

315 NEGATIVE TESTIMONY

Positive testimony of credible witnesses regarding an event is entitled to greater weight than negative testimony of equally credible witnesses as to the same event.

Testimony of a witness that the witness (heard the bell) is positive testimony.

Testimony of a witness (that the witness did not hear the bell) under circumstances that the witness (could have heard the bell) if it had actually (rung) may be positive or negative testimony.

If the witness' sense (of hearing) was directed toward learning whether (the bell did ring), the witness' testimony that the witness (did not hear the bell) is positive testimony.

If the witness' sense (of hearing) was not directed toward learning whether (the bell did ring), the witness' testimony that the witness (did not hear the bell) is negative testimony.

The strength or weakness of negative testimony depends upon all the circumstances and the weight you give to this testimony is for you to decide.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 1986 and 1991. The comment was updated in 1982, 1986, and 2016.

The general rule is that the weight to be accorded negative evidence is a matter for the jury to determine. Conrardy v. Sheboygan County, 273 Wis. 78, 82, 76 N.W.2d 560, (1956); Resseguie v. American Mut. Liab. Ins. Co., 51 Wis.2d 92, 186 N.W.2d 236, 244 (1971). This instruction provides for an exception to the general rule when certain criteria are met. Care should be used before giving the instruction. Not all testimony that might appear negative constitutes "negative testimony" warranting the instruction e.g. testimony of absence of entry in records is not negative testimony, Resseguie, supra; testimony that a party did not speak the words charged found not to be negative testimony, Suick v. Krom, 171 Wis. 254, 177 N.W. 20, 21 (1920). The court in Suick ruled that "Negative testimony relates only to the testimony of a witness who had an opportunity to see an occurrence, testified by some other witnesses to have taken place, that he did not see it, or of one who had an opportunity to hear or know of an occurrence testified positively by some other witnesses to have happened, that he did not hear or recollect it. Id. In addition to the requirement of negative testimony, the rule requires the element of equal credibility of the witnesses. Id. at 20-21.

Sometimes, testimony which appears positive can be sufficiently negative in effect to warrant the instruction. In explaining why an instruction similar to Wis JI-Civil 315 was warranted, the court ruled: "Although Mustas testified he did not go into the construction office or speak with anyone there, he also stated that he could not recall whether he went there or spoke with anyone. Under these circumstances, his testimony although positive in form is negative in effect." Mustas v. Inland Construction, Inc., 19 Wis.2d 194, 120 N.W.2d 95, 99 (1963).

Conrardy v. Sheboygan County, 273 Wis. 78, 82, 76 N.W.2d 560, 562 (1956); Rambow v. Wilkins, 264 Wis. 76, 78, 58 N.W.2d 517, 518 (1953); Zenner v. Chicago, St. P., M. & O. Ry., 219 Wis. 124, 126-29, 262 N.W. 581, 582-84 (1935).

Resseguie v. American Mut. Liab. Ins. Co., 51 Wis.2d 92, 186 N.W.2d 236 (1971); Becker v. Barnes, 50 Wis.2d 343, 184 N.W.2d 97 (1971).

A jury may not disregard positive, uncontradicted testimony as to the existence of some fact, or the happening of some event, in the absence of something in the case which discredits the existence of the fact or renders it against responsible probabilities. Schulz v. St. Mary's Hosp., 81 Wis.2d 638, 650, 260 N.W.2d 783 (1978).

This instruction needs to be tailored to the particular facts and witnesses in the case.