction (11/2025)

## 2004 ASSAULT

An assault occurred if:

1. (Defendant) intended to cause physical harm to (plaintiff); and

2. (Defendant) acted to cause (plaintiff) to reasonably believe (defendant) had the present intent and ability to harm (plaintiff).

The requirement that (defendant) intended to cause bodily harm means that (defendant) had the mental purpose to cause bodily harm to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause bodily harm to (plaintiff) (or another person).

[Burden of Proof, Wis JI-Civil 205]

### COMMENT

This instruction and comment were first approved in 1972. They were revised in 2009. This revision was approved by the Committee in September 2025; it added to the comment.

As originally approved, the instruction stated that the intent necessary to commit an assault was either an intent to physically injure the plaintiff or an intent to put the plaintiff in fear that physical harm was to be committed upon the plaintiff. This element departed from Wisconsin case law having its origin in 1896 which held that an intent to physically harm was required to establish an assault. Degenhardt v. Heller, 93 Wis. 662, 68 N.W. 411 (1896). The holding in Degenhardt has been criticized. 1940 Wis. Law Review 103; 1955 Wis. Law Review 6. See also Prosser, Torts, p. 40-41; Restatement (Second), Torts, § 21, p. 37.

While the Committee believes intent to cause apprehension or fear should be sufficient to establish an intent, as it is in many states, Wisconsin case law supporting this position does not currently exist. Therefore, the Committee withdrew the original version of the assault instruction and replaced it with the version above, which includes the requisite intent to cause physical harm as provided in Degenhardt.

For intentional infliction of emotional distress, see Wis JI-Civil 2725.

**Statutory background**. 2025 Wisconsin Act 24 reorganized the criminal battery statutes by recodifying former §§ 940.19–.208 into new §§ 940.60–.66 and by consolidating "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm). These revisions are structural in nature and do not affect the substantive elements of the civil tort of assault as set forth in this instruction. The changes are noted here solely to assist readers who may consult related criminal-law provisions.

## 2005 BATTERY: BODILY HARM

A battery occurred if:

1. (Defendant) intentionally caused bodily harm to (plaintiff); and

2. (Plaintiff) did not consent to the harm.

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

The requirement that (defendant) intended to cause bodily harm means that (defendant) had the mental purpose to cause bodily harm to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause bodily harm to (plaintiff) (or another person).

**COMMENT**

This instruction and comment were originally approved in 1977. The instruction was revised in 1994 and 2009. The comment was updated in 2010. This revision was approved by the Committee in September 2025; it added to the comment.

The definition of a battery is taken from Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), and McClusky v. Steinhorst, 45 Wis. 2d 350, 173 N.W.2d 148 (1970). See also Trogun v. Fruchtman, 58 Wis. 2d 569, 207 N.W.2d 297 (1973).

When there has been a bodily contact, without injury except to the dignity and personal sensibilities of the person subjected to the battery, use Wis JI-Civil 2005.5.

See also Wis JI-Criminal 1220.

**Statutory background**. 2025 Wisconsin Act 24 recodified criminal battery statutes from former §§ 940.19–.208 into new §§ 940.60–.66 and consolidated "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm). These revisions are structural in nature and do not affect the substantive elements of the civil tort of battery as set forth in this instruction. The changes are noted here solely to assist

readers who may consult related criminal-law provisions.

For a suggested verdict in a case involving an alleged battery by one tortfeasor and negligence by another tortfeasor, see JI-Civil 1580, Comment.

## 2005.1 BATTERY: OFFENSIVE CONTACT

A battery occurred if:

1. (Defendant) intentionally caused offensive contact with (plaintiff); and

2. (Plaintiff) did not consent to the contact.

A contact is "offensive" if a reasonable person in (plaintiff)'s situation would have been offended by the contact. [An offensive contact is one that offends a reasonable sense of personal dignity.]

The requirement that (defendant) intended to cause offensive contact means that (defendant) had the mental purpose to cause offensive contact to (plaintiff) (or another person) or was aware that his or her conduct was practically certain to cause offensive contact to (plaintiff) (or another person).

**COMMENT**

This instruction was originally approved in 1962 and numbered 2010. It was revised and renumbered Wis JI-Civil 2005.5 in 2010. The comment was updated in 2015. This revision was approved by the Committee in September 2025. It renumbered the instruction previously designated as Wis JI-Civil 2005.5 and added to the comment.

In Voith v. Buser, 83 Wis. 2d 540, 266 N.W.2d 304 (1978), the trial court, after the jury had deliberated for over an hour, reread the original instruction, dealing with bodily harm battery, Wisconsin Jury Instruction-Civil 2005. It then, for the first time, read an instruction involving an offensive bodily contact battery. The supreme court held that it was error to give the additional battery instruction, because the plaintiff's case was in no way based on the theory of offensive bodily contact, but rather on a theory of causing bodily harm.

For trial issues involving the element of consent (where the plaintiff was a child under sixteen), see Brekken v. Knopf, Appeal No. 2013AP1900 (per curiam) and Beul v. ASSE International, Inc., 233 F.3d 441 (7th Cir. 2000).

**Statutory background**. 2025 Wisconsin Act 24 recodified criminal battery statutes from former §§ 940.19–.208 into new §§ 940.60–.66 and consolidated "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm). These revisions are structural in nature and do not affect the substantive elements of the civil tort of battery (offensive contact) as set forth in this instruction. The changes are noted here solely to assist readers who may consult related criminal-law provisions.

## 2005.2 BATTERY: LIABILITY OF AN AIDER AND ABETTOR

Question ___ asks whether (defendant) participated in a battery to _____.

A person may participate in a battery even though he or she does not physically attack the victim. A person participates in a battery if the person:

1. knowingly renders assistance to the person(s) committing the battery, or
2. indicates a readiness or willingness to join in the battery and the person(s) committing the battery knows of his or her willingness, or
3. is present at the scene of the battery and intentionally incites another person to unlawfully attack another person. The word "incite" means to move another person to action, to spur him or her on, or persuade him or her to commit the battery.

A person who is present at the time and place of a battery but does not make an act, word, or gesture to aid or encourage the physical attack is not deemed to have participated in the battery even though the person did nothing to prevent or stop the attack.

**COMMENT**

This instruction and comment were originally approved in 1966 and were revised in 1986 and 2010. This revision was approved by the Committee in September 2025. It renumbered the instruction previously designated as Wis JI-Civil 2007 and added to the comment.

See Krudwig v. Koepke, 227 Wis. 1, 277 N.W. 670 (1938); Krudwig v. Koepke, 223 Wis. 244, 270 N.W. 79 (1936); Fredrickson v. Kabat, 266 Wis. 442, 63 N.W.2d 756 (1954); Rinehart v. Whitehead, 64 Wis. 42, 46, 24 N.W. 401 (1885); Hilmes v. Stroebel, 59 Wis. 74, 75, 17 N.W. 539 (1883); 6 Am. Jur.2d Assault and Battery § 128 (1963).

For one to incite another to commit a battery, it is necessary that he or she be present at the scene of the action. Krudwig v. Koepke, 227 Wis. 1, 277 N.W. 670 (1938).

"To 'incite' one, that is move him to action, spur him on, or persuade him to action, as to commit an assault, the person inciting him must be present at the scene of the action and not merely directing, ordering, or procuring such action." Krudwig, 227 Wis. at 5.

In Winslow v. Brown, 125 Wis.2d 327, 336, 371 N.W.2d 417 (Ct. App. 1985), the court concluded that a person is liable for aiding and abetting if: (1) the person undertakes conduct that as a matter of objective fact aids another in the commission of an unlawful act; and (2) the person consciously desires or intends that the conduct will yield such assistance. The court of appeals also held that liability premised on aiding and abetting in the civil context is not limited to intentional conduct but also extends to negligent torts as well.

**Statutory background**. 2025 Wisconsin Act 24 recodified criminal battery statutes from former §§ 940.19–.208 into new §§ 940.60–.66 and consolidated "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm). These revisions are structural in nature and do not affect the civil aiding-and-abetting battery liability as set forth in this instruction. The changes are noted here solely to assist readers who may consult related criminal-law provisions.

## 2006 BATTERY: SELF-DEFENSE

(Defendant) claims that any injury to (plaintiff) was inflicted by (defendant) in self-defense.

"Self-defense" is the right to defend one's person by the use of whatever force is reasonably necessary under the circumstances.

If (defendant) reasonably believed that (his) (her) life was in danger or that (he) (she) was likely to suffer bodily harm, then (defendant) had a right to defend (himself) (herself) by the use of force as under the circumstances (he) (she) reasonably believed was necessary. (Defendant), who alleges that (he) (she) acted in self-defense, has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed that the use of some force was necessary to prevent injury and also that the amount of force used by (defendant) was reasonable under the circumstances.

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.

In determining whether the force used by (defendant) was reasonably necessary, you

may consider the actions of (plaintiff), the force or threat of force used by (plaintiff), the amount of force used by (defendant), the means or instrument by which the force was applied, as well as the relative strength and size of (plaintiff) and (defendant).

If you determine that the (defendant) acted in self-defense, then you should answer "Yes" to Question No. _____, if you are required to answer that question.

**SPECIAL VERDICT**

**Question No. 1.**

Did (defendant) commit a battery on (plaintiff) on [date of alleged battery]?

Answer: _____

Yes or No

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

**Question No. 2.**

Was the battery a cause of (plaintiff)'s injuries?

Answer: _____

Yes or No

**If you answered "Yes" to Question No. 2, then answer Question No. 3.**

**Question No. 3**.

Did (defendant) act in self-defense when (he) (she) struck (plaintiff) on [date of alleged battery]?

Answer: _____

Yes or No

**COMMENT**

The instruction and comment were originally published in 1967. They were revised in 1994, 2010, 2011, and 2012. This instruction addresses the use of self-defense in cases not covered by Wis. Stat. § 895.62. This revision was approved by the Committee in September 2025; it added to the comment.

**Privilege of Self-Defense**. A defendant in a battery case can assert privilege as an affirmative defense. When the defendant's actions are privileged, "conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability." Restatement, Second, Torts § 10. This instruction deals with the privilege of self-defense, the most common example of privileged conduct asserted in a battery case.

See Maichle v. Jonovic, 69 Wis.2d 622, 230 N.W.2d 789 (1975), and Crotteau v. Karlgaard, 48 Wis.2d 245, 179 N.W.2d 797 (1970).

Use of more force than is reasonably necessary constitutes a battery to the extent of the force used in excess of the privilege. Schulze v. Kleeber, 10 Wis.2d 540, 545, 103 N.W.2d 560 (1960); Palmer v. Smith, 147 Wis. 70, 77, 132 N.W. 614 (1911); Gutzman v. Clancy, 114 Wis. 589, 90 N.W. 1081 (1902); McConaghy v. McMullen, 27 Wis. 73, 79 (1870); Restatement, Second, Torts § 71 (1965).

In the case of children, beliefs, instincts, and impulses are judged in relation to those of a reasonable person of like age, intelligence, and experiences. The reasonableness of the actor's beliefs, moreover, is not defeated by a subsequent determination that the beliefs were mistaken. Maichle v. Jonovic, supra at 627-28.

Oral abuse is not sufficient to justify a battery. See Crotteau, supra at 250. However, there may be situations involving what the court in Maichle described as an "overt act of an ambiguous character." In these situations, self-defense is a justifiable defense in a civil action where the act gives rise to "a reasonable belief of imminent bodily harm when coupled with knowledge of previous threats of physical harm and dangerous propensities exhibited by the victim." Maichle, supra at 630.

This instruction needs to be tailored when the affirmative defense is based on the defense of a third party.

A defendant who is the initial aggressor can lose the right to claim self-defense unless the defendant abandons the fight and gives notice to his or her adversary that he or she has done so. Root v. Saul, 2006 WI App 106, 293 Wis.2d 364, 718 N.W.2d 197. See also Wis JI-Criminal 815.

**Burden of Proof**. The burden of proof to prove self-defense as a justification for injurious physical

contact with another is on the defendant. See Rinehart v. Whitehead, 64 Wis. 42, 24 N.W. 401 (1885).

**Statutory background**. 2025 Wisconsin Act 24 recodified criminal battery statutes from former §§ 940.19–.208 into new §§ 940.60–.66 and consolidated "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm)**.** These revisions are structural in nature and do not affect the substantive elements of the civil self-defense privilege as set forth in this instruction. The changes are noted here solely to assist readers who may consult related criminal-law provisions.

## 2006.1 BATTERY: DEFENSE OF PROPERTY

(Defendant) claims that any injury (plaintiff) sustained was inflicted by (defendant) in defense of (his) (her) property.

(Defendant) has the burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed that some force was necessary to prevent an interference with (his) (her) property.

(Defendant) further has the same burden of proof to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the amount of force used was no more than a person of ordinary intelligence and prudence would have believed necessary under the same or similar circumstances.

A "reasonable belief" is the belief a person of ordinary intelligence and prudence would have under the circumstances confronting the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now. The fact that (defendant)'s belief may have been in error does not make (his) (her) conduct wrongful if a person of ordinary intelligence and prudence would have the same belief under the same or similar circumstances.

It is not reasonable to use force intended or likely to cause death or great bodily harm in defending one's property. "Great bodily harm" means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or

organ or other serious bodily injury.

If you find that (defendant) reasonably believed some force was necessary to defend (his) (her) property and that the force used was reasonable, then you should find that there was no battery.

**COMMENT**

This instruction was approved by the Committee in 1995 and revised in 2002, 2011, and 2012. The 2002 revision modified the language regarding the burden of proof to conform to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. This revision was approved by the Committee in September 2025. It renumbered the instruction previously designated as Wis JI-Civil 2006.5 and added to the comment.

See Oleson v. Fader, 160 Wis. 473, 152 N.W. 290 (1915); Wis JI-Criminal 855 and 860. See also Wis. Stat. § 895.529(3)(a) (created by 2011 Wisconsin Act 93) and the commentary to Wis JI-Civil 2006.2 for a discussion of self-defense.

**Statutory background**. 2025 Wisconsin Act 24 recodified criminal battery statutes from former §§ 940.19–.208 into new §§ 940.60–.66 and consolidated "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm). These revisions are structural in nature and do not affect the civil defense-of-property privilege as set forth in this instruction (including § 895.529). The changes are noted here solely to assist readers who may consult related criminal-law provisions.

## 2006.2 BATTERY: SELF-DEFENSE; DEFENDANT'S DWELLING, MOTOR VEHICLE, PLACE OF BUSINESS; WIS. STAT. § 895.62

This case involves an allegation of unlawful and forcible entry into a (dwelling) (motor vehicle) (place of business) and self-defense is an issue. The law of self-defense allows (defendant) to intentionally use force if (defendant) believed (his) (her) (or) (another's) life was in danger, or that (he) (she) (or) (another) was likely to suffer bodily harm.

(Defendant), who alleges that (he) (she) acted in self defense, has the burden to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that (he) (she) reasonably believed the use of force was necessary to prevent death or bodily harm.

A belief may be reasonable even though mistaken. In determining whether (defendant)'s beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in (defendant)'s position under the circumstances that existed at the time of the alleged offense. The reasonableness of (defendant)'s beliefs must be determined from the standpoint of (defendant) at the time of (his) (her) acts and not from the viewpoint of the jury now.

You may not consider whether (defendant) had an opportunity to flee or retreat before (he) (she) used force and (defendant) is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to (himself) (herself) (or) (another person), if you find that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s

(dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business);

- (Defendant) was present in the (dwelling) (motor vehicle) (place of business); and
- (Defendant) knew or had reason to believe that an unlawful and forcible entry was occurring or had already occurred.

**(NOTE: Insert a presumption instruction, Wis JI-Civil 350 or 352, adapted to the presumption created in Wis. Stat. § 895.62(3).)**

**[Alternative 1: Based on Wis JI-Civil 350:**

There is a conflict in the evidence as to:

- Whether (plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- Whether (defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- Whether (defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

If you find the existence of each of these facts more probable than not, then by law a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is also evidence from which you may conclude that (defendant)'s belief

was not reasonable. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that the (defendant)'s belief was not reasonable, you must answer question _____ "yes."]

**[Alternative 2: Based on Wis JI-Civil 352:**

There is no dispute in the evidence that:

- (Plaintiff) was in the process of unlawfully and forcibly entering (defendant)'s (dwelling) (motor vehicle) (place of business) or had already unlawfully and forcibly entered (defendant)'s (dwelling) (motor vehicle) (place of business)(;)
- (Defendant) was present in the (dwelling) (motor vehicle) (place of business)(;) (and)
- (Defendant) (knew) (had reason to believe) that an unlawful and forcible entry was occurring.

From these facts, a presumption arises that (defendant) reasonably believed the force (defendant) used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person). But, there is evidence in the case which may be believed by you that (defendant)'s belief was not reasonable. You must resolve this conflict.

Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable that (defendant) did not reasonably believe the force used was necessary to prevent (imminent death) (bodily harm) to (himself) (herself) (another person), you must answer question ____ "yes."]

**SPECIAL VERDICT**

**Question No. 1.**

Did (defendant) commit a battery on (plaintiff) on [date of alleged battery]?

Answer: _____

Yes or No

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

**Question No. 2.**

Was the battery a cause of (plaintiff's) injuries?

Answer: _____

Yes or No

**If you answered "Yes" to Question No. 2, then answer Question No. 3.**

**Question No. 3.**

Did (defendant) act in self-defense when (he) (she) [e.g. struck] (plaintiff) on [date of alleged battery]?

Answer: _____

Yes or No

**COMMENT**

This instruction and comment were approved in 2012 and revised in 2015. This revision was approved by the Committee in September 2025; it added to the comment.

On December 21, 2011, 2011 Wisconsin Act 94 became effective. It applies to a use of force that occurs on or after December 21, 2011. Act 94 creates Wis. Stat. § 895.62. It establishes a presumption of immunity in civil actions involving force that is intended or likely to cause death or great bodily harm if an actor reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person and either item 1. or 2., below, applies. A person is presumed to have reasonably believed that the force was necessary to prevent imminent death or bodily harm to himself or herself or to another person if either of the following applies:

1. The person against whom the force was used was unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business; the actor was on his or her property or present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that an unlawful and forcible entry was occurring.

2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; the actor was present in the dwelling, motor vehicle, or place of business; and the actor knew or had reason to believe that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The presumption does not apply if: (a) the actor was engaged in criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time he or she used force; or (b) the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties if the public safety worker identified himself or herself to the actor before force was used by the actor or the actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

The new law also provides that if either of the circumstances described above in paragraph 1 or 2 applies, the fact finder may not consider whether the actor had an opportunity to flee or retreat before he or she used force.

The defense, created by Wis. Stat. § 895.62, refers to what is commonly termed the "Castle Doctrine." See also Wis JI-Criminal 805.

**Presumption**. It is not clear whether the presumption set out in Wis. Stat. § 895.62(3) is rebuttable; or whether read in conjunction with the presumption in Wis. Stat. § 939.48(1m)(ar), is not. The committee believes the more prudent course is to follow well-established law as to presumptions, and therefore recommends giving Wis JI-Civil 350 or 352, which would shift the burden of proof to the party seeking to overcome the presumption. The committee agrees that another reading of the statute would render the presumption conclusive, not subject to rebuttal. There is no logical way to harmonize these two views, and this is our recommendation until further guidance on this issue is received from the appellate courts or the legislature. The statutory presumption in Wis. Stat. § 895.62(3) does not apply if (1) the defendant was engaged in criminal activity or using his or her property to further a criminal activity or (2) the plaintiff was a public safety worker who identified himself or herself or who the defendant knew or reasonably should have known was a public safety worker. Wis. Stat. § 895.62(4).

**Definition of Dwelling**. The civil "Castle Doctrine" statute (Wis. Stat. § 895.62) incorporates the following definition of "dwelling" given in Wis. Stat. § 895.07(1)(h):

> "Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basements.

In a criminal case, the Court of Appeals held that the defendant was not entitled to an instruction under the criminal "Castle Doctrine" statute (Wis. Stat. § 939.48(1m)) because the defendant fired a gun at persons who were fleeing from the defendant's apartment building through a parking lot and were not in the defendant's "dwelling." State v. Chew, 2014 WI App 116, 358 Wis.2d 368, 856 N.W.2d 541. The court noted that "dwelling" is defined in Wis. Stat. § 895.07(1)(h).

**Statutory background**. 2025 Wisconsin Act 24 recodified criminal battery statutes from former §§ 940.19–.208 into new §§ 940.60–.66 and consolidated "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm). These revisions are structural in nature and do not affect the civil Castle-Doctrine immunity and presumption in § 895.62 as set forth in this instruction. The changes are noted here solely to assist readers who may consult related criminal-law provisions.

## 2006.3 BATTERY: EXCESSIVE FORCE IN ARREST

Question ____ asks you to determine whether (defendant) used excessive force in arresting (plaintiff). It is admitted that (defendant) made contact with (plaintiff) and used force at the time of making the arrest, which force, if not reasonable under the circumstances, would constitute a battery.

As a law enforcement officer, (defendant) had the duty to enforce the laws of Wisconsin and in making an arrest may use reasonable force to overcome the resistance of the person being arrested. This force, however, must not be excessive; that is, the officer must not use more force than is reasonably necessary under all of the circumstances.

The fact that the evidence in this case shows physical contact between (defendant) and (plaintiff), which resulted in injury to (plaintiff), is not proof that (defendant) used excessive force.

(Defendant) had the lawful authority to use such force in making the arrest as a reasonable police officer would believe to be necessary. But the use of force beyond that which a reasonable police officer would believe necessary under all the circumstances then existing is excessive force.

The fact that (defendant) believed (plaintiff) was guilty of a crime is irrelevant. Persons being arrested have a right not to be mistreated by the use of excessive force.

[Give middle burden instruction, Wis JI-Civil 205.]

**COMMENT**

The instruction and comment were approved by the Committee in 1981 and revised in 1998 and 2001. This revision was approved by the Committee in September 2025. It renumbered the instruction previously designated as Wis JI-Civil 2008 and added to the comment.

Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981); Wirsing v. Krzeminski, 61 Wis.2d 513, 213 N.W.2d 37 (1973); McCluskey v. Steinhorst, 45 Wis.2d 350, 173 N.W.2d 148 (1970). See also Wis JI-Civil 2155.

In Wirsing, the court specifically recognized that a police officer's liabilities for a battery are founded on legal and policy considerations that are distinguishable from those in an ordinary battery case. The court stated that the general principle applicable to police officers making arrests is found in Restatement, Second, Torts § 118:

The use of force against another for the purpose of effecting his arrest . . . [is] privileged if all the conditions stated in secs. 119-132 . . . exist.

The principal condition to the above Restatement provision is that an actor may not use force in excess of what the actor believes to be necessary. Restatement, Second, Torts § 132.

In Wirsing, the court stated that the trial court's instructions placing emphasis upon the special privilege of a police officer were correct and that they "reflected . . . the legal entitlement conferred by law upon a police officer to use necessary force." Wirsing, supra at 521. Where the relevant facts that emerge at trial are primarily concerned with the issue of excessive force, an instruction on self-defense is not necessary.

The burden upon the plaintiff to establish excessive force is the middle burden. Johnson, supra at 783. A plaintiff is entitled to be awarded compensation only for injuries and resulting damages caused by the use of excessive force by the police. Johnson, supra at 786.

**Intentional Tort.** In Kofler v. Florence, 216 Wis.2d 41, 573 N.W.2d 568 (Ct. App. 1997), the court said excessive force in arrest is an intentional tort. The plaintiff argued that despite its title, "battery: excessive force in arrest," the pattern jury instruction, Wis JI-Civil 2008, does not involve an intentional tort because there is no requirement for a finding that the defendant had the requisite mental intent for civil battery. The court of appeals disagreed. It said that the jury instruction is premised on the fact that the officer did commit a civil battery and that the further requirement under the instruction that the use of force must be reasonable does not change the tort to one in negligence. It is merely a limitation on the amount of force a police officer may use under his or her limited privilege to engage in civil battery.

**Need for Expert Testimony**. The Wisconsin Supreme Court has concluded that determinations of excessive use of force are not, in general, beyond the realm of ordinary experience and lay comprehension. It rejected a categorical requirement of expert testimony in excessive use of force cases. Robinson v. City of West Allis, 2000 WI 126, 239 Wis.2d 595, 619 N.W.2d 692.

**Statutory background**. 2025 Wisconsin Act 24 recodified criminal battery statutes from former §§ 940.19–.208 into new §§ 940.60–.66 and consolidated "threats to commit a battery" into § 947.016 (Threatening to cause bodily harm). These revisions are structural in nature and do not affect the civil

excessive-force standard in arrests as set forth in this instruction. The changes are noted here solely to assist readers who may consult related criminal-law provisions.

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## 2750 EMPLOYMENT RELATIONS: WRONGFUL DISCHARGE — PUBLIC POLICY

In Wisconsin, an employer may discharge an employee for good reason, for no reason, or even for a reason that is morally wrong without committing a legal wrong. An exception to this rule is [where the termination of the employee's job violates] [where the employee is discharged for refusing an employer's command to do something that would itself violate] a well-established and important public policy. Public policy in Wisconsin prohibits the firing of an employee for (insert policy).

(Plaintiff) claims that (he) (she) was fired from (his) (her) job by (defendant) because (give public policy being violated, e.g., (he) (she) refused to commit perjury). If you find that (defendant) fired (plaintiff) for that reason, then (plaintiff) was wrongfully discharged.

A discharge is not wrongful merely because it is retaliatory, unreasonable, or motivated by bad faith or malice. Further, a discharge is not wrongful merely because the discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.

**SPECIAL VERDICT**

Was (plaintiff) wrongfully discharged from (his) (her) employment by (defendant)?

ANSWER: _____

Yes or No

**COMMENT**

This instruction was approved in 1985 and revised in 1991 and 1995. The comment was updated in 1986, 1987, 1995, 1998, 2018, 2020, and 7/2024. This revision was approved by the Committee in May 2025. It added language to the comment noting that Oconomowoc Area School District v. Cota, 2025 WI 11, extends arrest-record protection to municipal citations and limits the Onalaska independent-investigation defense to cases where the employer's decision is based solely on its own fact-finding.

Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983); Ferraro v. Koelsch, 124 Wis.2d 154, 368 N.W.2d 666 (1985); Scarpace v. Sears, Roebuck & Co., 113 Wis.2d 608, 335 N.W.2d 844 (1983); Yanta v. Montgomery Ward & Co., Inc., 66 Wis.2d 53, 244 N.W.2d 389 (1974). See also Schultz v. Industrial Coils, Inc., 125 Wis.2d 520, 373 N.W.2d 74 (Ct. App. 1985). A claim for wrongful discharge based on public policy may be grounded upon an administrative rule. Winkelman v. Beloit Memorial Hosp., 168 Wis.2d 12, 483 N.W.2d 211 (1992).

**Employment-at-Will Doctrine.** In Brockmeyer, the court expressly refused to require good faith in the termination of employment contracts. However, the court did recognize the "public policy exception" to the employment-at-will doctrine. The court stated that the public policy claimed by the plaintiff must be evidenced by a constitutional or statutory provision. The other two exceptions to employment-at-will are (1) where an employment contract specifies a period of employment and (2) where a statutory provision governs the employment agreement. The court in Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, provided the following non-exclusive list of various Wisconsin statutory provisions prohibiting the discharge of an employee for certain reasons:

> Statutory modification of the at will doctrine can be found in a variety of federal and state laws prohibiting certain forms of discrimination. Both Title VII of the Civil Rights Act of 1964 and Wisconsin's Fair Employment Act, secs. 111.31-111.395, Stats., make it unlawful for an employer to discharge an employee because of race, color, religion, sex or national origin. Similarly, the National Labor Relations Act and the Wisconsin Employment Peace Act, sec. 111.06(1) (c)1, prevent discharges for union activities. Other forms of discriminatory discharges have also been prohibited by the legislature.

Id., at 567-568. See also, n.9.

In Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 384 N.W.2d 325 (1986), the court concluded that Wis. Stat. § 103.455 articulates a "fundamental and well-defined public policy" within the public policy exception to the employment-at-will doctrine. This statute proscribes economic coercion by an employer upon an employee to bear the burden of a work-related loss when the employee has no opportunity to show that the loss was not caused by the employee's carelessness, negligence, or willful misconduct. Wandry, supra at 47.

In Hausman v. St. Croix Care Center, 214 Wis.2d 654, 571 N.W.2d 393 (1997), the Supreme Court examined the employment-at-will doctrine, surveyed the breadth of the narrow public policy exception to the doctrine, and determined whether the case fell within its requirements. In its decision, the court rejected the plaintiffs' claims that the facts as alleged fit within the existing public policy exception and declined to adopt a broad whistle-blower exception. However, the court recognized that the plaintiff's compliance with

an affirmative legal duty requiring them to take action to prevent abuse or neglect of nursing home residents comports with a well-defined public policy and the rationale of the court's public policy exception to the employment-at-will doctrine.

The plaintiff-employee bears the burden of proving that the dismissal violates a clear mandate of public policy. Kempfer v. Automated Finishing, Inc., 211 Wis.2d 100, 564 N.W.2d 692 (1997). In Kempfer, the court said that if a public policy is not contained in a statutory, constitutional, or administrative provision, it cannot fall under the public policy exception to the employment-at-will doctrine. However, just because a public policy is evidenced by a statutory, constitutional, or administrative provision does not mean that it falls under the exception. 211 Wis.2d at 112. The public policy must still be found to be fundamental and well defined. In Kempfer, the court noted that an administrative rule is less likely to satisfy the fundamental and well defined requirements than a statutory provision and that a statutory provision is less likely to rise to the level of fundamental and well defined than a constitutional provision. In Kempfer, the Supreme Court made clear that the Wisconsin public policy exception to the employment-at-will doctrine is very narrow. It only provides that an employee may not be discharged for refusing a command to violate a fundamental and well-defined public policy that is evidenced by a constitutional, statutory, or administrative provision. With the exception of such a public policy, an employer may discharge an employee at will for any reason or for no reason.

**Procedure.** In Brockmeyer, the court explained the format for wrongful discharge litigation. The threshold determination of whether the public policy asserted by the plaintiff is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Brockmeyer v. Dun & Bradstreet, supra at 574. At trial, the plaintiff must then "demonstrate" to the jury that "the conduct that caused the discharge was consistent with a clear and compelling public policy." The decision in Brockmeyer, supra at 574, suggests by way of dicta that an employer must then produce evidence to prove that the dismissal was for "just cause." See also Winkelman, supra at 24. The Committee is of the opinion that "just cause" need not be proved but only that the discharge was for a reason other than a violation of a clear and compelling public policy.

**Remedies.** In Brockmeyer v. Dun & Bradstreet, supra, the court determined that a wrongful discharge claim is a contract action. It specifically rejected tort remedies, including punitive damages. Instead, it stated, at 113 Wis.2d at 575:

> We believe that reinstatement and back pay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole."

The court, in Brockmeyer, also held that where the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive. 113 Wis.2d at 576 n.17.

**Effect of Employee Handbooks.** Representations in an employee's handbook may limit the power of an employer to terminate an employment relationship that would otherwise be terminable at will. Ferraro v. Koelsch, supra. A handbook may convert the employment relationship into one that can only be terminated by adherence to contractual terms.

**Attorney's Fees.** Attorney's fees are not available in a common law wrongful discharge cause of action. Winkelman v. Beloit Memorial Hosp., supra.

**Intentional disability discrimination**. An employer engages in employment discrimination if it terminates a person from employment "because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322(1). Two methods of determining whether an employer intentionally terminated employment "because of" disability are available. The first method asks whether the employer held "actual discriminatory animus against an employee because that employee was an individual with a disability[.]" Maeder v. Univ. of Wisconsin-Madison, ERD Case No. CR200501824 (LIRC June 28, 2013). The alternative method, known as the "inference method," finds intent to discriminate when an employer bases its adverse action on "a problem with that employee's behavior or performance which is caused by the employee's disability." See Id. A violation of Wis. Stat. § 111.322(1) cannot be found to have occurred under the inference method of proving intentional discrimination unless the employee proves the employer knew that a disability caused the conduct on which the adverse employment decision was made and that the employer had this knowledge at the time it made the decision. Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2018 WI 76, 382 Wis.2d 624, 657, 914 N.W.2d 1 (2018).

**Arrest-record discrimination**. Wisconsin's Fair Employment Act makes it unlawful for an employer to discharge or otherwise discriminate against an employee "because of … arrest record." Wis. Stat. §§ 111.321–.322. The term "arrest record" is defined broadly to include information that a person has been "questioned … arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law-enforcement authority." § 111.32(1). In Oconomowoc Area School District v. Cota, 2025 WI 11, 416 Wis.2d 1, 20 N.W.3d 182, the Wisconsin Supreme Court held that the phrase "any … other offense" encompasses non-criminal municipal citations and forfeiture violations. Thus, adverse action based even in part on a municipal-theft ticket, traffic forfeiture, or similar citation may violate the Act unless another statutory exception applies.

**Independent-investigation ("Onalaska") defense**. An employer does not violate the WFEA when it bases its decision solely on the findings of its own investigation into the employee's conduct rather than on the existence of an arrest record. City of Onalaska v. LIRC, 120 Wis. 2d 363, 354 N.W.2d 233 (Ct. App. 1984). Cota, however, makes clear that this defense is narrow: it is available only when the employer's decision genuinely rests on an independent assessment and not on the fact that the employee was cited, ticketed, or otherwise charged. When the evidence shows the employer relied, even in part, on the citation itself, the arrest-record ban applies and the defense fails.

**Probationary Employees:** For decisions discussing the applicability of procedural guarantees outlined in Wis. Stat. § 62.13(5) as they pertain to probationary employees, see Kaiser v. Board of Police & Fire Commissioners of Wauwatosa, 104 Wis.2d 498, 311 N.W.2d 646 (1981); and State v. City of Prescott, 390 Wis.2d 378, 938 N.W.2d 602, 2020 WI App 3.

## 2784 BREACH OF FIDUCIARY DUTY

Special Verdict Questions Nos. _____ relate to the breach of fiduciary duty (claim) (claims) made by (plaintiff). To prevail on a claim for breach of fiduciary duty, (plaintiff) must prove the following three elements: first, (defendant) owed (plaintiff) a fiduciary duty; second, (defendant) breached that duty; and third, the breach of duty caused injury to (plaintiff).[1]

### Fiduciary Duty–Definition

A fiduciary is a person who has undertaken a special position with regard to another. Because of their special position, a fiduciary is required to act for the benefit of another person on all matters within the scope of their relationship. This obligation is characterized as one of fidelity and loyalty, requiring the fiduciary to act solely for the benefit of the other person in all matters connected with the relationship, even at the expense of the fiduciary's own interests.[2]

[Insert nature of relationship and basis for alleged fiduciary duty]

[Corporate officers and directors are fiduciaries and owe duties of loyalty, good faith, and fair dealing in conducting corporate business and in dealing with shareholders.[3] Officers and directors may not use their position of trust to further a private interest. An officer or director is precluded from exploiting their position for personal gain when the benefit or gain belongs to the corporation.[4]]

[Additionally, majority shareholders have a fiduciary duty to avoid conduct that

unfairly benefits the majority shareholders at the expense of the minority shareholders.[5]]

[A fiduciary relationship may be created by contract, such as the relationship between a trust and trustee. When the fiduciary is a trustee, generally the tasks that the trustee is agreeing to undertake are set out in the trust agreement. A trustee is under a duty of undivided loyalty to the beneficiaries of the trust. As a result, a trustee may not profit personally from their position as a trustee apart from their agreed-upon compensation. A trustee has an affirmative duty to make full disclosure of all facts relevant to the transaction the beneficiary is about to undertake.][6]

[Attorneys owe a fiduciary duty of loyalty to their clients. An attorney may breach that duty of loyalty if the attorney enters into a transaction with the client without fully informing the client that the transaction will potentially benefit the attorney and potentially disadvantage the client.[7]]

[In a (general partnership) (LLC), each (partner) (member) (manager) owes fiduciary duties of loyalty and good faith to the others and to the enterprise. They must not profit at the expense of (their co-owners) (the entity) and must deal fairly and in good faith.][8]

**NOTES**

1. Berner Cheese Corp. v. Krug, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800. This decision confirmed that a breach of fiduciary duty claim in Wisconsin requires proof of three elements: (1) the existence of a fiduciary duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3)

resulting measurable harm to the plaintiff. This had earlier been recognized in Reget v. Paige, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302. See also Estate of Sheppard ex rel. McMorrow v. Specht, 2012 WI App 124, ¶5, 344 Wis. 2d 696, 824 N.W.2d 907.

