1900.4 SAFE PLACE STATUTE: INJURY TO FREQUENTER: NEGLIGENCE OF EMPLOYER OR OWNER OF A PLACE OF EMPLOYMENT

(Give Wis JI-Civil 1005.)

Question 1 asks: Was (defendant) negligent in failing to (construct) (repair) (maintain) the premises as safe as the nature of its business would reasonably permit.

The Wisconsin Legislature enacted a law which is known as the Safe-Place Statute, which applies to this case. That law imposes a duty upon (defendant) in this case to (construct) (repair) (maintain) the premises upon which (plaintiff) was injured so as to make them safe. The law requires (defendant) to (furnish and use safety devices and safeguards) (adopt and use methods and processes) reasonably adequate to render the place of employment safe. Violation of this law is negligence.

The term "safe" or "safety," as used in this law, does not mean absolute safety. The term "safe" or "safety," as applied to the premises in this case, means such freedom from danger to the life, health, safety, or welfare of (plaintiff) as the nature of the premises will reasonably permit.

(Defendant) was not required to guarantee (plaintiff)'s safety but rather was required to (construct) (repair) (maintain) the premises as safe as the nature of the place would reasonably permit.

In determining whether (defendant)'s premises were as free from danger as its nature would permit, you will consider the adequacy of the (construction) (repair) (maintenance) of the premises, bearing in mind the nature of the business and the manner in which the business is customarily conducted.

[**Note**: The following paragraph should not be given where the defect is a structural defect: To find that (defendant) failed to (construct) (repair) (maintain) the

premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

COMMENT

The instruction and comment were approved by the Committee in 1974. The instruction was revised in 1986, 1992, 1995, 1996, 1998, and 2003. This instruction was renumbered in 1976 from Wis JI-Civil 1900. The comment was updated in 1990, 1993, 1995, 1998, 2001, 2003, 2004, 2006, 2014, 2020, and 2021. The instruction was revised in 2003 to specifically refer to the statutory requirements.

See Petoskey v. Schmidt, 21 Wis.2d 323, 124 N.W.2d 1 (1963); For the form of the question, see Petoskey, supra; Krause v. V. F. W. Post 6498, 9 Wis.2d 547, 101 N.W.2d 645 (1960).

The safe-place statute imposes a higher standard of care than ordinary negligence at common law, Krause, supra; Saxhaug v. Forsyth Leather Co., 252 Wis. 376, 31 N.W.2d 589 (1948); Dykstra v. Arthur G. McKee & Co., 92 Wis.2d 17, 26, 284 N.W.2d 692 (1979); Topp v. Continental Ins. Co., 83 Wis.2d 780, 266 N.W.2d 397 (1978). Although the safe-place statute establishes a higher standard, failure of a safe place claim does not necessarily preclude a common law negligence claim arising out of the same condition. A safe-place statute addresses the condition of the premises while the common law claim looks at negligent acts. Megal v. Green Bay Area Visitor & Convention Bureau, et al., 2004 WI 98, Case No. 02-2932.

The giving of common-law negligence instruction followed by the safe-place instruction was approved in Carr v. Amusement, Inc., 47 Wis.2d 368, 375, 177 N.W.2d 388 (1970).

Although the statute creates a presumption that an injury was caused by a violation of the statute, the presumption does not establish as a matter of law that the defendant's negligence was greater than the plaintiff's, Brons v. Bischoff, 89 Wis.2d 80, 88, 277 N.W.2d 854 (1979); Fondell v. Lucky Stores, supra; Imnus v. Wisconsin Public Ser. Corp., 260 Wis. 433, 51 N.W.2d 42 (1952).

In reading Wis. Stat. § 101.11, it is suggested that parts dealing solely with employment be omitted, as well as other portions inappropriate under the facts of the case. A community-based residential facility, as defined in Wis. Stat. § 50.01(1), is a place of employment. Wis. Stat. § 101.11(3).

This instruction applies to an injury to a frequenter. For the definition of "frequenter," see Wis. Stat. § 101.01(2)(e) and JI-Civil 1901. Independent contractor employee as frequenter – McNally v. Goodenough, 5 Wis.2d 293, 300, 92 N.W.2d 890 (1958); Dykstra, supra; Sampson v. Laskin, 66 Wis.2d 318, 326, 224 N.W.2d 594 (1975); Hortman v. Becker Constr. Co., Inc., 92 Wis.2d 210, 226, 284 N.W.2d 621 (1979).

