8020 DUTY OF OWNER OR POSSESSOR OF REAL PROPERTY TO NONTRESPASSER USER

(An owner) (A possessor) of property must use ordinary care under the existing circumstances to (construct) (manage) (maintain) his or her premises to avoid exposing persons on the property with consent to an unreasonable risk of harm.

"Ordinary care" is the degree of care which the great mass of people ordinarily uses under the same or similar circumstances. A person fails to use ordinary care when, without intending to do any wrong, he or she does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence should reasonably foresee that the act or omission will subject another person or property of another to an unreasonable risk of injury or damage.

In performing this duty, (an owner) (a possessor) of premises must use ordinary care to discover conditions or defects on the property which expose a person to an unreasonable risk of harm. If an unreasonable risk of harm existed and the (owner) (possessor) was aware of it, or, if in the use of ordinary care (he) (she) should have been aware of it, then it was (his) (her) duty to either correct the condition or danger or warn other persons of the condition or risk as was reasonable under the circumstances.

COMMENT

This instruction and comment were originally published in 1963 and revised in 1982 and 1996. The comment was updated in 1988, 1992, 1996, 2000, 2004, 2012, and 2020.

For the duty of an owner or possessor of real property to trespassers, see Wis JI-Civil 8025.

In Antoniewicz v. Reszczynski, 70 Wis.2d 836, 236 N.W.2d 1 (1975), the Wisconsin Supreme Court declared the duty of a land occupier to persons on premises with consent to be "ordinary care under the circumstances." The court abrogated common-law immunities of owners and occupiers and declared:

"By such standard of ordinary care, we mean the standard that is used in all other negligence cases in Wisconsin."

Antoniewicz was followed by Pagelsdorf v. Safeco Ins. Co. of Am., 91 Wis.2d 734, 284 N.W.2d 55 (1979), in which the court addressed the issue of a landlord's duty toward his or her tenant invitee. In its decision, the court reaffirmed its earlier abrogation of common-law immunities, holding that a landlord (owner) owes a duty of ordinary care in maintaining premises to his or her tenant and others on the premises with permission. The court stated that issues of notice of defect, obviousness, control of premises, etc., are relevant only insofar as they bear on the ultimate issue: "Did the landlord exercise ordinary care in maintenance of the premises under all of the circumstances?" Antoniewicz was given only prospective effect while Pagelsdorf is unlimited in its application.

The foregoing cases were followed by Maci v. State Farm Fire & Casualty Co., 105 Wis.2d 710, 314 N.W.2d 914 (1981), a landlord liability case in which the court of appeals recognized the effect of Antoniewicz and Pagelsdorf in increasing a landlord's liability exposure by requiring him or her to exercise the duty of ordinary care to any person on his or her premises with permission but being of the opinion that Pagelsdorf did not abrogate the "warning/open and obvious" limitations on liability. The appeals court then interpreted Treps v. City of Racine, 73 Wis.2d 611, 243 N.W.2d 520 (1976), an invitee case, as adopting the "open, unconcealed, and obvious" rule, as set forth in Restatement, Second, Torts § 343A (1965), that "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

The Treps case was pre-Pagelsdorf and applied the common-law possessor-invitee rule. There may be some conflict between the holding in Maci and the statement in Pagelsdorf that issues of notice of defect, obviousness, and control of the premises are all relevant only insofar as they bear on the ultimate question of ordinary care. Maci purports to continue the "warning/open and obvious" limitations to liability as viable, thus perpetuating an immunity. See Maci, supra at 717. The Committee feels that since Pagelsdorf, there are no immunities and questions of "warning/open and obvious" should be addressed in terms of ordinary care and foreseeability. See also Couillard v. Van Ess, 141 Wis.2d 459, 415 N.W.2d 554 (Ct. App. 1987).

The court of appeals, in a line of decisions, relied on Treps to support the conclusion that neither Pagelsdorf nor Antoniewicz eliminated the "open and obvious limitation" on landowner or possessor liability. In 1989, however, the supreme court noted what it termed a "split of authority" on the issue of whether the "open and obvious danger" limitation on landowner or possessor liability still exists in Wisconsin. Shannon v. Shannon, 150 Wis. 2d 434, 442 N.W.2d 25 (1989). The supreme court reiterated its holding in Pagelsdorf that "issues of notice of [a] defect, its obviousness, control of the premises . . . are all relevant only insofar as they bear on the ultimate question: Did the landlord exercise ordinary care in the maintenance of the premises under all the circumstances? Shannon v. Shannon, 150 Wis. 2d 445-46." The court in Shannon responded to the line of apparent contrary holdings by the court of appeals in the following way:

> Notwithstanding this language, the court of appeals has held in a continuing line of cases that our decisions in Antoniewicz and Pagelsdorf did not abrogate the open and obvious limitation on landowner or possessor liability. . . . We decline to resolve this apparent conflict today because this issue has not been adequately briefed, and the facts have not been adequately developed to allow us to make a reasoned determination.

In the Shannon case, cited above, the adjoining land owner defendants, unsuccessfully argued that because the minor Shannon child fell into the lake abutting their property, they were entitled to dismissal on the grounds that the lake was an open and obvious danger to the minor child, therefore relieving them of liability. The supreme court noted that there appeared to be a split of authority on the issue of whether the open and obvious danger limitation on landowner or possessor liability still existed in this state. Citing Pagelsdorf v. Safeco Ins. Co. of Am., supra, the court reaffirmed its prior holding that a landlord owes his or her tenant or anyone else on his or her premises a duty to exercise ordinary care. The court expressly noted: "we also held [in Pagelsdorf] that issues of notice of a defect, its obviousness, . . . are all relevant only insofar as they bear on the ultimate question: did the landlord exercise ordinary care in the maintenance of the premises under all of the circumstances?"