2. Zastrow v. Journal Communications, Inc., 2006 WI 72, ¶¶ 28-31, 291 Wis. 2d 426, 718 N.W.2d 51. In Zastrow, the Wisconsin Supreme Court defined a fiduciary relationship as one voluntarily assumed through a "special position" that constrains the fiduciary's ability to pursue personal interests. This constraint is primarily expressed through the duty of loyalty, which may also include duties of confidentiality and full disclosure. The Court emphasized that a breach of fiduciary duty constitutes an act of "disloyalty or infidelity," reflecting a state of mind that exceeds mere negligence. It reaffirmed that Wisconsin law requires a fiduciary to act solely in the interest of the beneficiary, even to the fiduciary's own detriment.

3. Modern Materials, Inc. v. Advanced Tooling Specialists, Inc., 206 Wis. 2d 435, 442, 557 N.W.2d 835 (Ct. App. 1996). In Modern Materials, the court reaffirmed that corporate officers and directors owe a fiduciary duty of loyalty, good faith, and fair dealing in the conduct of corporate affairs. Applying that principle, the court held that the defendant, a plant manager who was neither designated as an officer nor vested with policy-making authority, did not owe a fiduciary duty to Modern Materials. Accordingly, the court concluded that summary judgment in favor of the defendant was appropriate.

4. Jorgensen v. Water Works, 2001 WI App 135, ¶ 10, 246 Wis. 2d 614, 630 N.W.2d 230; Rose v. Schantz, 56 Wis. 2d 222, 228, 201 N.W.2d 593, 597 (1972); Grognet v. Fox Valley Trucking Serv., 45 Wis. 2d 235, 242, 172 N.W.2d 812, 816 (1969). Reget v. Paige, 2001 WI App 73, ¶12, 242 Wis. 2d 278, 626 N.W.2d 302.

Wisconsin law recognizes a fiduciary duty owed by majority shareholders to minority shareholders. However, this duty does not extend to nonmajority shareholders; therefore, a 50-percent co-owner does not owe a fiduciary duty based solely on shareholder status unless they exercise domination or control over the corporation.

If a fiduciary duty is alleged on another basis—such as duties arising from officer or director status, or a separately established special relationship—the instruction should be tailored to reflect the parties' ownership interests and actual control. The Committee recommends clearly identifying the specific theory of duty and instructing the jury accordingly. See Estate of Sheppard ex rel. McMorrow v. Specht, 2012 WI App 124, ¶7, 344 Wis. 2d 696, 824 N.W.2d 907; see also id. ¶8 (addressing fiduciary duties of directors).

5. Jorgensen v. Water Works, Inc., 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998) (Jorgensen I); Grognet v. Fox Valley Trucking Service, 45 Wis. 2d 235, 172 N.W.2d 812 (1969).

6. Zastrow, supra, at 2006 WI 72, ¶¶ 32-34. The Wisconsin Supreme Court in Zastrow explained that a fiduciary relationship may arise either by contract—such as in a trustee-beneficiary relationship—or through a formal legal status, such as attorney-client or guardian-ward. When the fiduciary is a trustee, the scope of the trustee's obligations is defined by the trust instrument, which sets forth the specific tasks the trustee has agreed to undertake. The trustee's duty of undivided loyalty prohibits personal profit and imposes an affirmative obligation to disclose all facts material to any transaction the beneficiary is considering.

7. Berner Cheese, supra, at ¶41; Zastrow, supra, at ¶30; Groshek v. Trewin, 2010 WI 51, ¶¶15, 18.

8. Marx v. Morris, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112 ("Members of an LLC… owe each other the fiduciary duties of loyalty and care as a matter of Wisconsin common law"). Holman v. Kircher, 201 Wis. 2d 474, 480, 548 N.W.2d 718 (Ct. App. 1996) (partners in joint venture owe "fiduciary duties of the utmost good faith and loyalty").

**COMMENT**

This instruction and comment were approved in October 2025.

Many jurisdictions have promulgated jury instructions for claims associated with the breach of fiduciary duty. Prior to the Committee adopting these instructions, it considered first the question whether breach of fiduciary duty claims are properly submitted to a jury or rather should be tried to the court as quasi-equitable claims. Research established that many appellate cases reviewed jury verdicts as well as bench verdicts without any definitive statement approving of trying such cases to a jury. The Supreme Court has made clear, however, that breaches of fiduciary duties constitute intentional torts. Zastrow v. Journal Communications, Inc., 2006 WI 72, ¶¶35-40, 291 Wis. 2d 426, 718 N.W.2d 51.

The Wisconsin Constitution guarantees the right to a trial by jury for "all cases at law without regard to the amount in controversy." Wis. Const., Art. I, § 5. A tort claim is a "case at law" for which a plaintiff has a right to a jury trial. *E.g.*, Stuart v. Stuart, 140 Wis. 2d 455, 460, 410 N.W.2d 632 (Ct. App. 1987) (recognizing that parties in tort actions are entitled to a jury trial), abrogated on other grounds by Kruckenberg v. Harvey, 279 Wis. 2d 520, 694 N.W.2d 879 (2005).

**Burden of Proof**. The Committee believes the burden of proof to establish a breach of fiduciary duty is the middle burden. See Wis JI-Civil 205. As noted above, a breach of fiduciary duty is an intentional tort and intentional torts require proof based on the middle burden, or proof by clear and convincing evidence. Kuehler v. Kuehler, 11 Wis. 2d 15, 26-30, 104 N.W.2d 138 (1960). It is recommended that the court give Wis JI-Civil 205 (Clear, Satisfactory, and Convincing Evidence) immediately after this instruction.

## 2785 BREACH OF FIDUCIARY DUTY: DAMAGES

Special Verdict Questions Nos. _____ relate to claims of breach of fiduciary duty. If you answered "Yes" to one or more of Special Verdict Questions Nos. _____, then you must determine the damages that (plaintiff) is entitled to recover against (defendant) because of the breach(es) of fiduciary duty.

A person injured by a breach of fiduciary duty is entitled to compensatory damages. Generally, (defendant) is liable for all injuries resulting directly from the breach of fiduciary duty. Compensatory damages are designed to place the injured person in a position substantially equivalent to that which he or she would have been had no breach occurred.[1]

[However, in cases where (defendant) has received, by committing the breach, a benefit that unjustly enriches (him) (her) at the expense of (plaintiff), (defendant) may be liable to (plaintiff), at (plaintiff)'s election, either for the damage done to (plaintiff)'s interests or for the value of the benefit (defendant) received through the commission of the breach.[2]]

In considering the amount to be inserted by you in the answer to this damages question, the burden rests upon (plaintiff) to convince you that (plaintiff) sustained damages and the amount of the damages (plaintiff) should recover as a result of the breach of fiduciary duty.[3]

**NOTES**

1. Northern Air Services, Inc. v. Link, 2012 WI App 27, ¶16, 339 Wis. 2d 489, 809 N.W.2d 900 (unpublished, cited for persuasive value); Restatement (Second) of Torts § 903, cmt. a (1979). See also Community Nat. Bank v. Medical Ben. Adm'rs, LLC, 2001 WI App 98, ¶8, 242 Wis. 2d 626, 626 N.W.2d 340.

In Northern Air Services, Inc. v. Link, 2012 WI App 27, 339 Wis. 2d 489, 809 N.W.2d 900 (unpublished, cited for persuasive value), the court emphasized that Wisconsin tort law is designed to provide full compensation to injured parties. Citing Restatement (Second) of Torts § 903 cmt. b, the opinion explains that a plaintiff may elect between two remedies: (a) damages intended to restore the plaintiff to the position he or she would have occupied absent the breach, or (b) disgorgement of any benefit obtained by the fiduciary through the wrongdoing. As the court noted, a breaching fiduciary "ordinarily [becomes] liable … either for the damage done to the other's interests or for the value of the benefit received" as a result of the breach.

2. Id. cmt. b; see also Restatement (Second) of Torts § 874, cmt. b (1979). Northern Air Services, Inc. v. Link, 2012 WI App 27, ¶¶16-17 & n.7, 339 Wis. 2d 489, 809 N.W.2d 900 (unpublished, cited for persuasive value), Community Nat. Bank v. Medical Ben. Adm'rs, LLC, 2001 WI App 98, ¶8, 242 Wis. 2d 626, 626 N.W.2d 340.

In Community Nat. Bank v. Medical Ben. Adm'rs, LLC, 2001 WI App 98, 242 Wis. 2d 626, 626 N.W.2d 340, the court explained that a court-appointed receiver owes a fiduciary duty to all parties with an interest in the receivership estate. The receiver is prohibited from placing personal interests in conflict with those of the estate, may not profit from receivership property except through court-approved compensation, and is required to disgorge any profits obtained through self-dealing.

3. Wis JI-Civil 202 Burden of Proof: Ordinary: Compensatory Damages.

**COMMENT**

This instruction and comment were approved in October 2025.

In cases where the plaintiff seeks disgorgement of the fiduciary's profit rather than traditional damages, the verdict may include a question asking the amount of the fiduciary's gain. The plaintiff must elect a single recovery – either the loss or the gain – to prevent double recovery. It is recommended that the court clarify this election on the record and instruct the jury accordingly.

## 2786 BREACH OF FIDUCIARY DUTIES: SPECIAL VERDICT

**Question 1**

Did (defendant) owe (plaintiff) a fiduciary duty?

ANSWER: _____
Yes or No

**If you answered "yes" to Question 1, then answer Question 2. If you answered "no" to Question 1, (skip to Question __ for next the cause of action) (sign and date the verdict).**

**Question 2**

Did (defendant) breach a fiduciary duty owed to (plaintiff)?

ANSWER: _____
Yes or No

**If you answered "yes" to Question 2, then answer Question 3. If you answered "no" to Question 2, (skip to Question __ for next the cause of action) (sign and date the verdict).**

**Question 3**

What sum of money will fairly and reasonably compensate (plaintiff) for the (losses) (damages) caused by (defendant)'s breach(es) of fiduciary duty?

ANSWER: $_____

If you award any compensatory damages, proceed to Question 4. If your answer to Question 3 is $0, do not answer Questions 4 or 5. Sign and date the verdict.

**Question 4**

Did (defendant) act maliciously or in intentional disregard of (plaintiff)'s rights?

ANSWER: _____

Yes or No

**If you answered "yes" to Question 4, then answer Question 5. If you answered "no" to Question 4, do not answer Question 5 and sign and date the verdict.**

**Question 5**

What amount of punitive damages, if any, will punish (defendant) and deter (him) (her) and others from engaging in similar conduct in the future?

ANSWER: $_____

**COMMENT**

This instruction and comment were approved in October 2025.

This special verdict is based on Wis JI-Civil 2784 Breach of Fiduciary Duty. It is intended only as a model and may need to be modified depending on the facts of the case.

This model verdict corresponds to Wis JI-Civil 2784 (Breach of Fiduciary Duty) and 2785 (Damages). It should be tailored to the specific case. For example, if multiple breaches or multiple defendants are at issue, separate questions can be added as needed. Question 3 assumes a single damages question for all proven breaches; in complex cases, the court may require separate damages questions (e.g., different damage elements or multiple plaintiffs/defendants). Questions 4 and 5 address punitive damages pursuant to Wis. Stat. § 895.043(3) (requiring a finding that the defendant acted "maliciously" or "in intentional disregard of the plaintiff's rights" before punitive damages may be awarded). Standard jury instructions on punitive damages (see Wis JI-Civil 1707) should be given in conjunction with Questions 4–5. This verdict form intentionally omits a separate question on causation of damages; the jury is instructed to award in Question 3 only those damages caused by the breach (see Wis JI-Civil 2785). If the jury finds a breach but no resulting harm, it can reflect that by answering zero damages.

## 2792A UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT OR FUTURE CREDITORS – WIS. STAT. § 242.04(1)(a)

The plaintiff claims that (debtor) (made a transfer) (incurred an obligation) to (defendant) in order to avoid paying a debt to the plaintiff. [This is called "actual fraud."][1] To establish this claim against (defendant), the plaintiff must prove the following by a preponderance of the evidence:

1. That the plaintiff has a right to payment from (debtor) for (insert amount of claim);
2. That (debtor) (made a transfer) (incurred an obligation)[2] to (defendant);

[*Give Wis JI-Civil 2794A Transfer: Definition*]

3. That (debtor) (made a transfer) (incurred an obligation) with the intent to hinder, delay, or defraud one or more of (his) (her) (its) creditors;[3]

In determining whether (debtor) acted with actual intent to hinder, delay, or defraud any creditor, you may consider the following factors, among others:

- Whether the transfer or obligation was made to an insider.

[*Give Wis JI-Civil 2794B Insider: Definition*]

- Whether (debtor) retained possession or control of the property transferred after the transfer.
- Whether the transfer or obligation was disclosed or concealed.
- Whether, before the transfer or obligation, (debtor) had been sued or threatened with suit.

- Whether the transfer consisted of substantially all of (debtor)'s assets.
- Whether (debtor) absconded.
- Whether (debtor) removed or concealed assets.
- Whether the value of the consideration received by (debtor) was reasonably equivalent to the value of the property transferred or the amount of the obligation incurred.
- Whether (debtor) was insolvent or became insolvent shortly after the transfer or obligation.

[*Give Wis JI-Civil 2794C Insolvency: Definition*]

[*Give Wis JI-Civil 2795 Presumption of Insolvency*]

- Whether the transfer occurred shortly before or after a substantial debt was incurred.
- Whether (debtor) transferred essential assets of the business to a lienor who transferred the assets to an insider.

[It does not matter whether the plaintiff's right to payment arose before or after (debtor) (made a transfer) (incurred an obligation).][4]

The plaintiff bears the burden of proving the elements of the claim by a preponderance of the evidence. This means the plaintiff must prove that it is more likely than not that (debtor) (made a transfer) (incurred an obligation) that is voidable under the law.

**NOTES**

1. Include the bracketed language if the plaintiff asserts claims for both actual and constructive fraud.

2. Wis. Stat. § 242.06(5). An obligation is incurred:

(a) If oral, when it becomes effective between the parties.

(b) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

3. Under Wis. Stat. § 242.04(1)(a), only the intent of the debtor-transferor is relevant; the intent of the transferee does not matter. However, a transferee who acquires the property in good faith and for reasonably equivalent value may assert an affirmative defense. See Wis. Stat. § 242.08(7)(a), Wis JI-Civil 3327.

4. Include the bracketed language if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

**COMMENT**

This instruction and comment were approved in October 2025.

The Uniform Voidable Transactions Law permits a creditor to challenge certain transfers of assets by a debtor that are intended to deprive the creditor of assets that would otherwise be available if the debtor is or were to become insolvent. The UVTL was originally adopted in Wisconsin in 1988 under the title Uniform Fraudulent Transfer Act. The UFTA was amended by 2023 Wisconsin Act 246 [effective date: March 29, 2024].

Federal law does not preclude a labor union from bringing a state action for an alleged fraudulent conveyance by an employer when the claim does not require substantial interpretation of a collective bargaining agreement. International Ass'n of Machinists & Aerospace Workers, IAM Local 437 v. U.S. Can Co., 150 Wis. 2d 479, 441 N.W.2d 710 (1989).

The Wisconsin Uniform Voidable Transactions Law exists independently from the common law history of the law of fraudulent conveyances and fulfills a purpose quite separate from that of the fraudulent transaction exception to the rule of successor non-liability. Whereas the Act is designed to assist creditors in collecting on claims that may be frustrated by recent asset transfers, the fraudulent transaction exception is a doctrine that prevents successor companies from avoiding obligations incurred by their predecessors. This chapter has not supplanted the common law fraudulent transaction exception to the rule of successor non-liability. Springer v. Nohl Electric Products Corporation, 2018 WI 48, 381 Wis. 2d 438, 912 N.W.2d 1.

For cases involving an incurred obligation, users may want to consider including a brief description of the obligation in this instruction, such as "a lien on the property."

**Harm and causation**. Harm and causation are not required under Wis. Stat. ch. 242. The statutory framework centers on equitable relief: once a transfer is deemed voidable, the court may set it aside or grant related remedies "to the extent necessary to satisfy the creditor's claim," Wis. Stat. § 242.07(1). Thus, a creditor is not required to prove additional monetary loss or establish a causal nexus beyond the transfer itself. Wisconsin case law further confirms that rescission under § 242.07 constitutes equitable, rather than compensatory, relief. As a result, compensatory damages concepts—such as proof that the plaintiff suffered harm or that the transfer caused harm—are unnecessary. Although most tort instructions incorporate separate elements for harm and substantial causation, these familiar tort-based requirements are not imposed by Wis. Stat. §§ 242.04 or 242.07.

## 2792B UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT OR FUTURE CREDITORS – WIS. STAT. § 242.04(1)(b)

The plaintiff claims that (debtor) (made a transfer) (incurred an obligation) to (defendant) and, as a result, was unable to pay the plaintiff money that was owed. [This is called "constructive fraud."][1] To establish this claim against (defendant), the plaintiff must prove the following by a preponderance of the evidence:

1. That the plaintiff has a right to payment from (debtor) for (insert amount of claim);
2. That (debtor) (made a transfer) (incurred an obligation)[2] to (defendant);

   [*Give Wis JI-Civil 2794A: Transfer – Definition.*]

3. That (debtor) did not receive a reasonably equivalent value in exchange for the (transfer) (incurred obligation);

   [*Give Wis JI-Civil 2796: When Value Is Given*]

4. [That (debtor) was in business or about to start a business or enter a transaction when (his) (her) (its) remaining assets were unreasonably small in relation to the business or transaction.]

   [That (debtor) intended to incur debts beyond (his) (her) (its) ability to pay as they became due.]

   [That (debtor) believed or reasonably should have believed that (he) (she) (it) would incur debts beyond (his) (her) (its) ability to pay as they became due.]

[It does not matter whether the plaintiff's right to payment arose before or after (debtor) (made a transfer) (incurred an obligation).]

The plaintiff bears the burden of proving the elements of the claim by a preponderance of the evidence. This means the plaintiff must prove it is more likely than not that (debtor) (made a transfer) (incurred an obligation) that is voidable under the law.

**NOTES**

1. Include the bracketed language if the plaintiff asserts claims for both actual and constructive fraud.

2. Wis. Stat. § 242.06(5). An obligation is incurred:

(a) If oral, when it becomes effective between the parties.

(b) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

**COMMENT**

This instruction and comment were approved in October 2025.

The Uniform Voidable Transactions Law permits a creditor to challenge certain transfers of assets by a debtor that are intended to deprive the creditor of assets that would otherwise be available if the debtor is or were to become insolvent. The UVTL was originally adopted in Wisconsin in 1988 under the title Uniform Fraudulent Transfer Act. The UFTA was amended by 2023 Wisconsin Act 246 [effective date: March 29, 2024].

Federal law does not preclude a labor union from bringing a state action for an alleged fraudulent conveyance by an employer when the claim does not require substantial interpretation of a collective bargaining agreement. International Association of Machinists v. United States Can Co., 150 Wis. 2d 479, 441 N.W.2d 710 (1989)

The Wisconsin Uniform Voidable Transactions Law exists independently from the common law history of the law of fraudulent conveyances and fulfills a purpose quite separate from that of the fraudulent transaction exception to the rule of successor non-liability. Whereas the Act is designed to assist creditors in collecting on claims that may be frustrated by recent asset transfers, the fraudulent transaction exception is a doctrine that prevents successor companies from avoiding obligations incurred by their predecessors. This chapter has not supplanted the common law fraudulent transaction exception to the rule of successor

non-liability. Springer v. Nohl Electric Products Corporation, 2018 WI 48, 381 Wis. 2d 438, 912 N.W.2d 1.

For cases involving an incurred obligation, users may want to include a brief description of the obligation in this instruction, such as "a lien on the property."

**Harm and causation**. Harm and causation are not required under Wis. Stat. ch. 242. The statutory framework centers on equitable relief: once a transfer is deemed voidable, the court may set it aside or grant related remedies "to the extent necessary to satisfy the creditor's claim," Wis. Stat. § 242.07(1). Thus, a creditor is not required to prove additional monetary loss or establish a causal nexus beyond the transfer itself. Wisconsin case law further confirms that rescission under § 242.07 constitutes equitable, rather than compensatory, relief. As a result, compensatory damages concepts—such as proof that the plaintiff suffered harm or that the transfer caused harm—are unnecessary. Although most tort instructions incorporate separate elements for harm and substantial causation, these familiar tort-based requirements are not imposed by Wis. Stat. §§ 242.04 or 242.07.

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## 2793A UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITOR – Wis. Stat. § 242.05(1)

The plaintiff claims that (debtor) (made a transfer) (incurred an obligation) to (defendant) and was unable to pay the plaintiff money that was owed. [This is called "constructive fraud."][1] To establish this claim against (defendant), the plaintiff must prove the following by a preponderance of the evidence:

1. That plaintiff has a right to payment from (debtor) for (insert amount of claim);
2. That (debtor) (made a transfer) (incurred an obligation)[2] to (defendant);

[*Give Wis JI-Civil 2794A: Transfer – Definition*]

3. That (debtor) did not receive a reasonably equivalent value in exchange for the (transfer) (obligation);

[*Give Wis JI-Civil 2796: When Value Is Given*]

4. That plaintiff's right to payment from (debtor) arose before (debtor) (made a transfer) (incurred an obligation);
5. That (debtor) was insolvent at that time or became insolvent as a result of the (transfer) (obligation);

[*Give Wis JI-Civil 2794C: Insolvency: Definition*]

[*Give Wis JI-Civil 2795: Presumption of Insolvency*]

The plaintiff bears the burden of proving the elements of the claim by a preponderance of the evidence. This means the plaintiff must prove it is more likely than not that (debtor)

(made a transfer) (incurred an obligation) that is voidable under the law.

**NOTES**

1. Include the bracketed language if the plaintiff asserts claims for both actual and constructive fraud.

2. Wis. Stat. § 242.06(5). An obligation is incurred:

(a) If oral, when it becomes effective between the parties.

(b) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

**COMMENT**

This instruction and comment were approved in October 2025.

Wis. Stat. § 242.05 provides two distinct claims. This instruction applies to claims brought under Wis. Stat. § 242.05(1). For claims brought under Wis. Stat. § 242.05(2), see Wis JI-Civil 2793B.

This instruction may be used along with either Wis JI-Civil 2792A or Wis JI-Civil 2792B Uniform Voidable Transactions: Transfer or Obligation Voidable as to Present or Future Creditors, if it is alleged that the plaintiff became a creditor before the transfer was made or the obligation was incurred.

The Uniform Voidable Transactions Law permits a creditor to challenge certain transfers of assets by a debtor that are intended to deprive the creditor of assets that would otherwise be available if the debtor is or were to become insolvent. The UVTL was originally adopted in Wisconsin in 1988 under the title Uniform Fraudulent Transfer Act. The UFTA was amended by 2023 Wisconsin Act 246 [effective date: March 29, 2024].

Unlike other provisions of the Uniform Voidable Transactions Law governing transfers made with fraudulent intent, this section deems certain transactions constructively fraudulent based on the circumstances of the transfer. Proving fraudulent intent is not necessary under this section. Beck v. BidRX, LLC, 2018 WI App 61, 384 Wis. 2d 207, 918 N.W.2d 96.

Sub. (2) addresses "preferential transfers," a novel category of fraudulent transaction based on bankruptcy principles that attacks a transfer by an insolvent debtor to pay an antecedent debt to a preferred insider. The provision is aimed at diminishing the sometimes unfair advantages insiders possess when they are familiar with the debtor's financial status. A person attacking a transfer under sub. (2) must show that the debtor is improperly preferring insider creditors over others. Beck v. BidRX, LLC, 2018 WI App 61, 384 Wis. 2d 207, 918 N.W.2d 96.

The evidence in this case was insufficient to prove a fraudulent transfer under sub. (2) because no

evidence was introduced showing that the allegedly fraudulent transfers were made to satisfy an antecedent debt. The fact of a transfer to an insider is not enough; it is the preferential payment of prior debts to insiders to which sub. (2) is addressed. Beck v. BidRX, LLC, 2018 WI App 61, 384 Wis. 2d 207, 918 N.W.2d 96.

Intent to defraud need not be proved under this section. DeWitt, Porter v. Kovalic, 991 F.2d 1243 (7th Cir. 1993).

**Harm and causation**. Harm and causation are not required under Wis. Stat. ch. 242. The statutory framework centers on equitable relief: once a transfer is deemed voidable, the court may set it aside or grant related remedies "to the extent necessary to satisfy the creditor's claim," Wis. Stat. § 242.07(1). Thus, a creditor is not required to prove additional monetary loss or establish a causal nexus beyond the transfer itself. Wisconsin case law further confirms that avoidance and related remedies under § 242.07 are equitable rather than compensatory. As a result, compensatory damages concepts—such as proof that the plaintiff suffered harm or that the transfer caused harm—are unnecessary. Although most tort instructions incorporate separate elements for harm and substantial causation, these familiar tort-based requirements are not imposed by Wis. Stat. §§ 242.05(1), 242.04, or 242.07.

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## 2793B UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITOR – WIS. STAT. § 242.05(2)

(Plaintiff) claims that (debtor) made a transfer to (defendant) and was unable to pay (plaintiff) money owed. [This is called "constructive fraud."][1] To establish this claim against (defendant), (plaintiff) must prove the following by a preponderance of the evidence:

1. That (plaintiff) has a right to payment from (debtor) for (insert amount of claim).
2. That (debtor) transferred (describe property or asset) to (defendant).

[*Give Wis JI-Civil: 2794A Transfer – Definition.*]

3. That (plaintiff)'s right to payment from (debtor) arose before (debtor) transferred (describe property or asset) to (defendant).
4. That (defendant) was an "insider" of (debtor).

[*Give Wis JI-Civil: 2794B Insider – Definition.*]

5. That the transfer from (debtor) to (defendant) was made for an antecedent debt [a debt that already existed before the transfer was made].
6. That (debtor) was insolvent at the time of the transfer.

[*Give Wis JI-Civil: 2794C Insolvency – Definition.*]

[*Give Wis JI-Civil 2795: Presumption of Insolvency, if applicable.*]

7. That (defendant), as an insider, had reasonable cause to believe that (debtor) was insolvent when (debtor) made the transfer.

The plaintiff bears the burden of proving each of these elements by a preponderance of the evidence. This means the plaintiff must prove that it is more likely than not that the transfer made by (debtor) is voidable under the law.

**NOTES**

1. Include the bracketed language if the plaintiff asserts claims for both actual and constructive fraud.

**COMMENT**

This instruction and comment were approved in October 2025.

Wis. Stat. § 242.05 provides two distinct claims. This instruction applies to claims brought under Wis. Stat. § 242.05(2). For claims brought under Wis. Stat. § 242.05(1), see Wis JI-Civil 2793A.

**Harm and causation**. Harm and causation are not required under Wis. Stat. ch. 242. The statutory framework centers on equitable relief: once a transfer is deemed voidable, the court may set it aside or grant related remedies "to the extent necessary to satisfy the creditor's claim," Wis. Stat. § 242.07(1). Thus, a creditor is not required to prove additional monetary loss or establish a causal nexus beyond the transfer itself. Wisconsin case law further confirms that rescission under § 242.07 constitutes equitable, rather than compensatory, relief. As a result, compensatory damages concepts—such as proof that the plaintiff suffered harm or that the transfer caused harm—are unnecessary. Although most tort instructions incorporate separate elements for harm and substantial causation, these familiar tort-based requirements are not imposed by Wis. Stat. §§ 242.04 and 242.07

## 2794A TRANSFER: DEFINED – WIS. STAT. § 242.01(12)

"Transfer" means every mode of disposing of or parting with an asset or an interest in an asset.

*Read one of the following options*:

[A transfer may be direct or indirect, absolute or conditional, voluntary or involuntary. A transfer includes (the payment of money) (a release) (a lease) (a license) [and] (the creation of a lien or other encumbrance).][1]

[In this case, (describe transaction) is a transfer.][2]

**NOTES**

1. Include only the terms in parentheses at the end that are at issue in the case.
2. Include the bracketed language if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option.

**COMMENT**

This instruction and comment were approved in October 2025.

This instruction sets forth the statutory definition of a "transfer" within the Uniform Voidable Transactions Act. See Wis. Stat. § 242.01(12).

**[ This page is intentionally left blank ]**

## 2794B INSIDER: DEFINED – WIS. STAT. § 242.01(7)

"Insider" means a person or entity with a close relationship to the debtor, such as a relative, general partner, or corporation in which the debtor is an officer or director.

"Insider" includes (insert applicable "insider")[1].

**NOTES**

1. See Wis. Stat. § 242.01(7)(a)–(g)

If the debtor is an individual:
- A relative of the debtor or of a general partner of the debtor;
- A partnership in which the debtor is a general partner;
- A general partner in a partnership described in subsection 2;
- A corporation of which the debtor is a director, officer, or person in control; or
- A limited liability company of which the debtor is a manager or person in control.

If the debtor is a corporation:
- A director of the debtor;
- An officer of the debtor;
- A person in control of the debtor;
- A partnership in which the debtor is a general partner;
- A general partner in a partnership described in subsection 4; or
- A relative of a director, officer, or person in control of the debtor.

If the debtor is a limited liability company:
- A manager of the debtor;
- A person in control of the debtor;
- A partnership in which the debtor is a general partner;
- A general partner in a partnership described in subsection 3;
- A relative of a manager or person in control of the debtor.

If the debtor is a partnership:
- A general partner in the debtor;
- A relative of a general partner in the debtor, a general partner of the debtor, or a person in control of the debtor;
- Another partnership in which the debtor is a general partner;

- A general partner in a partnership described in subsection 3; or
- A person in control of the debtor;
- An affiliate or an insider of an affiliate as if the affiliate were the debtor;
- A managing agent of the debtor.

**COMMENT**

This instruction and comment were approved in October 2025.

This instruction sets forth the statutory definition of an "insider" within the Uniform Voidable Transactions Act. See Wis. Stat. § 242.01(7).

## 2794C INSOLVENCY: DEFINED – WIS. STAT. § 242.02(2)

(Debtor) was insolvent (at the time) (as a result) of the transaction if, at fair valuation, the total amount of (his) (her) (its) debts was greater than the total amount of (his) (her) (its) assets.

In determining (debtor)'s assets, do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors. [In determining (debtor)'s debts, do not include a debt to the extent it is secured by a valid lien on (his) (her) (its) property that is not included as an asset.][1]

**NOTES**

1. Include the bracketed final sentence if it is relevant to the facts of the case. See Wis. Stat. § 242.02(1)(b).

**COMMENT**

This instruction and comment were approved in October 2025.

This instruction sets forth the statutory definition of "insolvency" within the Uniform Voidable Transactions Act. See Wis. Stat. § 242.02.

**[ This page is intentionally left blank ]**

## 2795 PRESUMPTION OF INSOLVENCY – WIS. STAT. § 242.02(3)

A debtor who is generally not paying (his) (her) (its) debts as they become due, other than because of a bona fide dispute, is presumed to be insolvent.[1]

**NOTES**

1. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

**COMMENT**

This instruction and comment were approved in October 2025.

See also Wis. Stat. § 903.01 (effect of presumptions in civil actions).

**[ This page is intentionally left blank ]**

## 2796 REASONABLY EQUIVALENT VALUE: DEFINITION

Value is given for (a transfer) (an obligation) if, in exchange for the (transfer) (obligation), property is transferred or a preexisting debt is secured or satisfied.

[Value does not include an unperformed promise to furnish support to the debtor or another person [unless that promise was made in the ordinary course of the promisor's business]].[1]

**NOTES**

**1.** The first bracket provides language that is optional and should be used when there is evidence that an unperformed promise to support was given in exchange for the property transferred or the obligation incurred. The second bracket provides additional optional language that should be used if there is evidence that this unperformed promise to support was given in the ordinary course of the promisor's business.

**COMMENT**

This instruction and comment were approved in October 2025.

This instruction should be used with Wis JI-Civil 2792B and Wis JI-Civil 2793A.

This instruction is intended to define "value" when there is a question of whether the debtor received reasonably equivalent value for the transferred property or the obligation incurred. The Uniform Voidable Transactions Act does not provide a specific definition of "reasonably equivalent value."

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## 2797A AFFIRMATIVE DEFENSE: GOOD FAITH – WIS. STAT. § 242.08

(Defendant) is not liable to (plaintiff) [on the claim for actual fraud][1] if (defendant) proves both of the following:

**Use one of the following two sets of elements:**

[1. That (defendant) took the property from (debtor) in good faith; and

2. That (he) (she) (it) took the property for a reasonably equivalent value.]

**or**

[1. That (defendant) received the property from (third party), who had taken the property from (debtor) in good faith; and

2. That (third party) had taken the property for a reasonably equivalent value.]

"Good faith" means that (defendant) did not have actual or constructive notice of (plaintiff)'s rights in the (property/obligation). If you decide (defendant) had, or under the facts and circumstances should have had, such notice, then (defendant) did not take the (property) (obligation) in good faith.[2]

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

**NOTES**

1. Use with claims under Wis. Stat. § 242.04(1)(a). Include the bracketed language if the plaintiff asserts claims for both actual and constructive fraud.

2. Chapter 242 does not expressly define the term "good faith." However, Wis. Stat. § 242.08(4) uses the term "good-faith transferee" as an affirmative defense to the avoidance of a fraudulent conveyance.

Although the Committee was unable to locate any citable opinions specifically defining "good faith" within the context of Chapter 242, several Wisconsin recording-act cases provide useful guidance. In

Grosskopf Oil, Inc. v. Winter, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990), the court held that a purchaser or mortgagee acts in good faith when lacking notice of existing rights in the property. Similarly, in Bump v. Dahl, 26 Wis. 2d 607, 613, 133 N.W.2d 295 (1965), the Wisconsin Supreme Court characterized a good-faith purchaser as one without notice of prior interests in the land. Reinforcing this principle, Kordecki v. Rizzo, 106 Wis. 2d 713, 719–20, 317 N.W.2d 479 (1982), explicitly defined a good-faith purchaser as one "without notice, constructive or actual, of a prior conveyance."

It is important to note that each of these cases addresses whether a subsequent purchaser or mortgagee took title "in good faith" under Wisconsin's race-notice statutes, Wis. Stat. § 235.49 or § 706.08, thereby gaining priority over an earlier, unrecorded interest. The inquiry in these cases focuses on the three traditional sources of notice—open possession (Bump), tenant-in-possession (Grosskopf), and recorded litigation documents (Kordecki)—rather than on the existence of a prior, unrecorded conveyance.

**COMMENT**

This instruction and comment were approved in October 2025.

This instruction outlines a defense available to a good-faith transferee who provided value in cases involving allegations of actual fraud under the Uniform Voidable Transactions Act, as set forth in Wis. Stat. § 242.08.

