2550 INVASION OF PRIVACY: PUBLICATION OF A PRIVATE MATTER: WIS. STAT. § 995.50(2)(c)

Every person in Wisconsin enjoys a right of privacy. In this case, the plaintiff, (_____), contends that (his) (her) right of privacy was violated by the defendant, (_____), publicizing a matter concerning (his) (her) private life, namely (here describe the alleged publication).

For (plaintiff) to establish that (his) (her) right of privacy was violated, (he) (she) must prove four separate elements:

1. (Defendant) made a public disclosure of true facts concerning (plaintiff) and that the facts were communicated either to the public at large or a sufficient number of persons to insure that the facts become a matter of public knowledge.

2. The facts disclosed must be private facts. The term "private facts" suggests that the subject matter concerns something that (plaintiff) would not ordinarily disclose to anybody but (his) (her) family or close personal friends. It does not include information about a person that is already available to the public as a matter of public record.

3. The private matter must be one that would be highly sensitive to a reasonable person of ordinary sensibilities. In this regard, you may consider the information disclosed about (plaintiff) in relation to the customs of the time and place where the disclosure was made, [(plaintiff)'s occupation], and the habits of neighbors and fellow citizens. Only if the facts disclosed are such that a reasonable person would be seriously aggrieved by their

disclosure is this element satisfied.

4. (Defendant), in disclosing the facts, acted either recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts disclosed, or (defendant) actually knew that the public had no legitimate interest in knowing the facts.

If you conclude that the disclosure of the facts concerns a matter of legitimate public concern, then there is no invasion of privacy.

[Burden of Proof: Ordinary, see Wis JI-Civil 200]

SPECIAL VERDICT

1. Did (defendant) violate (plaintiff)'s right of privacy by _____?

Answer:

Yes or No

COMMENT

This instruction and comment were approved by the Committee in 1993. The instruction was revised in 2006. The comment was updated in 1995, 2006, 2009, 2014, and 2015. This revision was approved by the Committee in September 2022; it added to the comment.

This instruction addresses one of the four possible invasions of privacy set forth in Wis. Stat. § 995.50(2), namely § 995.50(2)(c). The four types of invasions are:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

(c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed.

It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

(d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.

Public Disclosure. In Zinda v. Louisiana Pacific Corp., 149 Wis.2d 913, 929, 440 N.W.2d 548, (1988), the Wisconsin Supreme Court interpreted the first element under § 995.50(2)(am)3 as requiring "publicity," meaning that "the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." See also Restatement 2d, Torts, sec. 652D, Comment a. at 384."

Therefore, "publicity" differs from "publication"—as the term "publication" is used "in connection with liability for defamation"—in that a "publication" "includes any communication by the defendant to a third person." RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a. "The distinction, in other words, is one between private and public communication," Id., with only the defendant's public communication being actionable under § 995.50(2)(am)3., Zinda, 149 Wis. 2d at 929. Moreover, a communication to the public at large necessarily means that the information **reaches the public**. See Id.; see also RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a.

For a discussion of the "public disclosure" sufficient to support a claim under subsection (c), see Hillman v. Columbia County, 164 Wis.2d 376, 395 n. 10, 474 N.W.2d 913 (Ct. App. 1991); Olson v. Red Cedar Clinic, 2004 WI App. 102, 273 Wis.2d 728, 681 N.W.2d 306. See also Dumas v. Koebel, 2013 WI App 152, 352 Wis.2d 13, 841 N.W.2d 319.

In Pachowitz v. LeDoux, 2003 WI App 120, 265 Wis.2d 631, 666 N.W.2d 88, the court of appeals rejected the appellant's assertion that a disclosure of private information to one person can never constitute "publicity." Further, the court said it was not persuaded that the use of the term "persons" opposed to "person" in the 2003 version of this jury instruction requires a disclosure to more than one person. The court concluded "that disclosure of private information to one person or to a small group does not, as a matter of law in all cases, fail to satisfy the publicity element of an invasion of privacy claim. Rather, whether such a disclosure satisfies the publicity element depends upon the facts of the case and the nature of plaintiff's relationship to the audience who received the information." Pachowitz v. LeDoux, supra, at ¶ 19-25.

Privileges. Section 995.50(3) states that the right of privacy is to be interpreted in accordance with the "developing common law of privacy, including defenses of absolute and qualified privilege . . ." For the treatment of a conditional privilege, see Wis. JI-Civil 2507.

Section 995.50(2)(a) and (b) describe invasions of privacy which do not warrant a standard instruction in that the subject matter of these subparagraphs are self-explanatory and in most instances, liability under these two sections will be decided by one fact question which contains a description of the privacy invasion set out in the statute. For a claim under subsection (d), see Wis JI-Criminal 1396.

A quasi-judicial officer and court-appointed expert witness enjoy absolute immunity so long as the statements "bear a proper relationship to the issues." Snow v. Koeppl, 159 Wis.2d 77, 464 N.W.2d 215 (Ct. App. 1990).

Elements. The Committee believes that a claim based on a violation of § 995.50(2)(c), which is embodied in the foregoing instruction, requires a more detailed jury instruction in light of Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 440 N.W.2d 548 (1989), wherein our supreme court discusses the necessary elements to prove a cause of action under this subparagraph. See also Hillman v. Columbia County, 164 Wis.2d 376, 474 N.W.2d 913 (Ct. App. 1991).