

3058 WAIVER OF STRICT PERFORMANCE

A party to a contract may waive strict and full performance of any provisions made for his or her benefit. To be effective, however, a waiver must be the voluntary and intentional relinquishment of a known right. Contract provisions may be waived expressly or the waiver may be inferred from the conduct of the parties.

If performance under a contract is defective but a party consents to such performance with knowledge of the circumstances and, after full opportunity for examination, that party fails to give timely notice of the defect to the performing party, any requirement of strict performance is deemed to be waived.

[A partial or total payment on a contract does not constitute an acceptance of less than full performance insofar as hidden defects are concerned. Payment by a party with knowledge of a particular defect is a waiver of strict performance in the absence of any other circumstances tending to show a waiver was not intended.]

COMMENT

This instruction and comment were approved by the Committee in 1975. Editorial changes were made in 1993 to address gender references in the instruction. No substantive changes were made to the instruction.

Waiver: Godfrey Co. v. Crawford, 23 Wis.2d 44,49, 126 N.W.2d 495 (1964); Lukens Iron & Steel Co. v. Hartmann-Greiling Co., 169 Wis. 350, 355, 172 N.W. 894 (1919); 17 Am. Jur. 2d Contracts § 390.

Failure of notice: Wis. Stat. § 402.606; The J. Thompson Mfg. Co. v. Gunderson, 106 Wis. 449, 453, 82 N.W. 299 (1900); Fun-N-Fish, Inc. v. Parker, 10 Wis.2d 385, 103 N.W.2d 1 (1960).

Payment with knowledge: Milaeger Well Drilling Co. v. Muskego Rendering Co., 1 Wis.2d 573, 580, 85 N.W.2d 331 (1957).