

128.00

CONCLUDING PARAGRAPHS--NO CONTRIBUTORY NEGLIGENCE--CONTRIBUTORY NEGLIGENCE--AFFIRMATIVE DEFENSE

INTRODUCTION

As alluded to in the introduction to the premises instructions the following chapter contains the alternative concluding paragraph(s) which would be appropriate for each case.

The alternatives are: a concluding paragraph that relates to no issues of contributory negligence or other affirmative defenses, a concluding paragraph to be used when there is a claim of contributory negligence, and a concluding paragraph that would incorporate the claim in an affirmative defense. These alternatives are put together much as IPI 30.01 is assembled with regard to damages. The trial attorneys and Court can then pick the appropriate alternatives based upon which claims the jury must decide. A sample instruction (IPI 128.04) shows how the various alternatives fit together.

128.01 Concluding Paragraph--No Issue Of Contributory Negligence Or Affirmative Defense

If you find from your consideration of all the evidence, that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for the defendant.

Notes on Use

The instructions numbered IPI 128.01 through 128.03 should be combined with the issues instructions IPI 120.08 through 125.02, as appropriate. Use IPI 128.01 as the last paragraph of the issue/burden of proof instruction in a premises case in which contributory negligence is not an issue. IPI 128.02 should follow the issue instruction when there is evidence supporting a contributory negligence verdict. IPI 128.03 contains an instruction for an affirmative defense.

If contributory negligence and/or an affirmative defense will be instructed upon, omit the final phrase “your verdict should be for the defendant.” Also use IPI 128.02 or 128.03 as appropriate.

128.02 Concluding Paragraph--Contributory Negligence Claimed

If you find from your consideration of all of the evidence that any of these propositions has not been proved, then your verdict shall be for the defendant. On the other hand, if you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff was contributorily negligent.

In order to reduce or deny plaintiff damages, the defendant has the burden of proving each of the following:

First, that plaintiff [plaintiff's name] failed to exercise ordinary care [for (his/her) own safety] [for the safety of (his/her) property] in one or more of the following ways:

- a) _____,
- b) _____,
- c) _____,

Second, plaintiff's failure to exercise ordinary care was a proximate cause of plaintiff['s][s'] [injury] [and] [damage].

If you find that the defendant has not proved both of the propositions required of the defendant, then your verdict should be for the plaintiff and you will not reduce plaintiff's damages. You should use Verdict form A.

If you find that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was more than 50% of the total proximate cause of the [injury] [and] [damage] for which recovery is sought, then your verdict should be for the defendant. You should use Verdict form C.

If you find that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the [injury] [and] [damage] for which recovery is sought, then your verdict should be for the plaintiff and you will reduce the plaintiff's damages in the manner stated to you in these instructions. You should use Verdict form B.

Instruction revised April 2007.

Notes on Use

The instructions numbered IPI 128.01 through IPI 128.03 should be used as concluding paragraphs with the issues/burden instructions IPI 120.08 through IPI 125.02. Use IPI 128.01 where contributory negligence is not an issue. Use IPI 128.02 where contributory negligence is claimed.

128.03 Concluding Paragraph--Affirmative Defense Claimed

If you find that the plaintiff has proved each of these propositions, then you should consider the defendant's affirmative defense of _____. In order to defeat the plaintiff's claim, the defendant must prove:

First: _____,

Second: _____,

(List the elements of the affirmative defense.)

If the defendant proves all of these propositions, your verdict should be for the defendant. If the defendant has failed to prove each of these propositions, [then you must consider the defendant's claim that the plaintiff was contributorily negligent] [then you must find for the plaintiff.]

Notes on Use

Use this instruction as the concluding paragraph to the issues/ burden instructions IPI 120.08 through IPI 125.02 where an affirmative defense other than contributory negligence is asserted.

If both an affirmative defense and contributory negligence are being asserted, a) this instruction should be appended to, and immediately follow, the appropriate issue/burden of proof instruction, b) the appropriate bracketed language above referring to the claim of contributory negligence must be used, rather than the language directing a finding for the plaintiff, and c) IPI 128.02, the contributory negligence instruction, should be appended to follow this instruction.

128.04 Sample Instruction--Premises--Contributory Negligence Claimed (120.08 And 128.02)

[In Count ___], plaintiff [plaintiff's name] seeks to recover damages from the defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property, land, building, ____] which presented an unreasonable risk of harm to people [children] on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that people [children] on the property [would not discover or realize the danger] [or] [would fail to protect themselves against such danger].

Fourth, the defendant was negligent in one or more of the following ways:

- a) _____,
- b) _____,
- c) _____.

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

If you find from your consideration of all of the evidence that the plaintiff has proved each of these propositions, then you should consider the defendant's affirmative defense of _____. In order to defeat the plaintiff's claim, the defendant must prove:

First: _____.

Second: _____.

(List the elements of the affirmative defense.)

If the defendant proves all of these items, your verdict should be for the defendant. If the defendant has failed to prove each of these propositions, then you must consider the defendant's claim that the plaintiff was contributorily negligent.

In order to reduce or deny plaintiff damages, the defendant has the burden of proving each of the following propositions:

First, plaintiff [plaintiff's name] failed to exercise ordinary care [for (his/her) own safety] [for the safety of (his/her) property] in one or more of the following ways:

- a) _____,
- b) _____,
- c) _____.

Second, plaintiff's failure to exercise ordinary care was a proximate cause of plaintiff[s]'s [injury] [and] [damage].

If you find the defendant has not proved both of the propositions required of the defendant, then your verdict should be for the plaintiff and you will not reduce plaintiff's damages. You should use Verdict form A.

If you find that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was more than 50% of the total proximate cause of the injury [or damage] for which recovery is sought, then your verdict should be for the defendant. You should use Verdict form C.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was 50% or

less of the total proximate cause of the [injury] [and] [damage] for which recovery is sought, then your verdict should be for the plaintiff and you will reduce the plaintiff's damages in the manner stated to you in these instructions. You should use Verdict form B.