## 2797B AFFIRMATIVE DEFENSE: STATUTE OF LIMITATIONS – WIS. STAT. § 242.09

(Defendant) contends that (plaintiff)'s lawsuit was not filed within the time set by law.

[To succeed on this defense, (defendant) must prove either that (plaintiff) filed (his) (her) (its) action more than four years after the (transfer was made) (obligation was incurred) or, if later, that (plaintiff) filed the action more than one year after the (transfer) (obligation) was, or in the exercise of reasonable diligence could have been, discovered.[1]

[To succeed on this defense, (defendant) must prove that (plaintiff) filed (his) (her) (its) lawsuit more than four years after the transfer was made or the obligation was incurred.][2]

**NOTES**

1. Read the bracketed paragraph in cases involving actual intent to hinder, delay, or defraud. See Wis. Stat. § 893.425(1). See also Wis JI-Civil 2792A.

2. Read the bracketed paragraph in cases involving constructive fraud. See Wis Stat. § 893.425(2)-(3).

**COMMENT**

This instruction and comment were approved in October 2025.

This instruction outlines an affirmative defense for failure to file within the statute of limitations. See Wis. Stat. § 242.09.

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# 2798A UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT OR FUTURE CREDITORS – WIS. STAT. § 242.04(1)(a): SPECIAL VERDICT

**Question 1**

Did (plaintiff) have a right to payment from (debtor)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 1, then answer question 2. If you answered no, stop here. Do not answer any other questions.**

**Question 2**

Did (debtor) (transfer property) (incur an obligation) to (defendant)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 2, then answer question 3. If you answered no, stop here. Do not answer any other questions.**

**Question 3**

Did (debtor) (transfer the property) (incur the obligation) with the intent to hinder, delay, or defraud one or more of (his) (her) (its) creditors?

ANSWER: _____
Yes or No

**If you answered "no" to Question 3, do not answer any further questions. If you answered "yes," and a transferee defendant asserts an affirmative defense, answer Questions 4–5.**

**[**On Questions 4–5, (defendant) bears the burden of proof.][1]

**Question 4**

Did (defendant) (name of third party) receive the property from (debtor) in good faith?[2]

ANSWER: _____
Yes or No

**Question 5**

Did (defendant) (name of third party) receive the property for a reasonably equivalent value?

ANSWER: _____
Yes or No

**NOTES**

1. Chapter 242 does not expressly define the term "good faith." However, Wis. Stat. § 242.08(4) uses the term "good-faith transferee" as an affirmative defense to the avoidance of a fraudulent conveyance.

Although the Committee was unable to locate any citable opinions specifically defining "good faith" within the context of Chapter 242, several Wisconsin recording-act cases provide useful guidance. In Grosskopf Oil, Inc. v. Winter, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990), the court held that a purchaser or mortgagee acts in good faith when lacking notice of existing rights in the property. Similarly, in Bump v. Dahl, 26 Wis. 2d 607, 613, 133 N.W.2d 295 (1965), the Wisconsin Supreme Court characterized a good-faith purchaser as one without notice of prior interests in the land. Reinforcing this principle, Kordecki v. Rizzo, 106 Wis. 2d 713, 719–20, 317 N.W.2d 479 (1982), explicitly defined, a good-faith purchaser as one "without notice, constructive or actual, of a prior conveyance."

It is important to note that each of these cases addresses whether a subsequent purchaser or mortgagee took title "in good faith" under Wisconsin's race-notice statutes, Wis. Stat. §§ 235.49 and 706.08, thereby gaining priority over an earlier, unrecorded interest. The inquiry in these cases focuses on the three traditional sources of notice—open possession (Bump), tenant-in-possession (Grosskopf), and recorded litigation documents (Kordecki)—rather than on the existence of a prior, unrecorded conveyance.

See Wis-JI Civil 2797A for a model definition "good faith."

2. See Wis. JI-Civil 200.

**COMMENT**

This instruction and comment were approved in October 2025.

This special verdict is based on Wis JI-Civil 2792A Uniform Voidable Transactions: Transfer or Obligation Voidable as to Present or Future Creditors and Wis JI-Civil 2797A Affirmative Defense: Good Faith. It is intended only as a model and may need to be modified depending on the facts of the case.

Wisconsin Statute § 242.07 provides the remedies available to creditors. Although compensatory damages are not explicitly mentioned within this subsection, § 242.07(1)(c) provides several equitable remedies available under applicable principles of equity and procedural rules, including granting any other relief that the circumstances may require.

Monetary damages are not explicitly referenced in § 242.07. The Committee takes no position as to whether the catch-all provision under § 242.07(1)(c)3 encompasses the awarding of such damages.

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# 2798B UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT OR FUTURE CREDITORS – WIS. STAT. § 242.04(1)(b): SPECIAL VERDICT

**Question 1**

Did (plaintiff) have a right to payment from (debtor)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 1, then answer question 2. If you answered "no," stop here. Do not answer any other questions.**

**Question 2**

Did (debtor) (transfer property) (incur an obligation) to (defendant)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 2, then answer question 3. If you answered "no," stop here. Do not answer any other questions.**

**Question 3**

Did (debtor) fail to receive a reasonably equivalent value in exchange for the (transfer) (obligation)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 3, then answer question 4. If you answered "no," stop here. Do not answer any other questions.**

**Question 4**

[Select one applicable alternative:]

[At that time, was (debtor) engaged in or about to engage in a business or transaction for which (his) (her) (its) remaining assets were unreasonably small?]

ANSWER: _____
Yes or No

[Did (debtor) intend to incur debts beyond (his) (her) (its) ability to pay as they became due?]

ANSWER: _____
Yes or No

[Did (debtor) believe, or reasonably should have believed, that (he) (she) (it) would incur debts beyond (his) (her) (its) ability to pay as the debts became due?]

ANSWER: _____
Yes or No

**COMMENT**

This instruction and comment were approved in October 2025.

This special verdict is based on Wis JI-Civil 2792B, Uniform Voidable Transactions: Transfer or Obligation Voidable as to Present or Future Creditors. It is intended only as a model and may need to be modified depending on the facts of the case.

Wis. Stat. § 242.07 provides the remedies available to creditors. Although compensatory damages are not explicitly mentioned within this section, § 242.07(1)(c) provides several equitable remedies available under applicable principles of equity and procedural rules, including granting any other relief that the circumstances may require.

Monetary damages are not explicitly referenced in § 242.07. The Committee takes no position as to whether the catch-all provision under § 242.07(1)(c)3. encompasses the awarding of such damages.

# 2799A UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITORS – WIS. STAT. § 242.05(1): SPECIAL VERDICT

**Question 1**

Did (plaintiff) have a right to payment from (debtor)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 1, then answer question 2. If you answered "no", stop here. Do not answer any other questions.**

**Question 2**

Did (debtor) (transfer property) (incur an obligation) to (defendant)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 2, then answer question 3. If you answered "no", stop here. Do not answer any other questions.**

**Question 3**

Did (debtor) fail to receive reasonably equivalent value in exchange for the (transfer) (obligation)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 3, then answer question 4. If you answered "no", stop here. Do not answer any other questions.**

**Question 4**

Did (plaintiff)'s right to payment from (debtor) arise before (debtor) (transferred property) (incurred an obligation)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 4, then answer question 5. If you answered "no", stop here. Do not answer any other questions.**

**Question 5**

Was (debtor) insolvent at that time or did (debtor) become insolvent as a result of the (transfer) (obligation)?

ANSWER: _____
Yes or No

**COMMENT**

This instruction and comment were approved in October 2025.

This special verdict is based on Wis JI-Civil 3321A Uniform Voidable Transactions: Transfer or Obligation Voidable as to Present Creditors. It is intended only as a model and may need to be modified depending on the facts of the case.

Wis. Stat. § 242.07 provides the remedies available to creditors. Although compensatory damages are not explicitly mentioned within this section, § 242.07(1)(c) provides several equitable remedies available under applicable principles of equity and procedural rules, including granting any other relief that the circumstances may require.

Monetary damages are not explicitly referenced in § 242.07. The Committee takes no position as to whether the catch-all provision under § 242.07(1)(c)3. encompasses the awarding of such damages.

# 2799B UNIFORM VOIDABLE TRANSACTIONS: TRANSFER OR OBLIGATION VOIDABLE AS TO PRESENT CREDITORS – WIS. STAT. § 242.05(2): SPECIAL VERDICT

**Question 1**

Did (plaintiff) have a right to payment from (debtor) for the claimed amount?

ANSWER: _____
Yes or No

**If you answered "yes" to question 1, then answer question 2. If you answered "no," stop here. Do not answer any other questions.**

**Question 2**

Did (debtor) transfer (describe property or asset) to (defendant)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 2, then answer question 3. If you answered "no," stop here. Do not answer any other questions.**

**Question 3**

Did (plaintiff)'s right to payment from (debtor) arise before (debtor) transferred (describe property or asset) to (defendant)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 3, then answer question 4. If you answered "no," stop here. Do not answer any other questions.**

**Question 4**

Was (defendant) an "insider" of (debtor)?

ANSWER: _____
Yes or No

**If you answered "yes" to question 4, then answer question 5. If you answered "no," stop here. Do not answer any other questions.**

**Question 5**

Was the transfer from (debtor) to (defendant) made for an antecedent debt?

ANSWER: _____
Yes or No

**If you answered "yes" to question 5, then answer question 6. If you answered "no," stop here. Do not answer any other questions.**

**Question 6**

Was (debtor) insolvent at the time of the transfer?

ANSWER: _____
Yes or No

**If you answered "yes" to question 6, then answer question 7. If you answered "no," stop here. Do not answer any other questions.**

**Question 7**

Did (defendant), as an insider, have reasonable cause to believe that (debtor) was insolvent at the time of the transfer?

ANSWER: _____
Yes or No

**COMMENT**

This instruction and comment were approved in October 2025.

This special verdict is based on Wis JI-Civil 2793B, Uniform Voidable Transactions: Transfer or Obligation Voidable as to Present Creditors. It is intended only as a model and may need to be modified depending on the facts of the case.

Wis. Stat. § 242.07 provides the remedies available to creditors. Although compensatory damages are not explicitly mentioned within this section, § 242.07(1)(c) provides several equitable remedies available under applicable principles of equity and procedural rules, including granting any other relief that the circumstances may require.

Monetary damages are not explicitly referenced in § 242.07. The Committee takes no position as to whether the catch-all provision under § 242.07(1)(c)3. encompasses the awarding of such damages.

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## 3094 RESIDENTIAL EVICTION: POSSESSION OF PREMISES[1]

The plaintiff, who has also been referred to as landlord,[2] claims that the defendant was (his) (her) (its) tenant at a property located at (address) and that the defendant breached their lease agreement[3] by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)]. The plaintiff is asking that the defendant(s) be evicted and possession of (address) be returned to the plaintiff. The defendant(s) deny(ies) that (he) (she) (they) should be evicted and that [(he) (she) (they)] [(is) (are)] entitled to remain in possession of (address) as [(he) (she) (they) did timely pay the rent], [the alleged (breach) (waste) did not occur] [the (breach) (waste) was corrected within the time specified in the notice].[4]

In order for you to find in favor of the plaintiff/landlord, the plaintiff/landlord must prove by the greater weight of the credible evidence, to a reasonable certainty, all of the following;

1. that there was a valid lease with the defendant(s),
2. that the defendant(s) breached the lease by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)], and
3. that the defendant(s) (was) (were) given the required written notice and did not comply with the notice.

**Lease**

The plaintiff must first prove by the greater weight of the credible evidence, to a reasonable certainty, that a lease existed. A lease is an agreement in which one party, the landlord, transfers the right to the possession of real property to another person for a definite period of time. [You will hear testimony from the parties regarding the issue of the lease for the property at (address)]. The plaintiff has the burden to prove to you by the greater weight of the credible evidence that the lease existed and that the defendant breached one or more conditions of the lease agreement by [not paying rent when due/committing waste/breach of condition of lease].

**WRITTEN NOTICE**

The plaintiff must also prove by the greater weight of the credible evidence, to a reasonable certainty, that proper notice was given to the defendant(s). Before a landlord can evict a tenant for a breach of a lease agreement a landlord is obligated by law to give their tenant written notice. The landlord must give notice by one of the following methods: [choose applicable provisions]

a. By giving a copy of the notice personally to the tenant or by leaving a copy at the tenant's usual place of abode in the presence of some competent member of the tenant's family at least 14 years of age, who is informed of the contents of the notice.

b. By leaving a copy with any competent person apparently in charge of the rented premises or occupying the premises or a part thereof, and by mailing a copy by regular or other mail to the tenant's last known address.

c. If notice cannot be given by either (a) or (b) with reasonable diligence, by affixing a copy of the notice in a conspicuous place on the rented premises where it can be conveniently read and by mailing a copy by regular or other mail to the tenant's last known address.

d. By mailing a copy of the notice by registered or certified mail to the tenant at the tenant's last-known address.

e. By serving the tenant as prescribed in s. 801.11 for service of a summons.

**Actual Notice Wis. Stat. 704.21(5) (if applicable)**[5]

If notice is not properly given by one of the methods specified in this section, but is actually received by the other party, the notice is deemed to be properly given; but the burden is upon the party alleging actual receipt to prove the fact by clear and convincing evidence.

**Type of Notice**

In this case the landlord was required to provide the following notice;

[choose applicable provision]:

**A. <u>Month-to-Month & Week-to-Week Tenancies</u>[6]:**

1. **<u>Failure to pay rent</u>: 5-Day:** If (a month-to-month) (a week-to-week) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the

tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay.

2. **Failure to pay rent/Waste: 14-Day:** A month-to-month tenancy is terminated if the landlord, while the tenant is in default in payment of rent, commits waste, or breaches the lease other than for payment of rent, gives the tenant notice requiring the tenant to vacate on or before a date at least 14 days after the notice is given.[7]

3. **Waste: 5-Day:** If a month-to-month tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

4. **[Drug/Gang House notification by law enforcement: see §704.17(1p)(c) – 5 day notice]**

**B. One Year Or Less & Year-To-Year Tenancies[8]:**

1. **<u>Failure to pay rent</u>: 5-Day:** If (a one year or less) (a year-to-year) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay accordingly.

2. **Failure to pay rent: 14-Day:** If a tenant within the prior year has been given written notice of failure to pay rent and the tenant fails to pay a subsequent installment of rent on time the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

3. **Waste: 5-Day:** If (a one year or less) (a year-to-year) tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

4. **Waste: 14-Day:** If a tenant within the prior year has been given written notice of committing waste or a breach of the lease other than for payment of rent and the tenant again commits waste or breaches the same or any other condition of the lease other than for payment of rent, the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

5. **[Drug/Gang House notification by law enforcement: see § 704.17(2)(c) – 5 day notice]**

**C. Lease For More Than One Year[9]:**

1. **Failure to pay rent, waste, or other breach: 30-Day:** If a tenant under a lease for more than one year fails to pay rent when due, or commits waste or breaches the lease, the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

2. **[Drug/Gang House/Criminal activity notification by law enforcement: see § 704.17(2)(c) & (3m) – 5-day notice]**

**Failure to Comply With Notice**

If you find that the plaintiff gave valid notice to the defendant(s), then the plaintiff must prove to you that the defendant(s) did not comply with the notice as: [give as appropriate from evidence received]

**A. Failure to pay rent:** Defendant(s) failed to pay the rent within 5 days after the 5-day notice was received,

**B. Waste or Breach:** Defendant(s) did not within 5 days after notice was received [promptly take reasonable steps to remedy the breach], [proceed with reasonable

diligence to repair the damage or correct the breach], [make a bona fide and reasonable offer to pay the landlord all damages for the breach].

**[NOTE: Valid 14-day notices have no remedy for defendant but may require an inquiry on the special verdict as to whether the tenant, within the prior year, had been given written notice of a prior breach]**

**SPECIAL VERDICT: Eviction: Possession of Premises**

We, the jury find as follows:

**[If the lease period is (week-to-week) (month-to-month), use the following special verdict when 5-day notice at issue]:**

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] pay the full amount of the past due rent within the 5-day notice period?

Answer: _____ Yes _____ No

**[If the lease period is month-to-month, use the following special verdict when 5-day notice for waste or other breach at issue]:**

Question 1: As of [date], had the [tenant(s)] committed waste or otherwise breached the lease?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to repair or fix the damage or other breach or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] comply with the notice by [promptly taking reasonable steps to remedy the breach and proceeding with reasonable diligence] [making a bona fide and reasonable offer to pay the landlord all damages for the breach within the 5-day notice period]?

Answer: _____ Yes _____ No

**[If the lease period is month-to-month, use the following special verdict when 14-day notice is alleged]:**

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

**[Alternate Question 1]:** As of [date of waste or other breach], did [the tenant(s) (commit waste) (breach the lease)]?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate the premises?

Answer: _____ Yes _____ No

**[If the lease period is year-to-year or one year or less use the following special verdict]:**

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 5-day notice period?

Answer: _____ Yes _____ No

**[use if a 14-day notice has been given alleging a prior notice within a year]:**

Question 1: Within the prior year had [the tenant(s)] failed to pay rent when due and been given prior written notice to pay rent or vacate the premises?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate?

Answer: _____ Yes _____ No

**[If the lease period is for more than one year use the following special verdict]:**

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 30-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 30-day notice period?

Answer: _____ Yes _____ No

Dated _____

Presiding Juror:

_____

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____: as to question(s) # _____

## Alternate Special Verdict

**Special Verdict Question No. 1:**

Who Is Entitled To Possession of (address): (circle party entitled to possession of the premises):

Plaintiff/Landlord or Defendant/Tenant

Dated this __ day of _____, 20____.

_____

Foreperson

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____: as to question(s) # _____

**COMMENT**

The instruction and comment were approved by the Committee in 2019. An editorial correction was made to the comment in 2020. This revision was approved by the Committee in September 2025; it added to the comment.

This instruction is created as a result of § 799.20(4) which requires that in a "residential eviction action" a jury or court trial on the issue of "possession of the premises" must be held within 30 days of the return date if the defendant "claims a defense to the action." This instruction addresses the instructions and special verdict required for deciding the eviction; i.e. who is entitled to the possession of the premises.

The reader should be aware that there is a discrepancy in the statutes; as noted § 799.20(4) requires a trial if a defendant "claims a defense" to the eviction action at the return date, whereas § 799.206(3) states that in an eviction action if a party at the return date "raises valid legal grounds for a contest," then the matter is to be scheduled for a "hearing" before a judge (not a court commissioner) within 30 days of the return date. We leave to you the significance, if any, regarding the competing language in the above statutes.

Residential Rental Practices are regulated in Wisconsin in Chapter 134 ATCP, Wis. Admin. Code and the reader should modify any instructions per the code provisions. Substantive statutes regarding Landlord

and Tenant are found in Chap. 704 Wis. Stats., and procedural rules regarding eviction actions are found in Chap. 799 Wis. Stats., (Small Claims).

**Contractual Notice-and-Cure; Minimum Statutory Periods**. Where a lease provides notice/cure terms more generous than § 704.17(1p), those terms are enforceable; the statute's 'at least' language sets minimums, not maximums. See Ivekich v. Morales, 2025 WI App 28, 2024AP1036, ¶¶14–16 (Wis. Ct. App. Mar. 25, 2025) (one-judge) (unpublished; persuasive only under § 809.23(3)).

Per 2025 Wis. Act 29 [effective date: Aug. 10, 2025], Chapter 704 does not apply to licensed campground occupants/guests; see § 704.96. Campground disputes may implicate § 943.13(1m)(g) and § 943.13(2)(am).

1. § 799.20(4).

2. ATCP 134.02(5)

3. ATCP 134.02(6) (10) & §704.01(1)

4. ATCP 134.02(9)

5. § 704.21(5)

6. § 704.17(1p)

7. § 704.17(1p)(a) & §704.17(b)(2). The statutory periods set minimums ("at least" the days stated) and allow lease-required notice or cure periods to be longer. See Ivekich v. Morales, 2025 WI App 28, 2024AP1036, ¶¶14–16 (Wis. Ct. App. Mar. 25, 2025) (one-judge) (unpublished; persuasive only under § 809.23(3)).

8. § 704.17(2)

9. § 704.17(3)

## 3095 LANDLORD-TENANT: CONSTRUCTIVE EVICTION

Constructive eviction consists of any disturbance of the tenant's possession of property by the landlord (or someone acting under the landlord's authority) which renders the premises unfit for occupancy for the purposes for which they were leased or which deprives the tenant of the beneficial enjoyment of the premises if:

- the landlord is given notice of the disturbance of possession and fails to remedy the disturbance within a reasonable time;
- the tenant abandons the premises within a reasonable time of the disturbance of possession; and
- the disturbance of possession caused the tenant to abandon the premises.

The disturbance must be substantial and of such duration that is can be said that the tenant has been deprived of the full use and enjoyment of the leased property for a material period of time.

**SPECIAL VERDICT**

Was (plaintiff) constructively evicted?

Answer: _____

Yes or No

**COMMENT**

This instruction and comment were originally approved in 1987 and revised in 2012. This revision was approved by the Committee in September 2025; it added to the comment.

Whenever a constructive eviction takes place, the tenant is released from the obligations under the lease to pay rent accruing after the eviction. First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis.2d 258, 268, 286 N.W.2d 360, 365 (1980). In First Wisconsin, the court explicitly required that the tenant abandon the premises for there to be a constructive eviction.

Wis. Stat. § 704.07, deals with the physical condition of property, rather than a disturbance of tenant's possession by the landlord, but likewise allows a tenant to leave the premises and not be responsible for further rent if the premises become untenantable. The statute forbids a tenant from withholding rent in full if the tenant maintains possession of the premises and, instead, provides for an abatement of rent.

Per 2025 Wis. Act 29 [effective date: Aug. 10, 2025], Chapter 704 does not apply to licensed campground occupants/guests; see § 704.96. Campground disputes may implicate § 943.13(1m)(g) and § 943.13(2)(am).

OFFICE OF JUDICIAL EDUCATION

11/2025

# WISCONSIN JURY INSTRUCTIONS

# CIVIL

# VOLUME III

**Wisconsin Civil Jury Instructions Committee**

- 11/2025 Supplement (Release No. 59)

**[ This page is intentionally left blank ]**

# TABLE OF CONTENTS

# VOLUME III

## CONTRACTS (Continued)

### Insurance

3100 Insurance Contract: Misrepresentation or Breach of Affirmative Warranty by the Insured (1998)
3105 Insurance Contract: Failure of Condition or Breach of Promissory Warranty (1994)
3110 Insurance Contract: Definition of "Resident" or "Member of a Household" (2022)
3112 Owner's Permission for Use of Automobile (1993)
3115 Failure of Insured to Cooperate (2016)
3116 Failure to Cooperate: Materiality (2016)
3117 Failure to Give Notice to Insurer (1994)
3118 Failure to Give Notice to Insurer: Materiality (2002)

### Breach of Warranty

3200 Products Liability: Law Note (2021)
3201 Implied Warranty: Merchantability Defined (2009)
3202 Implied Warranty: Fitness for Particular Purpose (1994)
3203 Implied Warranty: By Reason of Course of Dealing or Usage of Trade (1994)
3204 Implied Warranty: Sale of Food (1994)
3205 Implied Warranty: Exclusion or Modification (2009)
3206 Implied Warranty: Exclusion by Reason of Course of Dealing or Usage of Trade (1994)
3207 Implied Warranty: Use of Product after the Defect Known (2009)
3208 Implied Warranty: Failure to Examine Product (2009)
3209 Implied Warranty: Susceptibility or Allergy of User (2009)
3210 Implied Warranty: Improper Use (1994)
3211 Implied Warranty: Notice of Breach (1993)
3220 Express Warranty: General (1994)
3222 Express Warranty: No Duty of Inspection (1994)
3225 Express Warranty: Statement of Opinion (1994)

3230 Express Warranty under the Uniform Commercial Code (1994)

## Duties of Manufacturers and Sellers

3240 Negligence: Duty of Manufacturer (2007)
3242 Negligence: Duty of Manufacturer (Supplier) to Warn (2020)
3244 Negligence: Duty of Manufacturer (Seller) to Give Adequate Instructions as to Use of a Complicated Machine (Product) (1994)
3246 Negligence: Duty of Manufacturer (Seller) Who Undertakes to Give Instruction as to the Use of a Machine (Product) (1994)
3248 Negligence: Duty of Restaurant Operator in Sale of Food Containing Harmful Natural Ingredients (1994)
3250 Negligence: Duty of Seller: Installing (Servicing) Product (1994)
3254 Duty of Buyer or Consumer: Contributory Negligence (2015)
3260 Strict Liability: Duty of Manufacturer to Ultimate User (For Actions Commenced Before February 1, 2011) (2014)
3260.1 Product Liability: Wis. Stat. § 895.047 (For Actions Commenced after January 31, 2011) (1/2024)
3262 Strict Liability: Duty of Manufacturer (Supplier) to Warn (For Actions Commenced Before February 1, 2011) (2014)
3264 Strict Liability: Definition of Business (1994)
3268 Strict Liability: Contributory Negligence (2015)
3290 Strict Products Liability: Special Verdict (For Actions Commenced Before February 1, 2011) (2014)
3290.1 Product Liability: Wis. Stat. § 895.047: Verdict (For Actions Commenced after January 31, 2011) (2014)
3294 Risk Contribution: Negligence: Verdict (For Actions Commenced Before February 1, 2011) (2014)
3295 Risk Contribution: Negligence Claim (For Actions Commenced Before February 1, 2011) (2014)
3296 Risk Contribution: Negligence: Verdict (Wis. Stat. § 895.046) (For Actions Commenced after January 31, 2011) (2014)

## Lemon Law

3300 Lemon Law Claim: Special Verdict (2016)
3301 Lemon Law Claim: Nonconformity (2001)
3302 Lemon Law Claim: Four Attempts to Repair: Same Nonconformity (1999)
3303 Lemon Law Claim: Out of Service Warranty Nonconformity (Warranty on or after March 1, 2014) (2016)

3304 Lemon Law Claim: Failure to Repair (Relating to Special Verdict Question 6) (2006)
3310 Magnuson–Moss Claim (2020)

## Damages

3700 Damages: Building Contracts: Measure of Damages (2012)
3710 Consequential Damages for Breach of Contract (2018)
3720 Damages: Incidental (1994)
3725 Damages: Future Profits (2008)
3735 Damages: Loss of Expectation (1994)
3740 Damages: Termination of Real Estate Listing Contract (Exclusive) by Seller; Broker's Recovery (1994)
3750 Damages: Breach of Contract by Purchaser (1994)
3755 Damages: Breach of Contract by Seller (1994)
3760 Damages: Attorney Fees (1994)

## AGENCY; EMPLOYMENT; BUSINESS ORGANIZATION

4000 Agency: Definition (2019)
4001 General Agent: Definition (1994)
4002 Special Agent: Definition (1994)
4005 Agency: Apparent Authority (1994)
4010 Agency: Implied Authority (1994)
4015 Agency: Ratification (1994)
4020 Agent's Duties Owed to Principal (1994)
4025 Agency: Without Compensation (2005)
4027 Agency: Termination: General (1994)
4028 Agency: Termination: Notice to Third Parties (1994)
4030 Servant: Definition (2015)
4035 Servant: Scope of Employment (2020)
4040 Servant: Scope of Employment; Going to and from Place of Employment (2014)
4045 Servant: Scope of Employment While Traveling (2020)
4050 Servant: Master's Ratification of Wrongful Acts Done Outside Scope of Employment (1994)
4055 Servant: Vicarious Liability of Employer (2005)
4060 Independent Contractor: Definition (2005)
4080 Partnership (2009)

# PERSONS

5001 Paternity: Child of Unmarried Woman (2021)
7030 Child in Need of Protection or Services [Withdrawn 2014]
7039 Involuntary Termination of Parental Rights: Child in Need of Protection or Services: Preliminary Instruction [Withdrawn 2014]
7040 Involuntary Termination of Parental Rights: Continuing Need of Protection or Services [Withdrawn 2014]
7042 Involuntary Termination of Parental Rights: Abandonment under Wis. Stat. § 48.415(1)(a) 2 or 3 [Withdrawn 2014]
7050 Involuntary Commitment: Mentally Ill (2022)
7050A 7050A Involuntary Commitment: Mentally Ill: Recommitment Alleging Wis. Stat. § 51.20(1)(am) (1/2023)
7054 Petition for Guardianship of the Person: Incompetency; Wis. Stat. § 54.10(3)(a)2 (2019)
7055 Petition for Guardianship of the Estate: Incompetency; Wis. Stat. § 54.10(3)(a)3 (2009)
7056 Petition for Guardianship of the Estate: Spendthrift; Wis. Stat. § 54.10(2) (2009)
7060 Petition for Guardianship of Incompetent Person and Application for Protective Placement; Wis. Stat. § 54.10 and 55.08(1) (2/2025)
7061 Petition for Guardianship of Incompetent Person and Application for Protective Services; Wis. Stat. § 54.10 and 55.08(2) (2014)
7070 Involuntary Commitment: Habitual Lack of Self-Control as to the Use of Alcohol Beverages (2003)

# PROPERTY

## General

8012 Trespasser: Definition (2013)
8015 Consent of Possessor to Another's Being on Premises (2013)
8017 Duty of Hotelkeeper to Furnish Reasonably Safe Premises and Furniture for Guests (Renumbered JI-Civil 8051) (1994)
8020 Duty of Owner or Possessor of Real Property to Nontrespasser User (2020)
8025 Trespass: Owner's Duty to Trespasser; Duty to Child Trespasser (Attractive Nuisance) (2022)
8026 Trespass: Special Verdict (2016)
8027 Trespass: Child Trespasser (Attractive Nuisance): Special Verdict (2013)
8030 Duty of Owner of a Building Abutting on a Public Highway (2006)

8035 Highway or Sidewalk Defect or Insufficiency (2/2025)
8040 Duty of Owner of Place of Amusement: Common Law (1994)
8045 Duty of a Proprietor of a Place of Business to Protect a Patron from Injury Caused by Act of Third Person (2012)
8050 Duty of Hotel Innkeeper: Providing Security (1994)
8051 Duty of Hotelkeeper to Furnish Reasonably Safe Premises and Furniture for Guests (2020)
8060 Adverse Possession Not Founded on Written Instrument (Wis. Stat. § 893.25) (2/2025)
8065 Prescriptive Rights by User: Domestic Corporation, Cooperative Association, or Cooperative (Wis. Stat. § 893.28(2)) (1/2023)

## Eminent Domain

8100 Eminent Domain: Fair Market Value (Total Taking) (1/2023)
8101 Eminent Domain: Fair Market Value (Partial Taking) (2012)
8102 Eminent Domain: Severance Damages (2008)
8103 Eminent Domain: Severance Damages: Cost-To-Cure (2007)
8104 Eminent Domain: Unity of Use - Two or More Parcels (2007)
8105 Eminent Domain: Lands Containing Marketable Materials (2008)
8107 Eminent Domain: Severance Damages; Unity of Use (Renumbered JI-Civil 8104) (2008)
8110 Eminent Domain: Change in Grade (2022)
8111 Eminent Domain: Access Rights (1/2023)
8112 Eminent Domain: Air Rights (1/2024)
8115 Eminent Domain: Special Benefits (2008)
8120 Eminent Domain: Comparable Sales Approach (2022)
8125 Eminent Domain: Inconvenience to Landowner [Withdrawn 2008]
8130 Eminent Domain: Income Approach (2008)
8135 Eminent Domain: Cost Approach (2008)
8140 Eminent Domain: Legal Nonconforming Use, Lot or Structure (Definitions) (2007)
8145 Eminent Domain: Assemblage (2007)

**Table of Cases Cited** (11/2025)
**Index** (11/2025)

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# WIS JI-CIVIL

# TABLE OF CASES CITED


118th Street Kenosha, LLC v. Wisconsin Dept. of Transportation, 8100, 8111
260 North 12th Street, LLC v. State of Wisconsin Dept. of Transportation, 8100, 8101
1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 2400

**A**

A. E. Inv. Corp. v. Link Builders, Inc., 1005, 1022.4, 8020
A.G. v. Travelers Ins. Co., 3110
Abbott v. Truck Ins. Exch. Co., 1000, 1280
ABC Outdoor Advertising, Inc. v. Dolhun's Marine, Inc., 3030
Abdella v. Catlin, 2800
Ackley v. Farmers Mut. Auto Ins. Co., 1105A
Acme Equip. Corp. v. Montgomery Coop. Creamery Ass'n, 3220, 3230
Adams v. Maxcy, 2200
Affett v. Milwaukee & Suburban Transport. Corp., 1796
Affiliated F. M. Ins. Co. v. Constitution Reinsurance Corp., 3051
Afflerbaugh v. Geo. Grede & Bro., 1025.7
Ahola v. Sincock, 1023, 1145
Aicher v. Wis. Patients Comp. Fund, 1023, 1870, 1895, 1897
Aikens v. Wisconsin, 2820
AKG Real Est., LLC v. Kosterman, 8060
Albert v. Waelti, 1023.14
Alden v. Matz, 1133, 1133A, 1132
Allen v. Bonnar, 1760
Allen v. Chicago N.W. Ry., 1803, 8100
Allen v. Ross, 3117
Allen v. Wisconsin Public Service Corp., 950
Allen & O'Hara v. Barrett Wreckers, Inc., 2820
Allie v. Russo, 8060
Allis-Chalmers Mfg. Co. v. Eagle Motor Lines, 1026.5
Alpirn v. Williams Steel & Supply Co., 3056
Alsteen v. Gehl, 1511, 2725
Alsum v. WISDOT, 8102, 8103, 8120, 8130, 8135
Alt v. American Family Mut. Ins. Co., 2760
Alvarado v. Sersch, 1005
Alwin v. State Farm Fire and Casualty Co., 1390
American Family Mut. Ins. Co. v. Dobrzynski, 215
American Family Mut. Ins. Co. v. Golke, 400
American Family Mut. Ins. Co. v. Osusky, 3112
American Family Mut. Ins. Co. v. Shannon, 152
American Fidelity & Casualty Co. v. Travelers Indem. Co., 1350
American Ins. Co. v. Rural Mut. Casualty Ins. Co, 3117
American Nat'l Red Cross v. Banks, 1025.5
American States S. Co. v. Milwaukee N. R. Co., 8100, 8120
American Steam Laundry Co. v. Riverside Printing Co., 3725
American Tobacco Co. v. United States, 2802, 2804
Andersen v. Andersen, 260
Anderson v. Alfa-Laval Agri, Inc., 3240

Anderson v. Anderson, 4080
Anderson v. Continental Ins. Co., 1707, 2725, 2761, 3044
Anderson v. Eggert, 260
Anderson v. Hebert, 2500, 2501, 2505A, 2507, 2511, 2513
Anderson v. Seelow, 100
Anderson v. Stricker, 1144, 1210
Anderson v. Tri-State Home Improvement Co., 2400, 2405, 2405.5
Anderson v. Yellow Cab Co., 1025
Andraski v. Gormley, 1125
Anello v. Savignac, 2000
Ansani v. Cascade Mountain, Inc., 1393
Ansul v. Employers Ins. Co. of Wausau, 3116
Antoniewicz v. Reszczynski, 1901, 8012, 8015, 8020, 8025
Antwaun A. v. Heritage Mut. Ins. Co., 1005, 1009
Apex Hosiery Co. v. Leader, 2800
Appleton Chinese Food v. Murken Ins., 1023.6
Appleton Elec. Co. v. Rogers, 3063
Appleton State Bank v. Lee, 3048, 3076
Arbet v. Gussarson, 1500
Arents v. ANR Pipeline Company, 8100, 8101, 8102, 8103
Arjay Investment Co. v. Kohlmetz, 3028
Arledge v. Scherer Freight Lines, 1026
Armstrong v. Milwaukee Ins. Co., 1390, 1391
Arndt Brothers Minkery v. Medford Fur Foods, 3200
Arnold v. National Bank of Waupaca, 2400
Arnold v. Shawano County Agricultural Soc'y, 1815
Arsand v. City of Franklin, 1600, 4000, 4030, 4060
Ashley v. American Auto Ins. Co., 1090, 1758, 1760
Atlee v. Bartholomew, 3020
Attoe v. State Farm Mut. Auto Ins. Co., 3057
Augsburger v. Homestead Mutual Ins. Co., 1390, 1391
Augustine v. Anti-Defamation League B'nai B'rith, 2780, 2800
Ault v. International Harvester Co., 358
Auric v. Continental Cas. Co., 1023.5A
Austin v. Ford Motor Co., 1277
Autumn Grove Joint Venture v. Rachlin, 3044
Ayala v. Farmers Mut. Auto Ins. Co., 1500

