

1731 DAMAGES: DUTY TO MITIGATE: NEGLIGENCE OR BREACH OF CONTRACT

A person who has been damaged may not recover for losses that (he) (she) knows or should have known could have been reduced by reasonable efforts. It is not reasonable to expect a person to reduce (his) (her) damages if it appears that the attempt may cause other serious harm. A person need not take an unreasonable risk, subject (himself) (herself) to unreasonable inconvenience, incur unreasonable expense, disorganize (his) (her) business, or put (himself) (herself) in a position involving loss of honor and respect.

If you find that a reasonable person would have taken steps to reduce damages and if you find that (plaintiff) did not take such steps, then you should not include as damages any amount which (plaintiff) could have avoided. If a reasonable person would not have taken steps to reduce loss under the circumstances in this case, then (plaintiff)'s failure to act may not be considered by you in determining (plaintiff)'s damages.

The burden of proof is on (defendant) to satisfy you to a reasonable certainty, by the greater weight of the credible evidence, that (plaintiff) should have taken steps to reduce (his) (her) loss and (failed to do so) (did not).

COMMENT

This instruction was approved by the Committee in 1982. It was re-titled and updated in 2011. The comment was updated in 1990 and 2011.

Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis.2d 749, 266 N.W.2d 382 (1978); Sprecher v. Monroe County Fin. Co. v. Thomas, 243 Wis. 568, 571, 11 N.W.2d 190 (1943); Restatement, Second, Contracts § 350.

This instruction applies to damages for breach of contract or for damages in a tort action based on negligence that relate to property damage. For an instruction explaining mitigation of damages for negligently inflicted bodily injury, see Wis JI-Civil 1730; for an instruction explaining mitigation of damages from intentional acts, see Wis JI-Civil 1732.

See Comment to Wis JI-Civil 1806 for mitigation of damages to a growing crop.

Burden of Proof. Although the duty to mitigate damages rests with the aggrieved party, the burden of proof is upon the defaulting party to establish that the aggrieved party failed to do all that was reasonable to mitigate his damages. Sprecher, supra at 42; Byrnes v. Metz, 53 Wis.2d 627, 631, 193 N.W.2d 765 (1972). The failure to mitigate damages is an affirmative defense which must be raised by answer or be deemed waived. Wis. Stat. §§ 802.02 and 802.06; Sprecher, supra, Schiller v. Keuffel & Esser Co., 21 Wis.2d 545, 553, 124 N.W.2d 646 (1963). However, the court, in Sprecher, said a trial court has discretion to admit proof or lack of mitigation at variance with the pleadings and to amend the pleadings to conform to the proof.

Mitigation by Spending Money. Where the issue of mitigation centers on whether the plaintiff could reasonably have mitigated his damages by spending a sum of money, the following paragraph, based on the decision in Sprecher, supra at 42-49, may be inserted into the instruction:

Sometimes it is possible for an injured person to minimize his damages by spending money. A plaintiff is required to spend a sum of money to minimize his damages only if (1) the sum of money is small in comparison to the possible losses or damages and (2) it is virtually certain that the risks incurred will avoid at least a party of the losses or damages. Damages should not be decreased where only a substantial expenditure would have minimized the total loss or where it is uncertain at the time that the expenditure would have decreased damages.

An expenditure of \$9,000 was held not to be insignificant or slight under the facts of the case and thus plaintiff did not fail to mitigate by making such an expenditure. Crest Chevrolet-Oldsmobile Cadillac, Inc. v. Willemsen, 129 Wis.2d 129, 384 N.W.2d 692 (1986).