STATE OF WISCONSIN CONSTRUCTION LAW COMPENDIUM

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Revised 2010

I. WISCONSIN CONSTRUCTION LAW COMPENDIUM AND OTHER RELATED ISSUES

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In Wisconsin, most construction defect cases allege the following causes of action: negligence, breach of contract, or breach of warranty.

A. Negligence

A building contractor has a duty to exercise ordinary care in the construction or remodeling of a building. To establish a claim of negligent construction, a plaintiff must prove that a defendant failed to use such care as used and provided by contractors of reasonable prudence, skill, and judgment. They also have to prove that the failure to use such care caused the damage claimed. Stoll v. Adriansen, 122 Wis. 2d 503, 513, 362 N.W.2d 182, 188 (1984); see also WIS JI-Civil 1022.4.

In Wisconsin, implied in every contract is the common law duty to perform the contract with care and skill. Brooks v. Hayes, 133 Wis. 2d 228, 395 N.W.2d 167 (1986); Scott v. Savers Property & Casualty Ins. Co., 2003 WI 60; 262 Wis. 2d 127; 663 N.W.2d 715.

B. Breach of Contract

Wisconsin recognizes a cause of action for breach of contract in construction defect claims. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract. Colton v. Foulkes, 259 Wis. 142, 146, 47 N.W.2d 901 (1951).

To enforce a contract, a party must substantially perform its own obligations under the contract. See Klug & Smith Co. v. Sommer, 83 Wis. 2d 378, 386, 265 N.W.2d 269 (1978); WIS JI-CIVIL 3052. To substantially perform, a party must meet the essential purpose of the contract. Plante v. Jacobs, 10 Wis. 2d 567, 570, 103 N.W.2d 296 (1960).

Some measure of nonperformance or defective performance of a contract will be tolerated if the other party received, with minor deviations, what it bargained for. WIS JI--CIVIL 3052. A breach of contract is material when it is so serious as to destroy the essential object of the contract. See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). Whether a breach is material presents a question of fact. See Shy v. Industrial Salvage Material Co., 264 Wis. 118, 125, 58 N.W.2d 452 (1953).

When a general contractor enters into a contract to construct a building for a third person and the contractor hires sub-contractors to perform the work, the contractor cannot avoid liability by hiding behind its sub-contractors. See Jacob v. West Bend Mutual Ins. Co., 203 Wis. 2d 524, 553 N.W.2d 800 (1996). The general contractor can sue the negligent sub-contractor for breach of contract and/or negligence.

C. Breach of Warranty

1. Breach of Express Warranty

Wisconsin Jury Instruction 3220 explains that an express warranty is an express statement of fact material to the transaction, which is a part of the contract between the parties. Any direct and positive representation of a fact, affirmation of a fact, or acts equivalent to such affirmation, made by the seller to the purchaser during the negotiations to effect a sale respecting the quality of the article or the efficiency of the property sold, constitutes a warranty if relied upon by the purchaser in making the purchase.

The principal elements of an express warranty are:

1) affirmation of a material fact or a direct and positive representation of a fact or a promise material to the transaction by the seller;

2) inducement to the buyer; and

3) reliance thereon by the buyer.

The test in determining whether the party made an express warranty is not whether the seller actually intended to be bound by the statement but whether he or she made an affirmation of a material fact, a direct and positive representation of a fact, or a promise material to the transaction, the natural tendency of which was to induce a sale and which in fact did induce a sale. See Wis JI--Civil 3220.

2. Breach of Implied Warranty of Fitness for a Particular Purpose

Wisconsin Jury Instruction 3202 explains that an implied warranty is a warranty which arises by operation of law from the acts of the parties or circumstances of the transaction. It requires no intent or particular language or action by the seller to create it.

When the seller at the time of sale has reason to know any particular purpose for which the goods (product) are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods (product), there is an implied warranty that the goods (product) shall be fit for such purpose. See Wis JI-Civil 3202.

D. Defenses

1. Economic Loss Doctrine. The Economic Loss Doctrine bars causes of action sounding in tort. See Bay Breeze Condo. Ass'n v. Norco Windows, Inc., 2002 WI App 205, 257 Wis. 2d 511, 651 N.W.2d 738.

2. Contributory Negligence is a defense to negligence and product liability

3. Misuse of the product is a defense to product liability

4. Standard warranty defenses, i.e. plaintiff failed to perform a condition precedent under the warranty such as giving notice to allow defendant to cure alleged defect.

E. Economic Loss Doctrine

The Wisconsin Supreme Court first adopted the economic loss doctrine in 1989, in Sunnyslope Grading, Inc. v. Miller, Bradford and Risberg, Inc., 148 Wis. 2d 910, 437 N.W.2d 213 (1989). Historically, the doctrine developed in the context of products liability disputes between commercial parties. As a result, the definition that developed for the concept of "economic loss" was a definition that depended in large part on this context: Economic loss is loss "resulting from inadequate value because the product 'is inferior and does not work for the general purposes for which it was manufactured and sold.'" Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 400, 573 N.W.2d 852 (1998).