**B**

Bach v. Liberty Mut. Fire Ins. Co., 1610, 1760
Bachand v. Connecticut Gen. Life Ins. Co., 2520, 2722
Bachman v. Salzer, 2401
Backus v. Waukesha County, 8100, 8111
Bade v. Badger Mut. Ins. Co., 3057, 3074
Badger Cab Co. v. Soule, 2620
Badger Furniture Co. v. Industrial Comm'n, 4030, 4060
Bagnowski v. Preway, Inc., 1022.4
Baier v. Farmers Mut. Auto Ins. Co., 1157
Baierl v. Hinshaw, 1001
Bailey v. Bach, 100, 1285
Bailey v. Hagen, 1310
Bailey v. Hovde, 205, 3040
Baird v. Cornelius, 1046
Baker v. Herman Mut. Ins. Co., 1075

Baker v. Northwestern Nat'l Casualty, 2760, 2770, 3725
Balas v. St. Sebastian's Congregation, 1900.4
Baldewein Co. v. Tri-Clover, Inc., 2769
Ballard v. Lumbermen's Mut. Casualty Co., 410, 1760, 1815
Bank of Calif., v. Hoffmann, 4020
Bank of Sheboygan v. Fessler, 3040
Bank of Sun Prairie v. Esser, 2401, 3068
Bank of Sun Prairie v. Opstein, 3057
Bankert v. Threshermen's Mut. Ins. Co., 1013, 1014
Bannach v. State Farm Mut. Auto Ins. Co., 1350
Barker Barrel Co. v. Fisher, 1310
Barlow v. DeVilbiss Co., 3200
Barnard v. Cohen, 2520, 2722
Barnes v. Lozoff, 1022.4, 1812
Barney v. Mickelson, 1023
Barr v. Granahan, 3020
Barragar v. Industrial Comm'n, 1605, 4045
Barry v. Employers Mut. Casualty Co., 1022.6, 1900.4
Bartelt v. Smith, 4080
Barth v. Downey Co., 1022.2
Barthel v. Wisconsin Elec. Power Co., 1901
Basche v. Vanden Heuvel, 1725
Battice v. Michaelis, 1191
Bauer v. Wisconsin Energy Corp., 8065
Bay View Packing Co. v. Taff, 2511, 2500
Beacon Fed. Sav. & Loan Ass'n v. Panoramic Enter., Inc., 3020
Beck v. BidRX, LLC, 2793A
Becker v. Barnes, 315
Beer v. Strauf, 1105
Beers v. Bayliner Marine Corp., 400
Behringer v. State Farm Mut. Auto Ins. Co., 1735
Bekkedal v. City of Viroqua, 1
Bell v. County of Milwaukee, 1838
Bell v. Duesing, 1012, 1582
Belling v. Harn, 3110
Bellrichard v. Chicago & N. W. Ry., 1336, 1405, 1408, 1409
Below v. Norton, 2400, 2418A, 2418B, 2419
Bembister v. Aero Auto Parts, 1336
Benke v. Mukwonago Mut. Ins. Co., 2761
Benkoski v. Flood, 2418A, 2418B, 2720
Bensend v. Harper, 180
Bentley v. Foyas, 2401, 2402
Bentzler v. Braun, 1114, 1277, 1300
Bergevin v. Chippewa Falls, 1900.4
Bergman v. Hupy, 2507
Berner Cheese Corp, v. Krug, 1707.1, 2784
Bernhagen v. Marathon Fin. Corp., 4028
Betchkal v. Willis, 1005, 1009, 1350
Betehia v. Cape Cod Corp., 3200, 3204, 3248
Beul v. ASSE International, Inc., 2005.1
Beuttler v. Marquardt Management Services Inc., 2400, 2401, 2402, 2403
Bey v. Transport Indem. Co., 1065
Beyak v. North Central Food Systems, Inc., 8045
Bielski v. Schulze, 1006, 1383
Biersach v. Wolf River Paper & Fiber Co., 1580, 1585, 1590

Bigelow v. West Wis. Ry. Co., 8102, 8103, 8105
Binsfeld v. Curran, 1045
Bird v. Kleiner, 2400
Biskupic v. Cicero, 2500
Bishop-Babcock Co. v. Keeley, 3034
Black v. General Elec. Co., 260
Blahnik v. Dax, 100
Blair v. Staats, 1582
Blaisdell v. Allstate Ins. Co., 1766
Blankavag v. Badger Box & Lumber Co., 405
Bleyer v. Gross, 1758
Bloom v. Krueger, 4040
Bloomer v. Bloomer, 1796
BMW of North Am., Inc., v. Gore, 1707.1, 1707.2
Bockemuhl v. Jordan, 4020
Bode v. Buchman, 410
Boelter v. Ross Lumber Co., 1705
Bohn v. Leiber, 3079
Bohn Mfg. Co. v. Reif, 3034
Bohnsack v. Huson-Ziegler Co., Inc., 1605
Boles v. Milwaukee County, 1880
Bolick v. Gallagher, 1722A
Booth v. Frankenstein, 410, 1135, 1140
Borello v. United States Oil Co., 950
Borg v. Downing, 3220
Boschek v. Great Lakes Mut. Ins. Co., 3116
Bourassa v. Gateway Erectors, Inc., 1051, 1767, 1768, 1796
Bourestom v. Bourestom, 1112
Bovi v. Mellor, 1144
Bowen v. American Family Ins. Co., 1897
Bowen v. Industrial Comm'n, 410
Bowen v. Lumbermens Mut. Casualty Co., 1510, 1511, 1770, 1855
Bowers v. Treuthardt, 1065, 1325, 1610
Boynton Cab Co. v. ILHR Dep't, 1025
Bradford v. Milwaukee & Suburban Transp. Corp., 1025
Bradley v. Harper, 1025.5
Brain v. Mann, 1760
Brandenburg v. Briarwood Forestry Services, LLC, 1022.6
Bratt v. Peterson, 3074
Braun v. Wisconsin Elec. Power Co., 8102, 8103, 8105
Brekken v. Knopf, 2005.1
Brest v. Maenat Realty, 3040
Brethorst v. Allstate, 2761
Breunig v. American Family Ins. Co., 1021, 1021.2
Brew City Redevelopment Group v. The Ferchill Group, 2808, 2820
Brice v. Milwaukee Auto Ins. Co., 1010, 1582
Bridgeport Mortgage & Realty Corp. v. Whitlock, 3045
Bridgkort Racquet Club v. University Bank, 1796
Briese v. Maechtle, 1010
Briggs v. Miller, 3010, 3020
Bright v. City of Superior, 4015
Bristol v. Eckhardt, 2605
Britz v. American Ins. Co., 3117
Broadbent v. Hegge, 3057
Brockmeyer v. Dun & Bradstreet, 2750

Brodis v. Hayes, 1022.6, 4060
Brons v. Bischoff, 1900.4
Brooks v. Hayes, 1022.6, 4060
Brooten v. Hickok Rehab. Servs., LLC, 2020
Brown v. Dibbell, 1023.4
Brown v. Maxey, 1707, 1707.1, 3051
Brown v. Milwaukee Terminal Ry. Co., 1920, 1922, 1928
Brown v. Muskego Norway School Dist. Group Health Plan, 4035, 4045
Brown v. Oneida Knitting Mills, Inc., 3082
Brown v. Travelers Indem. Co., 1055, 1501
Brown v. Wisconsin Natural Gas Co., 1002, 1003
Browne v. State, 2115
Brownsell v. Klawitter, 2600, 2620
Brueggeman v. Continental Casualty Co., 1910
Brunette v. Slezewski, 1806
Brunke v. Popp, 1006
Bruner v. Heritage Co., 2200, 2800
Brunner v. Van Hoof, 1145
Brusa v. Mercy Health Sys., Inc., 1023
Bruss v. Milwaukee Sporting Goods Co., 3250
Bruttig v. Olsen, 1013, 1014
Bryan v. Noble, 3072
Buchberger v. Mosser, 3115
Buchholz v. Rosenberg, 3700
Buchholz v. Schmidt, 8060
Buckett v. Jante, 3028
Buckman v. E. H. Schaefer & Assoc., Inc., 3086
Buckner v. General Casualty Co., 3115
Bump v. Dahl, 2797A
Bump v. Voights, 1885
Bunbury v. Krauss, 3074
Bunkfeldt v. Country Mut. Ins. Co., 1140
Burant v. Ortloff, 1045
Burch v. American Family Mut. Ins. Co., 1021
Burg v. Cincinnati Cas. Ins. Co., 1120
Burke v. Milwaukee & Suburban Transp. Co., 1005, 1009
Burke v. Tesmer, 1165
Burkhalter v. Hartford Accident & Indem. Ins. Co., 1155, 1157
Burkhardt v. Smith, 8060
Burkman v. New Lisbon, 3079
Burmeister Woodwork Co. v. Friedel, 2722
Burnside v. Evangelical Deaconess Hosp., 1024
Bursack v. Davis, 2100
Burton v. Sherwin-Williams Co., 3295
Burzlaff v. Thoroughbred Motorsports, Inc., 3303
Bushweiler v. Polk County Bank, 1025.5, 1025.7
Buss v. Clements, 3117, 3118
Butler v. Industrial Comm'n, 4045
Butts v. Ward, 1320
Butzow v. Wausau Memorial Hosp., 1710, 1722A, 1723
Buxbaum v. G. H. P. Cigar Co., 3725
Buza v. Wojtalewicz, 8060
Bychinski v. Sentry Ins., 1796, 1797
Byerly v. Thorpe, 1052
Byrnes v. Metz, 1731

**C**

Calaway v. Brown County, 8101, 8120
Calero v. Del Chemical, 2500, 2501, 2511, 2513, 2520, 2552
Calhoun v. Lasinski, 1000
Calhoun v. Western Casualty & Sur. Co., 3117
California Wine Ass'n v. Wisconsin Liquor Co. of Oshkosh, 3024, 3049, 3083, 3084
Callan v. Peters Constr. Co., 1056, 1901, 1904
Callies v. Reliance Laundry Co., 1835
Calumet Cheese Co. v. Chas. Pfizer & Co., 3200
Cameron v. Union Auto Ins. Co., 1895
Camp v. Anderson, 1511
Campbell v. Spaeth, 1032
Campenni v. Walrath, 1390
Camper Corral v. Alderman, 1023.6
Canifax v. Hercules Powder Co., 3200
Converters Equip. Corp. v. Condes Corp., 2500
Capello v. Janeczko, 410, 1052, 1054
Capital Sand & Gravel Co. v. Waffen Schmidt, 305
Capital Investments, Inc. v. Whitehall Packing Co. Inc., 3049, 3051
Carazalla v. State, 8110, 8125
Carl v. Spickler Ent. Ltd, 3302
Carlson v. Drews of Hales Corners, Inc., 1760, 1902
Carlson & Erickson v. Lampert Yards, 205
Carr v. Amusement, Inc., 410, 1900.4
Carson v. Beloit, 1023, 1385
Carson v. Pape, 2115
Cary v. Klabunde, 1315
Casper v. American International South Ins. Co., 1005
Cass v. Haskins, 3016
Cedarburg Light & Water Comm'n v. Allis-Chalmers, 3240
Central Corp. v. Research Products Corp., 2769
Century Fence Company v. American Sewer Services, Inc., 2722
Champion Companies v. Stafford Development, 3700
Chandelle Enters., LLC v. XLNT Dairy Farm, Inc., 8060
Chapleau v. Manhattan Oil Co., 1804, 1805
Chapman v. Zakzaska, 2400
Chapnitsky v. McClone, 1506
Charolais Breeding Ranches, Ltd. v. FPC Securities Corp., 2780
Charolais v. FPC Securities, 2780
Chart v. General Motors Corp., 325, 358
Chernetski v. American Family Mutual Insurance Co., 1153, 1555, 1157, 1558, 1159, 1160, 1165, 1170, 1175, 1180, 1185, 1190, 1190.5, 1191, 1193.5, 1195, 1205, 1210, 1220, 1225, 1230, 1235, 1240, 1245, 1250, 1255, 1260, 1270
Chicago & N.W. R. Co. v. James, 4015
Chicago & N.W. Ry. v. Railroad Comm'n of Wisconsin, 1412
Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Chicago & N.W. Transp. Co., 3070
Chille v. Howell, 1153
Chmill v. Friendly Ford-Mercury, 3301, 3302
Christ v. Exxon Mobil Corp., 950
Christians v. Homestake Enter., Ltd., 1011, 8025, 8027
Christianson v. Downs, 1023
Christus Lutheran Church of Appleton v. Wisconsin Dept. of Transportation, 8100
Chrysler Corp. v. Lakeshore Commercial Fin. Corp., 2780

Chudnow Constr. Corp. v. Commercial Discount Corp., 3020
Cierzan v. Kriegal, 3110
Cincoski v. Rogers, 1870
Cirillo v. Milwaukee, 1381
City of Franklin v. Badger Ford Truck Sales, 3290
City of Hartford v. Godfrey, 1220, 1225
City of Onalaska v. LIRC, 2750
City of Milwaukee v. Allied Smelt Corp., 410
City of Milwaukee v. NL Industries, Inc., 1920, 2800
City of Milwaukee v. Roadster LLC, 8104
City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority, 8100
City of Stoughton v. Thomasson Lumber Co., 400
Clark v. Corby, 1901
Clark v. Leisure Vehicles, Inc., 1500
Clarmar Realty Company, Inc. v. Redevelopment Authority of the City of Milwaukee, 8100, 8101, 8145
Claypool v. Levin, 950
Cluskey v. Thranow, 2401
Coakley v. Prentiss-Wabers Stove Co., 3254
Cobb v. Simon, 2100
Cochran v. Allyn, 1600
Coenen v. Van Handel, 215, 1280
Cogger v. Trudell, 1861
Cohan v. Associated Fur Farms, Inc., 3200
Cohen v. Lachenmaier, 3020
Cole v. Schaub, 1756
Coleman v. Garrison, 1742
Colla v. Mandella, 1145
Collier v. State, 215
Collins v. Eli Lilly Co., 1707, 3295
Collova v. Mutual Serv. Casualty Ins. Co., 1730
Colton v. Foulkes, 1022.4
Commerce Ins. Co. v. Merrill Gas Co., 1002, 1145
Commonwealth Tel. Co. v. Paley, 4005
Community Nat Bank v. Medical Ben. Adm'rs, LLC, 2785
Concrete Equip. Co. v. Smith Contract Co., Inc., 3207
Coney v. Milwaukee & Suburban Transp. Corp., 410
Congreve v. Smith, 1920
Connar v. West Shore Equip. of Milwaukee, Inc., 1900.2
Conrad Milwaukee Corp. v. Wasilewski, 3012, 3042
Conrardy v. Sheboygan County, 315
Consolidated Papers, Inc. v. ILHR Dep't, 305
Continental Cas. Co. v. Wisconsin Patients Comp. Fund, 3028
Continental Ore Co. v. Union Carbide & Carbon Corp., 2806
Convenience Store Leasing and Management v. Annapurna Marketing, 3070
Cook v. Cook, 2500
Cook v. McCabe, 3062
Cook v. Wisconsin Tel. Co., 1096
Cooper v. Chicago & N.W. Ry., 230
Copperweld Corp. v. Independence Tube Corp., 2808
Corbitt v. Stonemetz, 3054
Cords v. Anderson, 1007.5, 1796, 1797
Corning v. Dec Aviation Corp., 325
Correa v. Woodman's Food Market, 1900.4
Coryell v. Conn, 1767, 1768
Costa v. Neimon, 2406

Costas v. City of Fond du Lac, 1920, 1928, 1930, 1932
Couillard v. Van Ess, 1911, 8020
Cramer v. Theda Clark Memorial Hosp., 1385
Crane v. Sears Roebuck & Co., 3200, 3262
Cranston v. Bluhm, 2800
Crest Chevrolet-Oldsmobile Cadillac, Inc. v. Willemsen, 1383, 1731, 8045, 1920
Criswell v. Seaman Body Corp., 1051, 1911
Cronin v. Cronin, 1870
Cross v. Leuenberger, 1910
Crotteau v. Karlgaard, 1708, 2006
Crowbridge v. Village of Egg Harbor, 1049, 8035
Crowder v. Milwaukee & Suburban Transp. Corp., 155
Crown v. General Motors Corp., 3200
Crown Life Ins. Co. v. LaBonte, 3044
Cruis Along Boats, Inc., v. Standard Steel Prods. Mfg. Co., 1804
Crye v. Mueller, 1090, 1153, 1155, 1157, 1158, 1160, 1165, 1190, 1191, 1192, 1195, 1225, 1354
Cudd v. Crownhart, 2780
Culton v. Van Beek, 1080
Culver v. Webb, 1285
Cunnien v. Superior Iron Works Co., 1055
Curtis Land & Loan Co. v. Interior Land Co., 3014
Cutler Cranberry Co. v. Oakdale Elec. Coop., 1806
Czapinski v. St. Francis Hosp., 1897
Czarnetzky v. Booth, 1080

**D**

D.L. v. Huebner, 358, 410, 1019
D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson, 2790, 2791
Dabareiner v. Weisflog, 1797
Dahl v. Ellis, 1260
Dahlberg v. Jones, 1385, 1385.5
Dahmen v. American Family Mut. Ins. Co., 52B
Dakter v. Cavallino, 1005
Dalton v. Meister, 1707, 2500, 2516, 2520, 2800
Darst v. Fort Dodge D.M. & S.R.R., 3074
Dauplaise v. Yellow Taxicab Co., 1025
Davis v. Allstate Ins. Co., 1075, 2761
Davis v. Feinstein, 1050
Davis v. Nuzum, 2400
Dawson v. Jost, 410
DeBaker v. Austin, 1354
DeBruine v. Voskuil, 1023
DeChant v. Monarch Life Ins. Co., 410, 2761
Degenhardt v. Heller, 2004
Dehnart v. Waukesha Brewing Co., 3710, 3735
De Keuster v. Green Bay & W. R.R., 215
Dekeyser v. Milwaukee Automobile Ins. Co., 1030
Delaney v. Supreme Inv. Co., 8030
Delap v. Institute of Am., Inc., 3048
Delmore v. American Family Mut. Ins. Co., 1046, 1047, 1047.1
Delong v. Sagstetter, 1350
Delvaux v. Vanden Langenberg, 100, 1580, 8045
Denil v. Coppersmith, 1391
Denil v. Integrity Mut. Ins., 1815

Denny v. Mertz, 2500, 2501, 2505, 2505A, 2509, 2516, 2520
Denzer v. Rouse, 1023.5A
DeRuyter v. Wisconsin Elec. Power Co., 1605, 4035
DeSombre v. Bickel, 3052, 3700
Desotelle v. Continental Casualty Co., 4035
DeThorne v. Bakken, 1023.5A, 1023.5B
Devine v. McGowan, 1403
DeWitt, Porter v. Kovalic, 2973A
Dick v. Heisler, 190
Dickman v. Schaeffer, 1766
Dickson v. Pritchard, 3725
Diemel v. Weirich, 1767, 1768
Diener v. Heritage Mut. Ins. Co., 1114
Dieter v. Chrysler Corp., 3301
Dietz v. Hardware Dealers Mut. Fire Ins. Co., 3115, 3116
Digicorp, Inc. v. Ameritech Corp., 2400
DiMiceli v. Klieger, 2500, 2505
Dippel v. Sciano, 1924, 1930, 3200, 3260, 3260.1, 3268
Docter v. Furch, 3044
Dodge v. Dobson, 410
Doern v. Crawford, 3110
Dombeck v. Chicago, M. St. P. & P. Ry., 1405, 1407, 1408, 1409
Dombrowski v. Albrent Freight & Storage Corp., 1500
Dombrowski v. Tomasino, 1
Donlea v. Carpenter, 1350, 1795
Donovan v. Barkhausen Oil Co., 2200, 2200.1, 2200.2
Doolittle v. Western States Mut. Ins. Co., 1750.2
Douglas v. Dewey, 1900.4
Doyle v. Engelke, 1383
Doyle v. Teasdale, 3072
Drake v. Farmers Mut. Auto Ins. Co., 1157
Draper v. Baker, 1707
Draper v. United States, 2115
Dreazy v. North Shore Publishing Co., 3022
Droege v. Daymaker Cranberries, Inc., 8060
Duffey Law Office v. Tank Transport, 1023.5A, 1023.5B, 1023.8
Dumas v. Koebel, 2550, 2725, 2780
Dumer v. St. Michael's Hosp., 1385
Duncan v. Steeper, 2900
Dunn v. Pertzsch Const., Inc., 3074
Durand West, Inc. v. Milwaukee W. Bank, 3020
Dutcher v. Phoenix Ins. Co., 1047.1
Dwyer v. Jackson Co., 8051
Dykstra v. Arthur G. McKee & Co., 1900.4, 1904

**E**

E. L. Chester Co. v. Wisconsin Power & Light Co., 1003
Eastern States Retail Lumber Dealers' Ass'n v. United States, 2800
Eckel v. Richter, 4035
Eckstein v. Northwestern Mut. Life Ins. Co., 3074
Edeler v. O'Brien, 1105A
Eden v. LaCrosse Lutheran Hosp., 1385
Edlebeck v. Hooten, 1610
Edward E. Gillen Co. v. John H. Parker Co., 3060

Egan v. Travelers Ins. Co., 1715
Ehlers v. Colonial Penn. Ins. Co., 3117
Eide v. Skerbeck, 8040
Einhorn v. Culea, 1005
Eleason v. Western Casualty & Sur. Co., 1021.2
Ellsworth v. Schelbrock, 202, 1723, 1756
Elmer v. Chicago & N.W. Ry., 2600
Elmergreen v. Kern, 3020
Emerson v. Riverview Rink & Ballroom, 8040, 8045
Employers Ins. Co. v. Pelczynski, 3112
Employers Mut. Ins. Co. v. Industrial Comm'n, 4030
Enea v. Pfister, 1600
Engel v. Dunn County, 1804, 3700
Engsberg v. Hein, 1144
Engstrum v. Sentinel Co., 1095
Enz v. Duke Energy Renewable Services, Inc., 1920
Erdmann v. SF Broad. of Green Bay, Inc., 2500
Erickson v. Prudential Ins. Co., 1014, 1014.5
Ernst v. Greenwald, 350
Ertl v. Ertl, 2900
Esch v. Chicago M. & St. P. R. Co., 8100
Estate of Ansell, 3024
Estate of Briese, 3020
Estate of Cavanaugh v. Andrade, 1031
Estate of Chayka, 3044
Estate of Daniels, 3110
Estate of Gooding, 8100
Estate of Hatten, 3020
Estate of Holt v. State Farm, 1861
Estate of Lade, 1812
Estate of Lube, 3012
Estate of Miller v. Storey, 2420
Estate of Nale, 1812
Estate of Neumann, 400, 405
Estate of Schoenkerman, 3020
Estate of Sheppard ex rel. McMorrow v. Specht, 2784
Estate of St. Germain, 3024
Estate of Starer, 1610
Estate of Steffes, 1812
Estate of Stromstead, 1825
Estate of Voss, 1812
Estate of Zellmer, 3061
Estate of Zhu v. Hodgson, 1153, 1555, 1157, 1558, 1159, 1160, 1165, 1170, 1175, 1180, 1185, 1190, 1190.5, 1191, 1193.5, 1195, 1205, 1210, 1220, 1225, 1230, 1235, 1240, 1245, 1250, 1255, 1260, 1270
Everlite Mfg. Co. v. Grand Valley Machine & Tool Co., 3030
Ewen v. Chicago & N.W. Ry., 1012, 1861
Ewers v. Eisenzopf, 3202, 3220, 3225, 3230
Ewing v. Goode, 1023

**F**

Fabick, Inc. v. JFTCO, Inc., 2790
Fahrenberg v. Tengel, 415, 1707, 2520
Fairbanks v. Witter, 1708
Farley v. Salow, 3049

Farm Credit Bank of St. Paul v. F&A Dairy, 2200
Farmers Mut. Auto Ins. Co. v. Gast, 1500
Farrell v. John Deere Co., 1723
Faultersack v. Clintonville Sales Corp., 4020
Fawcett v. Gallery, 1605, 4045
Featherly v. Continental Ins. Co., 410, 1760, 1762
Federal Pants, Inc. v. Stocking, 2780
Fee v. Heritage Mut. Ins. Co., 1825
Fehrman v. Smirl, 415, 1024, 1145
Fenelon v. Butts, 1708
Ferdon v. Wisc. Patients Compensation Fund, 1023, 1870, 1895, 1897
Ferraro v. Koelsch, 2750
Ferris v. Location 3 Corp., 2400
Field v. Vinograd, 1230, 1582
Fieldhouse Landscape v. Gentile, 1812
Fields v. Creek, 1501
Fifer v. Dix, 1390
Filipiak v. Plombon, 1910
Finch v. Southside Lincoln-Mercury, Inc., 2780
Finke v. Hess, 1023
Finken v. Milwaukee County, 1025
Fire Ins. Exchange v. Cincinnati Ins. Co., 1390
Firemen's Fund Ins. Co. v. Schreiber, 1025.7, 4035
First Credit Corp. v. Behrend, 2401
First Nat'l Bank v. Hackett, 2400
First Nat'l Bank of Oshkosh v. Scieszinski, 2401, 2402
First Trust Co. v. Holden, 3020
First Wisconsin Land Corp. v. Bechtel Corp., 1806
First Wisconsin Nat'l Bank v. Oby, 3020
First Wisconsin Nat'l Bank of Milwaukee v. Wichman, 2790
First Wisconsin Trust Co. v. L. Wiemann Co., 3095
Fischer v. Cleveland Punch and Shear Work Co., 1760
Fischer v. Fischer, 60, 61, 1825
Fischer v. Ganju, 1023
Fisher v. Lutz, 4015
Fisher v. Simon, 1022.4
Fitzgerald v. Badger State Mut. Casualty Co., 1900.4
Fitzgerald v. Meissner & Hicks, Inc., 1815
Fiumefreddo v. Mclean, 1024
Fleming v. Thresherman's Mut. Ins. Co., 1383, 1580, 8045
Fletcher v. Ingram, 1025.5
Flies v. Fox Bros. Buick Co., 3200, 3240
Flynn v. Audra's Corp., 8045
Foellmi v. Smith, 1052, 1140, 3074
Foerster, Inc. v. Atlas Metal Parts Co., 2769
Foley v. City of West Allis, 1277, 1278, 1722A
Fond du Lac County v. Helen E.F., 7050, 7050A, 7060, 7061
Fondell v. Lucky Stores, Inc., 1001, 1900.4, 1904
Foote v. Douglas County, 3116
Ford, Bacon & Davis, 1580
Ford Motor Co. v. Lyons, 2808
Forrer v. Sears Roebuck & Co., 3084
Fortier v. Flambeau Plastics Co., 1924, 1930
Foseid v. State Bank of Cross Plains, 2780, 3044
Foss v. Madison Twentieth Century Theaters, 2401

Foster v. Fidelity & Casualty Co. of N. Y., 3117
Fouse v. Persons, 1710, 1756
Fox v. Boldt, 3202
Fox v. Iowa Health System, 2550
Francois v. Mokrohisky, 1023
Frank v. Metropolitan Life Ins. Co., 3018
Frankland v. Peterson, 1144, 1210
Franz v. Brennan, 1707
Fredrickson v. Kabat, 2005.2
Freeman v. Dells Paper & Pulp Co., 4005
Freeman v. Morris, 3022
Freude v. Berzowski, 1023.5A, 1023.5B, 1023.5C
Freuen v. Brenner, 1750.2
Frey v. Dick, 1035
Frey Construction & Home Improvement, LLC v. Hasheider Roofing & Siding, Ltd., 2780
Fricano v. Bank of America, 2418A, 2418B
Frinzi v. Hanson, 2500
Frion v. Coren, 1910
Frion v. Craig, 115
Froh v. Milwaukee Medical Clinic, S.C., 1023, 1385
Fuchs v. Kupper, 1707
Fuchsgruber v. Custom Accessories, 3290
Fultz v. Lange, 1605, 4045
Fun-N-Fish, Inc. v. Parker, 3058

**G**

Gabriel v. Gabriel, 3074
Gage v. Seal, 1105A
Gall v. Gall, 3054
Gallagher v. Chicago & N.W. Ry., 1405
Galst v. American Ladder Co., 3242
Gamble-Skogmos v. Chicago & N.W. Transp. Co., 1410
Garceau v. Bunnel, 1105A, 1730
Garcia v. Samson's, Inc., 4015
Garfoot v. Fireman's Fund Ins. Co., 400
Garlick v. Morley, 4005, 4015
Garner v. Charles A. Krause Milling Co., 3220
Garrett v. City of New Berlin, 1510 1511
Garrison v. State of Louisiana, 2511
Gaspord v. Hecht, 1090
Gauerke v. Rozga, 2400, 2402
Gauthier v. Carbonneau, 1580, 1585, 1590
Gay v. Milwaukee Elec. Ry. & Light Co., 1145
Geis v. Hirth, 1030, 1105A
Geise v. Montgomery Ward, Inc., 180, 191, 1600, 1837
Geldnich v. Burg, 4035, 4040
Gelhaar v. State, 420
Gename v. Benson, 1812
Gendanke v. Wisconsin Evaporated Milk Co., 3076
General Elec. Co. v. N.K. Ovalle, Inc., 3074
Georgeson v. Nielsen, 4000, 4027
Georgia Casualty Co. v. American Milling Co., 1145
Gerbing v. McDonald, 1756
Gerlat v. Christianson, 1013

Gerovac v. Hribar Trucking, Inc., 3024
Gerrard Realty Corp. v. American States Ins. Co., 3117
Gertz v. Robert Welch, Inc., 2500, 2505, 2509, 2516, 2520
Gervais v. Kostin, 1600
Gessler v. Erwin Co., 3060, 3078
Gewanski v. Ellsworth, 4035
Gibson v. American Cyanamid, 3295
Gibson v. Overnite Transportation Company, 2507
Gibson v. Streeter, 1090
Gilberg v. Tisdale, 1056
Gill v. Benjamin, 3066
Gillund v. Meridian Mut. Ins. Co., 2550, 2551
Gilman v. Brown, 1806
Gladfeldter v. Doemel, 1707
Glamann v. St. Paul Fire & Marine Ins., 1023.5A
Gleason v. Gillihan, 1055, 1060, 1191
Godfrey Co. v. Crawford, 3058
Godoy v. E.I. du Pont De Nemours et al, 3260.1
Goebel v. General Bldg. Serv. Co., 1145
Goehmann v. National Biscuit Co., 1075
Goetz v. State Farm Mut. Auto Ins. Co., 3012
Goldberg v. Berkowitz, 1010
Goldenberg v. Daane, 1140
Goller v. White, 2900
Gonzalez v. City of Franklin, 1010, 1582, 1795
Gordon v. Milwaukee County, 1023
Gosse v. Navistar Int'l Transp. Corp., 3300
Gouger v. Hardtke, 2001
Gould v. American Family Mut. Ins. Co., 1021
Graass v. Westerlin & Campbell Co., 3244
Graf v. Neith Co-op. Dairy Products Association, 3028
Grana v. Summerford, 1141, 1350, 1354, 1355, 1580, 1585, 1590
Grand Trunk W. R.R. v. Lahiff, 3072
Granger v. Chicago M. & St. P. Ry., 3072
Gray v. Wisconsin Tel. Co., 1395
Greco v. Bueciconi Eng'r Co., 3200
Green Bay Broadcasting v. Redevelopment Authority, 8100, 8101
Green Bay-Wausau Lines, Inc. v. Mangel, 1355
Green Spring Farms v. Spring Green Farms, 1
Green v. Kaemph, 3062
Green v. Rosenow, 1756
Green v. Smith & Nephew AHP, Inc., 3200, 3260, 3260.1
Greene v. Farmers Mut. Auto Ins. Co., 1285
Greenlee v. Rainbow Auction/Realty Co., 3028
Greenville Coop. Gas Co. v. Lodesky, 1350
Greiten v. LaDow, 3240, 3260
Gremban v. Burke, 1010
Griebler v. Doughboy Recreational, Inc., 8020
Grimes v. Snell, 1840
Gritzner v. Michael R., 1005, 1013, 1397
Grognet v. Fox Valley Trucking Serv., 425, 2784
Groshek v. Trewin, 2784
Grossenbach v. Devonshire Realty, 8012
Grosskopf Oil, Inc. v. Winter, 2797A
Grosso v. Wittemann, 1380, 1381

Grube v. Daun, 1005, 1009, 2403
Gruen Indus., Inc. v. Biller, 3074
Gruenberg v. Aetna Ins. Co., 2761
Grunwald v. Halron, 1001
Grutzner v. Kruse, 1070
Grygiel v. Monches Fish & Game Club, Inc., 1810
Guardianship and Protective Placement of Shaw, 7060
Guardianship of Meyer, 1021
Guderyon v. Wisconsin Tel. Co., 1115, 1310
Guentner v. Gnagi, 1812
Guerra v. Manchester Terminal Corp., 2150
Guillaume v. Wisconsin-Minnesota Light & Power Co., 230
Gumz v. Northern States Power Company, 950
Gunderson v. Struebing, 2100
Gundlach v. Chicago & N. W. Ry., 1338
Gunning v. King, 1265
Gustavson v. O'Brien, 1023.5A
Gutzman v. Clancy, 2006
Guzman v. St. Francis Hospital, Inc., 1707.1, 1897
Gyldenvand v. Schroeder, 2400, 2405, 2405.5, 2406

**H**

H.A. Friend & Co. v. Professional Stationery, Inc., 2200
Haag v. General Accident Fire & Life Assurance Corp., 1035
Habrich v. Industrial Comm'n, 4060
Habrouck v. Armour & Co., 1500, 3242
Haentz v. Toehr, 2402
Hafemann v. Milwaukee Auto Ins. Co., 1055
Hajec v. Novitzke, 2600
Hale v. Stoughton Hosp. Ass'n, Inc., 2780
Hales v. City of Wauwatosa, 1049
Hamed v. Milwaukee County, 1025
Hamilton v. Reinemann, 1140
Hamus v. Weber, 1048
Hanes v. Hermsen, 1045, 1096
Hannebaum v. DiRenzo & Bomier, 1900.4
Hannemann v. Boyson, 1023.8
Hannon v. Kelly, 3042
Hansberry v. Dunn, 1012
Hansche v. A. J. Conroy Co., Inc., 4005
Hansen v. Crown Controls Corp., 1723
Hansen v. Industrial Comm'n, 4045
Hansen v. New Holland North America, Inc., 1723
Hansen v. Texas Roadhouse, Inc., 1383
Hanson v. Binder, 1582
Hanson v. Matas, 1050
Hanson v. Valdivia, 1861
Hanz Trucking, Inc. v. Harris Bros. Co., 3057
Hardware Dealers Mut. Fire Ins. Co. v. Home Mut. Ins. Co., 1191
Hardware Mut. Casualty Co. v. Harry Crow & Son, Inc., 1105A, 1735
Hardy v. Hoefferle, 1277
Hareng v. Blanke, 50, 195
Hargrove v. Peterson, 1730, 1750.2, 1767, 1795
Harrigan v. Gilchrist, 1

