

1056 LOOKOUT: CAMOUFLAGE

A person who [claims to have] exercised ordinary care in maintaining a lookout, but nevertheless failed to see an object is not negligent because of failure to see the object if the object is not seen because at least one of the factors of recognition (color, shape, texture, movement, position, or shadow) was not present causing the object to blend with its background.

You must decide whether the factor(s) of recognition claimed to be absent provide(s) a valid explanation for (party) who claims to have exercised ordinary care in maintaining lookout but, nevertheless, failed to see the object.

COMMENT

The instruction and comment were originally published in 1963. The instruction was revised in 1997 and 2003. A spelling error was corrected in 2012. The comment was updated in 1980 and 1987 and was reviewed without change in 1989 and 2003.

This instruction is to be used in a case where there is no evidence of negligence as to speed.

Zoellner v. Kaiser, 237 Wis. 299, 296 N.W. 611 (1941); Pickett v. Travelers Indem. Co., 283 F.2d 837 (7th Cir. 1960); Gilberg v. Tisdale, 13 Wis.2d 249, 108 N.W.2d 515 (1961).

Although the camouflage instruction is typically involved only in cases involving nighttime motor vehicle accidents, "the instruction is proper anytime the party is accused of failure to see an object in plain sight, as long as there is adequate testimony excusing the failure on the ground that the object blends with its surroundings." Callan v. Peters Constr. Co., 94 Wis.2d 225, 236, 288 N.W.2d 146 (Ct. App. 1979). See also Suhaysik v. Milwaukee Cheese Co., 132 Wis.2d 289, 296-97, 392 N.W.2d 98 (Ct. App. 1986).

In Callan, the court defined six factors of recognition which influence perception of objects by the eye. The factors are:

- | | |
|------------|-------------|
| 1. Color | 4. Movement |
| 2. Shape | 5. Position |
| 3. Texture | 6. Shadow |

The court applied these factors to the law of camouflage in Wisconsin, stating:

Applying the factors of recognition to the law of camouflage in Wisconsin, we hold that a person who claims to have exercised ordinary care in maintaining a lookout, but nevertheless failed to see an object in plain sight, is not negligent because of failure to see an object in plain sight if the object is not seen because at least one of the factors of recognition was not present thereby causing the object to blend with its background, obscuring its presence and diminishing the reasonable prospect of its perception.

Obviously, the nighttime will present the most usual case for camouflage since factors of recognition are more apt to be absent than during the daytime. We cannot, however, restrict the camouflage instruction to the nighttime since we are convinced that at least one factor of recognition could be missing during a daytime observation, thereby causing a camouflage effect.

We further hold that it is a jury question whether the factors of recognition claimed to be absent provide a valid explanation for a person who professes to have exercised ordinary care in maintaining lookout but, nevertheless, failed to see an object in plain sight. 94 Wis.2d at 240.