Under any jurisprudence pertinent to "economic loss" – whether the economic loss doctrine or the distinct conceptual dichotomy between "economic loss" and "property damage" – economic loss is considered a mutually exclusive category from damage to property other than the "product" itself. Economic loss is damage to the product itself or monetary loss caused by a defective product that does not cause personal injury or damage to other property. Biese v. Parker Coatings, Inc., 223 Wis. 2d 18, 23, 588 N.W.2d 312 (Ct. App. 1998). This definitional distinction leads to the "other property" exception to the application of the economic loss doctrine: the economic loss doctrine precludes recovery in tort for loss to a product itself that does not cause bodily injury or damage to "other property."

This requirement of "other property" has lead to a test called the integrated system test for purposes of analyzing what constitutes the "product itself" and what constitutes "other property." Under the subsidiary "integrated system" doctrine, component parts integrated into the same contiguous system as the parts that caused damage do not qualify as "other property." The Bay Breeze Condominium Association, Inc. v. Norco Windows, Inc., 2002 WI App 205, ¶ 25, 257 Wis. 2d 511, 527, 651 N.W.2d 738, 746.

Both the economic loss doctrine, and the integrated-system doctrine apply where building construction defect claims are concerned. See, e.g., Bay Breeze, 2002 WI App 205 at ¶ 26.

The economic loss doctrine does not apply to services. Where the contract is for both services and goods, the court uses the "predominant purpose" test. The question is whether the predominant purpose of the contract was to provide services or goods. If it was to provide goods, the economic loss doctrine applies to bar the tort actions. Biese v. Parker Coatings, Inc., 223 Wis. 2d 18 (Ct. App. 1996); Cease Electric, 276 Wis. 2d 361 (2004).

In the intervening years since Sunnyslope and Daanen & Janssen, Wisconsin has gradually extended the economic loss doctrine by judicial decision to allow its application – sometimes – in cases involving a noncommercial party, see, e.g., Linden v. Cascade Stone Co., 2005 WI 113, 283 Wis. 2d 606, 699 N.W.2d 189, and to cases involving real estate. See, e.g., Van Lare v. Vogt, Inc., 2004 WI 110, 274 Wis. 2d 631, 683 N.W.2d 46.

Although earlier cases suggested that the economic loss doctrine could constitute a defense against an insurance coverage claim by relegating certain tort claims to the status of "failure[s] to state a claim upon which relief may be granted," the Wisconsin Supreme Court ultimately held that the economic loss doctrine plays no role in determining the existence of insurance coverage. See American Family Mutual Ins. Co. v. American Girl, Inc., 2004 WI 2, ¶ 6, 268 Wis. 2d 16, 25-27, 673 N.W.2d 65, 70. For this reason, it is important to take care to attend the distinction between the economic loss doctrine, which is exclusively a matter of the defense on the merits of liability and damage claims, and the economic loss-property damage dichotomy.

F. Respondeat Superior

Under the doctrine of *respondeat superior*, an employer is responsible to third parties for the negligent conduct of its servants. Arsand v. City of Franklin, 83 Wis. 2d 40, 45, 264 N.W.2d 579 (1978). "'A servant is one employed to perform a service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right of control.'" Arsand, 83 Wis. 2d at 45-46 (quoting Heims v. Hanke, 5 Wis. 2d 465, 468, 93 N.W.2d 455 (1958), overruled on other grounds by Butzow v. Wausau Memorial Hospital, 51 Wis. 2d 281 (1971)).

A servant or employer under the doctrine of *respondeat superior* should be distinguished from an independent contractor. "An independent contractor is one who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work in accordance with his own ideas or under plans furnished by the person for whom the work is done, to produce certain results required by such person." Potter v. Kenosha, 268 Wis. 361, 370, 68 N.W.2d 4, 9 (1955) (quoting 18 McQuillin, Municipal Corporations § 53.75, 343 (3d ed)). One who contracts with an independent contractor is not liable to others for the torts of the

independent contractor. Snider v. N. States Power Co., 81 Wis. 2d 224, 232, 260 N.w.2d 260 (1977).

G. Damages in Construction Defect Cases

1. Damages for Tort Actions

Damages for tort actions are those damages that are a proximate cause of the tort (negligence or product liability.) A defendant is liable for damages that its actions were a substantial factor in causing. There can be more than one proximate cause of plaintiff's damages. Limitation of liability clauses are invalid as against public policy in construction cases sounding in tort. Section 895.447 Wis. Stats. They are however valid in contract cases.

2. Damages for Breach of Warranty or Contract

If there is a warranty or contract limitation on damages, that limitation will apply as well as any liquidated damage clause so long as it is not unconscionable. If there is no contractual provision regarding damages for breach of warranty or breach of contract, then the plaintiff is entitled to consequential damages which are damages that are intended to put the plaintiff back to the position he would have been in had the contract or warranty not been breached.