Harris v. Kelley, 1880
Harris v. Richland Motors, Inc., 4030, 4060
Hartman v. Buerger, 2500
Hartzheim v. Smith, 1045, 1080
Harvey v. Wheeler Transfer and Storage Co., 1803
Harvot v. Solo Cup, 1
Harweger v. Wilcox, 2400
Hastings Realty Corp. v. Texas Co., 8111
Hatch v. Smail, 1501
Hauer v. Union State Bank of Wautoma, 3044
Hausman v. St. Croix Care Center, 2750
Havens v. Havens, 1140
Hawarden v. The Youghiogheny & Lehigh Coal Co., 2820
Hayton v. Appleton Machine Co., 4080
Heath v. Madsen, 1010
Heck & Paetow Claim Service, Inc. v. Heck, 4080
Heckel v. Standard Gateway Theater, 1900.4
Hegarty v. Beauchaine, 1023
Heikkila v. Standard Oil Co., 1080
Heilgeist v. Chasser, 2600
Heims v. Hanke, 1722A, 4025, 4030
Heldt v. Nicholson Mfg. Co., 1900.2
Helleckson v. Loiselle, 1750.2
Hellenbrand v. Bowar, 3200, 3230
Hellenbrand v. Hilliard, 1804
Helmbrecht v. St. Paul Ins. Co., 1023.5A
Henricksen v. Mc Carroll, 1025.6
Henrikson v. Strapon, 1707.1
Henry v. United States, 2115
Henschel v. Rural Mut. Casualty Ins. Co., 1065
Henthorn v. M.G.C. Corp., 1125, 1145
Herbst v. Hansen, 3110
Herbst v. Wuennenberg, 2100
Heritage Farms, Inc. v. Markel Ins. Co., 1757
Herman v. Milwaukee Children's Hosp., 1796, 1797, 1837, 1845, 1880
Hernandez v. United States, 2802
Herro v. Department of Natural Resources, 8100, 8101
Herro v. Northwestern Malleable Iron Co., 1861
Herro v. Steidl, 1870
Herzberg v. Ford Motor Co., 3260
Hess Bros., Inc. v. Great N. Pail Co., 3063, 3064, 3065
Hess v. Holt Lumber Co., 3014
Hett v. Ploetz, 2500
Heuer v. Wiese, 2200
Heuser v. Community Insurance Corp., 1380
Hibner v. Lindauer, 1112
Hickman v. Wellauer, 1804
Hicks v. Nunnery, 1023.5A
Hietpas v. State, 8115
Hildebrand v. Carroll, 1025.7
Hilker v. Western Automobile Ins. Co., 2760
Hillman v. Columbia County, 2550
Hillstead v. Smith, 1114
Hilmes v. Stroebel, 2005.2
Hinrichs v. Dow Chemical Co., 2400

Hintz v. Mielke, 1255
Hipke v. Industrial Comm'n, 1900.4
Hocking v. City of Dodgeville, 1900.4
Hodgson v. Wisconsin Gas & Light Co., 1051
Hoeft v. Friedel, 1075, 1600
Hoekstra v. Guardian Pipeline, 8100, 8101, 8102, 8120, 8135
Hoff v. Wedin, 1010
Hofflander v. St. Catherine's Hospital, 1007, 1021, 1385.5, 1902
Hoffman v. Danielson, 3076
Hoffman v. Dixon, 3220
Hoffman v. Halden, 2800
Hoffman v. North Milwaukee, 1049
Hoffman v. Pfingsten, 3022
Hoffman v. Red Owl Stores, Inc., 3020, 3074
Holbach v. Classified Ins. Corp., 1277
Holman v. Kircher, 2874
Holschbach v. Washington Park Manor, 8030
Holton v. Burton, 1023
Holytz v. Milwaukee, 2900, 8035
Holzem v. Mueller, 1045
Home Fire & Marine Ins. Co. v. Farmers Mut. Auto Ins. Co., 1155, 1157
Home Protective Services, Inc. v. ADT Security Services, Inc., 2769
Home Sav. Bank v. Gertenbach, 3020, 4015
Hommel v. Badger State Inv. Co., 1902
Hornback v. Archdiocese of Milwaukee, 1005
Horst v. Deere & Company, 3260, 3260.1
Hortman v. Becker Constr. Co., Inc., 1900.4, 1901, 1904
Household Fin. Corp. v. Christian, 2401, 2402
Hoven v. Kelble, 1023, 1024
Howard v. State Farm Mut. Auto Liab. Co., 1730
Howe v. Corry, 1076
Hrubes v. Faber, 1023
Huchting v. Engel, 1010
Huck v. Chicago, St. Paul M. & O. Ry., 1026.5, 3051
Huebner v. State, 2115
Hunt v. Clarendon Nat'l Ins. Service, Inc., 1025
Hunter v. Sirianni Candy Co., 1210
Husting v. Dietzen, 180
Hutching v. Engel, 2000
Hyer v. Janesville, 230
Hyland v. GCA Tractor & Equip. Co., 3200, 3205
Hynek v. Kewaunee, G.B. & W. Ry., 1405

**I**

Ianni v. Grain Dealers Mut. Ins. Co., 1750.1, 1760, 1762
Ide v. Wamser, 1090, 1506
Idzik v. Reddick, 4005
Illinois Cent. R.R. Co. v. Blaha, 3117
Illinois Steel Co. v. Bilot, 8060
Imark Industries, Inc. v. Arthur Young & Co., 1383, 1580, 8045
Imnus v. Wisconsin Pub. Ser. Corp., 1900.4
Ingram v. Rankin, 2201
In Matter of Mental Condition of C.J., 7050, 7050A
In Interest of C.E.W., 180, 191

In Re Commitment of Dennis H., 7050
In Re Estate of Schaefer, 4080
In re Kelly M., 7050, 7050A
In Re Paternity of M.J.B., 5001
In Re Paternity of Taylor, R.T., 5001
In Re Paternity of J.M.K., 5001
In re Estate of Sheppard, 3070
Insurance Co. of North Am. v. Cease Electric Inc., 400, 2400
Insurance Co. of North Am. v. Krieck Furriers, Inc., 1025.7
International Machinist Association v. United States Can Co., 2792A, 2792B
Irby v. State, 420
Irish v. Dean, 3049
Isgro v. Plankington Packing Co., 1265
Ivancevic v. Reagan, 3072
Ivekich v. Morales, 3094

**J**

J. H. Clark Co. v. Rice, 2401, 2402
J. F. McNamara Corp. v. Industrial Comm'n, 4035
J.W. Cartage Co. v. Laufenberg, 1354, 1355
Jackson v. Robert L. Reisinger & Co., 180
Jacob v. West Bend Mut. Ins. Co., 1022.6, 3700, 4060
Jacobs v. Major, 1810
Jacobson v. Greyhound Corp., 1114
Jacobson v. Milwaukee, 305
Jacque v. Steenberg Homes, Inc., 1707.1, 1810
Jadofski v. Town Kemper Ins. Co., 2762
Jaeger v. Stratton, 1023
Jagmin v. Simonds Abrasive Co., 400, 1145
Jama v. Gonzalez, 1023.5A
Jandre v. Wisconsin Injured Patients and Families Compensation Fund, 1023.1
Jandrt v. Milwaukee Auto Ins. Co., 205, 3072
Janke Const. Co., Inc. v. Balcan Materials Co., 3074
Jankee v. Clark County, 1007, 1021, 1385.5
Jeffers v. Nysse, 1707
Jenkinson v. New York Casualty Co., 3115
Jennings v. Lyons, 3062, 3066, 3067
Jensen v. Jensen, 1032
Jessup v. LaPin, 3090
Jewell v. Schmidt, 1825
John Doe 1 v. Archdiocese of Milwaukee, 2401, 1920
Johnson v. Agoncillo, 1023
Johnson v. Calado, 2605
Johnson v. Cintas Corp. No. 2., 115, 1007, 1014
Johnson v. Fireman's Fund Indem. Co., 1155
Johnson v. Heintz, 50, 1710, 1722A, 1723
Johnson v. Holmen Canning Co., 4035
Johnson v. McDermott, 1113
Johnson v. Misericordia Community Hosp., 1384, 1760
Johnson v. Pearson Agri-Systems, Inc., 1796
Johnson v. Prideaux, 1140
Johnson v. Ray, 205, 1506, 1700, 2006.3, 2155
Johnson v. St. Paul & W. Coal Co., 1835, 1845
Jolin v. Oster, 1

Jonas v. State, 8104, 8107
Jones v. Alfred H. Mayer Co., 2150
Jones v. Fisher, 1707
Jones v. Jenkins, 3051
Jones v. Pittsburgh Plate Glass Co., 3222
Jones v. State, 63
Joplin v. John Hancock Mut. Life Ins. Co., 3057
Jorgenson v. Northern State Power Co., 1395
Jorgenson v. Water Works, 2874
Jungbluth v. Hometown, Inc., 2771
Justmann v. Portage County, 8102, 8103, 8120

**K**

K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2418A, 2418B
Kablitz v. Hoeft, 1715, 1720
Kaesler, Adm'r v. Milwaukee Elec. Ry. & Light Co., 1880
Kaiser v. Board of Police & Fire Commissioners of Wauwatosa, 2750
Kalkopf v. Donald Sales & Mfg. Co., 1019, 3260
Kamp v. Curtis, 4035
Kamrowski v. State of Wis., 8120
Kansas City Star Co. v. ILHR Dep't, 2722, 3045,
Karls v. Drake, 2401, 2402
Karsteadt v. Phillip Gross H. & S. Co., 3200, 3246
Kathan v. Comstock, 3220
Kaufman v. Postle, 1143
Kaufman v. State Street Ltd. Partnership, 1900.4
Keegan v. Chicago, M., St. P. & P. R.R., 1336, 1403, 1405
Keeley v. G.N.R. Co., 2507
Kehl v. Economy Fire & Casualty Co., 1707.1
Kehm Corp. v. United States, 3060
Keith v. Worcester & D. V. St. R.R., 1050
Keithley v. Keithley, 1885
Kelley v. Ellis, 3022
Kelley v. Hartford Casualty Ins. Co., 1024
Kelley v. State, 195
Kellogg v. Chicago & N.W. Ry., 1030
Kelly v. Berg, 1007.5, 1105A
Kemper Independence Insurance Company v. Islami, 3110
Kempf v. Boehring, 1014
Kempfer v. Automated Finishing, Inc., 2750
Kempfer v. Bois, 1140
Ken-Crete Prod. Co. v. State Highway Comm'n, 8100, 8101, 8103
Kennedy-Ingalls Corp. v. Meissner, 3200, 3211, 3225, 3230
Kenwood Equip., Inc. v. Aetna Ins. Co., 110
Kerkman v. Hintz, 1023, 1023.8, 1023.9
Kerl v. Rasmussen, 4025, 4030, 4040, 4055, 4060
Kernz v. J.L. French Corp., 3010
Kerwin v. Chippewa Shoe Mfg. Co., 1500
Kettner v. Wausau Ins. Co., 4060
Kiefer v. Fred Howe Motors, Inc., 2000
Killeen v. Parent, 2401, 2402
Kim v. American Family Mut. Ins. Co., 1800
Kimble v. Land Concepts, Inc., 1707.1
Kincaide v. Hardware Mut. Casualty Co., 1144

Kincannon v. National Indem. Co., 1705, 1797
Kink v. Combs, 410
Kinsman v. Panek, 1310
Kirby v. Corning, 4027
Klassa v. Milwaukee Gas Light Co., 1511
Kleckner v. Great Am. Indem. Co., 325
Kleeman v. Chicago & N.W.R. Co., 4035
Kleinke v. Farmers Coop. Supply & Shipping, 1510
Kleist v. Cohodas, 1315
Kleven v. Cities Serv. Oil Co., 3086
Kline v. Johanneson, 1120
Klinefelter v. Ditch, 8060
Klingbeil v. Saucerman, 1023.5A
Klink v. Cappelli, 1762
Klipstein v. Raschein, 205
Kluck v. State, 2115
Klug v. Flambeau Plastics Corp., 3049
Klug v. Sheriffs, 3026
Knapke v. Grain Dealers Mut. Ins. Co., 1904, 3057
Kneeland-McClurg Lumber Co. v. Industrial Comm'n, 4060
Knief v. Sargent, 1023
Knoke v. City of Monroe, 8035
Knowles v. Stargel, 1265
Knutson v. Fenelon, 1840
Koback v. Crook, 1009
Kochanski v. Speedway Superamerica, 410, 1900.4
Koehler v. Thiensville State Bank, 1145
Koehler v. Waukesha Milk Co., 1855
Koele v. Radue, 1760
Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd., 2790
Koetting v. Conroy, 1391
Koffman v. Leichtfuss, 1756
Kohler v. Dumke, 1582
Kohloff v. State, 63
Kohls v. Glassman, 3118
Kojis v. Doctors Hosp., 2900
Kolbeck v. Rural Mut. Ins. Co., 1806, 3117
Kolpin v. Pioneer Power & Light, 950, 1019
Koltka v. PPG Indus., Inc., 1870
Konneker v. Romano, 8060
Kordecki v. Rizzo, 2797A
Korenak v. Curative Workshop Adult Rehabilitation Center, 1900.4
Korth v. American Family Ins. Co., 1837
Kosnar v. J. C. Penney Co., 1900.4
Kottka v. PPG Indus., Inc., 1815
Kowalczuk v. Rotter, 8045
Kowalke v. Farmers Mut. Auto Ins. Co., 180, 1032, 1052, 1140, 1705, 1760, 1767, 1768
Kowalke v. Milwaukee Elec. Ry. & Light Co., 3072
Kozlowski v. John E. Smith's Sons Co., 3262
Kraft v. Charles, 1285
Kraft v. Steinhafel, 1023.5A, 4035
Kraft v. Wodill, 2401
Krainz v. Strle, 1114
Kramer v. Alpine Valley Resort, Inc., 3074
Kramer v. Chicago, M., St. P. & P. Ry., 1501, 1796

Kramer v. Hayward, 3024
Kramschuster v. Shawn E., 1014
Kranzush v. Badger State Mut. Casualty Co., 2760, 2761
Kraskey v. Johnson, 1070, 1155, 1157
Kraus v. Mueller, 8060
Kraus v. Wisconsin Life Ins. Co., 3061
Krause v. Milwaukee Mut. Ins. Co., 230, 1105A
Krause v. V. F. W. Post 6498, 1900.4, 1904, 3290
Krause v. Western Casualty & Sur. Co., 4040
Krebsbach v. Miller, 3112
Kremer v. Rule, 1805
Kreyer v. Driscoll, 3052
Krieg v. Dayton-Hudson Corp., 2600, 2605
Krolikowski v. Chicago & N.W. Transp. Co., 1403
Kruck v. Wilbur Lumber Co., 1840
Kruckenberg v. Harvey, 2784
Kruckenberg v. Krukar, 8060
Krudwig v. Kaepke, 2005.2
Krueger v. AllEnergy Hixton, LLC, 1920
Krueger v. Mitchell, 1920
Krueger v. Steffen, 1800, 1801, 1805, 3725
Krueger v. Tappan, 358
Krueger v. Winters, 180
Kruse v. Horlamus Indus., 200, 205, 1008, 8060
Kryzko v. Gaudynski, 4025
Kuehn v. Kuehn, 200, 205
Kuehnemann v. Boyd, 1023
Kuehler v. Kuehler, 2784
Kuentzel v. State Farm Mut. Auto Ins. Co., 1105A
Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 1730, 1731, 1806
Kujawski v. Arbor View Health Care Center, 1023.7, 1385
Kukuska v. Home Mut. Hail-Tornado Ins. Co., 3016
Kurz v. Chicago, M. St. P. & P. Ry., 1408, 1410, 1413
Kurz v. Collins, 3115, 3116
Kutsugeras v. Avco Corp., 1723
Kuzel v. State Farm Mut. Ins. Co., 1610

**L**

L.L.N. v. Clauder, 1383
L. L. Richards Mach. Co. v. McNamara Motor Express, 1026.5, 1804
La Fave v. Lemke, 1120
La Fleur v. Mosher, 1511
Laabs v. Bolger, 8060
LaChance v. Thermogas Co. of Lena, 1760
LaCombe v. Aurora Medical Group, Inc., 1023
LaCrosse Plow Co. v. Brooks, 3202
LaCrosse Plow Co. v. Helgeson, 3202
Ladd v. Uecker, 2500
Ladewig v. Tremmel, 1390, 1397
Laehn Coal and Wood Co. v. Koehler, 2401, 2402
Lagerstrom v. Myrtle Werth Hospital - Mayo Health System, 1757, 1850
Lake to Lake Dairy Coop. v. Andrews, 1070
Lambert v. Hein, 2400
Lambert v. Wrensch, 1815, 1816

Lambrecht v. Estate of Kaczmarczyk, 1021.2, 1145
Lamming v. Galusha, 1920
Lampertius v. Chmielewski, 1075
Landess v. Borden, Inc., 3074
Landrey v. United Serv. Auto Ass'n, 1035
Langhoff v. Milwaukee & Pr. du Ch. R. Co., 1030
Langlade County v. D.J.W, 7050, 7050A
Larry v. Commercial Union Ins. Co., 1381
Larsen v. Wisconsin Power & Light Co., 1003
Larson v. Superior Auto Parts, 3018
Lathan v. Journal Co., 2500, 2505
Laughland v. Beckett, 2500, 2501, 2505, 2505A, 2507, 2511, 2513
Laurent v. Plain, 1600
Lauson v. Fond du Lac, 1310, 1315, 1320
Lautenschlager v. Hamburg, 1715
Lawlis v. Thompson, 3028
Lawrence v. E. W. Wylie Co., 1090
Lawrence v. Jewell Cos., Inc., 2500
Layton School of Art & Design v. WERC, 205
Le Mere v. Le Mere, 1075
Le Sage v. Le Sage, 1600
Lecander v. Billmeyer, 1024
Lechner v. Ebenreiter, 4015, 4050, 2600, 2605
Leckwe v. Ritter, 1096
Leckwee v. Gibson, 1055, 1065, 1070, 1105A, 1141, 1153, 1175
Lee v. Bielefeld, 2400
Lee v. Lord, 4050
Lee v. Milwaukee Gas Light Co., 8030
Lee v. National League Baseball Club, 8045
Legue v. City of Racine, 1031
Leibl v. St. Mary's Hosp. of Mil., 1766
Leipske v. Guenther, 1391, 8112
Leitinger v. DBart, Inc., 1756
Leitner v. Milwaukee County, 1900.4, 1904
Lemacher v. Circle Constr. Co., 1022.2
LeMay v. Oconto, 1049
Lembke v. Farmers Mut. Auto Ins. Co., 1285
Leonard v. Employers Mut. Liab. Ins. Co., 1155, 1157
Lestina v. West Bend Mut. Ins. Co., 2020
Leuchtenberg v. Hoeschler, 3014
Levin v. Perkins, 3020
Lewandowski v. Continental Casualty Co., 195, 1023.5A
Lewandowski v. Preferred Risk Mut. Ins. Co., 261
Lewis v. Coursolle Broadcasting, 2511, 2500
Lewis v. Leiterman, 1075, 1325, 1610
Lewis v. Physicians Ins. Co., 1023, 4030
Libowitz v. Lake Nursing Home, Inc., 3086
Liebe v. City Fin. Corp., 2780
Lieberman v. Weil, 3083
Lievrouw v. Roth, 180, 1105A, 1707.1, 1710
Ligman v. Bitker, 1337
Liles v. Employers Mut. Ins. of Wausau, 1055
Lincoln v. Claflin, 2802
Lind v. Lund, 1070
Linden v. Cascade Stone Co., 2400

Linden v. City Car Co., 4035
Linden v. Miller, 1000
Lindloff v. Ross, 1023
Lippert v. Chicago & N. W. Ry. Co., 8104, 8107
Lisowski v. Milwaukee Auto Mut. Ins. Co., 1045, 1050
Listman Mill Co. v. William Listman Milling Co., 2790
Little v. Maxam, Inc., 3260
Lloyd v. S. S. Kresge Co., 1901
Lobermeier v. General Tel. Co. of Wis., 410, 1730
Loeb v. Board of Regents, 8100, 8140
Londre v. Continental Western Ins. Co., 3110
Lorbecki v. King, 180
Loser v. Libal, 1730
Lovesee v. Allied Dev. Corp., 1580, 1585, 1590
Lubner v. Peerless Ins. Co., 410
Luby v. Bennett, 2605
Ludke v. Egan, 8060
Lueck v. Heisler, 2100
Luessen v. Oshkosh Elec. Light & Power Co., 1890
Lukens Iron & Steel Co. v. Hartmann-Greiling Co., 3058
Lumbermen's Mut. Cas. Co. v. S. Morgan Smith Co., 3200
Lund v. Keller, 2200
Lundin v. Shimanski, 1707
Lundquist v. Western Casualty & Sur. Co., 410, 1065, 1090
Luther Hosp. v. Garborg, 1825
Lutz v. Shelby Mut. Ins. Co., 1105A, 1750.2, 1767, 1768

**M**

M & I Marshall & Ilsley Bank v. Pump, 2770
M. Capp Mfg. Co. v. Moland, 1026.5
MS Real Estate Holdings, LLC v. Fox Family Trust, 3049
Maben v. Rankin, 1742
Macherey v. Home Ins. Co., 205
Machesky v. Milwaukee, 3012
Maci v. State Farm Fire & Casualty Co., 8020
Mack v. Decker, 1045
Mack Trucks, Inc. v. Sunde, 3200
Mackensie v. Miller Brewing Co., 2401
Mackenzie Fandrey v. American Family Mut. Ins. Co., 1500
MacLeish v. Boardman Clark LLP, 1023.5A
Madison Metropolitan Sewerage Dist. v. Committee, 1922
Madison Trust Co. v. Helleckson, 2401, 2402
Madison v. Geier, 205, 1107
Madix v. Hockgreve Brewing Co., 4060
Maeder v. Univ. of Wisconsin-Madison, 2750
Magin v. Bemis, 1070
Maichle v. Jonovic, 2006
Mair v. Trollhaugen Ski Resort, 1900.4
Maitland v. Twin City Aviation Corp., 8112
Majestic Realty Corp. v. Brant, 1022.6, 8030
Majorowicz v. Allied Mut. Ins. Co., 2760, 52B
Malco v. Midwest Aluminum Sales, 1707
Maleki v. Fine-Lando Clinic, 2800, 2820
Malik v. American Family Ins. Co., 1391

Maloney v. Wisconsin Power, Light & Heat Co., 1796, 1861
Malzewski v. Rapkin, 2400, 2401, 2402
Management Computer Serv. v. Hawkins, Ash, Baptie, 3010, 3051
Mandell v. Bryam, 4050
Maniaci v. Marquette Univ., 2100, 2600, 2605, 2620
Mann v. Reliable Transit Co., 1320
Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co., 3046
Manzanares v. Safeway Stores, Inc., 2150
Marathon County v. Zachary W., 7050, 7050A
Mark McNally v. Capital Cartage, Inc., 3086
Market Street Assoc. Ltd. Ptrshp. v. Frey, 3044
Marlatt v. Western Union Tel. Co., 4050
Marmolejo v. DILHR, 4035, 4045
Marquez v. Mercedes-Benz USA, 3300
Marsh Wood Prod. Co. v. Babcock & Wilcox Co., 3200, 3240
Marshfield Clinic v. Discher, 1825
Martell v. National Guardian Life Ins. Co., 3040
Martens v. Reilly, 2800
Martin v. Outboard Marine Corp., 2500, 2501, 2516
Marx v. Morris, 2784
Maskrey v. Volkswagenwerk Aktiengesellschaft, 1723, 1760, 1797
Maslow Cooperage Corp. v. Weeks Pickle Co., 202, 1705, 3700
Mastercraft Paper Co. v. Consolidated Freightways, 1026.5
Matson v. Dane County, 1012
Matter of Commitment of C.J.A. 7050A
Matter of Commitment of C.S., 7050
Matter of Commitment of J.W.K. 7050A
Matter of Marks v. Gray, 4045
Matteson v. Rice, 2400, 3220
Matthews v. Schuh, 1190.5
Matuschka v. Murphy, 1023
Maurin v. Hall, 1023, 1870, 1895, 1897
May v. Skelly Oil Co., 1580, 1900.4
Mayo v. Wisconsin Injured Patients and Families Compensation Fund, 1023, 1870, 1895, 1897
MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2418A, 2418B
McAleavy v. Lowe, 3200
McAllister v. Kimberly-Clark Co., 1707
McCaffery v. Minneapolis, St. P. & S.S.M. Ry., 1796
McCarthy v. Thompson, 325
McCartie v. Muth, 1766
McCarty v. Weber, 215
McCluskey v. Steinhorst, 2005, 2006.3
McConaghy v. McMullen, 2006
McConville v. State Farm Mut. Auto Ins. Co., 1047, 1047.1 1500, 1591, 1592
McCrossen v. Nekoosa Edwards Paper Co., 1051.2, 1105A, 1705, 1885, 1890, 1892
McDonnell v. Hestnes, 3115, 3116
McEvoy v. Group Health Cooperative, 2761
McGaw v. Wassman, 265
McGee v. Kuchenbaker, 1285
McGowan v. Story, 100
McGuiggan v. Hiller Bros., 1580, 1585, 1590
McKone v. Metropolitan Life Ins. Co., 4020
McLaughlin v. Chicago, M. St. P. & P. Ry., 1410
McLean v. McLean, 3020
McLuckie v. Chicago, M. St. P. & P. Ry., 1408

McMahon v. St. Croix Falls Sch. Dist., 1385.5
McManus v. Donlin, 1023
McNally v. Goodenough, 1900.4, 1901
McNamara v. Village of Clintonville, 1720
McNeil v. Jacobson, 1005, 1009
Mead v. Ringling, 1812
Medford Lumber Co. v. Industrial Comm'n, 4060
Medley v. Trenton Inv. Co., 1022.6, 4010
Meeme Mut. Home Protective Fire Ins. Co. v. Lorfeld, 3072
Megal v. Green Bay Area Visitor & Convention Bureau, et al., 1900.4
Meier v. Meurer, 2500
Meihost v. Meihost, 1381
Meke v. Nicol, 1707
Memphis v. Greene, 2150
Mendelson v. Blatz Brewing Co., 2780, 3068
Menge v. State Farm Mut. Automobile Ins. Co., 1105A
Menominee River Boom Co. v. Augustus Spies Lumber & Cedar Co., 3020
Meracle v. Children's Serv. Soc., 1705
Merco Distrib. Corp. v. Commercial Police Alarm Co., Inc., 1500
Merco Distrib. Corp. v. O & R Engines, Inc., 110
Merkle v. Behl, 1505
Merkley v. Schramm, 1050
Merriman v. Cash-Way, Inc., 1900.4
Mertens v. Lake Shore Yellow Cab & Transfer Co., 1070
Meshane v. Second Street Co., 1707
Metcalf v. Consolidated Badger Coop., 1582
Methodist Manor Health Center, Inc. v. Py, 2200
Metropolitan Sav. & Loan Ass'n v. Zuelke's, Inc., 2200, 2201
Metropolitan Ventures v. GEA Assoc., 3044
Meyer v. Laser Vision Inst., LLC, 3028
Metz v. Medford Fur Foods, 3200, 3260
Metz v. Rath, 1105A
Metzinger v. Perry, 1708
Meurer v. ITT Gen. Controls, 145
Meyer v. Ewald, 2600, 2605, 2610, 2611
Meyer v. Laser Vision Inst., LLC, 3028
Meyer v. Norgaard, 1023.6
Meyer v. Val-Lo-Will Farms, 1051.2
Meyers v. Matthews, 1600, 4001, 4030
Meyers v. Wells, 3030
Mezera v. Pahmeier, 1354
Michaels v. Green Giant Co., 1760
Mid-Continent Refrigerator Co. v. Straka, 1707
Midwestern Helicopter v. Coolbaugh, 2200, 2201
Mikaelian v. Woyak, 1047
Milaeger Well Drilling Co. v. Muskego Rendering Co., 3058
Milbauer v. Transport Employes' Mut. Benefit Soc'y, 260, 265
Miller & Rose v. Rich, 4060
Miller v. Conn, 3074
Miller v. Epstein, 4035
Miller v. Joannes, 1
Miller v. Keller, 1010
Miller v. Kim, 1023
Miller v. Neale, 1806
Miller v. Paine Lumber Co., 1900.2

Miller v. Tainter, 1880
Miller v. Wadkins, 2900
Miller v. Wal-Mart Stores, Inc., 1383, 1384
Millonig v. Bakken, 215, 1000, 1112, 1145, 1285
Milwaukee & Suburban Transp. Corp. v. Milwaukee County, 106
Milwaukee & Suburban Transp. Corp. v. Royal Transit Co., 1112
Milwaukee Boiler Co. v. Duncan, 3202
Milwaukee Constructors II v. Milwaukee Metro Sewerage District, 400
Milwaukee County v. Schmidt, Gardner, and Erickson, 1023.5A
Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 1920, 1922, 1924, 1926, 1928, 1930, 1932
Milwaukee Mirror & Art Glass Works v. Chicago, 1025.7
Milwaukee Rescue Mission, Inc. v. Redevelopment Authority of the City of Milwaukee 8135
Milwaukee Tank Works v. Metals Coating Co., 100
Milwaukee Transport Services, Inc. v. Family Dollar Stores of Wisconsin, Inc. 1605, 4035, 4040
Milwaukee Trust Co. v. Milwaukee, 305
Milwaukee Western Fuel Co. v. Industrial Commission, 4035, 4045
Miranovitz v. Gee, 2401, 2402
Misiewicz v. Waters, 1105A
Mittelstadt v. Hartford Accident & Indem. Co., 1000
Mittleman v. Nash Sales, Inc., 4035
Mixis v. Wisconsin Pub. Serv. Comm'n, 1145
Modern Materials v. Advanced Tooling Spec., 2800, 2784
Modl v. National Farmers Union Property & Casualty Co., 1145
Moe v. Benelli U.S.A. Corp., 2769
Mohns, Inc. v. BMO Harris Bank, 3028
Mohs v. Quarton, 3700
Mondl v. F.W. Woolworth, 1048, 1902
Monrean v. Eastern Wis. Ry. & Light Co., 1012
Monroe v. Chase, 2605
Monsivais v. Winzenried, 8012
Moore v. Relish, 1025.5
Moore v. State, 415
Moran v. Quality Aluminum Casting Co., 1815, 2900
Morden v. Continental AG, 3240
Morgan v. Pennsylvania Gen. Ins. Co., 1500
Moritz v. Allied Mut. Fire Ins. Co., 1820
Morris F. Fox & Co. v. Lisman, 3014
Morris v. Resnick, 4080
Morris v. Juneau County, 8035
Mortgage Associates v. Monona Shores, 1
Moulton v. Kershaw, 3012
Mowry v. Badger State Mut. Casualty, 2760
Mt. Pleasant v. Hartford Accident & Indemnity, 3118
Mueller v. Bull's Eye Sport Shop, LLC, 400
Mueller v. Harry Kaufmann Motorcars, Inc., 2401, 2418A, 2418B, 3068
Mueller Real Estate Inv. Co. v. Cohen, 1804
Mulder v. Acme-Cleveland Corp., 1383, 1900.2
Mullen v. Larson-Morgan Co., 1900.4
Mullen v. Reinig, 110
Mullen v. Walczak, 1511
Murawski v. Brown, 1402
Murphy v. Columbus McKinnon Corp., 3260.1
Murphy v. Nordhagen, 1023.8, 1023.9
Murray v. Holiday Rambler, Inc., 145, 3201, 3205, 3220, 3222
Murray v. Yellow Cab Co., 1000

Muscoda Bridge Co. v. Grant County, 8100
Muskevitch-Otto v. Otto, 3110
Mustas v. Inland Constr. Inc., 315, 1901
Myhre v. Hessey, 2605

**N**

Naden v. Johnson, 3700
Narloch v. State of Wis. Dept of Transp., 8102, 8103
Nashban Barrel & Container Co. v. Parsons Trucking Co., 1730, 1800, 1801 1804
National Auto Truckstops, Inc. v. WISDOT, 8111, 8120, 8130, 8135
National Farmers Union Property & Casualty v. Maca, 3110
Navine v. Peltier, 3034
Neas v. Siemens, 2400, 2401, 2402
Neave v. Arntz, 3220
Nees v. Weaver, 3052
Neff v. Barber, 1
Neitzke v. Kraft-Phenix Dairies, Inc., 1051, 1900.4, 1902
Nelsen v. Farmers Mut. Auto Ins. Co., 3010, 3032, 3050
Nelson v. Boulay Bros. Co., 1803, 3208
Nelson v. Davidson, 1023.6
Nelson v. Hansen, 3290
Nelson v. Pauli, 100
Nelson v. Travelers Ins. Co., 1310
Nesbitt v. Erie Coach Co., 3074
Nessler v. Nowicki, 1155, 1157
Nestle's Food Co. v. Industrial Comm'n, 4030, 4060
Neuman v. Evans, 155
Neumann v. Industrial Sound Engineering, Inc., 2600, 2605, 2610, 2611
New Amsterdam Casualty Co. v. Farmers Mut. Auto Ins. Co., 325
New Dells Lumber Co. v. Chicago St. P. M. & O. R. Co., 8135
New York Times Co. v. Sullivan, 2500, 2511
Nickel v. Hardware Mut. Casualty Co., 1815
Niedbalski v. Cuchna, 1352
Nielsen v. Spencer, 1013
Nimlos v. Bakke, 1756
Nimmer v. Purtell, 125
Noffke v Bakke, 2020
Nolop v. Skemp, 1795
Nolop v. Spettel, 3057
Nommensen v. American Cont. Ins. Co., 200
Nooyen v. Wisconsin Electric Power Company, 1900.4
Nordahl v. Peterson, 1885, 3112
Norfolk & Western Ry. Co. v. Liepelt, 1735
Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 2804
North Highland Inc. v. Jefferson Mach. & Tool Inc., 2800
Northern Air Services. v. Link, 2785
Northern Crossarm Co., Inc. v. Chemical Specialties, Inc., 3028
Northern Supply Co. v. Vangard, 3207
Northland Ins. Co. v. Avis Rent-a-Car, 1112
Northrop v. Opperman, 8060
Northwest Capital Corp. v. Kimpel, 3070
Northwest Gen. Hosp. v. Yee, 1023
Northwestern Blaugas Co. v. Guild, 3202
Northwoods Dev. Corp. v. Klement, 8060

Norton v. Kearney, 3040
Nothem v. Berenschot, 1140
Novell v. Migliaccio, 2401, 2418A, 2418B
Novick v. Becker, 2605
Novitzke v. State, 265
Nowaczyk v. Marathon County, 8100, 8135
Nowatske v. Osterloh, 1023, 1023.5A, 1023.7, 1023.8, 1023.14, 1024, 1384