The definition of "safe" and "safety" is from Wis. Stat. § 101.01(2)(g).

Nature of Business. Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 446, 253 N.W. 579 (1934). Free from danger – Olson v. Whitney Bros. Co., 160 Wis. 606, 612-13, 150 N.W. 959 (1915); Dykstra v. Arthur G. McKee & Co., supra; Topp v. Continental Ins. Co., supra at 788; Fondell v. Lucky Stores, Inc., 85 Wis.2d 220, 230-31, 270 N.W.2d 205 (1978). An Elks Club was held to be a "place of employment" in Schmorrow v. Sentry Ins. Co., 138 Wis.2d 31, 405 N.W.2d 672 (Ct. App. 1987).

The defendant is not a guarantor of a frequenter's safety. Hipke v. Industrial Comm'n, 261 Wis. 226, 52 N.W.2d 401 (1952).

A business is not an insurer of a frequenter's safety. Zehren v. F. W. Woolworth Co., supra; Dykstra, supra; Stefanovich v. Iowa Nat'l Mut. Ins. Co., 86 Wis.2d 161, 166, 271 N.W.2d 867 (1978); May v. Skelly Oil Co., 83 Wis.2d 30, 36, 264 N.W.2d 574 (1978).

Safety is a relative, not an absolute, term. Sykes v. Bensinger Recreation Corp., 117 F.2d 964, 967 (7th Cir. 1941); Heckel v. Standard Gateway Theater, 229 Wis. 80, 281 N.W. 640 (1938); May v. Skelly, supra.

The statutory duty is to make the place as safe as the nature and place of employment will reasonably permit. Mullen v. Larson-Morgan Co., 212 Wis. 52, 249 N.W. 67 (1933); Saxhaug v. Forsyth Leather Co., supra. This duty is not a lesser standard than that imposed by the common law, Balas v. St. Sebastian's Congregation, 66 Wis.2d 421, 425, 225 N.W.2d 428 (1975).

A place is safe if it is as free from danger as the nature of the employment will reasonably permit when used in a customary or usual manner for the work intended or in such a manner as an ordinarily prudent and careful person might anticipate it might be used. Olson v. Whitney Bros. Co., supra; Topp v. Continental, supra.

The words "construction" or "constructing" should be used when, on the facts, faulty construction is involved.

Notice. Werner v. Gimbel Bros., 8 Wis.2d 491, 99 N.W.2d 708 (1959). There is no requirement of notice where the condition was created by the party sought to be charged. Merriman v. Cash-Way, Inc., 35 Wis.2d 112, 150 N.W.2d 472 (1967); Kosnar v. J. C. Penney Co., 6 Wis.2d 238, 242, 277, 132 N.W.2d 595 (1965).) Or where the alleged defect is a structural defect Hannebaum v. DiRenzo & Bomier, 162 Wis.2d 488, 469 N.W.2d 900 (Ct. App. 1991); see also Fitzgerald v. Badger State Mut. Casualty Co., 67 Wis.2d 321, 227 N.W.2d 444 (1975). Also, if the defendant claims that no defective condition existed, then proof of notice is not necessary. Petoskey v. Schmidt, supra.

The employer must have notice of the defect except where the alleged defect is a structural defect, Fitzgerald, supra. Krause v. V. F. W. Post 6498, supra; Pettric v. Gridley Dairy Co., 202 Wis.

289, 232 N.W. 595 (1930). As to the length of time of notice required, see Bergevin v. Chippewa Falls, 82 Wis. 505, 52 N.W. 588 (1892); Topp v. Continental Ins. Co., supra at 780; Fitzgerald v. Badger State Mut. Casualty Co., supra, at 326; Dykstra, supra; May v. Skelly Oil Co., supra, at 36.

Defect Versus Unsafe Condition. This instruction provides that a property owner is liable for injuries caused by a structural defect regardless of whether the owner knew or should have known that the defect existed. However, where the property condition that causes the injury is an unsafe condition associated with the structure, the owner is liable only if it had actual or constructive notice of the condition. This instruction contains an optional paragraph to be used in cases involving a structural defect. This paragraph reads:

> [**Note**: The following paragraph should not be given where the defect is a structural defect. To find that (defendant) failed to (construct) (repair) or (maintain) the premises in question as safe as the nature of the place reasonably permitted, you must find that (defendant) had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident that (defendant) or its employees in the exercise of reasonable diligence (this includes the duty of inspection) should have discovered the defect in time to take reasonable precautions to remedy the situation. However, this notice requirement does not apply where (defendant)'s affirmative act created the defect.]