3. Cost of Repair v. Diminution in Value of Property

Wisconsin Jury Instruction 3700 requires the jury to award the lesser of either the cost of repair or the diminution in value of the property.

H. New Construction Defect Laws Pertain to Residential Construction

Wisconsin passed Section 101.148 and Section 895.07 which apply to construction on or after October 1, 2006. It applies to residential construction including driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages and basements. It applies to condominiums. It also applies to window and door suppliers and manufacturers for residential construction.

The law requires a party to follow certain requirements before it can file a lawsuit for defective construction against a contractor or a window or door supplier or manufacturer. It requires written notice to the contractor containing a description of the claim explaining the nature of the alleged defect and a description of the evidence that the claimant knows or possesses including expert reports that substantiate the nature and cause of the alleged construction defect. It must provide the contractor or supplier with the opportunity to settle, repair or remedy the alleged construction defect. The law allows for testing and inspection of the dwelling.

II. BODILY INJURY CLAIMS IN CONSTRUCTION CASES

In Wisconsin, most bodily injury claims in construction cases allege the following causes of action: a violation of the Safe Place Statute and/or negligence.

A. Wisconsin's Safe Place Statute

Wisconsin has a unique statute known as the Safe Place Statute. See Wis. Stat. § 101.11. It imposes a heightened standard of care (more stringent than common law negligence) on employers, owners of places of employment, and owners of public buildings with respect to the health, safety and welfare of employees and people who frequent the premises. Wis. Stat. § 101.11(1). The safe place statute has no applicability where strictly private residences are concerned, but it does apply to premises that are rented to tenants if they consist of three or more units.

1. A Heightened Standard Of Care

The safe place statute requires every employer or owner within its ambit to "furnish a place of employment which shall be safe for employees therein and for frequenters thereof." Wis. Stat. § 101.11(1). This obliges such employers and owners to maintain their premises in a manner that is as "'free from danger as the nature of the place will reasonably permit.'" Bunce v. Grand & Sixth Bldg, Inc., 206 Wis. 100, 104, 238 N.W. 867, 868 (1931). The standard is a higher standard than the ordinary care standard because it requires employers and owners to do everything reasonably permitted – including things that a reasonable person might not necessarily do – to keep the premises safe. A party may have insufficient support for a safe place statute claim, and yet have sufficient support for a negligence claim. Megal v. Green Bay Area Visitor & Convention Bureau, Inc., 2004 WI 98, ¶ 21, 274 Wis. 2d 162, 178, 682 N.W.2d 857, 864.

2. Non-Delegable Duty

A person that has a Safe Place Statute duty cannot delegate that responsibility to someone else. (For example, a general contractor can't delegate his responsibilities to maintain the premises in as safe a condition as the nature of the premises would reasonably permit to a subcontractor by way of contract). Barry v. Employers Mutual Casualty Co., 245 Wis. 2d 560 (2001).

3. Open and Obvious Conditions

The continued vitality and proper analysis of the open and obvious doctrine in Wisconsin tort jurisprudence remains in flux. See James P. End, "The Open and Obvious Doctrine: Where Does It Belong In Our Comparative Negligence Regime?" 84 Marq. L. Rev. 445 (Winter 2000). Wisconsin courts have on occasion regarded the open and obvious doctrine as effectively barring a plaintiff's recovery. See Wagner v. Wisconsin Mun. Mut. Ins. Co., 230 Wis. 2d 633, 637, 601 N.W.2d 856, 859 (Ct. App. 1999). Courts have

held the doctrine to absolutely bar cases where the plaintiff dove head-first into water of unknown depth, Griebler v. Doughboy Recreational, 160 Wis. 2d 547, 466 N.W. 2d 897 (1991), and where a plaintiff became injured after deliberately bypassing the safety mechanisms on an elevator to produce a more rapid descent. Johnson v. Grzadzielewski, 159 Wis. 2d 601, 465 N.W.2d 503 (Ct. App. 1990). The contemporary trend, however, is toward merely allow the jury to consider the openness or obviousness of a hazard when weighing the comparative negligence of the plaintiff. See, e.g., Rockweit v. Senacal, 197 Wis. 2d 409, 541 N.W.2d 742 (1995).

4. Subsequent Remedial Measures Admissible

Subsequent remedial measures are admissible at trial to show that the premises were not kept in as safe a condition as the nature of the premises would reasonably permit and that something more reasonable could have been done.