**O**

O'Brien v. Chicago & N.W. Ry., 215
O'Connell v. Old Line Life Ins. Co., 1500
O'Kon v. Laude, 8060
O'Shea v. Lavoy, 1032
Oconomowoc Area School District v. Cota, 2750
Odgers v. Minneapolis, St. P. & S. S. M. Ry., 1336
Odya v. Quade, 1140
Oelke v. Earle, 1191
Ogle v. Avina, 1060, 1107, 1153, 1175
Ogodziski v. Gara, 1707
Ohio Elec. Co. v. Wisconsin-Minnesota Light and Power Co., 3202
Ohrmund v. Industrial Comm'n, 4040
Ohrmundt v. Spiegelhoff, 2400, 2402
Oleson v. Fader, 2006.1
Olfe v. Gordon, 1023.5A
Ollerman v. O'Rourke Co., Inc., 2405, 2405.5
Ollhoff v. Peck, 1391
Ollman v. Wisconsin Health Care Liab. Ins. Plan, 405
Olsen v. Milwaukee Waste Paper Co., 1080
Olsen v. Moore, 4035
Olson v. Red Cedar Clinic, 2550
Olson v. Siordia, 1585, 1590
Olson v. Whitney Bros. Co., 1900.4
Olson v. Williams, 100
Onderdonk v. Lamb, 2800
Onsrud v. Paulsen, 3020
Orlowski v. State Farm Mut. Auto Ins. Co., 1756, 1757
Ormond v. Wisconsin Power & Light Co., 1025
Osborne v. Montgomery, 1005, 1384, 1500, 1835
Otterstatter v. City of Watertown, 8100
Otto v. Cornell, 1806, 8060
Outagamie County v. Michael H., 7050, 7050A

**P**

Pachowitz v. LeDoux, 2550
Pacific Mut. Life Ins. Co. v. Haslip, 1707
Padley v. Lodi, 1910
Pagelsdorf v. Safeco Ins. Co. of Am., 8020
Palisades Collection LLC v. Kalal, 1024, 1145
Pallange v. Mueller, 3022
Palmer v. Smith, 2006
Palsgraf v. Long Island Railroad Co., 1005
Pamperin v. Milwaukee Mutual Ins., 3110
Panzer v. Hesse, 1260

Papacosta v. Papacosta, 1105A
Papenfus v. Shell Oil Co., 145
Papke v. American Auto Ins. Co., 1870
Pappas v. Jack O. A. Nelson Agency, Inc., 325
Parchia v. Parchia, 1006
Parks v. Wisconsin Cent. R. Co., 8102, 8103, 8105
Parrish v. Phillips, 3117
Patterman v. Patterman, 1390, 1391
Patterson v. Edgerton Sand & Gravel Co., 1051, 1080, 1096
Paul v. Hodd, 1000
Paul v. Skemp, 1023
Paulson v. Madison Newspapers, 1049
Paulson v. Olson Implement Co., Inc., 3211
Pavelski v. Roginski, 3112
Pawlack v. Mayer, 1013
Pawlowski v. American Family Mut. Ins. Co., 1390
Payne v. Milwaukee Sanitarium Found., Inc., 1384, 1385, 1385.5
Payne v. State, 100
Peacock v. Wisconsin Zinc Co., 1806
Pedek v. Wegemann, 1352, 1795
Peeples v. Sargent, 1730, 1815
Pence v. Slate, 1023.5A
Pennell v. Am. Family Mut. Ins. Co. 1500
Pennington v. United Mine Workers of Am., 2804
Peot v. Ferraro, 1705, 1707.1, 1870, 1885, 1890, 1895, 1897
Perlick v. Country Mut. Casualty Co., 3057
Perpignani v. Vonasek, 200, 205, 260
Perry Creek C. Corp. v. Hopkins Ag. Chem. Co., 3200
Peter H. and Barbara J. Stueck Living Trust v. Easley, 8060
Peter M. Chalik & Assoc. v. Hermes, 3086, 3740
Peters v. Hall, 2600, 2605
Peters v. Holiday Inns, Inc., 8050
Peters v. Zimmerman, 1505, 1720
Petersen v. Pilgrim Village, 3012
Peterson v. Sinclair Refining Co., 1022.6
Peterson v. Volkswagen of America, Inc., 3310
Peterson v. Warren, 3117, 3118
Petkus v. State, 8115
Petoskey v. Schmidt, 1900.4
Pettera v. Collins, 1070
Pettric v. Gridley Dairy Co., 1900.4
Petzel v. Valley Orthopedics Ltd., 1024
Pfeifer v. Standard Gateway Theater, Inc., 230, 1090, 1153, 1155, 1157, 1158, 1160, 1165, 1190, 1191, 1192, 1195, 1225, 1354, 1500, 8045
Pfister v. Milwaukee Free Press Co., 4050
Phaneuf v. Industrial Comm'n, 4030, 4060
Phelps v. Physicians Ins. Co. of Wisconsin, Inc., 1023, 1510
Philadelphia Newspapers, Inc. v. Hepps, 2500, 2501, 2505, 2505A
Philip Morris USA v. Williams, 1707.1, 1707.2
Phoenix Ins. Co. v. Wisconsin S. Gas Co., 8051
Physicians Plus v. Midwest Mutual, 1920, 1922, 1924, 1926, 1928, 1930, 1932
Pickett v. Travelers Indem. Co., 1056
Pierce v. American Family Ins. Co., 1897
Pierce v. Colwell, 1023.5A
Pierce v. Physicians Ins. Co. of Wis., 1510, 1511

Pierz v. Gorski, 8060
Pizzo v. Wiemann, 3200
Plaintikow v. Wolk, 2401
Plante v. Jacobs, 3052, 3700
Pleasure Time, Inc. v. Kuss, 3700
Pleucner v. Industrial Comm'n, 4060
Plog v. Zolper, 1055, 1060, 1065, 1141, 1153, 1175, 1195, 1325, 1337, 1354
PMT Machinery Sales, Inc. v. Yama Seiki USA, Inc., 2769
Pokrojac v. Wade Motors, Inc., 3205
Polar Mfg. Co. v. Integrity Mut. Ins. Co., 3105
Poling v. Wisconsin Physicians Serv., 2761
Pollock v. Vilter Mfg. Corp., 2600
Polzin v. Helmbrecht, 2500, 2511, 2513, 2520
Poneitowcki v. Harres, 1032
Poole v. State Farm Mut. Auto Ins. Co., 1280
Portee v. Jaffee, 1510
Porter v. Ford Motor Co., 3300
Poston v. Burns, 2551
Potter v. Potter, 1895
Powers v. Joint School Dist. No. 3 of Price County, 1090, 1153, 1155, 1157, 1158, 1160, 1165, 1190, 1191, 1192, 1195, 1225, 1354
Prange v. Rognstad, 1855, 1885
Pressure Cast Prod. Corp. v. Page, 3710
Price v. Ross, 2200, 2200.1
Price v. Shorewood Motors, 4045
Prill v. Hampton, 1051, 1880
Prinsen v. Russos, 3200
Prisuda v. General Casualty Co. of Am., 3112, 4020
Pritchard v. Liggett & Myers Tobacco Co., 3230
Production Credit Ass'n v. Equity Coop. Livestock, 2200
Production Credit Ass'n v. Nowatzski, 2200, 2201
Prunty v. Schwantes, 1890
Przybyla v. Przybyla, 2725
Przybylski v. Von Berg, 4015
Puccio v. Mathewson, 1120
Puhl v. Milwaukee Automobile Ins. Co., 1055, 1090, 1153, 1825
Puls v. St. Vincent Hospital, 1024, 1145
Pumorlo v. Merrill, 405, 1049
Pure Milk Prod. Coop. v. National Farmers' Org., 2780

**Q**

Quady v. Sickl, 1315
Quinlan v. Coombs, 3110

**R**

Raaber v. Brzoskowski, 1225
Rabata v. Dohner, 260, 265
Rabe v. Outagamie County, 1880
Rabideau v. City of Racine, 1510, 2725
Rademann v. State of Wisconsin Dept. of Transp., 8105, 8120, 8135
Radloff v. National Food Stores, Inc., 8045
Radue v. Dill, 2800, 2820
Raim v. Ventura, 1019

Rambow v. Wilkins, 315
Randall v. Minneapolis, St. P. & S.S.M. Ry., 1412
Ranous v. Hughes, 2500, 2507, 2552
Rasmussen v. Garthus, 1010, 1582
Raszeja v. Brozek Heating & Sheet Metal Corp., 1007
Raymaker v. American Family Mut. Ins. Co., 8020
Reber v. Hanson, 1012
Recreatives, Inc. v. Myers, 3201, 3205, 3210
Red Top Farms v. State Dept. of Transp., Div. of Highways, 8115
Reda v. Sincaban, 2400, 2402
Reddington v. Beefeaters Tables, Inc., 1901, 8012
Redepenning v. Dore, 1705, 1758, 1767, 1768, 1796, 1820, 1861, 1880, 1885, 1890, 1892
Reed v. Keith, 2513
Reetz v. Advocate Aurora Health, 2550
Regas v. Helios, 2200
Reget v. Paige, 2784
Reicher v. Rex Accessories Co., 230
Reid v. Milwaukee Air Pump Co., 4027
Reiher v. Mandernack, 8040
Reinke v. Chicago, M. St. P. & P. Ry., 1408, 1409
Reinke v. Woltjen, 1760
Reiter v. Dyken, 1580
Rembalski v. John Plewa, Inc., 1024, 1145
Renk v. State of Wis., 8102, 8103
Repinski v. Clintonville Sav. & Loan Ass'n, 3710
Reserve Supply Co. v. Viner, 1500
Reshan v. Harvey, 1055
Resseguie v. American Mut. Liab. Ins. Co., 315
Retzlaff v. Soman Home Furnishings, 1500
Reuhl v. Uszler, 1315
Reyes v. Greatway Ins. Co., 1707.1
Reyes v. Lawry, 155, 1591, 1595
Richards v. Badger Mut. Ins. Co., 1740
Richards v. Mendivil, 1024
Rigby v. Herzfeldt-Phillipson Co., 4050
Riley v. Chicago & N.W.Ry., 1402
Rineck v. Johnson, 1870
Rinehart v. Whitehead, 2006, 2005.2
Ritter v. Farrow, 2790
Robinson v. Briggs Transp. Co., 1115, 1120
Robinson v. City of West Allis, 2006.3
Robinson v. Kolstad, 1880
Rock County v. Industrial Comm'n, 4040
Rockweit v. Senecal, 8020, 1393
Roeske v. Diefenbach, 410
Roeske v. Schmitt, 1090
Rogers v. Bradford, 3028
Rolph v. EBI Cos., 3240, 3260
Romberg v. Nelson, 1047.1, 1075
Root v. Saul, 2006
Rosche v. Wayne Feed, Continental Grain, 1803, 1806
Rosen v. Milwaukee, 8120
Rosenblatt v. Baer, 2500
Ross v. Faber, 3222
Ross v. Martini, 3110

Rossow v. Lathrop, 1010
Roth v. City of Glendale, 3051
Rottman v. Endejan, 3048
Rowe v. Compensation Research Bureau, Inc., 3067
RTE Corp. v. Maryland Casualty Co., 3117
Rubin v. Schrank, 2100
Ruby v. Ohio Casualty Ins. Co., 1600
Rud v. McNamara, 2401
Rudy v. Chicago, M. St. P. & P. R.R., 1026.5
Ruka v. Zierer, 1045
Rule v. Jones, 4000
Rumary v. Livestock Mortgage Credit Corp., 230
Runjo v. St. Paul Fire Marine Ins. Co., 1023
Ruppa v. American States, Inc., 1904
Russell Grader Mfg. Co. v. Budden, 3202
Ryan v. Cameron, 1500
Ryan v. Department of Taxation, 4030
Ryan v. Estate of Sheppard, 3070
Ryan v. Zweck-Wollenberg Co., 3240, 3242
Ryder v. State Farm Mut. Auto Ins. Co., 3057

**S**

S. A. Healy v. Milwaukee Metropolitan Sewerage District, 3051
S.C. Johnson & Son, Inc. v. Morris, 400, 425, 1732
Sabinasz v. Milwaukee & Suburban Transp. Corp., 1025, 1030
Salladay v. Town of Dodgeville, 63
Sample v. United States, 4035
Sampson v. Laskin, 1500, 1900.4
Samson v. Riesing, 3201, 3204, 3211
Sandeen v. Willow River Power Co., 1051, 1885
Sander v. Newman, 4080
Sanderfoot v. Sherry Motors, Inc., 3117, 3118
Sandford v. R. L. Coleman Realty Co., 2150
Sands v. Menard, 3028
Saros v. Carlson, 4015
Sasse v. State, 152
Sater v. Cities Serv. Oil Co., 4005
Saveland v. Western Wis. R. Co., 4005
Saxhaug v. Forsyth Leather Co., 1900.4
Saylor v. Marshall and Ilsley Bank, 3082
Scales v. Boynton Cab Co., 1025
Scalzo v. Marsh, 305
Scandrett v. Greenhouse, 2401, 2402
Scarpace v. Sears Roebuck & Co., 2750, 2800
Schabelski v. Nova Casualty Co., 2020
Schaefer v. State Bar of Wis., 2500
Schaefer v. Weber, 3200
Schaller v. Marine Nat'l Bank of Neenah, 3044
Schara v. Thiede, 2200
Schauf v. Badger State Mut. Casualty Co., 3116
Schemenauer v. Travelers Indem. Co., 350, 410
Scherg v. Puetz, 3054
Schey Enterprises, Inc. v. State, 8100, 8101
Schicker v. Leick, 8030

Schier v. Denny, 2605
Schiller v. Keuffel & Esser Co., 1731
Schiro v. Oriental Realty Co., 1920, 1922, 1928, 1930, 1932
Schlewitz v. London & Lancashire Indem. Co., 1095
Schlintz v. Equitable Life Assurance Soc'y, 3061
Schlueter v. Grady, 1070, 1090
Schmidt v. Jansen, 1070
Schmidt v. Northern States Power Co., 950
Schmidtke v. Great Atlantic & Pacific Tea Co. of Am., 3072
Schmiedeck v. Gerard, 1055, 1065
Schmit v. Klumpyan, 2620
Schmit v. Sekach, 155, 1105A, 1591, 1595
Schmorrow v. Sentry Ins. Co., 1900.4, 1910
Schnabl v. Ford Motor Co., 1500
Schneck v. Mutual Serv. Co., 3116
Schneider v. Schneider, 3049
Schneider v. State of Wisconsin, 8111
Schoedel v. State Bank of Newburg, 2401, 2402
Schoenauer v. Wendinger, 1158, 1220, 1225, 1255
Schoenberg v. Berger, 325
Schoenfeld v. Journal Co., 2500
Schoer v. West Bend Mutual Ins. Co., 3110
Schroeder v. Kuntz, 1315, 1320
Schrubbe v. Peninsula Veterinary Serv., 1800, 1806
Schubert v. Midwest Broadcasting Co., 3735
Schubring v. Weggen, 1035
Schueler v. City of Madison, 1255
Schuh v. Fox River Tractor Co., 3262
Schultz v. Industrial Coils, Inc., 2750
Schultz v. Miller, 1760
Schulz v. Chicago, M. St. P. & P. Ry., 1407, 1410
Schulz v. General Casualty Co., 1105, 1855
Schultz v. Strauss, 2507
Schulz v. St. Mary's Hosp., 265, 315, 1762
Schulze v. Kleeber, 1383, 2006, 8045
Schuster v. Altenberg, 1023
Schuster v. St. Vincent Hosp., 1384, 1385
Schwalbach v. Antigo Elec. & Gas, Inc., 1803, 3200
Schwartz v. City of Milwaukee, 1815, 8035
Schwartz v. Evangelical Deaconess Soc'y of Wis., 3020
Schwartz v. San Felippo, 1352
Schwartz v. Schneuriger, 1140
Schwartz v. Schwartz, 2605
Schwarz v. Winter, 1354
Schweidler v. Caruso, 1354, 1355, 1610
Schwenn v. Loraine Hotel Co., 1910, 1911
Scipior v. Shea, 180
Scory v. LaFave, 1500
Seaman v. McNamara, 3040
Seavey v. Jones, 4000
Seefeldt v. WISDOT, 8111
Segnitz v. A. Grossenbach Co., 3026
Seichter v. McDonald, 3110
Seidl v. Knop, 4035
Seidling v. Unichem, Inc., 3068

Seif v. Turowski, 1105A
Seifert v. Balink, 260, 1023
Seitz v. Seitz, 1090, 1825
Seitzinger v. Community Health Network, 3051
Seligman v. Hammond, 353, 1135, 1140
Sell v. General Elec. Supply Corp., 3014, 4005
Selleck v. City of Janesville, 1710, 1815
Sellmer Co. v. Industrial Comm'n, 4040
Seltrecht v. Bremer, 1023.5A
Selzer v. Brunsell Bros., Ltd. 2400
Sentry Ins. V. Royal Ins. Co. of America, 400
Serkowski v. Wolf, 305
Sevey v. Jones, 1600
Shain v. Racine Raiders Football Club, Inc., 2020
Shannon v. City of Milwaukee, 1383, 4035
Shannon v. Shannon, 8020
Sharp v. Case Corp., 1707.2, 3240, 3260
Sharpe v. Hasey, 1910
Shaw v. Wisconsin Power & Light Co., 1002
Shaw v. Wuttke, 1010
Shawver v. Roberts Corp., 100, 215, 3262
Sherley v. Peehl, 3012
Sherman v. Heiser, 430
Shetney v. Shetney, 3022
Shevel v. Warter, 4020
Shier v. Freedman, 1023, 1023.7
Shockley v. Prier, 1815, 1837, 1845
Short Way Lines v. Sutton's Adm'r, 1050
Shy v. Industrial Salvage Material Co., 3056, 3076
Sidoff v. Merry, 2500
Siebert v. Morris, 1013
Silberman v. Roethe, 3074
Simmons v. Industrial Comm'n, 4045
Simon v. Van de Hey, 1105
Singleton v. Kubiak & Schmitt, Inc., 1911
Skaar v. Dept of Revenue, 4080
Skebba v. Kasch, 3074
Skindzelewski v. Smith, 1023.5A
Slattery v. Lofy, 1060, 1065
Smader v. Columbia Wis. Co., 4015
Smaxwell v. Bayard, 1391, 8020
Smee v. Checker Cab Co., 202, 1705
Smith v. Atco Co., 3200, 3240, 3242
Smith v. Federal Rubber Co., 2600
Smith v. Goshaw, 8020
Smith v. Milwaukee County, 1020
Smith v. Pabst, 1025.6, 1391
Smith v. Poor Hand Maids of Jesus Christ, 1025.7
Smith v. Sneller, 1050
Smuda v. Milwaukee County, 8120
Sniden v. Laabs, 3740
Snider v. Northern States Power Co., 1022.6
Snow v. Koeppl, 2550
Sohns v. Jensen, 1920
Sojenhomer LLC v. Village of Egg Harbor, 1049, 8035

Solberg v. Robbins Lumber Co., 215
Soletski v. Krueger International, Inc., 1900.4
Somers v. Germania Nat'l Bank, 3057
Sommerfield v. Flury, 1032
Sparling v. Thomas, 1350
Spencer v. ILHR Dep't, 1710
Spencer v. Kosir, 3079
Spensley Feeds v. Livingston Feed & Lumber, Inc., 1
Spheeris Sporting Goods, Inc. v. Spheeris on Capitol, 2790
Spigelberg v. State of Wisconsin, 8104
Spitler v. Dean, 950
Spleas v. Milwaukee & Suburban Transp. Corp., 1025, 1500
Spoehr v. Mittlestadt, 2500
Sprecher v. Monroe County Fin. Co. v. Thomas, 1731
Sprecher v. Roberts, 4060
Sprecher v. Weston's Bar, Inc., 1806
Springer v. Nohl Electric Products Corporation, 2792A, 2792B
St. Amant v. Thompson, 2511
St. Clair v. McDonnell, 1113
St. Mary's Hosp. Med. Center v. Brody, 1825
St. Paul Fire & Marine Ins. Co. v. Burchard, 1075
Stack v. Padden, 1825
Stack v. Roth Bros. Co., 3020
Staehler v. Beuthin, 1766
Stahl v. Gotzenberger, 1
Stahler v. Philadelphia & R.R., 1880
Stamnes v. Milwaukee & State Line R. Co., 8105
Staples v. Glienke, 1230, 1260
Starobin v. Northridge Lakes, 2500
State Bank of Viroqua v. Capitol Indem., 3117
State ex rel. Brajdic v. Seber, 200
State ex rel. Park Plaza Shopping Center, Inc. v. O'Malley, 410
State ex rel. Schultz v. Bruendl, 1005, 1009
State Farm Mutual Automobile Insurance Co. v. Campbell, 1707.1
State Farm Mutual Automobile Insurance Co. v. Ford Motor Co., 2400
State Farm Fire & Cas. Co. v. Amazon, 3200
State Farm Fire & Cas. Co. v. Hague Quality Water, Int'l, 2400
State of Wisconsin v. Abbott Laboratories, 1
State v. Alexander, 80
State v. American TV & Appliance of Madison, Inc., 2418A, 2418B
State v. Anderson, 80
State v. Automatic Merchandisers of America, Inc., 2418A, 2418B
State v. Blaisell, 2722
State v. Caibaiosai, 1035
State v. Camara, 2115
State v. Chew, 2006.2
State v. Cooper, 63
State v. Darcy N. K., 57
State v. Eaton, 1510
State v. Genova, 2420
State v. Henley, 3295
State v. Herrington, 2115
State v. Hess, 2722
State v. Holt, 1005, 1009
State v. Hutnik, 415

State v. Joe Must Go Club, 1910, 3264
State v. Keyes, 2722
State v. Lederer, 420
State v. Major, 420
State v. City of Prescott, 2750
State v. Robinson, 405
State v. Schweda, 1, 3028
State v. Sobkowiak, 2722
State v. Smith, 2115
State v. Talyansky, 2418A, 2418B
State v. Tarrell, 63
State v. Vogel, 420
State v. Williamson, 405
State v. Wolske, 1035
State v. Wolter, 2722
Statz v. Pohl, 1010, 1013
Steel v. Ritter, 1803, 1804
Steele v. Pacesetter Motor Cars, Inc., 3053
Stefan Auto Body v. State Highway Comm., 8111
Stefanovich v. Iowa Nat'l Mut. Ins. Co., 1900.4, 1904
Steffen v. McNaughton, 4035
Steffes v. Farmers Mut. Auto Ins. Co., 1035
Stehlik v. Rhoads, 1014, 1014.5, 1277, 1278
Steinbarth v. Johannes, 1861
Steinberg v. Jensen, 1500
Steinhorst v. H. C. Prange Co., 1902
Stelloh v. Liban, 2115
Stephenson v. Universal Metrics, Inc., 1397
Steuck Living Trust v. Easley, 8060
Stevens v. Farmers Mut. Auto Ins. Co., 1140
Stevenson v. Barwineck, 2400, 2401, 2402
Stewart v. City of Ripon, 1720
Stilwell v. Kellogg, 1
Stippich v. Morrison, 3116
Stolze v. Manitowoc Terminal Co., 8120
Stoppleworth v. Refuse Hideaway, Inc., 50
Strack v. Great Atlantic & Pacific Tea Co., 1900.4
Strahlendorf v. Walgreen Co., 3200, 3242
Strait v. Crary, 1010
Straub v. Schadeberg, 1096
Strauss Bros. Packing Co. v. American Ins. Co., 1806
Strelecki v. Fireman's Ins. Co. of Newark, 1815
Strenke v. Hogner, 1707.1
Strid v. Converse, 2600, 2605, 2620
Strnad v. Cooperative Ins. Mut., 325
Stroede v. Society Insurance, 8025
Strong v. Milwaukee, 2100
Strupp v. Farmers Mut. Automobile Ins. Co., 1600
Stuart v. Stuart, 2784
Stuart v. Weisflog's Showroom Gallery, Inc., 2400, 2720
Stunkel v. Price Elec. Cooperative, 1922, 1928
Struthers Patent Corp. v. Nestle Co., 400
Sufferling v. Heyl & Patterson, 202, 1705
Suhaysik v. Milwaukee Cheese Co., 1051, 1056
Suick v. Krom, 315

Sulkowski v. Schaefer, 1075, 1825, 1840, 1845
Sullivan v. Minneapolis, St. Paul & S.S.M.R. Co., 200
Sumnicht v. Toyota Motor Sales, 1500, 1723, 3260, 3260.1
Sunnyside Feed Co., Inc. v. City of Portage, 1920
Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc., 2400
Super Value Stores, Inc. v. D-Mart Food Stores, Inc., 3044
Surety Savings & Loan Association v. WISDOT, 8111
Swanson v. Maryland Casualty Co., 1115, 1120
Sweeney v. Matthews, 3200
Sweet v. Chicago & N.W. Ry., 1796
Sweet v. Underwriters Casualty Co., 1032
Swinkles v. Wisconsin Mich. Power Co., 1210
Sykes v. Bensinger Recreation Corp., 1900.4
Symes v. Milwaukee Mutual Ins. Co., 8045

**T**

T.A.T. v. R.E.B., 5001
Tackes v. Milwaukee Carpenters Health Fund, 1023.6
Takera v. Ford Motor Co., 3201, 3211
Talley v. Mustafa, 1383
Tallmadge v. Boyle, 1023.5
Tang v. C.A.R.S. Protection Plus, Inc., 3310
Tanner v. Shoupe, 3240
Tatera v. FMC Corp., 1022.2, 3242
Tatur v. Solsrud, 1005, 1009
Taylor v. Bricker, 3022
Taylor v. Western Casualty & Sur. Co., 1580, 1585, 1590
Teas v. Eisenlord, 1030, 1047.1, 1075, 1076
Techworks, LLC v Wille, 2401, 2402, 2403
Tegen v. Chapin, 3200
Tempelis v. Aetna Casualty & Surety Co., 3100
Templeton v. Crull, 1391
Tenney v. Cowles, 3220, 3225
Tensfeldt v. Haberman, 1023.5A
Terry v. Journal Broadcast Corp.. 1510, 2505, 2725
Tesch v. Industrial Comm'n, 4060
Tesch v. Wisconsin Pub. Serv. Corp., 1113
Tew v. Marg, 3200, 3211
The J. Thompson Mfg. Co. v. Gunderson, 3058
The Lamar Co. v. Country Side Restaurant, 8060
The Milwaukee & Mississippi R.R. Co. v. Elbe, 8115
The Yacht Club at Sister Bay Condominium Ass'n, Inc. v. Village of Sister Bay, 1920
Theama v. City of Kenosha, 1838
Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 2804
Theisen v. Milwaukee Auto Mut. Ins. Co., 353, 1021.2, 1046, 1047, 1047.1, 1075, 1140, 1500, 1591
Theuerkauf v. Sutton, 1812
Thieme v. Weyker, 1055
Thomas v. Lockwood Oil Co., 4035
Thomas v. Mallett, 3295
Thomas v. Williams, 1707
Thompson v. Beecham, 2605, 2620
Thompson v. Nee, 1113
Thompson v. Village of Hales Corners, 3057
Thoreson v. Milwaukee & Suburban Transp. Corp., 410, 1230, 1840

Thorp v. Mindeman, 3040
Thurn v. LaCrosse Liquor Co., 4030
Thurner Heat Treating Corp. v. Menco, Inc., 3710
Tidmarsh v. Chicago M. & St. P. Ry., 1855
Tietsworth v. Harley-Davidson, Inc., 2401, 2418A, 2418B
Tillman v. Michigan-Wisconsin Pipe Line Co., 8100
Tills v. Elmbrook Memorial Hosp., Inc., 1023.7
Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n, 3010, 3014
Tombal v. Farmers Ins. Exch., 1096, 1105A, 1153
Tomberlin v. Chicago, St. P., M. & O. Ry., 1075
Topham v. Casey, 1760
Topolewski v. Plankinton Packing Co., 4050
Topp v. Continental Ins. Co., 1900.4
Topzant v. Koshe, 2201
Totsky v. Riteway Bus Serv., Inc., 1005, 1009, 1105, 1105A, 1325, 1325A
Tower Special Facilities, Inc. v. Investment Club, Inc., 2605
Town of Fifield v. State Farm Ins. Co., 1803, 1806
Treps v. City of Racine, 8020
Treptau v. Behrens Spa, Inc., 1023
Trinity Evangelical Lutheran Church v. Tower Ins. Co., 1707.1
Tri-State Home Improvement Co. v. Mansavage, 3700
Tri-Tech Corp. v. Americomp Serv., 2419, 2420, 2722
Trogun v. Fruchtman, 1023, 1023.7, 1024, 2005
Troppi v. Scarf, 1742
Truelsch v. Miller, 230
Tucker v. Marcus, 1707
Turk v. H. C. Prange Co., 1145, 1501, 3200
Turner v. Industrial Comm'n, 4045
Tuschel v. Haasch, 1350
Tuteur, Adm'r v. Chicago & N. W. Ry., 1880
TXO Prod. Corp. v. Alliance Resources Corp., 1707.1
Tynan v. JBVBB, LLC, 3074

**U**

Underwager v. Salter, 2500
Underwood v. Paine Lumber Co., 4050
Underwood v. Strasser, 415
Underwood Veneer Co. v. London Guar. & Accident Co., 3117
United America, LLC v. Wis. Dept. of Transportation, 8110
United Concrete & Construction v. Red-D-Mix Concrete, Inc. 2401, 2403, 2418A, 2418B
United States Fidelity & Guar. Co. v. Milwaukee & Suburban Transp. Corp., 1025
United States Fidelity & Guar. Co. v. Forest County State Bank, 4010
United States v. Bausch & Lomb Optical Co., 2802
United States v. Causby, 8112
United States v. Crescent Amusement Co., 2808
United States v. First Nat'l Bank & Trust Co. of Lexington, 2800
United States v. National City Lines, 2802
United States v. Paramount Pictures, Inc., 2802
United States v. Patten, 2806
United States v. Richards, 1920
United States v. Sanno, 2802
United States v. Standard Oil Co., 2800
United States v. Twentieth Century Fox Film Corp., 2804
United States v. Vasquez, 2115

United States v. Walker, 2115
United States v. Wise, 2802
Utech v. Milwaukee, 8100
Utica Mut. Ins. Co. v. Ripon Co-op., 1024, 1145

**V**

Valiga v. National Food Co., 410, 3202, 3207, 3208
Van Galder v. Snyder, 1225
Van Gheem v. Chicago & N.W. Ry., 1405
Van Lare v. Vogt, Inc., 2400, 2401
Van Matre v. Milwaukee Elec. Ry. & Transp. Co., 1280
Van Riper v. United States, 2802
Van Wie v. Hill, 1157
Vandehey v. City of Appleton, 2405, 2405.5
Vanden Heuvel v. Schultz, 1096
Vandenack v. Crosby, 1075
Vanderbloemen v. Suchosky, 100
Vandermark v. Ford Motor Co., 3200
Vandervort v. Industrial Comm'n, 1910
Venzke v. Magdanz, 3700
Ver Hagen v. Gibbons, 1511
Verbeten v. Huettl, 1132, 1133, 1133A
Verhelst Constr. Co. v. Galles, 1820
Vetter v. Rein, 1804, 1805
Victorson v. Milwaukee & Suburban Transp. Corp., 200, 410, 1019, 1025, 1760, 1815
Village Food & Liquor v. H&S Petroleum, Inc., 1
Vincer v. Esther Williams All-Aluminum Swimming Pool Co.,, 3260.1
Viola v. Wisconsin Electric Power Co., 1900.4
Vivid, Inc. v. Fiedler, 8130
Vodrey Pottery Co. v. H. E. Home Co., 3225
Voell v. Klein, 4005, 4010
Vogel v. Grant-Lafayette Elec. Coop., 1922, 1928
Vogel v. State, 420
Vogel v. Vetting, 1155, 1580, 1585, 1590
Vogelsburg v. Mason, 1902
Vogt v. Chicago, M., St. P. & P. R.R., 180
Voigt v. Voigt, 1140, 1280
Voith v. Buser, 415, 2005.1
Volbrecht v. State Highway Comm'n, 8102, 8105
Volk v. Stowell, 3070
Vonch v. American Standard Ins. Co., 1035
Vosburg v. Putney, 1010, 2005
Vultaggio v. General Motors, 3300, 3304

**W**

W.G. Slugg Seed & Fertilizer v. Paulsen Lumber, 3700
Wadzinski v. Cities Serv. Oil Co, 1025.6
Wagner v Allen Media Broadcasting, 2500
Wagner v. Continental Casualty Co., 1022.2, 1022.6, 4060
Wagner v. Mittendorf, 1725
Wagner v. Wisconsin Municipal Mut. Ins. Co., 8020
Wait v. Pierce, 2900
Waldheim & Co., Inc. v. Mitchell St. Bank, 4015

Waldman v. Young Men's Christian Ass'n, 1910
Walk v. Boudheim, 1052, 1054
Walker v. Baker, 1796
Walker v. Bignell, 1005, 1009
Walker v. Kroger Grocery & Baking Co., 1585, 1590
Walker v. Sacred Heart Hospital, 1024, 1384
Wall v. Town of Highland, 1048
Walsh v. Wild Masonry Co., 1051
Walter v. Four Wheel Drive Auto Co., 4005
Wandry v. Bull's Eye Credit Union, 2750
Wangen v. Ford Motor Co., 200, 205, 1707, 1707.1, 1850, 2500, 2520, 2725
Wanta v. Milwaukee Elec. Ry. & Light Co., 305
Wappler v. Schench, 1076
Waranka v. State Farm Mut. Auto Ins. Co., 1870, 1895, 1897
Warren v. American Family Mut. Ins. Co., 2760
Washburn v. Milwaukee & Lake Winnebago R.R. Co., 8120
Wasikowski v. Chicago & N. W. Ry., 1338
Water Quality Store v. Dynasty Spas, Inc., 2769
Waters v. Markham, 1032
Waters v. Pertzborn, 1707.1, 52A
Watland v. Farmers Mut. Auto Ins. Co., 1035
Watts v. Watts, 3028
Waube v. Warrington, 1510, 1511
Waukesha County v. J.W.J., 7050, 7050A
Wauwatosa Realty Co. v. Bishop, 3048
Webb v. Wisconsin S. Gas Co., 1002
Webber v. Wisconsin Power & Light Co., 1803, 1804
Weber v. Hurley, 1022.6, 4060
Weber v. Interstate Light & Power Co., 1002
Weber v. Mayer, 1070
Weber v. White, 1758
Weber v. Young, 2100
Weborg v. Jenny, 260, 1023, 1757
Webster v. Krembs, 1760, 1835
Webster v. Roth, 1403, 1408, 1409
Wedell v. Holy Trinity Catholic Church, 2900
Weggeman v. Seven-Up Bottling Co., 3200
Weigell v. Gregg, 4005
Weihert v. Piccione, 8045
Weil-McLain Co. v. Maryland Casualty Co., 4005
Weil v. Biltmore Grande Realty Corp., 3030
Weinhagen v. Hayes, 4020
Weise v. Polzer, 1500
Weise v. Reisner, 2800
Weiseger v. Wheeler, 4015
Weiss v. Holman, 1395, 8030
Weiss v. United Fire and Casualty Co., 2760, 2761
Welch v. Milwaukee St. P. R.R., 8104
Wells v. Chicago & N.W. Transp. Co., 1411
Wells v. National Indemnity Co., 1762
Wendt v. Manegold Stone Co., 8012
Wendy M. v. Helen E.K., 3074
Werdehoff v. General Star Indemnity Co., 2020
Wergin v. Voss, 1920
Werlein v. Milwaukee Elec. Ry & Transp. Corp., 1025

Werner Transp. Co. v. Barts, 1300
Werner Transp. Co. v. Zimmerman, 1210
Werner v. Gimbel Bros., 1900.4, 1910
Wertheimer v. Saunders, 1022.6
West v. Day, 1840
Westby v. Madison Newspapers, Inc., 2500
Westcott v. Mikkelson, 1510, 1511
Western Casualty & Sur. Co. v. Dairyland Mut. Ins. Co., 1125
Westfall v. Kottke, 350, 1055, 1070, 1114, 1144, 1355, 1600
Westmas v. Creekside Tree, 4000
Weyauwega v. Industrial Comm'n, 4060
Whipp v. Iverson, 2401, 3068
White Hen Pantry v. Buttke, 2771
White v. Benkowske, 3725
White v. Leeder, 1391
White v. Lunder, 1815, 1820
White v. Minneapolis, St. P. & S. S. M. Ry., 1336
White v. Stelloh, 3220, 3225
White v. The Milwaukee City Ry. Co., 1705
Whitty v. State, 415
Widemshek v. Fale, 2520, 2722
Wiener v. J.C. Penney Co., 3295
Wiger v. Carr, 4027
Wilcox v. Estate of Hines, 8060
Will of Bate, 3032
Will of Rice: Cowie v. Strohmeyer, 3057
Williams v. American Transmission Co. LLC, 8065
Williams v. Brown Mfg. Co., 3200
Williams v. Journal Co., 2505
Wills v. Regan, 1385
Wilmet v. Chicago & N.W. Ry., 1411
Wilson v. Koch, 1030, 1191
Wilson v. Young, 1708
Winkelman v. Beloit Memorial Hosp., 2750
Winnebago County v. Christopher S., 7050
Winnebago County v. Christopher S. (III), 7050, 7050A
Winslow v. Brown, 2005.2
Winston v Minkin, 3086, 3740
Wintersberger v. Pioneer Iron & Metal Co., 1352
Winzer v. Hartmann, 1023
Wirsing v. Krzeminski, 2006.3, 2155
Wischer v. Mitsubishi Heavy Industries America, Inc., 1707.1
Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2750
Wisconsin Bridge and Iron Co. v. Industrial Comm'n, 1900.4
Wisconsin Elec. Power Co. v. Zallea Bros., Inc., 3202, 3262
Wisconsin Loan & Fin. v. Goodnough, 1010, 2000
Wisconsin Natural Gas Co. v. Employers Mut. Liab. Ins. Co., 1021.2
Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr., 1580
Wisnicky v. Fox Hills Inn & Country Club, 8020
Wm. Beaudoin & Sons, Inc. v. Milwaukee County, 3070
Wodill v. Sullivan, 1113
Wojahn v. National Union Bank of Oshkosh, 3026
Wojciechowski v. Baron, 1260
Wojciuk v. United States Rubber Co., 3200, 3211, 3240
Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wisconsin, S.C., 2780

Woodcock v. Home Mut. Casualty Co., 1125
Wood v. Heyer, 3200
Woodward v. City of Boscobel, 1720
Wosinski v. Advance Cast Stone Co., 1511, 1707.1, 1855, 3074, 3710
Wozny v. Basack, 3086
Wright v. Hasley, 2725
Wright v. Mercy Hosp., 1021, 1880
Wunderlich v. Palatine Fire Ins. Co., 100
Wurdemann v. Barnes, 1023
Wurtzler v. Miller, 3290
Wussow v. Commercial Mechanisms, Inc., 2520, 2722

**Y**

Yanta v. Montgomery Ward & Co., Inc., 2750
Yao v. Chapman, 1025.7
Yaun v. Allis-Chalmers Mfg. Co., 3200, 3254
Yelk v. Seefeldt, 2600, 2605
Young v. Anaconda Am. Brass Co., 1051.2
Young v. Professionals Ins. Co., 1023

**Z**

Zabel v. Zabel, 1
Zarder v. Humana Ins. Co., 2500
Zarling v. LaSalle Coca-Cola Bottling Co., 3200
Zartner v. Scopp, 1053, 1195, 1354
Zastrow v. Journal Communications, Inc., 1707.1, 2784
Zawistowski v. Kissinger, 1707.1
Zehren v. F. W. Woolworth Co., 1900.4, 1902, 1904
Zeinemann v. Gasser, 1140, 1280
Zeller v. Northrup King Co., 1707
Zenner v. Chicago, St. P., M. & O. Ry., 315, 1210
Ziegler Co., Inc. v. Rexnord, Inc., 2769
Ziino v. Milwaukee Elec. Ry. & Transp. Co., 1145
Zimmerman Bros. & Co. v. First Nat'l Bank, 3014
Zinda v. Louisiana Pacific Corp., 2550, 2552
Zindell v. Central Mut. Ins. Co., 1030, 1804
Zintek v. Perchik, 1816
Zinzow Constr. Co. v. Giovannoni, 3220
Zoellner v. Fond du Lac, 1049
Zoellner v. Kaiser, 1056, 1320
Zombkowski v. Wisconsin River Power Co., 8100
Zuelke v. Gergo, 3048
Zummach v. Polasek, 4005
Zweck v. D. P. Way Corp., 3051

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# WIS JI-CIVIL INDEX

(References are to Instruction Numbers.)


