

WRITTEN TESTIMONY OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY

United States Senate

The RESTORE Patent Rights Act: Restoring America's Status as the Global IP Leader

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Chairman Coons, Ranking Member Tillis, and Members of the Committee:

Thank you for this opportunity to speak with you today about why Congress should enact the RESTORE Patent Rights Act.¹ Specifically, this act would establish a “rebuttable presumption” in favor of injunctive relief for patent infringement, thereby bringing back a patent system based on reliable and effective patent rights that serves as the foundation of this country’s innovation ecosystem.

For over two centuries, if a valid patent was found to be infringed, the patent owner could generally rely on the court granting a permanent injunction to prevent further infringement.² In 2006, however, the Supreme Court issued an opinion in *eBay v. MercExchange*³ that dramatically altered the patent landscape. Rather than being able to rely on infringers being enjoined by the court, injunctive relief was no longer certain. Instead, after *eBay*, specific patent owners are more certain that they will *not* be granted a permanent injunction against an infringer. The best those patent owners can hope for is an ongoing royalty, set by the court, while the infringer is permitted to continue to use the patent owner’s innovation.

This shift, from a presumption of injunctive relief for patent infringement to uncertainty about whether a patent owner can even stop an infringer, has had serious negative impacts on the patent system. In cases where injunctive relief is unlikely, there are few deterrents to infringement. There

¹ I am speaking on own behalf, and my testimony does not reflect the views of my employer or of any institution or organization with which I am affiliated.

² See, e.g., Adam Mossoff, *The Injunction Function: How and Why Courts Secure Property Rights in Patents*, 96 Notre Dame L.Rev. 1581, 1598 (2021)

³ *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388 (2006).

are some infringers who, knowing they are unlikely to be enjoined, decide to “infringe now, pay later.”⁴ Not only is the patent owner forced to use litigation, rather than negotiation, to obtain payment for use of their patented technology, but there is evidence that court-determined fees are lower than negotiated fees.⁵

Beyond ongoing royalties set by a court, uncertain injunctive relief also impacts licensing negotiation more broadly. Specifically, when an injunction is available, a patent owner can say, during the course of negotiations, “No, I will not license my patent to you at the price you are offering.” Parties who wish to use the patented technology will either need to pay the patent owner’s asking price or will need to design around or use different technology. On the other hand, when an injunction is unlikely to be granted, parties who wish to use the patented technology have no need to negotiate in good faith – or at all. Some parties may choose to engage in the “infringe now, pay later” predatory infringement described above, but even those who are not willing to infringe – whether due to an ongoing relationship with the patent owner or reputational concerns – will end up negotiating in a distorted market in which patents are devalued as an asset class. For example, a recent study conducted by AUTM showed that exclusive licenses, which are typically higher-valued, have decreased post-*eBay*, while non-exclusive licenses, which are typically lower-valued, have increased.⁶

Because patents are issued, in part, to incentivize investment in invention and innovation, if patents are unable to be licensed on fair terms and are devalued more generally, then investment in invention and innovation is likely to suffer. Companies may decrease their research efforts or may move their innovation activities to other jurisdictions with more favorable patent systems. A strong patent system, built on effective and reliable patent rights, is the backbone of the United States innovation ecosystem. Injunctive relief is a critical component of a strong patent system.

My comments today address how the Supreme Court’s *eBay* decision led to the unavailability of injunctive relief for patent infringement, how the uncertainty around injunctions has negatively impacted the US patent system, and how enacting the RESTORE Patent Rights Act would undo the detrimental effects of the *eBay* decision and strengthen this country’s innovation ecosystem.

I. The Supreme Court’s *eBay* Opinion Ignored History and Devalued Patents

Injunctive relief upon a finding of patent infringement stems from the constitutional grant of power to Congress to secure “the exclusive right” to “inventors” for their discoveries and writings.⁷ This

⁴ While some refer to this as “efficient infringement,” a more apt term is “predatory infringement.” See, e.g., Kristen Osenga, “*Efficient*” *Infringement and Other Lies*, 52 SETON HALL L. REV. 1085 (2022).

⁵ See Jonathan Barnett, *Has the Academy Led Patent Law Astray?*, 32 BERKELEY TECH. L.J. 1313, 1363-67 (2017) (explaining why court-set “monetary remedies are likely to chronically yield distorted valuations relative to market negotiations”).

⁶ See Kristen Osenga, *The Loss of Injunctions under eBay: Evidence of the Negative Impact on the Innovation Economy*, Hudson Institute Policy Memo (Feb. 28, 2024), available at <https://www.hudson.org/regulation/loss-injunctions-under-ebay-evidence-negative-impact-innovation-economy>.