5. Available Defenses

a) Comparative Negligence

In cases involving the safe place statute, the jury still compares the culpable conduct of all of the alleged tortfeasors, and therefore may be required to compare ordinary negligence to negligence founded on a violation of the safe place statute. See Lovesee v. Allied Development Corp., 45 Wis. 2d 340, 346, 173 N.W.2d 196, 199-200 (1970). In doing so, the jury must consider the nature and character of the defendants' conduct – including the fact that it may have violated the heightened safe place statute – but culpability founded on the safe place statute will not necessarily constitute a greater share of the culpable negligence than ordinary negligence. Id.

b) Lack Of Notice

Notice is required if the defect is an "unsafe condition associated with the structure" as opposed to a "structural" defect. An "unsafe condition associated with the structure" arises from a breach of the statutory duty to repair or maintain. A defect is "structural" if it arises by reason of the materials used in construction or from improper layout or construction. If a defect is a structural defect, no notice is required under the Safe Place Statute to establish liability. If the condition is an unsafe condition associated with the structure, actual or constructive notice is required before liability can be found. Barry v. Employers Mutual Casualty Co., 245 Wis. 2d 560 (2001).

B. Negligence

To succeed on a cause of action premised on negligence, a claimant must prove four elements: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. Miller v. Wal-Mart Stores, Inc., 219 Wis. 2d 250, 259-60, 580 N.W.2d 233, (1998).

1. Meaning of Ordinary Care

In a typical negligence action, the duty breached is the duty to exercise ordinary care. Ordinary care is the degree of care or diligence that the great majority of persons use in the same or similar circumstances. See Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 15, 231 N.W. 257, 235 N.W. 413 (1931). In Wisconsin, "[e]veryone owes the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." Alvarado v. Sersch, 2003 WI 55, ¶ 13, 262 Wis. 2d 74, 662 N.W.2d 350 (quoting Palsgraf v. Long Island R. R. Co., 162 N.E. 99, 103 (N.Y. 1928)). This amounts to a duty "'to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act.'" Rockweit v. Senecal, 197 Wis. 2d 409, 419-20, 541 N.W.2d 742 (1995) (quoting A.E. Investment Corp. v. Link Building, Inc., 62 Wis. 2d 479, 483-84, 214 N.W.2d 764 (1974)).

Wisconsin Jury Instruction 1005 Negligence: Defined, states "A person is negligent when he fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent if the person, without intending to do harm, does something or fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property."

2. Meaning of Causal Connection

A defendant's negligence is a "cause" of a plaintiff's injury or damage if the negligence was a substantial factor in producing the injury or damage. Alvarado v. Sersch, 2003 WI 55, ¶ 34 n. 5, 262 Wis. 2d 74, 90 n. 5, 662 N.W.2d 350, 357 n. 5. There may be more than one cause of the plaintiff's injury or damage. Id. (citing Wis. JI-Civil 1500).

3. Comparative Negligence

Any damages that a plaintiff is allowed to recover are diminished in proportion to the amount of negligence attributed to the plaintiff. See Wis. Stat. § 895.045(1). And a plaintiff cannot recover any amount from any defendant if the plaintiff's apportionment of causal negligence is greater than that particular defendant's apportionment of causal negligence. See id.

4. Assumption of Risk

In Wisconsin, the "assumption of risk" doctrine is no longer a specific defense and the fact that a party may have assumed the risk of some adverse outcome is no longer an absolute bar to recovery in negligence or under the heightened standard of conduct under Wisconsin's safe place statute. See Cole v. Hubanks, 2004 WI 74, ¶ 18, n. 13, 272 Wis. 2d 539, 553, n. 13, 681 N.W.2d 147, 154 n. 13. The fact that a plaintiff may have assumed

some risk remains, however, a consideration in a negligence claim, see id. (citing Gilson v. Drees Bros., 19 Wis. 2d 252, 258, 120 N.W.2d 63 (1963)), and therefore may affect the outcome of a jury's comparison of causal negligence.

5. Joint and Several Liability

If two or more defendants are found causally negligent with respect to a claimant's injuries or death, the defendant whose causal negligence is less than 51% is liable only for that percentage of the damages sustained by the claimant, whether those damages represent medical expenses, wage loss or pain and suffering. The defendant whose negligence is found to be 51% or more of the total is jointly and severally liable to the plaintiff for all of the damages awarded. See Wis. Stat. § 895.045(1).

A plaintiff cannot recover from a person whose negligence is less than the plaintiffs. For example, if the plaintiff is 35% at fault and one defendant is 25% at fault and the other defendant is 40% at fault, the plaintiff cannot recover from the defendant that is 20% at fault and only receives 40% of its damages.

6. Res Ipsa Loquitur

Under Wisconsin law, when certain conditions are satisfied, a plaintiff may establish negligence through the doctrine of *res ipsa loquitur*, a rule of circumstantial evidence that permits a fact-finder to infer a defendant's negligence from the occurrence of an event. Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis. 2d 804, 819, 623 N.W.2d 751 (2001). Where *res ipsa loquitur* applies, a jury may infer negligence if the event is one that does not occur ordinarily in the absence of negligence and the instrumentality causing the harm is within the exclusive control of the defendant. Id. at 820.