## A

Abettor, liability of, battery, 2005.2
Abrogation of tort immunities,
    Law Note, 2900
Absent witness, 410
Abuse of privilege
    defamation, nonconstitutional conditional privilege, 2507
    defamation, constitutional, 2511, 2513
    malicious prosecution, 2552
Abuse of process, 2620
Access rights, defined, eminent domain, 8111
Accident, unavoidable, 1000
Accrual of claim, 950
Activation of latent disease or condition, 1720
Adult and child, comparative negligence, 1582
Adult child, death of, pecuniary loss, 1885
Adverse possession
    elements, 8060
    burden of proof, 200
Advice of counsel as defense, malicious prosecution, 2610
Agency
    agent's duty to principal, 4020
    apparent authority of agent, 4005
    defined, 4000
    driver of automobile, 1600
    general agent, defined, 4001
    implied authority of agent, 4010
    independent contractor, definition, 4060
    master-servant, See Scope of employment ratification by principal of agent's acts, 4015
    servant, See Scope of employment special agent, defined, 4002
    termination, general, 4027
    termination, notice to third party, 4028
    volunteer, without compensation, 4025
Agent, negligence of insurance, 1023.6
Aggravation of injury, damages
    injury because of medical malpractice, 1710
    latent disease or condition, 1720
    preexisting injury, 1715
Agreement, See also Contracts
    defined, 3010
    release, avoidance of for mutual mistake of fact, 3012
    supplemental instruction on, 195
Air rights, defined, eminent domain, 8112
Alcohol, See also Negligence
    negligence of person consuming, 1035 (comment)
    test for, in blood, 1008,
Alcoholic, commitment of, 7070
Allergy of user, implied warranty, 3209
Alley, emerging from
        stop, 1330
        stop and yield right of way, 1270
        yield right of way, 1175
Ambiguous contracts, 3051
Animal (dog) owner's or keeper's liability common law, 1391
    statutory, 1390
Animals, right of way, 1200
Apparent authority, agency, 4005
Application for insurance, See Insurance
Approaching car
    at intersection, defined, 1195
    on highway, defined, 1205
Approaching nonarterial intersections, right of way, 1155
    Approaching or entering intersection about same time, 1157
Approach of emergency vehicle, right of way, 1210
Arguments of counsel
    instruction at close of evidence, 110
    preliminary instruction, 50
Arrest
    defined, 2115
    excessive force in, 2006.3, 2155
    false, 2115
    without a warrant, reasonable grounds, 2115
Arterial, driver on, right of way, 1090
Artificial condition as attractive nuisance, 1011
Asking questions, by juror, 57
Assault, 2004
Assumption of due care by highway user, 1030
Assumption, of duty, voluntary, 1397
Attorney, See also Counsel
    fees, 3760
    malpractice, 1023.5A, 1023.5B, 1023.5C
    status as a specialist, 1023.5B
Attractive nuisance, 1011, 8025
Audible, defined, 1210
Authority
    apparent, agency, 4005
    implied, agency, 4010
Automobile, See also Vehicles
    damage to, 1805
    defective condition of, host's liability, 1032
    driver of, agency, 1600
    joint adventure (enterprise), 1610
    Lemon Law, 3300, 3301, 3302, 3303, 3304
    loss of use, damages
        not repairable, 1801
        repairable, 1800
    Magnuson-Moss Act claim, 3310
    owner's permission for use of, 3112
    racing of, 1107
Avoidance of contract for mutual mistake of fact, 3072

## B

Backing, lookout, 1060
Bad faith by insurance company, 2760, 2761, 2762
Bailment
    defined, 1025.5
    duty of bailee under for mutual benefit, 1025.7
    duty of bailor for hire, 1025.6
    negligence of bailee may be inferred, 1026
    negligence of carrier presumed, 1026.5
Bailor, negligence of gratuitous, 1025.8
Battery,
        defense of property, 2006.1
        defined, 2005

excessive force in arrest, 200, 2155
Battery (continued)
liability of aider and abettor, 2005.2
offensive contact 2005.1
punitive damages, 1708
self-defense, 2006
sports participant, injury, 2020
Bell, railroad, duty to ring within municipality, 1402
Belt, safety, failure to use, 1277
Benefit-of-the-bargain, 2405, 2405.5
Benefits, special, defined, eminent domain, 8115
Bifurcated proceedings, 52A, 52B
Bifurcation, punitive damages, 1707.1 (comment)
Blind persons
duty of, 1050
right of way, 1170
Blood test for alcohol, 1008
Brakes, equipment, and maintenance of vehicles, 1054
Breach of fiduciary duty, 2784
Damages, 2785
Special verdict, 2786
Breach of contract, 3053
by purchaser, damages, 3750
by seller, damages, 3755
Breach of warranty, See Products liability
Building
abutting on a public highway, owner's duty, 8030
public, negligence of owner, safe-place statute, 1904
Building contractor, negligence of, 1022.4
Building contracts, damages, 3700, 3701
Burden of proof, See Evidence
Bus, school
flashing red signals, 1133
stopped on highway, 1132
Business
defined, safe-place statutes, 1910
defined, strict liability (products), 3264
injury to, 2820, 2822
liability of proprietor, patron injured, act of third person, 8045
loss of profits, damages, 1750.2, 1754, 1780
nuisance arising out of operation of, 1924
Buyer, duty of, 3254
Bystander recovery, 1510

## C

Camouflage
lookout, 1056
speed, 1320
Capitalization of rental income, eminent domain, 8130
Care, ordinary, varies with circumstances, 1020
Caregiver, duty of, 1021
Carrier, common, 1025
Castle Doctrine, 2006.2
Cause
defined, 1500
informed consent cases, 1023.1, 1023.3, 1023.16, 1023.17
normal response, 1501
probable cause, malicious prosecution, 2605
proximate, 1500
relation of collision to physical injury, 1506
risk contribution theory, 3295
where cause of death is in doubt, 1505
Charge after verdict, 197
Chemical tests, intoxication, 1008
Child
and adult, comparative negligence, 1582
attractive nuisance, 1011, 8025
death of adult child, pecuniary loss, 1885
death of child, parents' loss of society and companionship, 1895
death of minor child, pecuniary loss, 1890
driver's duty when present, 1045
injury to, parents' damages
for loss of child's services, 1835
for loss of society and companionship, 1837
for medical expenses, 1840
for services rendered to child, 1845
injury to parent, 1838
loss of society and companionship for death of parent, 1897
negligence of, 1010
negligence of child compared with adult, 1582
parents' duty
negligent entrustment, 1014
to control, 1013
to protect, 1012
trespasser, 8025, 8027
Chiropractor
determining treatability, 1023.9
duty to inform patient, 1023.15, 1023.16, 1023.17
negligence of, 1023.8, 1023.9
Circumstantial evidence, 230
Civil rights, See Federal civil rights
Civil theft
by contractor, 2722
by contractor of movable property of another, 2420
Closing instruction, 190, 191
Collateral source, 1756, 1757
College degree, delay in obtaining, 1760
Commitment
of a mentally disabled person, 7050
of an alcoholic, 7070
Common carrier, negligence of, defined, 1025
Common motor carrier
defined, 1339
stop at all railroad crossings, 1339
Common scheme or plan, 1740
Comparable sales, eminent domain, 8120
Comparative negligence
adult and child, 1582
basis of comparison, 1580, 1585, 1590
multiple driver-multiple guest comparison, 1591
recommended questions, 1592
when negligence or cause question has been answered by the court, 1595
Compensatory damages, See Damages
Computer use, by jurors, 50
Concerted action, 1740

Condemnation, See Eminent domain
Conditional privilege
- defamation, abuse of, 2509
- emergency vehicle, 1031
- invasion of privacy, abuse of, 2552

Consortium, defined, 1815

Conspiracy
- affiliated corporations, between, 2808
- defined, 2800
- evidence of to be viewed as a whole, 2806
- indirect proof, 2802
- injury to business, 2820, 2822
- overt acts, 2810
- proof of membership, 2802
- restraint of will, 2822

Construction workers, right of way, 1265
Constructive eviction, 3095
Consumer, duty of, 3254
Contact sports injury, 2020
Contractor
- building, contract damages, 3701, 3700
- building, negligence of, 1022.4
- independent, defined, 4060
- liability of one employing, 1022.6
- theft by, 2722

Contracts
- abandonment, mutual, 3078
- agreement, 3010
- ambiguous provisions, 3051
- avoidance for mutual mistake of fact, 3072
- breach, 3053
  - by purchaser, damages, 3750
  - by seller, damages, 3755
- building contracts, damages, 3700
- consideration, 3020
- damages, out-of-pocket rule, 3710
- definiteness and certainty, 3022
- definitions — "bona fide," 3045
- demand for performance, 3054
- duration, 3049
- estoppel, 3074
- frustration of purpose, 3070
- good faith, 3044
- hindrance or interference with performance, 3060
- implied contract
  - general, 3024
  - promise to pay reasonable value, 3026
  - unjust enrichment, 3028
  - implied promise of no hindrance, 3046
- impossibility
  - act of God, 3066
  - disability or death of a party, 3067
  - original, 3061
  - partial, 3063
  - superior authority, 3065
  - supervening, 3062
  - temporary, 3064
- insurance contracts, See Insurance
- interference with, 2780
- integration of several writings, 3040
- landlord-tenant, 3095
- modification
  - by conduct, 3032
  - by mutual assent, 3030
- novation, 3034
- offer
  - acceptance, 3014
  - making, 3012
  - rejection, 3016
  - revocation, 3018
- partial integration, contract partly written, partly oral, 3042
- real estate listing contract
  - broker's commission on sale subsequent to expiration of contract containing "extension" clause, 3090
  - termination for cause, 3088
  - validity, performance, 3086
- rescission for nonperformance, 3076
- sale of goods, delivery or tender of performance, 3056
- subsequent construction by parties, 3050
- substantial performance, 3052
- termination of servant's employment
  - additional consideration provided by servant, 3084
  - employer's dissatisfaction, 3083
  - indefinite duration, 3082
- time as an element, 3048
- tortious interference with, 2780
- voidable contracts, duress, fraud, misrepresentation, 3068
- waiver, 3057
- waiver of strict performance, 3058

Contribution, risk, 3295
Contributory negligence
- defined, 1007
- highway defect, 1048
- of guest
  - intoxication, 1035
  - failure to protect, 1047
  - placing self in position of danger, 1049
  - of mentally disabled person, 1007, 1385.5
  - of patient and informed consent, 1007, 1023.4
  - of pedestrian, sidewalk defect, 1049 of rescuer, 1007.5

Control and management, See Management and control
Controlled intersection, right of way, 1150 Conversion
- damages, 2201
- destruction of property, 2200.2
- dispossession, 2200
- failure to return upon demand, 2200.1

Corporate officers, liability of, 1005
Costs, reproduction, eminent domain, 8125
Counsel
- advice of, as defense, malicious prosecution, 2610
- arguments of, 110
- objection of, 115
- reference to insurance company, 125

Course of dealing, implied warranty, 3203, 3206
Court
- appreciation of jury's services, 197

damage question answered by, 150
demeanor of, 120
finding in special verdict that one or more parties at fault, 108
negligence question answered by, 155
order striking testimony, 130
reference to insurance company, 125
Credibility of witnesses, 50, 215
Credible evidence, defined, 200
Crops, damages for injury to, 1806
Crossing arterial highway, lookout, 1065
Crossing, railroad
duty of railroad to maintain open view, 1411
duty of train crew, 1405
Crossing roadway, pedestrian's duties, See Right of way
Crosswalk, pedestrian's rights and duties, See Right of way
Custom and usage, evidence of in determining negligence, 1019

## D

Damages
activation of latent disease or condition, 1720
aggravation of injury because of medical malpractice, 1710
aggravation of preexisting injury, 1715
attorney fees, 3760
automobile
loss of use, 1800
property, 1805
breach of contract
building contracts, 3700, 3701
burden of proof, 202
by purchaser, 3750
by seller, 3755
bystander, 1510
collateral source, 1756, 1757
common scheme or plan, 1740
compensatory, burden of proof as to, 202
condemnation, See Eminent domain
consortium, 1815
contracts
building, 3700
breach by purchaser, 3750
breach by seller, 3755
general, 3710
conversion, 2201
crops, 1806
damage question answered by the court, 150
death, wrongful
estate's recovery for medical, hospital, and funeral expenses, 1850
estate's recovery for pain and suffering, 1855
of adult child, pecuniary loss, 1885
of child, parents' loss of society and companionship, 1895
of husband, all items, 1861
of minor child, pecuniary loss, 1890
of parent,
loss of society and companionship, 1897
pecuniary loss, 1880
of spouse, loss of society and companionship, 1870
of wife, medical, hospital, and funeral expenses, 1875
of wife, pecuniary loss, 1861
defamation
compensatory, 2516
punitive, 2520
disability, past and future, personal injury, 1750.1, 1750.2, 1766, 1767, 1768
divisible injuries from nonconcurrent or successive torts, 1722
dog bite, 1390
duty to mitigate, 1730, 1731
earnings, loss of, as, 1760, 1762
effects of inflation, 1797
eminent domain
change in grade, 8110
loss of access, 8110
severance, 8105
unit rule, 8100, 8101
unity of use, two or more parcels, 8107
emotional distress, 1770
enhanced injury, 1723
estate’s recovery, 1850, 1855
fraud and deceit, See Misrepresentation future profits, 3725
general instruction on, 1700
incidental, 3720
income, loss of, as 1760, 1762
income, not taxable as, 1735
in general, 1700
injury to child, parents' damages
for loss of child's services, 1835
medical expenses, 1840
services rendered to child, 1845
injury to a growing crop, 1806
injury to parent, 1838
injury to spouse
loss of consortium, 1815
medical and hospital expenses, 1825
wife's responsibility for her own, 1830
nursing services, 1820
loss of consortium, 1815
loss of expectation, 3735
misrepresentation
basis for liability and damages, 2400
fraud and deceit, measure of damages in sale or exchange of property, 2405
negligence, out-of-pocket rule, fraud, 2406
strict responsibility, 2405.5
mitigate, duty to, 1730, 1731
nominal, 1810
not taxable as income, 1735
personal injury
aggravation or activation of latent disease or condition, 1720
aggravation of injury because of medical malpractice, 1710

aggravation of preexisting injury, 1715
disability, 1750.1, 1750.2, 1766, 1767, 1768
earning capacity, impairment of, 1750.1, 1750.2, 1760, 1762
earnings, loss of
delay in obtaining a degree, 1760
future, 1762
past, 1760
professional, 1785
injuries from nonconcurrent or successive torts, 1722
Damages (continued)
life expectancy and mortality tables, 1795
loss of business, profits, 1760, 1762
loss of professional earnings, 1760, 1762
malpractice, lack of informed consent, 1741
malpractice, offsetting benefit, 1742
medical and hospital expenses
future, 1750.1, 1750.2, 1758
past, 1750.1, 1750.2, 1756, 1757
pain and suffering
future, 1750.1, 1750.2, 1767, 1768
past, 1750.1, 1750.2, 1766, 1768
traumatic neurosis, 1770
present value of future damages, 1796
property
automobile
damage to, 1804
loss of use, 1800
personal
damage to, 1804
destruction of, 1803
punitive
when awarded, 1707, 1707.1
defamation, 2520
products liability, 1707A, 1707.2
question answered by the court, 150
severance
change in grade, 8110
defined, 8105
loss of access, 8110
subsequent event causing further injury, 1725
termination of real estate listing contract by seller, broker's recovery, 3740
Deaf person, duty of, 1050
Dealership, See Fair Dealership Law this index.
Death
cause of in doubt, 1505
of adult child, pecuniary loss, 1885
of child, parents' loss of society and companionship, 1895
of husband, all items, 1861
of minor child, pecuniary loss, 1890
of parent,
pecuniary loss, 1880
society and companionship, 1897
of spouse, loss of society and companionship, 1870
of wife, medical, hospital, and funeral expenses, 1875
of wife, pecuniary loss, 1861
presumption of due care, 353
Deceive, defined, 3105
Defamation
compensatory damages, 2516
conditional privilege, abuse of privilege, 2507
defined, 2501
express malice, 2513
Law Note, 2500
media defendant, abuse of constitutional privilege, 2509
private individual versus media defendant, 2509
private individual versus private individual, 2501
public figure, 2511
punitive damages, 2520
truth as defense, 2505, 2505A
Defective condition of car, host's liability, 1032
Defects
highway, 8035
contributory negligence, 1048
if known in a product, then no implied warranty, 3207
sidewalk, 8035
contributory negligence, 1049
Defense of property, 2006.1
Degree, delay in obtaining, 1760
Deliberation, process of, 191
Demeanor of judge, jury to ignore, 120
Dentist
duty to inform patient, 1023.15-1023.17
negligence of, 1023.14
Depositions, use of, See Preliminary instructions before trial
Destruction of personal property, 1803
Deviation
ascertainment that movement can be made with reasonable safety, 1354
from clearly indicated traffic lanes, 1355
signal required, 1350
Directional signals, 1350
Disability, damages, 1750.1, 1750.2, 1766, 1767, 1768
Disabled vehicle, parking, 1125
Discharge, wrongful, 2750
Discovery, 950
Disease or condition, latent, aggravation or activation of, damages, 1720
Dissenting jurors, to sign verdict, 180
Distance between front and rear car, 1112
Divided highway, pedestrians' rights, 1160
Divisible injuries, 1722
Doctor, See Physician
Dog bite, 1390
Dog owner or keeper, liability of
common law, 1391
statutory, 1390
Domestic partner, 1861, 1870 (comment)
Double damages, dog bite, 1390
Drinking by driver or guest, relation to negligence, 1035
Driver of automobile
drinking by, relation to negligence, 1035 duties
approaching intersection when yellow light shows, 1192
at railroad crossing, 1336, 1337
entering intersection with green light in his favor, 1191

following another, 1112
preceding another, lookout, 1114
preceding another, slowing or stopping, signalling, 1113
when children present, 1045
inattentive, 1070
obstructed view, 1310
position on right side of roadway and exceptions, 1135, 1140
seat belt negligence, 1277
as servant, 1600
scope of employment, 1605
Driver's manual, use by jury, 255
Driveway
emerging from a private driveway or other nonhighway access, 1355
left turn into, 1352
Due care, by highway users
right to assume, 1030
presumption of, 353
Duties, See entries under specific titles
Duty to inform patient
cause, 1023.3, 1023.17
chiropractor, 1023.15-1023.17
dentist, 1023.15-1023.17
medical, 1023.1-1023.4
optometrist, 1023.15-1023.17
podiatrist, 1023.15-1023.17
special verdict, 1023.1, 1023.16
Duty to sound horn, nonstatutory, 1096
Duty, voluntary assumption of, 1397

## E

Earnings, loss of
business profits, 1750.1, 1750.2, 1760, 1762
delay in obtaining degree, 1760
impairment of earning capacity, future, 1762
past, 1750.1, 1750.2, 1760
professional, 1760, 1762
Easement, termination by abandonment, 3079
Economic loss doctrine, 2419
Economic waste, 3700
Emergency doctrine, 1105A
Emergency vehicle, approach of, right of way, 1210
Emergency vehicle, conditional privilege, 1031
Emerging from alley or other nonhighway, 1175, 1270, 1330, 1335
Emerging from, defined, 1270
Eminent domain, 8100-8145
access rights, defined, 8111
air rights, defined, 8112
assemblage, 8145
capitalization of rental income, 8120
change in grade, 8110
comparable sales, 8120
cost approach, 8135
fair market value
defined, 8100
lands containing marketable deposits, 8105
partial taking, 8101
income approach, 8130
inconvenience to landowner, 8125 (withdrawn)
legal nonconforming use, 8140
reproduction costs, 8135
severance damages, 8102, 8103
special benefits, 8115
Taking of a Limited Easement, 8113
unit rule, 8100, 8101
unity of use, 8104
Emotional distress
bystander, 1510
intentional infliction of, 2725
negligent infliction of, 1510, 1511
Employees of hospital, See Hospital employees
Employer
duty of, safe-place statute, 1900.2
liability of one employing independent contractor, 1022
negligence of, safe-place statute, 1900.4
negligent supervision, training, or hiring by, 1383
vicarious liability of, 4055
wrongful discharge, 2750
Employment, See also Agency; Scope of employment safe place, 1900.2, 1900.4
wrongful discharge, 2750
Enhanced injuries, 1723
Entering
defined, 1175
from alley or nonhighway access point, 1175
or crossing through highway, 1065
Enterprise, joint, automobile, 1610
Entrustment, negligent, 1014, 1014.5
Equipment and maintenance of vehicles
brakes, 1054
directional signals, 1350
general duty, 1052
headlights, 1053
school bus, flashing red signals, 1133
Equitable actions, right to jury trial, 1
Estate's recovery
for medical, hospital, and funeral expenses, 1850
for pain and suffering, 1855
Eviction, constructive, 3095
Evidence
burden of proof, 200
adverse possession, 200, 205
compensatory damages, 202
defined, 100
false imprisonment, 2105
"fraud" standard, 205
higher civil standard, 205
medical or scientific treatise, 261
middle, 205
ordinary civil standard, 200
preliminary instruction, 50
circumstantial, 230
credibility of witnesses, 215, 415
driver's manual, use by jury, 255
expert testimony, 260, 265
failure to call witness, 410
false testimony, 405

falsus in uno, 405
general, 260
hypothetical question, 265
inferences, permissive, 356
Law Note, 349
measurements, use of, 305
medical or scientific treatise, 261
negative testimony, 315
opinion of expert, 260
physical facts, use of as, 325
permissive inferences, 356,
Law Note, 349
positive testimony, 315
presumptions, 350-356 spoliation, 400
subsequent remedial measures, 358
summary of, 103
Evidence (continued)
weight of, 215
witness
absence of, 410
impeachment of, 420
prior conviction of, 415
prior inconsistent statement of, 420
self-incrimination of, 425
Exhibits, 50, 100
Expert testimony
general, 260
hypothetical question, 265
Express malice, defamation, 2518
Express warranty, See Products liability

## F

Failure
of insured to cooperate, 3115
materiality of failure, 3116
to examine product, implied warranty, 3208
to give notice to insurer, 3117
to protest, guest, 1047
to see object in plain sight, 1070
to use safety belt, 1277
to use safety helmet, 1278
to yield roadway, slow moving vehicles, 1305
Fair Dealership Law, 2769-2772
Fair market value
defined, 1803, 8100, 8105
lands containing marketable deposits, 8102
testimony by owner, 260
False arrest
felony, 2115
False arrest
reasonable grounds to believe offense committed, 2115
False imprisonment, 2100
Falsely represent, defined, 3100
False representative, See Insurance; Misrepresentation
False testimony, willful, 405
Falsus in uno, 405
Fault, defined, ultimate fact verdict, 1001
Federal civil rights
excessive force in arrest (in maintaining jail security), 2155
Section 1981 actions, 2150
Section 1982 actions, 2150
Section 1983 actions, 2151
Fees, attorney, 3760
Felony, false arrest for, 2115
Fitness for particular purpose, warranty, 3202
Five-sixths verdict, 180
Fixed speed limits, 1290
Flammable liquid, defined, 1339
Flashing traffic signal
red, 1133
yellow, 1090
Following car, operation of, 1112
Franchise, wrongful termination of, 2770
Fraud, See also Misrepresentation
elements of, 2400, 2419
Frequenter
defined, 1900.4, 1901
injury to, safe-place statute, 1900.4
negligence of, safe-place statute, 1902
Front car
duty of preceding driver to following driver, 1114
slowing, stopping and signalling, 1113
Funeral
burial expenses, wrongful death, 1850
procession, right of way, 1180
Future and past disability, damages, 1750.1, 1750.2, 1766, 1767, 1768
Future damages, present value of, 1796

## G

Gas company
duties relating to company's pipes, mains, and meters, 1003
duties relating to customer's pipes or appliances, 1002
Gender-Neutral Language, 5
General agent, defined, 4001
General benefit, eminent domain, 8115
General disability, one question as to, 1750.2
General verdict, submission on, 106
Good faith,
duty of, 3044
Lemon law, 3300
Gratuitous bailor, negligence of, 1025.8
Green arrow, traffic signal, 1185
Green light, entering intersection with, 1191
Green or go, traffic signal, 1190
Gross negligence, See also Negligence
defined, intoxication not involved, 1006
reckless conduct, 1006, 2020
Growing crop, damage to, 1806
Guardianship, 7054, 7055, 7056, 7060, 7061
Guest
automobile
active negligence, management and control, 1047.l
drinking of intoxicants, relation to negligence, 1035

failure to protest, contributing negligence, 1047
lookout
duty of with respect to, 1075
duty to warn, 1076
placing self in position of danger, 1046

## H

Handicaps, physical, duty of persons with, 1050
Headlights
automobile, 1053
railroads, 1412
Helmet negligence, 1277 (comment), 1278
Highway
defects, 8035
defects, contributory negligence, 1048 defined, 1325A
divided, defined, 1160

Highway (continued)
entering from an alley or nonhighway access point, 1175
entering or crossing through highway, 1065
insufficiency, 8035
intersection, right of way, 1157
obst ructions, public utility, non-energized facilities, 1395
users, right to assume due care, 1030
worker, right of way, 1265
Hiring, Negligent, 1383
Horn
duty to sound when passing vehicles proceeding in same direction, statutory, 1144
failure to sound, duty, nonstatutory, 1096
Horse, liability of owner or keeper, common law, 1391
Hospital, negligence of, in granting staff privileges, 1384
Hospital employees, negligence
injury resulting from patient's inability to look out for own safety, 1385
registered nurses and licensed technicians performing skilled services, 1023.7
suicide or injury resulting from escape or attempted suicide, 1385.5
Hospital expenses
estate's recovery for, 1850
injury to child, 1840
injury to spouse, 1825
personal injuries, 1750.1, 1750.2, 1756, 1757, 1758
wife's responsibility for own, 1830
wrongful death, 1850
Hospital licensed technicians, See Hospital employees
Host-guest relationship
agency, driver of automobile, 1600
contributory negligence of guest, placing self in position of danger, 1046
contributory negligence of guest, riding with host, 1047
danger, 1046
defective condition of car, host's liability, 1032
drinking by driver, relation to negligence, 1035
driver's management and control, limited skill, 1110
guest's duty as to lookout, 1075
joint enterprise, automobile cases, 1610
Hotel innkeeper
duty to furnish reasonably safe premises and furniture for his guests, 8051
duty to provide reasonable security, 8050
Household member, 3110
Household services, loss of, 1816, 1817
Husband
death of, damages, all items, 1861, 1870
injury to, See Spouse
Hypothetical question, expert testimony, 265

## I

Ignoring judge's demeanor, 120
Illness without forewarning, 1021.2
Immunity, abrogation of torts, Law Note, 2900
Impairment of earning capacity, See Earnings
Impeachment of witness, prior inconsistent or contradictory statements, 420
Impeding traffic
by reason of slow speed, 1300 failure to yield roadway, 1305
Implied authority, agency, 4010
Implied duty of good faith, 3044
Implied warranty, See Products liability
Imprisonment, See False imprisonment
Improper use, implied warranty, 3210
Imputed negligence, driver of automobile
agency, 1600
joint adventure (enterprise), 1610
scope of employment, 1605
Inattentive driving, 1070
Income, damages award, not taxable as, 1735
Income, loss of, 1760, 1762
Income approach, eminent domain, 8130
Incompetent person, 7054-7061
Inconvenience to landowners, eminent domain, 8125
Independent contractor
defined, 4060
liability of one employing, 1022.6
Inference,
self-incrimination, 425
spoliation, 400
Inflation, effects of, 1797
Infliction of emotional distress, 1510, 1511, 2725
Informed consent, 1023.2, 1023.3
causation, 1023.3
contributory negligence, 1007, 1023.4
dentist, 1023.15-1023.17
optometrist, 1023.15-1023.17
podiatrist, 1023.15-1023.17
duty of chiropractor, 1023.15-1023.17
duty of physician, 1023.2
suggested verdict, 1023.1
Injuries, divisible, 1722
Injury

aggravation of, because of medical malpractice, 1710
caused by subsequent event, 1725
enhancement of, 1723
from failure to wear safety belt, 1277 from fright, 1510
personal, See Damages
preexisting, aggravation or activation of, 1715
relation of collision to physical injury, 1506
to child
parents' damages for loss of child's services, 1835
parents' damages for medical expenses, 1840
parents' damages for services rendered to child, 1845
to frequenter, safe place, 1900.4
to spouse
medical and hospital expenses, 1825
wife's responsibility for own, 1830
nursing services, 1820
services, society, and companionship, 1815
Inspection, no duty of, express warranty, 3222
Insufficiency of highway or sidewalk, 8035

Insurance
agent, negligence of, 1023.6
application for
false representations, 3100
misrepresentation with intent to deceive, 3100
bad faith by insurance company, 2760, 2761, 2762
breach of
affirmative warranty, 3100
promissory warranty, 3105
failure of condition, 3105
failure of insured to cooperate, 3115
materiality, 3116
failure to give notice to insurer, 3117
materiality, 3118
household member, 3110
resident covered by, 3110
Intent, defined, 3100
Intentional deceit, misrepresentation, 2401
Intentional tort, 2000
infliction of emotional distress, 2725
interference with contract, 2780
liability of minor, 2000
mitigation of damages, 1732
verdict in cases involving
joint tortfeasors, 1580 (comment)
Interrelationship of special verdict questions, 145
Intersection
alley, stop emerging from, 1330
defined, 1325A
driver on arterial approaching, 1090
left turn at, 1195
lookout, 1090, 1191
of highways, right of way, 1157
pedestrians' right, 1158, 1159, 1160, 1165
right of way, See Right of way
stop at, 1325, 1325A
Intoxicants
drinking by driver, 1035
drinking by guest, 1040
Intoxication
chemical tests, 1008
not involved in gross negligence, 1006
of driver, 1035
Intrusion, invasion of privacy, 2551
Invasion of privacy, 2550, 2551, 2552
Involuntary commitment of mentally ill person, 7050
Involuntary commitment: mentally ill: recommitment alleging Wis. Stat. § 51.20(1)(am), 7050A

**J**

Joint adventure, enterprise, automobile, 1610
Joint and several liability, 1740
Judge, See Court
Juror
computer use by, 50
conduct during trial, 50
duties in general, 100-197
knowledge, 215
no obligation to discuss case, 197
questions, 57
Jury
appreciation of services, 197
asking questions, 57
conduct of, 50
election of foreman, 190
not to discuss case after verdict, 197
note taking, 60, 61
reaching a verdict, 190
unable to agree, supplemental instruction, 195
use of driver's manual, 255
view, 152
Jury trial, right to, 1
Just compensation, eminent domain, 8100, 8105

**K**

Keeper or owner of animal, liability of common law, 1391
statutory, 1390
Knowledge of juror, 215

