

353 PRESUMPTIONS: DECEASED PERSON WAS NOT NEGLIGENT

Because (decedent) has died and cannot testify, you must presume that (decedent) was not negligent at and before the time of the occurrence, unless you find the presumption is overcome by other evidence.

In deciding whether (decedent) was negligent, you must weigh the presumption with all the other evidence. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more likely that (decedent) was negligent, you must find that (decedent) was not negligent.

COMMENT

The instruction and comment were approved in 1989. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

See Seligman v. Hammond, 205 Wis. 199, 236 N.W. 115 (1931); Theisen v. Milwaukee Automobile Mut. Ins. Co., 18 Wis.2d 91, 118 N.W.2d 140 (1962). Theisen applied the "bursting bubble" theory to the presumption, *i.e.*, the presumption of due care is eliminated and drops out of the case entirely once the defense presents evidence showing conduct contrary to the presumption. As explained in Law Note, Wis JI-Civil 349, the 1974 rules of evidence made substantial changes in the theory of presumptions. Presumptions do not disappear or burst when evidence contrary to the presumed fact is presented. Instead, a presumption when established shifts the burdens of persuasion and proceeding. See Law Note, Wis JI-Civil 349, p. 2, for the policy reasons for the presumption of due care.