Res ipsa loquitur generally applies when (1) the result normally does not occur absent negligence, (2) the agent or instrumentality of injury was within the exclusive control of the defendant, and (3) the evidence sufficiently removes the causation question from the realm of conjecture but still fails to completely explain the event. See Lecander v. Billmeyer, 171 Wis. 2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992). Where such conditions are present, a jury may infer negligence without proof of the exact cause of the accident or proof that the defendant had notice of the defect precipitating the harm. Ziino v. Milwaukee Ry. & Transp. Co., 272 Wis. 21, 23-24, 74 N.W.2d 791 (1956). Where *res ipsa loquitur* applies, the burden shifts to the defendant to offer an explanation of the accident satisfactory to the jury. Turk v. Prange Co., 18 Wis. 2d 547, 557, 119 N.W.2d 365, 371 (1963).

C. Damages for Bodily Injury

* Past and Future Medical Bills

* Past and Future Pain, Suffering and Disability and Disfigurement

* Past and Future Wage Loss or Loss of Earning Capacity

III. INDEMNIFICATION CLAUSES

A. Contractual Indemnification

A party possesses a right to indemnification when the party possesses a right to shift a loss paid by that party to another who by contract or in equity should rightfully bear the loss. See Teacher Retirement System of Texas v. Badger XVI Ltd. Partnership, 205 Wis. 2d 532, 546, 556 N.W.2d 415, 421 (Ct. App. 1996). A right to indemnification can arise either because of an indemnification provision in a contract, or because of principles of equity. See Brown v. LaChance, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991).

Indemnity contracts are valid in Wisconsin. See Spivey v. Great Atl. & Pac. Tea Co., 79 Wis. 2d 58, 63, 255 N.W.2d 469 (1977). This is true even when the effect of the agreement would be to cause indemnification of a party for the results of that party's own negligence. Id. However, a contract will not be construed as providing indemnification of a party for the party's own negligence absent a specific and express statement in the agreement to that effect. Id.

When a party who must potentially indemnify another party receives notification of pending lawsuit against the potential indemnitee, and receives a tender of the indemnitee's defense, the potential indemitor must exercise reasonable diligence in protecting its interests. See Deminsky v. Arlington Plastics Machinery Locator Corp., 2003 WI 15, ¶ 43, 259 Wis. 2d 587, 657 N.W.2d 411 (citing Illinois Central Railroad Co. v. Blaha, 3 Wis. 2d 638, 644-45, 89 N.W.2d 197 (1958)). This may entail providing the indemnitee with a defense or participating in the defense of an indemnitee. An indemnitor who fails to defend its indemnitee may lose rights to contest its liability for the judgments or settlements that ultimately result. Deminsky v. Arlington Plastics Machinery Locator Corp., 2003 WI 15, ¶¶ 41-47, 259 Wis. 2d 587, 657 N.W.2d 411.

A party, such as a contractor, can indemnify another party, such as the general contractor or owner for the general contractor or owner's own negligence. However, the indemnification clause must be expressly and clearly set forth in the contract. Algrem v. Nowlan, 37 Wis. 2d 70, 154 N.W.2d 217 (1967)

1. Indemnification Clauses Held Sufficient to Indemnify Contractor for its Own Negligence

In Wisconsin the following indemnification clauses have been upheld "You shall assume liability for, be responsible for, indemnify…and save harmless ourselves…against any loss, damage, or expense…(including any such injury, death or damage caused in part by our negligence…)" Dykstra v. Arthur J. McKee & Co., 100 Wis. 2d 120, 301 N.W.2d

201 (1981). In another case a contract that required indemnification of a claim "regardless of whether or not it is caused in part by a party indemnified hereunder" required indemnification of a claim based on the indemnitee's partial negligence but did not require indemnification if the indemnitee was solely at fault. Gunka v. Consolidated Papers, Inc., 179 Wis. 2d 525, 508 N.W.2d 426 (Ct. App. 1993).

The most recent case on this subject came down from the Seventh Circuit Court of Appeals in March, 2008. In Foskett v. Great Wolf Resorts, Inc., 2008 U.S. App. LEXIS 4646 (7th Cir. March 5, 2008), the buyers of a waterpark agreed to indemnify the sellers for any and all liabilities and claims founded on events occurring at or after the date of closing, specifically including liabilities founded on sellers' own negligence. The agreement also contained the sellers' agreement to indemnify the buyers for pre-closing negligence, but the agreement provided that the sellers' obligations to indemnify ceased after the expiration of 18 months. Almost seven years after the sale, a plaintiff who allegedly suffered injury on a slide in the waterpark sued the buyers, who filed a third-party complaint for contribution against the sellers. After a settlement with the plaintiffs to which both buyers and sellers contributed, the sellers sought indemnification from the buyers, and the district court dismissed the sellers' indemnification claims on grounds that the sellers' pre-closing design, installation and maintenance of the waterpark's slide contributed to the underlying loss. The Seventh Circuit Court of Appeals reversed the district court, concluding that the agreement unambiguously provided that the buyer would indemnify the seller for a post-closing accident – even if the sellers' conduct contributed to causing it.

