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.

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. Co., 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).

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 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.