A decision of the supreme court discussed whether a loose stairway nosing that caused the plaintiff to fall down stairs was a "structural defect" or an "unsafe condition associated with the structure." The trial judge found that the loose nosing was a structural defect and, therefore, did not instruct the jury on notice. The court said that the classification of the loose nosing was a question of law. Barry v. Employers Mut. Casualty Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517. The court concluded that the nosing was an "unsafe condition." Thus, the court said the plaintiff was required to prove the defendant property owner had notice of the condition. Because the jury was not instructed on the notice issue, the court said the case was not fully tried and remanded the case. For a discussion of defect versus unsafe condition, see Mair v. Trollhaugen Ski Resort, 2006 WI 61, 291 Wis.2d 132, 715 N.W.2d 598.

Constructive Notice. Constructive notice requires evidence as to the length of time that the condition existed Kaufman v. State Street Ltd. Partnership, 187 Wis.2d 54, 59 (Ct. App., 1994). An owner or employer is deemed to have constructive notice when that defect or condition has existed a long enough time for a reasonably diligent owner to discover and repair it. May v. Skelley Oil Co., 83 Wis.2d 30, 36 (1978); Strack v. Great Atlantic & Pacific Tea Co., 35 Wis.2d 51, 55 (1967). Determining the exact point in time at which an unsafe condition commenced is not an essential condition in establishing constructive notice. Although a plaintiff is still obligated to prove the unsafe condition lasted long enough to establish constructive notice, it is not necessary for the plaintiff to locate the "temporal commencement" of the unsafe condition if the evidence shows it existed long enough to give a reasonably diligent owner an opportunity to discover and remedy it. Correa v. Woodman's Food Market, 2020 WI 43, ¶26, 391 Wis. 2d 651, 943 N.W.2d 535.

"Speculation as to how long the unsafe condition existed and what reasonable inspection would entail are insufficient to establish constructive notice." Kochanski v. Speedway SuperAmerica, LLC, 2014 WI 72, ¶36, 356 Wis.2d 1, 850 N.W.2d 160. Therefore, before a case may reach the jury, the

plaintiff "must present a quantum of evidence sufficient to render the eventual answer non-speculative." See Correa v. Woodman's Food Market, supra at 662.

Length of time required for constructive notice depends on the surrounding facts and circumstances, including the nature of the business and the nature of the defect. May, 83 Wis.2d 30 at 37. The need for "length of time" evidence (and therefore any constructive notice) is obviated where harm from the method of merchandising is reasonably foreseeable. See Strack, 35 Wis.2d 51 at 55.

Duty to Inspect. Wisconsin Bridge and Iron Co. v. Industrial Comm'n, 8 Wis.2d 612, 618, 99 N.W.2d 817 (1959). There is no duty to inspect and warn unless it is shown that the premises were not in a reasonably safe condition. Balas v. St. Sebastian's, supra.

Acts of Operation Versus an Unsafe Condition. In Stefanovich v. Iowa Nat'l Mut. Ins. Co., supra, at 166, the court stated that liability under the safe-place statute is based on unsafe conditions, not unsafe acts. See also Korenak v. Curative Workshop Adult Rehabilitation Center, 71 Wis.2d 77, 84, 237 N.W.2d 43 (1976). Similarly, the court in Leitner v. Milwaukee County, 94 Wis.2d 186, 195, 287 N.W.2d 803 (1980), concluded that injuries to a frequenter caused by unsafe conditions of an employer's premises are covered by the safe-place statute, while injuries caused by negligent, inadvertent, or even intentional acts committed therein are not. See also Viola v. Wisconsin Electric Power Co., 352 Wis.2d 541, 842 N.W.2d 515 (2014).

Recreational Use Immunity. If a private property owner is immune from liability under Wis. Stat. § 895.52(2), the owner is not subject to liability under the safe-place statute. However, if the recreational use immunity of § 895.52(2) is negated by Wis. Stat. § 895.52(6) (because the owner collects over $500 in payments), then the safe-place statute may apply to premises used for recreational purposes. Douglas v. Dewey, 154 Wis.2d 451, 453 N.W.2d 500 (Ct. App. 1990).