2. Indemnification Clause Not Sufficient to Indemnify Contractor for its Own Negligence

"The sub-contractor assumes full responsibility and risk for any and all damage to person or property and shall hold the owner and contractor free from, and harmless of and from, any and all claims for injury…resulting from or arising out of, and in connection with, any of the sub-contractor's operations. Sub-contractor shall defend any such claim asserted or suit brought against the contractor…" Mustas v. Inland Construction, 19 Wis. 2d 194, 121 N.W.2d 274 (1963).

3. Indemnification Clause Must be Conspicuous to Indemnify Indemnitee for its Own Negligence

Wisconsin courts have held that indemnity contracts must conform to the conspicuousness standards set out in Wis. Stat. 401.201(10). *Deminsky v. Arlington Plastics Mach.*, 295 Wis. 2d 587, 610, 657 N.W.2d 411 (2003). Wis. Stat. 401.201(10) states: "'Conspicuous:' a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court."

B. Equitable Indemnification

Absent a contractual right to indemnification, any right to indemnification must be based on equity. Brown v. LaChance, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991). Equitable indemnification permits a defendant who has paid a claim that in equity should have been satisfied by another to recover the payment from the person or entity who should be primarily liable. General Accident Ins. Co. of Am. v. Schoendorf & Sorgi, 195 Wis. 2d 784, 795, 537 N.W.2d 33 (Ct. App. 1995). For example, in Wisconsin, a negligent tortfeasor has a right to equitable indemnification from an intentional tortfeasor who shares responsibility for the same loss. See Kutner v. Moore, 159 Wis. 2d 120, 126, 464 N.W.2d 18, 20 (Ct. App. 1990). The party seeking indemnification must have no liability.

IV. STATUTE OF LIMITATIONS AND STATUTE OF REPOSE

A. Statutes Of Limitations

1. Personal Injury

An action to recover damages for injuries to the person must be brought within three years after the cause of action accrues, or the action is barred. See Wis. Stat. § 893.54(1).

2. Property Damage

An action to recover damages for injury to real or personal property must be brought within six years after the cause of action accrues, or the action is barred. See Wis. Stat. § 893.52.

3. Wrongful Death

An action to recover damages for wrongful death must be brought within three years after the death of the decedent, or the action is barred. See Wis. Stat. § 893.54(2); Miller v. Luther, 170 Wis. 2d 429, 435-36, 489 N.W.2d 651, 652-53 (1992) (citing Terbush v. Boyle, 217 Wis. 636, 640, 259 N.W. 859, 861 (1935) (wrongful death cause of action accrues upon the decedent's death)).

4. Contract

An action to recover upon any express or implied contract generally must be brought within six years after the cause of action accrues, or the action is barred. See Wis. Stat. § 893.43. The statute of limitations begins to run from the moment the breach occurs.

5. Subrogation

The statute of limitations that applies where a subrogation claim is concerned is the statute of limitations that applies to the underlying tort. Schwittay v. Sheboygan Falls Mut. Ins. Co., 2001 WI App 140, ¶ 6, 246 Wis. 2d 385, 388, 630 N.W.2d 772, 774.

6. Contribution And Indemnification

Although there may exist some circumstances where the analysis changes, for the most part, an action for contribution or indemnification accrues when the party bearing a greater share of a common liability than is justified (or the party possessing a right to indemnity) makes a payment in satisfaction of the common liability, and if the cause of action if it arises as a matter of contract is subject to the six-year statute of limitations applicable to contract actions. State Farm Mutual Automobile Insurance Co. v. Schara, 56 Wis. 2d 262, 266, 267-68, 201 N.W.2d 758, 760, 761 (1972). If it arises by operation of tort law, it is subject to a one-year statute of limitations. Wis. Stat. § 893.92.

B. Statute of Repose In Construction Cases

Wisconsin Statute § 893.89 – a statute of repose rather than a statute of limitation – prohibits, with many exceptions, actions for injury to a person, injury to property, or wrongful death resulting from improvements to real property brought more than ten (10) years after substantial completion of improvement, regardless of whether the injuries are discovered or the cause of action accrues by that date. The date of occupation and use for the building's intended purpose ordinarily signals the date when the building qualifies as substantially completed. See Holy Family Catholic Congregation v. Stubenrauch Assoc., Inc., 136 Wis. 2d 515, 524, 402 N.W.2d 382 (Ct. App. 1987).

Wisconsin Statute § 893.89 sets forth exceptions to when the statute of repose does not apply:

1) A person who commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property.

2) A person who expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee.

3) An owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.

4) Damages that were sustained before April 29, 1994.

