1022.6 LIABILITY OF ONE EMPLOYING INDEPENDENT CONTRACTOR

Generally, an (owner) (principal contractor) is not responsible to a third person for the negligence of an independent contractor. However, an (owner) (a principal contractor) must exercise ordinary care to prevent injury to third persons or damage to their property if: [the work to be done is inherently dangerous] [a contract between the (owner) (principal contractor) and the third person requires that the (owner) (principal contractor) will take ordinary care to (prevent injury to the third person) (prevent damage to the property of the third person) (secure the proper performance of the work)].

Ordinary care is that degree of care which you would expect a reasonable person to use under the same or similar circumstances.

[Inherently dangerous work is work from which one can naturally expect harm to arise unless something is done to avoid that harm.]

[Note: Insert appropriate instructions on contract law, if applicable.]

SUGGESTED VERDICT FORMS

FORM 1 (Inherently dangerous activity):

1. Was the work performed by the (owner) (principal contractor) inherently dangerous?

Answer:_____
Yes or No

[Note: There are times when the above question will not be necessary. In Wagner v. Continental Casualty Co., 143 Wis.2d 379, 421 N.W.2d 835 (1988), cited in the comment, the Wisconsin Supreme Court said that AA person engaged in an activity . . . that is inherently dangerous without special

precautions, can take steps to minimize the risk of injury. Examples include general construction, demolition, and excavation.@ The case appears to say that those three types of activity are inherently dangerous by their nature. Note also that the Wagner court differentiates between activity that is "inherently dangerous" and activity that is "extrahazardous or abnormally dangerous." Examples of extrahazardous activity ". . . include transporting nuclear waste or working with toxic gases."]

2. If you answered question 1 "yes," then answer this question: Did (owner) fail to use ordinary care in (describe the work done)?

Answer:_____
Yes or No

3. If you answered question 2 "yes," then answer this question: Was that failure to use ordinary care a cause of (injury to (third person)) (damage to (third person)'s property)?

Answer:_____
Yes or No

[Follow with the appropriate damage question.]

FORM 2 (Contract to prevent injury or damage):

1. Did the contract between (third person) and the (owner/principal contractor) require that (he) (she) (it) would use ordinary care to prevent (injury to (third person)) (damage to the property of (third person))?

Answer:_____
Yes or No

2. If you answered question 1 "yes," then answer this question: Did the (owner/principal contractor) fail to use ordinary care to protect the (third person) (or (his) (her) property) from (injury) (harm)?

Answer:_____
Yes or No

3. If you answered question 2 "yes," then answer this question: Was that failure to use ordinary care a cause of (injury to (third person)) (damage to the property of (third person))?

Answer:_____
Yes or No

[Follow with the appropriate damage question.]

FORM 3 (Contract to secure proper performance):

1. Did the contract between (third person) and (owner/principal contractor) require that (he) (she) (it) would use ordinary care to secure the proper performance of the work?

Answer:_____
Yes or No

[Follow the format of questions in Form 2 for questions 2 and 3 and then follow with the appropriate damage question.]

COMMENT

The instruction was approved by the Committee in 1974 and revised in 1999. Editorial changes were made in 2004. The comment was updated in 1989, 1997, 1999, 2001, 2014, and 2015.

Liability of One Employing an Independent Contractor. The general rule, stated in the first sentence of the instruction, is found in numerous cases. See Brandenburg v. Briarwood Forestry Services, LLC, 2014 WI 37, 354 Wis.2d 413, 847 N.W.2d 395; Wagner v. Continental Casualty Co., 143 Wis.2d 379, 421 N.W.2d 835 (1988); Snider v. Northern States Power Co., 81 Wis.2d 224, 260 N.W.2d 260 (1977); Weber v. Hurley, 13 Wis. 2d 560, 109 N.W.2d 65 (1961). See also 41 Am. Jur.2d Independent Contractors, " 32 & 33 (1968).

A contractor qualifies as an independent contractor when the principal (hiring) contractor does not control the details of the hired contractor's work. See Wis JI-Civil 4060.

Inherently Dangerous Exception. The general rule, though long recognized in Wisconsin, has been sidestepped in many cases where the appellate courts have found that the risk of injury or damage (the inherently dangerous exception) from the work was so great that the owner or principal contractor should have

taken reasonable steps to avoid it. See Brandenburg v. Briarwood Forestry Services, LLC, 2014 WI 37, 354 Wis.2d 413, 847 N.W.2d 395. For example, the court, in Wertheimer v. Saunders, 95 Wis. 573, 70 N.W. 824 (1897), ruled that a landlord owed a duty of reasonable care to protect a tenant's property from damage while having a roof replaced. Also, in Majestic Realty Corp. v. Brant, 198 Wis. 527, 224 N.W. 743 (1929), the court stated there was an exception as to work inherently dangerous to users of the highway. The case involved a fatal injury to a pedestrian caused by falling terra cotta. The terra cotta was dislodged by the swinging platform of a painting contractor coming into contact with the owner's building.

Contract Language. In other cases, the supreme court has found a duty exists because of the contractual relationship between the third party and the owner or principal contractor. See Medley v. Trenton Investment Co., 205 Wis. 30, 236 N.W. 713 (1931), where a landlord was found to have a duty to use reasonable care to protect tenants from injury (a tenant died from fumes leaking into her apartment from another apartment that was being fumigated); also Peterson v. Sinclair Refining Co., 20 Wis. 2d 576, 123 N.W.2d 496 (1963), in which gasoline was delivered to a home instead of the fuel oil contracted for and an explosion followed. The court stated that the contract between the parties included an implied promise of safe delivery which, if breached, gave rise to a tort action. Two other cases, Brooks v. Hayes, 133 Wis.2d 228, 395 N.W.2d 167 (1986), and Jacob v. West Bend Mut. Ins. Co., 203 Wis.2d 524, 553 N.W.2d 800 (1996), involved home constructions where the principal contractors attempted to defend the homeowner's suits for defective workmanship by claiming that the independent subcontractors were the proper defendants. In each case, the appellate court said that the principal contractor had agreed in its contract with the homeowner that it would provide the needed materials and labor to build the home so the principal contractor could not avoid liability by hiding behind its subcontractor.

Duty Under Safe Place Is Not Delegable. In Barry v. Employers Mutual Casualty Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517, the plaintiff argued that the owner's duty under the safe place statute was nondelegable, and, therefore, any causal negligence attributed to the independent contractor who installed unsafe loose nosing should be imputed to the owner. The property owner disagreed, pointing out the general rule that one who hires an independent contractor is not liable for the negligence of the independent contractor. The supreme court held that the duties imposed on employers under the safe place statute are nondelegable. It said the plaintiff's safe place statute claim against the property owner is separate and distinct from the owner's claim for contribution against the nosing contractor. The owner must answer to the plaintiff "for any violation of that duty regardless of whether another party contributed to the violation." The court concluded by saying: that [the property owner] may have contribution rights against [the contractor] to the extent of [the contractor]'s negligence does not diminish the nature of [the owner's] statutory duty.