In the 1991 case of Griebler v. Doughboy Recreational, Inc., 160 Wis. 2d 547, 466 N.W.2d 897 (1991), our supreme court, without discussing Shannon v. Shannon, appeared to resurrect the "open and obvious defense" in those cases where the court is able to conclude as a matter of law that the danger is open and obvious. In Griebler, the supreme court reversed the court of appeals and affirmed the trial court's granting of a summary judgment to the defendants because the plaintiff, Griebler, had "voluntarily confronted an open and obvious danger" under circumstances where he, Griebler, conceded that he did not know of the water's depth when he dove into the pool owned by the defendants. Griebler was followed by a number of court of appeals applying the open and obvious danger doctrine to a variety of property conditions. In 1996, the supreme court in Rockweit v. Senecal 197 Wis.2d 409, 541 N.W.2d 742 (1995), again addressed what it described as the apparent conflict of authority among the court of appeals again with respect to the application of the open and obvious danger doctrine. The supreme court, expressly reaffirmed its prior holding in Pagelsdorf, stating:

> In the ordinary negligence case, if an open and obvious danger is confronted by the plaintiff, it is merely an element to be considered by the jury in apportioning negligence and will not operate to completely bar the plaintiff's recovery.

Although the court in Rockweit never referred to the Griebler decision, the Committee interprets Rockweit to overrule Griebler as to the effect of open and obvious dangers on the responsibilities of plaintiffs and defendants.

As to the application of comparative negligence principles and the application of the open and obvious danger doctrine, see Wagner v. Wisconsin Municipal Mut. Ins. Co., 230 Wis.2d 633, 601 N.W.2d 856 (Ct. App. 1999). In Wagner, the court said that because Wisconsin is a comparative negligence state, application of the open and obvious danger doctrine should be limited to cases where a strong public policy exists to justify such a direct abrogation of comparative negligence principles. 230 Wis.2d at 638.

A commercial landlord is held to the same duty as a residential landlord. Couillard v. Van Ess, 141 Wis.2d 459, 415 N.W.2d 554 (Ct. App. 1987).

Impact of Smaxwell v. Bayard. The decision in Smaxwell v. Bayard, 2004 WI 101, raises three important issues concerning liability arising from property ownership:

- First, the Court limited liability arising from injuries caused by dogs. The Court held, on public policy grounds, that landowners and landlords can be held liable only if they are the owner or keeper of the dog in question:

> "We hold, on public policy factors, that common-law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." Id. at par. 55.

- Second, the Court in Smaxwell raised the question of whether a landlord's liability for injuries incurred on the leased property are limited to those caused by defects in or maintenance of the physical property. After some discussion of the issue, the Court observed that: " . . . all of the cases in Wisconsin involving landlord liability . . . concerned actual defects in the leased property." Id. at par. 38. However, the Court concluded that it was unnecessary to determine whether a landlord's duty extends beyond defects in or maintenance of the property, because the issue in Smaxwell was resolved on separate public policy grounds. Id.

- Finally, the Smaxwell court makes note of the holding in Shannon v. Shannon, 150 Wis.2d 434, 442 N.W.2d 25 (1989) that held that the duty of landowners to those on their property with consent of the owner is one of ordinary care, and is not restricted "to defects or conditions which may be on such premises." Id. at 443. The landowners in Shannon were actually occupying the land at the time in question, and were not landlords. Footnote 7 suggests that "In light of Shannon. . . . (Wis JI-Civil 8020) incorrectly states the law as far as a landowner's duty is concerned." Presumably, that is because a landowner's duty may be of a more general nature, and is not limited to property defects or maintenance. Nonetheless, it is the Committee's considered opinion that most claims arising from property ownership indeed do involve allegations of defect or maintenance. For those cases, Wis JI-Civil 8020 would remain an accurate statement of the law. If the allegations do not arise from alleged defects or inadequacy of maintenance, the general negligence instruction Wis JI-Civil 1005 is recommended by the Committee.

Modification of jury instruction by statute or ordinance. The modification of Wis JI-Civil 8020 to reflect statutory provisions or local ordinances may not be proper unless an expression of legislative intent to impose civil liability exists. In Smith v. Goshaw, 387 Wis.2d 620, 928 N.W.2d 619, 2019 WI App 23 the court of appeals addressed whether a modification to Wis JI-Civil 8020 based on provisions found in the Wisconsin Administrative Code and a City of Eau Claire Ordinance was proper. In its decision, the court determined that reversible error occurred when the trial court added the sentence "[E]very building and all parts thereof shall be kept in good repair," at the beginning of the first paragraph of the instruction. Citing the analysis provided in Raymaker v. American Family Mut. Ins. Co., 2006 WI App 117, 293 Wis. 2d 392, 718 N.W.2d 154, the court concluded that neither the administrative code provision nor the local ordinance at issue supported negligence per se. Specifically, the court noted that "A violation of a statute constitutes negligence per se only when the plaintiff demonstrates that the harm inflicted was of the type the statute was designed to prevent, the person injured was within the class of persons protected by the statute, and there is some expression of legislative intent to impose civil liability." Smith, citing Raymaker, 2006 WI App 117, ¶20.

Additionally, the court in Smith also held that the modification included in the jury instruction presented the landlord's duty "as being absolute," which in turn, likely had the effect of misleading the jury regarding the correct legal standard for negligence. Id. at ¶3. Highlighting the problematic nature of the modified language, the court stated "As we have explained, a reasonable juror could understand the 'good repair' instruction as permitting it to find fault without regard to whether Goshaw had exercised ordinary care in inspecting or maintaining the premises." Id. at ¶16.