V. SELECTED DAMAGE RULES

A. Loss of Consortium

Claims by family members arising out of injuries to other family members are called claims for either "loss of consortium" or "loss of society and companionship." Consortium is said to cover losses for love, companionship, affection, sexual relations, household chores, and similar types of loss. Peeples v. Sergeant, 77 Wis. 2d 612, 253

N.W.2d 459 (1977). Loss of society and companionship has a broader meaning, and refers to relational injuries, including a deprivation of shared experiences or loss of guidance and protection. Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975); Theama v. City of Kenosha, 117 Wis. 2d 508, 344 N.W.2d 513 (1984). Such loss of society/loss of consortium claims can be made by parents due to the injury of a minor child, by a minor child due to the injury of a parent, or by a surviving spouse, child or parent due to the wrongful death of another family member.

B. Punitive Damages

In 1995, the Wisconsin legislature modified the previous common law standard of conduct applicable where punitive damage claims were concerned, declaring that a plaintiff can recover punitive damages only if there is proof that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the plaintiff's rights. See Wis. Stat. § 895.85(3). Subsequent case law has determined that this requires, at a minimum, proof that the defendant's "acts [were] substantially certain to result in the plaintiff's rights being disregarded." Strenke v. Hogner, 2005 WI 25, ¶ 38, 279 Wis. 2d 52, 70, 694 N.W.2d 296, 304. The awareness does not need to be an awareness that the particular person who will eventually become the plaintiff was substantially certain to be harmed. See id. Beyond this, it has always been the case that punitive damages may be recovered if the defendant acted outrageously or with malice, evil intent, ill will, wanton disregard of duty. See, e.g., Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 697, 271 N.W.2d 368 (1978).

C. Mitigation of Damages

A party has an obligation to mitigate its damages in Wisconsin. A person who has been damaged may not recover for losses that he knew or should have known could have been reduced by reasonable efforts.

VI. SELECTED ASPECTS OF INSURANCE AND INSURANCE COVERAGE LAW

The watershed case in Wisconsin on insurance coverage issues relating to construction defects is the case entitled American Family Mut. Ins. Co. v. American Girl, Inc., 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65. In American Girl, a property owned hired a general contract to construct a building, and the general contractor in turn hired a soils engineer subcontractor to analyze the property and determine how the site of the construction should be prepared. Id. at ¶ 12, 268 Wis. 2d at 28, 673 N.W.2d at 71. The supreme court ruled in part that the mere fact that the claims against the general contractor took the form of breach of contract and warranty claims did not preclude liability insurance coverage for such claims. See id. at ¶¶ 48-49, 268 Wis. 2d at 43-44, 673 N.W.2d at 78-79. The supreme court concluded that in substance – ignoring the superficial form of the controlling pleading – the settlement of poor soil beneath the building constructed in American Girl constituted continuous or repeated exposure to harm sufficiently accidental in nature to qualify as an occurrence. See id. at ¶ 38, 268

Wis. 2d at 38, 673 N.W.2d at 76. Cases decided in the years since the American Girl decision have struggled with defining the difference between occasions when an occurrence accompanies a breach of contract or warrant, and therefore the case warrants insurance coverage, and occasions when no occurrence accompanies the breach of contract or warranty and the case therefore falls outside the ambit of insurance coverage.

A. Wisconsin's Direct Action Statute

Wisconsin is a direct-action state. A liability insurer may be named as a defendant in a negligence action either along with, or instead of, its insured. See Wis. Stat. §§ 632.24 and 803.04(2). The direct action statutes cannot be invoked to support a direct action against an insurer whose policy was issued and delivered somewhere other than Wisconsin. See Kenison v. Willington Ins. Co., 218 Wis. 2d 700, 710, 582 N.W.2d 69, 73 (Ct. App. 1998). A direct action may not be brought against a company that merely provided genuine reinsurance. See Ott v. All-Star Ins. Corp., 99 Wis. 2d 635, 645, 299 N.W.2d 839 (1981).

B. Declaratory Judgment Actions

Wisconsin law authorizes courts of general jurisdiction to declare rights, status, and other legal relations' which 'declaration may be either affirmative or negative in form and effect. See Wis. Stat. § 806.04(1).

C. Intervention, Stay, Bifurcation And the Duty To Defend

In other jurisdictions, insurers routinely raise coverage issues by bringing a separate declaratory judgment action that seeks judgment declaring that no coverage exists. In Wisconsin, the preferred procedure to determine insurance coverage is for the insurer to proceed in the context of the original action by: (1) intervening, if necessary, in the plaintiff's action against its insured, (2) seeking a bifurcation of insurance coverage issues from issues on the merits of liability and damage claims, and (3) seeking a stay of all proceedings on the liability and damages issues pending the outcome of the insurance coverage dispute. Fire Ins. Exchange v. Basten, 202 Wis. 2d 74, 89, 549 N.W.2d 690, 696 (1996).