**L**

Landlord-tenant, 3095
Landowner, inconvenience to, eminent domain, 8125
Latent disease or condition, activation or aggravation of, 1720
Lay witness, 268
Leaving curb or place of safety, pedestrian, 1255
Leaving vehicle
off the roadway, 1115
on the roadway, 1120
lights, 1130
on or off the roadway, exception to prohibition, 1125
Left side of road, driving on, 1135
violation excused, 1140
Left turn at intersection, 1195, 1352
Legal nonconforming use, eminent domain, 8140

Lemon Law, 3300, 3301, 3302, 3303, 3304
Liability
- of abettor, battery, 2005.2
- of dog (animal) owner or keeper, common law, 1391
- of dog owner or keeper, statutory, 1390
- of employer, 4055
- of host, defective condition of car, 1032
- of minor, intentional tort, 2000
- of one employing independent contractor, 1022.6
- of principal for acts of agent, See Agency
- of proprietor for injury to patron caused by third person, 8045

Libel, See Defamation
Licensed technician, negligence of, 1023.7
Life expectancy and mortality tables, 1795
Lights, motor vehicle
- directional signals, 1350
- flashing red, school bus, 1133
- headlights, equipment, and maintenance, 1053

Limitations period, 950
Limited skill and judgment of host driver, 1110
Livestock
- on highway, 1200 right of way, 1200

Long term care providers, damages, 1757, 1815, 1870, 1897
Loitering on roadway, thumbing rides, 1250

Lookout
- approaching flashing yellow traffic signal, 1090
- ascertainment that movement can be made with reasonable safety, 1354
- backing, 1060
- camouflage, 1056
- driver on arterial approaching intersection, 1090
- entering intersection on green light, 1191
- entering or crossing through highway, 1065
- failure to see object in plain sight, 1070
- guest, 1075
- guest's duty to warn, 1076
- limited duty
  - on private property, 1080
  - to rear, 1114
- on through highway, 1090
- passing, vehicles proceeding in same direction, 1141
- pedestrian, 1095
- turn or deviation, 1354

Loss of
- access, eminent domain, 8105
- child's services, 1835
- earnings, See Earnings
- society and companionship of domestic partner, 1870 (comment)
- society and companionship of spouse, 1815, 1870
- society and companionship of parent, 1838
- use of automobile, not repairable, 1801
- use of repairable automobile, 1800

## M

Magnuson-M oss Claim, 3310
Maintenance and equipment of vehicles, See Equipment and maintenance of vehicles
Maintenance workers on highway, 1265
Malice
- defined, 1707
- express, defamation, 2513
- punitive damages, 1707, 1707A

Malicious prosecution
- advice of counsel as defense, 2610, 2611
- elements, 2600, 2605
- instituting civil proceeding, 2605
- instituting criminal proceeding, 2600

Malpractice
- aggravation of injury because of medical malpractice, 1710
- attorney, 1023.5A, 1023.5B, 1023.5C
- cause, medical, informed consent cases, 1023.3
- chiropractor, 1023.8, 1023.9
- dentist, 1023.14
- nurse, 1023.7
- physician, 1023
- professional, 1023.5A, 1023.5B, 1023.5C
- psychiatrist, 1023 (comment)
- res ipsa loquitur, 1024

Management and control
- defined, 1105
- in an emergency, 1105A
- negligence of guest, active, 1047.l

Manufacturer, negligence of, See Products liability
Market value, property damaged, 1804, 1805
Master and servant, See Servant
Measurements, evidence, 305
Medical expenses, See Hospital expenses
Medical negligence, 1023
- informed consent, 1023.2
- informed consent, cause, 1023.3
- res ipsa loquitur, 1024

Medical technician, See Hospital employees
Medical treatise, 261
Meeting and passing
- position on highway, 1135
- violation excused, 1140

Meeting at intersection of highways, right of way, 1155
Member of household, 3110
Mentally disabled, See also Protective placement
- contributory negligence of, 1007, 1021, 1385.5
- involuntary commitment, 7050
- recommitment alleging § 51.20(1)(am), 7050A
- negligence of, 1021

Merchantability, defined, 3201
Middle burden of proof, 205
Military convoys, right of way, 1180
Minor
- attractive nuisance, 1011
- death of, pecuniary loss, 1890
- liability of, intentional tort, 2000
- parents' duty
  - to control, 1013
  - to protect, 1012

Misrepresentation, fraud
- bases for liability and damages, 2400

damages, measure of, in actions involving sale or exchange of property, 2405
damages, out-of-pocket rule, negligent misrepresentation, 2406
intentional deceit, elements of fraud, 2401
negligence, 2403
property loss (Wis. Stat. § 895.80), 2419
strict responsibility, 2402
under Wis. Stat. § 100.18, 2418 RENUMBERED 2418B
unfair trade practice, 2418 RENUMBERED 2418B
verdicts suggested, 2402, 2403
insurance
application with intent to deceive, 3105
in application for insurance, 3100
Mistake of fact, mutual, avoidance of contract, because of, 3072
Mitigation of damage,
breach of contract, 1731
intentional torts, 1732
negligence, 1731
physical injuries, 1730
Modification or exclusion of the implied warranty, 3205
Mortality tables and life expectancy, 1795
Motor vehicles, See specific headings
Moving from parked position, 1205
Multiple driver-multiple guest comparison, 1591
recommended questions, 1592
Municipality, creating or maintaining nuisance, 1922

Mutual mistake of fact, avoidance of contract, because of, 3072

## N

Negative testimony, defined, 315
Negligence
attorney, 1023.5A, 1023.5B, 1023.5C
bailee, 1026
for hire, 1025.6
for mutual benefit, 1025.7
inferred, 1026
bailor, 1026.8
building contractor, 1022.4
bus driver, 1025
carrier
common, 1025
negligence presumed, 1026.5
children, 1010
chiropractor, 1023.8, 1023.9
common carrier, 1025
comparative, See also Comparative negligence
adult and child, 1582
basis of comparison, 1580
multiple driver-multiple guest comparison, 1591
recommended questions, 1592
where negligence or cause question has been answered by the court, 1595
contributory, See also Contributory negligence
defined, 1007
highway defect, 1048
of guest
drinking by, 1035
failure to protest, 1047
in informed consent case, 1021
placing self in position of danger, 1046
of mentally disabled person, 1021
of plaintiff frequenter, safe-place statute, 1902
sidewalk defect, 1049
defamation, 2509
defined, 1005
dentist, 1023.14
diagnosis, 1023.4
driver, See individual headings
duty of
agent to principal, 4020
buyer, 3254
consumer, 3254
driver
approaching intersection when yellow light shows, 1192
at railroad crossing, 1336
children, when present, 1045
drinking, 1035
entering intersection with green light in his or her favor, 1191
entering or crossing arterial highway, 1065
following another car, 1112
front car, 1114
slowing, stopping, or signalling, 1113
highway defect or insufficiency, 1048
horn, to sound, 1012
lookout
defined, 1055
private property, 1080
management and control, 1047.l, 1105
speed, obstructed vision, 1310
speed, nighttime, 1315
to see defects, 1048
employer, in hiring, training, or supervising, 1383
employer, safe-place statute, 1900.4
frequenter, safe-place statute, 1902
gas company
relating to company's pipes, mains, and meters, 1003
relating to customer's pipes or appliances, 1002
guest, See Contributory negligence; Guest
highway defect, 1049
hiring, 1383
hospital employees
employees, 1385, 1385.5
registered nurses and technicians, 1023.7
hotelkeeper, to furnish reasonably safe premises and furniture for his guests, 8051
informed consent, 1023.1-1023.4, 1023.15-1023.17
insurance agent, 1023.6
jurors, in general, 100-195
licensed technician, 1023.7
manufacturer, See Products liability mentally ill, 1021

mitigate damages, injured person, 1730, 1731
municipality, highway or sidewalk defects and insufficiency, 8035
nurse, 1023.7
owner
of building on public highway, 8030
of land to user, 8020
of place of amusement, 8040
of place of business, duty to protect patrons, 8045
of public building, safe place, 1904
of public business, not safe place, 8040
of vehicle, to equip and maintain, 1052
to trespasser, 8025
parent
to control minor child, 1013, 1014
to protect minor child, 1012
pedestrian, See also Right of way
lookout, 1095
sidewalk defect or insufficiency, 1049
physically handicapped persons, 1050
place of amusement, owner, 8040
place of business, owner's duty to protect patrons, 8045
possessor of land to user, 8012
private nuisance, 1920
proprietor for injury to patron caused by third person, 8045

Negligence (continued)
public utility, highway obstructions, non-energized facilities, 1395
railroad crossing, driver's duty, 1336
railroad, See Railroads
registered nurse, 1023.7
restaurant operator, sale of food containing harmful natural ingredients, 3248
risk contribution, 3294, 3295
school bus driver
and other drivers when bus is stopped, 1132
to display flashing red signals when bus is stopped, 1133
seller, See Products liability
sensory handicapped persons, 1050
sidewalk defect, 1048
subsequent remedial measures, 358
superior skills doctrine, 1005
supervision, 1383
teacher
to instruct or warn, 1380
to supervise students, 1381
technicians, 1023.7
training, 1383
worker, preoccupation in work minimizes duty, 1051
emergency doctrine, 1105A
employer, in hiring, 1383
employer, in supervising, 1383
employer, in training, 1383
employer, safe place, 1900.2
entrustment, 1014, 1014.5
evidence of custom and usage, 1019
fault, ultimate fact verdict, 1001
frequenter, safe place, 1902
gas company
relating to company's pipes, mains, and meters, 1003
relating to customer's pipes and appliances, 1002
gross, See Gross negligence
handicapped persons
physical, 1050
sensory, 1050
highway defect or insufficiency, 1048
highways and sidewalks, care of, 8035
hospital
employees, 1385, 1385.5
registered nurses and technicians, 1023.7
imputed, See Imputed negligence
independent contractor, liability of one employing, 1022.6
infliction of emotional distress, 1510, 1511
informed consent, 1023.1, 1023.2, 1023.3, 1023.4
intentional acts compared to, 1004, 2001
lookout, 1055
malpractice
attorney, 1023.5A, 1023.5B, 1023.5C
chiropractor, 1023.08
dentist, 1023.14
physician, 1023
res ipsa loquitur, 1024
management and control, 1047.l, 1105
manufacturer, See Products liability
mentally ill, 1021, 1385.5
misrepresentation, 2403
municipality
highway and sidewalk defect, 8035
highway and sidewalk insufficiency, 8035
nuisance, 1922
owner, See Owner
owner of animal
common law, 1391
statutory, 1390
*per se*, 950
physically handicapped person, 1050
physician, malpractice by, 1023
res ipsa loquitur, 1024
plaintiff frequenter, 1902
product user, 3268
psychiatrist, 1023 (comment) question answered by court, 155
res ipsa loquitur
defined, 1145
malpractice, physician, 1024
rescuer, 1007.5
restaurant operator, sale of food containing harmful natural ingredients, 3248
right to assume due care by highway users, 1030
seat belt, failure to use, 1277
seller, See Products liability
sensory handicapped persons, 1050
sidewalk defect, duty of pedestrian, 1049
speed, See Speed

sports participant, 2020
strict liability, 3260
supplier, See Products liability
taxicab driver, 1025
teacher
instruct or warn, 1380
supervise students, 1381
user, strict liability, 3260
violation of safety statute, 1005, 1009
worker, preoccupation in work minimizes duty, 1051
Negligent
conduct contrasted to intentional conduct 1004, 2001
entrustment, 1014, 1014.5
hiring, 1383
infliction of emotional distress, 1510, 1511
misrepresentation, 2403
supervising, 1383
training, 1383
Nominal damages, 1810
Nonconcurrent or successive torts
divisible injuries from, 1722
Nonconforming use, legal, eminent domain, 8140
Nonexpert witness, 268
Nonhighway access, emerging from, 1270
No passing zone, vehicles proceeding in same direction, 1143
Normal response, cause, 1501
Notetaking by jury, 60, 61
Notice
actual or constructive, as to defect, 1900.4
of breach, implied warranty, 3211
Notice (continued)
of municipality with respect to highway or sidewalk defects, 8035
timeliness of, breach of warranty, 3211
to third parties of termination of agency, 4028
Nuisance
attractive, 1011, 8025
private, 1920, 1922, 1924, 1926
public, 1920, 1928, 1930, 1932
Nursing services
personal injury, 1756, 1758
injury to spouse, 1820

## O

Objections of counsel
instruction at conclusion of trial, 115
preliminary instruction, 50
Obstructed view, passing, 1142
Obstructed vision, driver, speed, 1310
nighttime, 1315
Offensive bodily contact, battery, 2005.1
Offer, making, 3012
Opening instruction, 100
Opening statements of counsel, See Preliminary instructions before trial
Opinion of nonexpert witness, 268
Optometrist, duty to inform patient, 1023.15-1023.17
Order(s), See Court
Order of proof, See Preliminary instructions before trial
Ordinary burden of proof, 200, 202
Ordinary care
defined, 1005
varies with circumstances, 1020
Out-of-pocket
rule damages, 3710
negligence misrepresentation, 2406
Owner
dog, 1390
duty to trespasser, 8025
duty to user, 8020
of building abutting on a public highway, 8030
of place of amusement, common law, 8040
of place of business, duty to protect patrons, 8045
of place of employment, safe place, 1900.4
of public building, safe place, 1904
of public business not under safe-place statute, 8040
of vehicle, 1600
permission for use of automobile, 3112
testimony of, to establish value, 260 (comment)

## P

Pain and suffering, damages
estate's recovery for, 1855
future, 1768
past, 1766, 1768
past and future disability, 1750.1, 1750.2, 1756, 1767
Parent
damages
adult child, pecuniary loss, 1885
loss of society and companionship, 1895
minor child
postmajority pecuniary loss, 1892
premajority pecuniary loss, 1890
death of, pecuniary loss, 1880
injury to child
loss of child's services, 1835
loss of society and companionship, 1837
medical expenses, 1840
services rendered to child, 1845
injury to parent, 1838
death of, child’s loss of society and companionship, 1897
duty of
to control minor child, 1013, 1014
to protect minor child, 1012
paternity, 5001
Parked position, moving from, 1205
Parked vehicle
disabled vehicle, 1125
leaving off the roadway, 1115
leaving on or off the roadway, exception to prohibition, 1125
leaving on the roadway, 1120
yield right of way to moving vehicles, 1205
Participation in a recreational activity, 1393
Parties to lawsuit, 50
Partnership, defined, 4080
Party’s presence not required at trial, 430

Passenger, See Guest
Passing, vehicles proceeding in same direction
  lookout, 1141
  no passing zone, 1143
  obstructed view, 1142
  overtaken vehicle turning left, 1143
  signal, return to right-hand lane, 1144
Paternity, 5001
Pecuniary loss
  death of
    adult child, 1885
    domestic partner, 1861
    husband, 1861
    minor child, 1890
    parent, 1880
    spouse, 1861
    wife, 1861
Pedestrian
  crossing railroad tracks, 1337.5
  lookout, 1095
  right of way, See Right of way
  sidewalk defect, contributory negligence, 1049
  standing or loitering on highway, 1250
  suddenly leaving curb or place of safety, 1255
  walking on highway, position on highway, 1260
Permission of owner for use of automobile, 3112
Permissive inferences, 356
  Law Note, 349
Personal injury, See Damages
Personal property, See Property damage
Persons in specific situations, duties of, 1030-1355
Persons with physical handicaps, duties of, 1050
Physical danger
  in field of, 1510
Physical facts, 325
Physical handicaps, duty of persons with, 1050
Physical injury, relation of collision to, 1506
Physician
  duty to inform patient, 1023.2
  medical malpractice, 1023
  negligence of hospital in granting staff privileges to, 1384
  standard of skill, 1023
Place of business, owner's duty to protect patrons, 8045
Place of employment, safe-place statute, 1910
Plaintiff frequenter, negligence of, safe-place statute, 1902
Podiatrist, duty to inform patient, 1023.15-1023.17
Point of access, defined, 1175
Position and method of turn to right or left, 1352
Position on highway
  on meeting and passing, 1135
  violation excused, 1140
Positive testimony, defined, 315
Possessor
  consent of to another's being on his premises, 8015
  of land, duty to user, 8020
Post-traumatic disorder, 1511, 1770
Posted speed limit, 1290
Preceding car
  duty of driver to following driver, 1114
  slowing, stopping, signalling, 1113
Preexisting injury, aggravation of, 1715
Preliminary instructions before trial, 50
Preoccupation in work minimizes duty of worker, 1051
Prescriptive rights by user, 8065
Present value of future damages, 1796
Presumption, negligence
  res ipsa loquitur, 1145
  res ipsa loquitur, malpractice, physician, 1024
Presumptions
  and permissive inferences
    Law Note, 349
  basic fact conflict, possibility of nonexistence of presumed fact, 350
  basic fact conflict, presumed fact may be inferred, 354
  basic fact uncontradicted, possibility of nonexistence of presumed fact, 352
  due care by decedent, 353 medical expenses, 1756, 1757
  possibility of nonexistence of presumed fact, basic fact conflict, 350
  possibility of nonexistence of presumed fact, basic fact uncontradicted, 352
  presumed fact may be inferred, basic fact conflict, 354
  servant status from ownership of vehicle, 1600
Principal, and agent, See Agency
Prior conviction of witness, 415
Prior inconsistent or contradictory statements, 420
Privacy, invasion of, 2550, 2551, 2552
Private driveway, emerging from or other nonhighway access, 1335
Private nuisance, 1920, 1922, 1924, 1926
Private property, lookout, limited duty on, 1080
Privilege
  against self-incrimination, 425
  conditional, abuse of, defamation, 2507
  invasion of privacy, 2552
  public official, abuse of, defamation, 2509
Probable cause, malicious prosecution, 2600, 2610
Process, abuse of, 2620
Procession, funeral, right of way, 1180
Products liability
  allergy of user, 3209, 3260 (comment)
  basis, 3200
  breach of warranty, notice of, implied warranty, 3211
  business defined, strict liability, 3264
  buyer, duty of, 3254
  consumer, duty of, 3254
  contributory negligence, strict liability, 3268
  defect, use of product after defect known, 3207
  exclusion by reason of course of dealing or usage of trade, 3206
  exclusion or modification, 3205
  express warranty
    general, 3220
    no duty of inspection, 3222
    statement of opinion under Uniform Commercial Code, 3225, 3230
  implied warranty
    allergy of user, 3209
    by reason of course of dealing or usage of trade, 3203

exclusion by reason of course of dealing or usage of trade, 3206
failure to examine product, 3208
fitness for particular purpose, 3202
food, sale of, 3204
improper use, 3210
merchantability, defined, 3201
notice of breach, 3211
use of product after defect known, 3207
negligence
duty of buyer, 3254
duty of consumer, 3254
duty of manufacturer, 3240
duty of manufacturer to give adequate instructions as to the use of a complicated machine (product), 3244
duty of manufacturer (seller) to warn of dangers with respect to intended use, 3242
duty of manufacturer (seller) who undertakes to give instructions as to the use of a machine (product), 3246
duty of restaurant operator in sale of food containing harmful natural ingredients, 3248
duty of seller installing (servicing) a product, 3250
duty of seller to warn of dangers of product with respect to intended use, 3242
punitive damages, 1707A, 1707.2
Restatement, Third, of Torts, 3260 (comment)
risk contribution theory, 3294, 3295, 3296
strict liability
comparative negligence, 3290, 3290.1
contribution, 3290 (comment)
contributory negligence of user, 3268, 3290, 3290.1
definition of business, 3264
duty of manufacturer to ultimate user, 3260, 3260.1
Products liability (continued)
duty of manufacturer (supplier) to warn, 3260.1, 3262
duty of supplier to warn, 3260.1, 3262
suggested special verdict, 3290, 3290.1
Professional earnings, loss of, 1760, 1762
Proof, burden of, See Burden of proof
Property
automobile
damages to, 1805
loss of use, not repairable, 1800
loss of use, repairable, 1801
eminent domain, See Eminent domain
personal
damage to, 1804
damage to, property not repairable, 1805
destruction of, 1803
relation of property owners to others, 1900.4, 1904, 8012
with market value, 1805
without market value, 1803
Property loss through misrepresentation, 2419
Proprietor of business, duty to protect person from injury by act of third person, 8045
Prosecution, malicious, See Malicious prosecution
Protective placement, 7060
Protective services, 7061
Protest, failure to on part of guest, 1047
Proximate cause, 1500
Psychiatrist, negligence of, 1023 (comment)
Public building, safe-place statute, 1904
Public business, not under safe-place statute, duties of owner, 8040
Public nuisance, 1920, 1928, 1930, 1932
Public official, defamation, abuse of privilege, 2509
Public utility, duty of, highway obstructions, nonenergized facilities, 1395
Publication, defamatory effect of, 2514
Puffing, 3225
Punitive damages
defamation, 2520
intentional disregard, 1707.1
malice, 1707, 1707.1
mitigation of, by provocation of battery, 1708
outrageousness, 1707
products liability, 1707A, 1707.2
Purchaser, breach of contract by, 3750

## Q

Quantum meruit, 1812
Questions,
answered by the court
damages, 150
negligence, 155
by juror, 57
special verdict, interrelationship, 145

## R

Racing, 1107
Railroads
crossing
driver's duty, 1336
duty of train crew approaching crossing, 1405
duty to maintain open view at, 1411
nonoperation of signals, 1338
signs, duty to maintain, 1410
special vehicles required to stop at all crossings, 1339
ultrahazardous or unusually dangerous, increased duty, 1413
vehicles stopping at signals, 1337
duty to blow whistle
outside municipality, 1402
within municipality, 1403
duty to ring bell within municipality, 1401
headlights, duty to have proper, 1412
pedestrian crossing tracks, 1337.5
speed
fixed limits, 1407
negligent, causation, 1409
no limit, 1408
Ratification

by master of servant's wrongful acts done outside scope of employment, 4050
of agent's acts by principal, 4015
Rear car, operation of, 1112
Rear lookout, limited duty, 1114
Reasonable grounds to believe offense committed, defined, 2115
Recording played to the jury, 80
Red traffic control light, 1193
flashing, 1193.5
signalling stop, 1193
Reduce speed
obstructed vision, 1310
nighttime, 1315
reasonable and prudent speed, 1285
Reference to insurance company by counsel, 125
Registered nurse, See Hospital employees, negligence
Relation of collision to physical injury, 1506
Release, agreement, avoidance of for mutual mistake of fact, 3072
Rental income, capitalization of, 8130
Representations, false, See Misrepresentation Reproduction costs, eminent domain, 8135
Res ipsa loquitur
defined, 1145
malpractice, medical, 1024
permissive inference, 356
Rescuer, contributory negligence of, 1007.5
Resident, defined, 3110
Response, normal, cause, 1501
Responsibility, strict, misrepresentation, 2402
Restatement, Third, of Torts, effect on products liability, 3260 (comment)
Restaurant operator, duty of, in sale of food containing harmful natural ingredients, 3248
Restraint of will, 2822
Right-hand lane, return to, after passing, vehicles proceeding in same direction, 1144

Right of way
auto
at intersection of highways, nonarterial, 1155
at intersection of highways, nonarterial, ultimate fact question, 1157
at intersection with through highway, 1153
emergency vehicle approach of, 1210
entering highway from an alley or nonaccess points, 1175
funeral procession, 1180
green arrow, 1185
green or go signal, 1190
left turn at intersection, 1195
livestock, 1200
meeting at intersection, 1155
military convoy, 1180
moving from parked position, 1205
vehicles using alley or nonhighway access, 1270
when yield sign installed, 1275
highway worker, 1265
livestock, 1200
pedestrian
at intersections or crosswalks on divided highways provided with safety zones, 1160
at uncontrolled intersections or crosswalks, 1165
blind pedestrian on highway, 1170
control signal, 1159, 1220
crossing at controlled intersection, 1158, 1225
crossing at place other than crosswalk, 1095, 1230
divided highways or highways with safety zones, 1235
duty of
at pedestrian control signals, 1220
crossing at controlled intersection or crosswalk, 1225
crossing roadway at point other than crosswalk, 1230
green arrow, facing, 1240
red or stop signal, facing, 1245
standing or loitering on highway, 1250
to stop when vehicle using alley or nonhighway access, 1270
uncontrolled intersection or crosswalk, suddenly leaving curb or place of safety, 1255
walking on highway, 1260
walk signal, 1159
when yield sign installed, 1275
persons working on highway, 1265
Right side of roadway
meeting and passing, 1135
Right side of roadway, meeting and passing
violation excused, 1140
Right to assume due care by highway users, 1030
Risk contribution theory, 3294, 3295, 3296
Roadway, defined, 1160

## S

Safe-place statute
business, 1910
control, 1911
duty of employer, 1900.2
frequenter
defined, 1901
injury to, 1900.4
negligence of
employer, 1900.4
owner of place of employment, 1900.4
owner of public building, 1904
plaintiff frequenter, 1902
place of employment, defined, 1910
public building, defined, 1904
public business not under, duties of owner, 8040
Safety belt, failure to use, 1277
Safety, defined, 1900.4-1904
Safety helmet negligence, 1277 (comment), 1278
Safety statute, 1005, 1009 Safety zone, defined, 1160
Sale of food, implied warranty, 3204
Sales, comparable, eminent domain, 8120
Scene, view of, by jury, 152
Scientific treatises, 261
School bus

Equipped with flashing red and amber warning lights, 1133A
flashing red warning lights, 1133
stop for, 1340
stopped, position on highway, 1132
School zone, speed, 1290
Scope of employment
driver, 1605
servant
defined, 4030
going to and from place of employment, 4040
master's ratification of wrongful acts done outside of, 4050
while traveling, 4050
Seat belt, failure to use, 1277
Section 1983, 2151, 2155
Self-defense
battery, 2006
defense of property, 2006.1
Self-incrimination, 425
Seller
breach of contract by, damages, 3755
negligence of, duty of, See Products liability
Sensory handicaps, duty of persons with, 1050
Servant, See also Scope of employment
defined, 4030
driver of automobile, 1600
Services rendered to child, past and future, 1845
Services, society and companionship
death of child, 1895
death of spouse, 1870
injury to spouse, 1815
Severance damages, eminent domain, 8102, 8103
Sidewalk
defect, contributory negligence, 1049
defects, 8035
insufficiency, 8035
Signal, required
audible warning when passing, 1144
deviation, 1350
school bus, flashing red, 1133
slow or stop, 1113
Signal, required (continued)
turn, 1350
Signals, railroad crossing
non-operation of, 1338
stop at, all vehicles, 1337
Signals, traffic control, See Traffic signals
Signs
railroad crossing, duty to maintain, 1410
stop, 1325, 1325A
Skidding, 1280
Slander, See Defamation
Slow moving vehicles, 1300
Society and companionship
death of child, 1895
death of parent, 1897
death of spouse, 1870
injury to minor child, 1837
injury to parent, 1838
Special agent, defined, 4002
Special benefits, eminent domain, 8115
Special circumstances, negligence under, 1020
Special knowledge and skills doctrine, 1005 (comment)
Special verdict
five-sixths verdict, 180
informed consent, 1023.1, 1023.15
Lemon Law, 3300
mentioned in court's opening statement, 100
questions, interrelationship, 145
recommended, comparative negligence, multiple driver-multiple guest comparison, 1592
risk contribution, 3294
suggested
misrepresentation, 2402, 2403
strict liability, 3290
ultimate fact verdict, 107
when court finds one or more parties at fault, 108
Speed
camouflage, 1320
driver on arterial not bound to reduce speed when approaching intersection, 1090
failure to yield roadway, 1305
fixed limits, 1290
impeding traffic, 1300
obstructed vision, 1310
nighttime, 1315
posted limit, 1290
reasonable and prudent, reduced speed, 1285
school zone, 1290
slow-moving vehicles, 1305
special restrictions for certain vehicles, 1295
Speed, railroads
fixed limits, 1407
negligent speed, causation, 1409
no limit, 1409
Spendthrift, 7056
Spoliation of evidence, 400
Sports participant injury, 2020
Spouse
death of
loss of society and companionship, 1870
medical, hospital, and funeral expenses, 1875
pecuniary loss, 1861, 1861
injury to
household services, loss of, 1816, 1817
medical and hospital expenses, 1825
wife's responsibility for own, 1830
nursing services, 1820
services, society, and companionship, 1815, 1816, 1817
Standing on highway, pedestrian's duty, 1250
Statement of opinion, express warranty, 3225
Statement, slander, See Defamation
Statute of Limitations, 950
Stop
at intersection, 1325, 1325A
at railroad crossing signals, 1337
duty of preceding driver to signal, 1113
emerging from an alley, 1330
emerging from a private driveway or other

nonhighway access, 1335
for school bus, 1340
leaving vehicle off roadway, 1115
non-operation of railroad crossing signals, 1338
parking on or off roadway, exception to prohibition, 1125
parking on roadway, 1120
pedestrian crossing railroad tracks, 1337.5
special vehicles at all railroad crossings, 1339
train whistle within municipality, 1403
Stopped school bus, 1132
Stopping and leaving vehicle
off roadway, 1115
on or off roadway, exception to prohibition, 1125
on roadway, 1120
Stricken testimony, 130
Strict liability, See Products liability
Strict responsibility, misrepresentation, 2402
Submission on general verdict, 106
Submission on ultimate fact verdict, 107
when court finds one or more parties at fault, 108
Subsequent event causing further injury, 1725
Subsequent remedial measures, 358
Successive or nonconcurrent torts
injuries from, 1722
Suddenly leaving curb or place of safety, 1255
Summary exhibit, 103
Superior skills doctrine, 1005
Supervising, negligence in, 1383
Supplemental instruction on agreement, 195

## T

Taxicab driver, negligence of, 1339
Teacher, duties
to instruct or warn, 1380
to supervise students, 1381
Tenant, constructive eviction of, 3095
Termination
agency
general, 4027
notice to third parties, 4028
dealership, 2770
Termination (continued)
employment, See Wrongful discharge
franchise, 2770
Testimony
expert
general, 260
hypothetical question, 265
negative, 315
positive, 315
stricken, 130
Tests, intoxication, chemical, 1008
Textbooks, 261
Theft by contractor, 2722
Through highway, lookout on, 1065, 1090
Timeliness of notice, breach of warranty, 3211
Tort, See individual heading
Tortious interference with contract, 2780
Traffic signals or signs flashing red, 1133
flashing yellow, 1090
green arrow, 1185
green light, 1190
pedestrian, duty of
pedestrian control, 1220
red light, pedestrian facing, 1245
stop sign, 1245
walk signal, 1159
red flashing, 1090
red light, 1245
stop sign, 1325, 1325A
yellow flashing, 1090
yellow light, 1192
yield sign, 1275
Training, negligence in, 1383
Treatises, 261
Trespass
nominal damages, 1810
verdicts, 8026, 8027
Trespasser
attractive nuisance, 1011, 8025
children, 1011, 8025
consent, 8015
defined, 8012
duty of owner to, 8025
Truth as defense to defamation, 2505, 2505A
Turning movements
ascertainment that turn can be made with reasonable safety, 1354
deviation from clearly indicated traffic lanes, 1355
directional signals, 1350
left turn, 1195
lookout, 1354
overtaken vehicle turning left, passing, 1143
position and method when not otherwise marked or posted, 1352
signal required, 1350

## U

Ultimate fact question, attractive nuisance, 1011
Ultimate fact verdict, See also Special verdict
fault, defined, 1001
submission on, 107, 108
Ultimate verdict question, right of way at intersection of nonarterial highways, 1157
Ultrahazardous or unusually dangerous railroad crossings, increased duty, 1413
Unavoidable accident, 1000
Uncontrolled intersection or crosswalk, right of way, 1165
Unfair trade practice (Wis. Stat. § 100.18(1)), 2418B
Unfair trade practice (Wis. Stat. § 100.18(11)(b)2), 2418A
Uniform Commercial Code, express warranty under, 3230
Uniform voidable transactions:
Transfer or obligation voidable as to present or future creditors, 2792A, 2972B
Transfer or obligation voidable as to present creditor, 2793A, 2793B
Transfer: defined, 2794A
Insider: defined, 2794B
Insolvency: defined, 2794C

Presumption of insolvency, 2795
Reasonably equivalent value: definition, 2796
Affirmative defense: good faith, 2797A
Affirmative defense: statute of limitations, 2797B
Transfer or obligation voidable as to present or future creditors – Special Verdict, 2798A, 2798B
Transfer or obligation voidable as to present creditors – Special Verdict, 2799A, 2799B
Unit rule, 8100, 8101
Unity of use, two or more parcels, severance damages, 8104
Unjust enrichment, 3028
Unlawful, defined, false imprisonment, 2100
Unreasonably dangerous, defined, 3200, 3260
Usage of trade, implied warranty, 3203
Use
improper, implied warranty, 3210
legal nonconforming, eminent domain, 8140
of product after defect known, 3207
User, contributory negligence, strict liability, 3268

## V

Value, fair market, 8100
expert testimony to establish, 260
Vehicles
distance between, 1112
equipment and maintenance of
brakes, 1054
general duty, 1052
headlights, 1053
horn, 1096
following, 1112
lemon law and, 3300, 3301, 3302, 3303, 3304
parked, See Parked vehicles
passing, proceeding in same direction, See Passing
position and method when turning, 1352
slow moving, 1300, 1305
stopping, See Stop; Stopping and leaving vehicle
Vehicular traffic, defined, 1185
Verdict
case involving intentional and negligent joint tortfeasors, 1580 (comment)
dissenting juror to sign, 180 five-sixths, 180
general, 106
product liability, 3290, 3290.1
risk contribution, 3295, 3296
special, question, interrelationship, 145
suggested special
misrepresentation, 2402, 2403
strict liability, 3290
ultimate fact
fault, 1001
submission on, 107
when court finds one or more parties at fault, 108
Vicarious liability of employer, 4055
View
by jury, 152
railroads duty to maintain open view, 1411
Violation of safety statute, 1005, 1009
Vision, obstructed, speed, 1310
nighttime, 1315
Voluntary assumption of duty, 1397

## W

Wages, See Earnings
Walking on highway, pedestrian's duty, 1260
Walk signal, pedestrian, 1159
Warn
guest's duty to, 1076
teacher's duty to, 1380
Warrant, arrest without, false arrest
felony, 2115
Warranty claim, Magnuson-Moss, 3310
Warranty, express or implied, See Products liability
Weight of evidence, 215
Whistle, railroads, duty to blow
outside municipality, 1402
within municipality, 1403
Wife
death of
loss of society and companionship, 1870
medical, hospital and funeral expenses, 1875
pecuniary loss, 1861
injury to
medical and hospital expenses, 1825
wife's responsibility for own, 1830
nursing services, 1820
services, society, and companionship, 1815
Witness
absent witness, 410
contradictory statements, 420
credibility of, 50, 215
expert testimony
general, 260
hypothetical question, 265
falsus in uno, willful false testimony, 405
impeachment of witness, prior inconsistent or contradictory statements, 420
opinion of nonexpert, 268
prior conviction, 415
self-incrimination, 425
spoliation of evidence by, 400
Working on highway, 1265
Worker
preoccupation in work minimizes duty, 1051
when required to work in unsafe premises, 1051.2
Wrongful death
adult child, pecuniary loss, 1885
child, parents' loss of society and companionship, 1895
domestic partner, 1861, 1870 (comment)
estate's recovery
medical, hospital, and funeral expenses, 1850
pain and suffering, 1855
husband's death, all items, 1861
minor child, pecuniary loss, 1890
parent, child's loss of society and companionship, 1897
parent, pecuniary loss, 1880

spouse, loss of society and companionship, 1870
wife
medical, hospital, and funeral expenses, 1875
pecuniary loss, 1861
Wrongful discharge, 2750
Wrong side of road, driving on, 1135
violation excused, 1140

## Y

Yellow flashing signal, 1090
Yellow light, duty of driver, 1192
Yield sign, 1275