An insurer who fails to protect its insured in this manner, or by means of an equivalent procedure, and who leaves its insured undefended, may be deemed to have breached its duty to defend, and may be estopped from later challenging coverage. Professional Office Buildings, Inc. v. Royal Indemnity Co., 145 Wis. 2d 573, 584-85, 427 N.W.2d 427, 429, 431 (Ct. App. 1988). Because such harsh consequences result in the event of a breach of the duty to defend, insurers often reflexively pay for a putative insured's defense under a reservation of rights while coverage issues are being resolved notwithstanding the insurer's existing belief that it has no duty to do so.

In the event that for whatever reason a resolution of coverage issues in the context of the plaintiff's action against the insured is not feasible, Wisconsin law permits a separate,

independent declaratory judgment action to resolve insurance coverage issues. See Basten, 202 Wis. 2d at 90, 549 N.W.2d 690.

D. The Continuous Trigger Theory

Wisconsin's courts have adopted the continuous trigger theory. The continuous trigger theory, sometimes known as the "triple trigger" theory in non-Wisconsin jurisdictions, provides that, in insurance coverage cases involving occurrences spread continuously or recur over multiple policy periods, for purposes of determining whether the potentially implicated policies are triggered, the occurrence is deemed to occur continuously from exposure until manifestation. See Society Insurance v. Town of Franklin, 2000 WI App. 35, ¶ 8, 607 N.W.2d 342, 346. Policies continue to be triggered under this theory until the continuing nature of the occurrence ceases, or until the loss qualifies as a known – and thus no longer fortuitous – loss. See, e.g., American Family Mut. Ins. Co. v. American Girl, Inc., 2004 WI 2, ¶ 86, 268 Wis. 2d 16, 673 N.W.2d 65.

VII. CONSTRUCTION LIEN LAW

Under Wisconsin construction lien law, codified in Chapter 779 of the Wisconsin Statutes, any person who performs, furnishes, or procures any work, labor, service, materials, plans, or specifications, used or consumed for the improvement of land, and who complies with the appropriate notice requirements of Wis. Stat. § 779.02, shall have a construction lien on all interests in the land belonging to its owners. Wis. Stat. § 799.01(3).

Construction lien rights are extended to a prime contractor, a person who contracts directly with a land owner, and a person who provides labor or materials for the construction (a subcontractor, or a laborer or mechanic employed by a prime contractor or subcontractor). Notwithstanding certain exceptions identified in Wis. Stat. § 779.02(1), a person seeking to exercise a construction lien must follow a specific notice procedure.

With respect to a prime contractor, a prime contractor who enters into a contract with a land owner for improvement of the owner's land and who has contracted or will contract with any subcontractors, suppliers or service providers to perform, furnish or procure labor, services, materials, plans, or specifications for the improvement must provide the land owner written notice, which is usually contained within the initial written contract between a prime contractor and a land owner, of potential lien rights on the owner's land and buildings in the event the prime contractor or any subcontractor, etc. is not paid. Wis. Stat. § 779.02(2)(a). If no written contract is entered into by a prime contractor and a land owner for the improvement, a prime contractor must give notice to the land owner of the potential lien rights with 10 days after the first labor, services, materials, plans, or specifications are performed, furnished, or procured for the improvement by or pursuant to the authority of the prime contractor. Wis. Stat. § 779.02(2)(a).

With respect to any person other than a prime contractor who performs, furnishes, or procures labor, materials, plans, or specifications for an improvement, that person must

give written notice of their lien rights to the land owner within 60 days after they first perform, furnish, procure the first labor, services, materials, plans, or specifications. Wis. Stat. § 779.02(2)(b).

Failure to give notice by a prime contractor or any other lien claimant other than a prime contractor could result in the forfeiture of the lien. See Wis. Stats. §§ 779.02(2)(c) and (3).

If any person desires to enforce construction lien rights, a written "Notice of Intention to File Claim for Lien" form must be served upon the land owner at least 30 days before filing a "Claim for Lien" form. Wis. Stat. § 779.06(2). This particular Notice is required regardless of whether a prime contractor or any other person who furnished labor or materials for the construction was required to give notice of lien rights. Id. The Notice must briefly describe the nature of the claim, its amount, and the land and improvement to which it relates. Id.

After the Notice of Intention to File Claim for Lien is served on the land owner, and after 30 days runs since the service of the Notice of Intention to File Claim for Lien, a Claim for Lien must be filed within 6 months from the date the lien claimant furnished the last labor or materials on the improvement. Wis. Stat. § 779.06(1). The Claim for Lien must attach a copy of the notice given under Wis. Stat. § 799.02 and a copy of the Notice of Intention to File Claim for Lien. Wis. Stat. § 799.06(3). The Claim for Lien gets filed with the clerk of court's office in the county in which the lands affected by the lien is situated, and the Claim for Lien must be served upon the land owner within 30 days. Wis. Stat. § 799.06(1). If a lawsuit is necessary, a lien claimant must file a lawsuit within 2 years from the date of the filing of the Claim for Lien.