⁷ U.S. Const. art. I, § 8, cl. 8.

right to exclude, as the Supreme Court has acknowledged, is “the essence of a patent grant.”⁸ Because the only right a patent confers is a right to exclude, if a patent owner cannot stop an infringer from using their patented technology, the patent is essentially worthless. In recognition of this essential right, prior to *eBay*, if courts found a valid patent to have been infringed by a defendant, they presumptively granted an injunction in nearly all cases.⁹

Although the *eBay* decision is over eighteen years old, it is worth briefly reviewing the opinion for a few reasons. First, the most oft-cited portion of the opinion is not the majority opinion, but a concurrence by Justice Kennedy. Second, understanding what happened in the *eBay* case explains why the RESTORE Patent Rights Act, as simple as it is, is a powerful fix that can strengthen the patent system.

The patent in the *eBay* case was owned by MercExchange, a company that did not directly manufacture or sell anything covered by its patent.¹⁰ MercExchange was an unsuccessful startup; when it could not succeed in starting a manufacturing enterprise, it instead licensed its patented technology to others.¹¹ The internet auction site eBay was using MercExchange’s patented technology without a license, and MercExchange sued for patent infringement. The trial court held that MercExchange’s patent was valid and that MercExchange had proven that eBay infringed. The court granted MercExchange a substantial damages award,¹² but denied MercExchange’s request for a permanent injunction because MercExchange did not manufacture the technology itself; it only licensed the technology to other companies.¹³ MercExchange appealed to the Federal Circuit, which affirmed the trial court’s finding of validity and infringement, but reversed the trial court’s denial of MercExchange’s request for an injunction.¹⁴ eBay then petitioned the Supreme Court to reverse the Federal Circuit and reinstate the denial of injunctive relief.

The Supreme Court unanimously reversed the Federal Circuit.¹⁵ In a very short opinion, the Court stated that categorical denials of injunctive relief (as the district court had done in this case) and blanket grants of injunctive relief (as was the Federal Circuit’s practice) were both in error.¹⁶ Instead, the Court set forth a four-factor test that courts should use to decide whether to grant a permanent injunction.¹⁷ This test requires the party seeking a permanent injunction to

⁸ *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980).

⁹ Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 650-51 (2008) (discussing the Federal Circuit’s rule of nearly automatically granting injunctions).

¹⁰ Ryan T. Holte, *Trolls or Great Inventors: Case Studies of Patent Assertion Entities*, 59 ST. LOUIS U. L.J. 1, 23-28 (2014) (providing the history of MercExchange).

¹¹ *Id.*

¹² *MercExchange, LLC v. eBay, Inc.*, 275 F.Supp.2d 695, 698-99 (E.D. Va. 2003).

¹³ *Id.* at 712.

¹⁴ *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1338-39 (Fed. Cir. 2005).

¹⁵ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

¹⁶ *Id.* at 393-94.

¹⁷ This four-factor test has been the subject of significant legal debate focused on its history and legitimacy, which is beyond the scope of this testimony but has been covered extensively elsewhere. See, e.g., Adam Mossoff, *Injunctions for Patent Infringement: Historical Equity Practice between 1790-1882*, ___ HARVARD J.L. & TECH. ___ (forthcoming 2025); Mark P. Gergen, John M. Golden & Henry E.

demonstrate “(1) that is has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”¹⁸ These factors are to be balanced and each particular case should be decided on its merits.¹⁹

Although the majority opinion is rather clear that categorical grants or denials of injunction are incongruous with its four-factor test, the *eBay* case spawned two concurring opinions in the Supreme Court. One, authored by Chief Justice Roberts and joined by Justices Scalia and Ginsberg, stated that although automatic grants of injunctive relief are inappropriate, the historical case law confirms that a patent’s exclusionary right means that injunctions have been predictably granted in almost all cases.²⁰ As with all property rights, the loss of an exclusive right has long been held by courts to create a presumption of irreparable harm, or a harm that cannot be remedied by damages alone.

The other concurrence, written by Justice Kennedy and joined by Justices Stevens, Souter, and Breyer, embraced policy arguments, not historical case law or judicial practices in remedying patent infringement. Justice Kennedy focused on a number of controversial policy concerns and other supposed perils in patent law that would counsel against the grant of an injunction despite a finding of infringement of a valid patent.²¹ These included patent trolls,²² business method patents,²³ or single consumer devices that include a large number of patented components held by different patent owners.²⁴ Justice Kennedy concluded that in all these circumstances, a court should be wary about granting any injunctive relief.²⁵ Many district court judges have denied injunctive relief in the circumstances highlighted in the Kennedy concurrence.

The Federal Circuit, which hears all appeals in patent infringement cases, has also made injunctive relief more difficult to obtain, following on the Supreme Court’s *eBay* decision. Prior to 2011, the

Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L.REV. 203, 207-208 (2012).

¹⁸ *eBay Inc.*, 547 U.S. at 391.

¹⁹ *Id.* at 391-94.

²⁰ *Id.* at 394-95 (Roberts, C.J., concurring) (noting that injunctions should continue to issue in the “vast majority of patent cases,” as the right to exclude is difficult to remedy via monetary damages).

²¹ *Id.* at 395-97 (Kennedy, J., concurring).

²² “Patent troll” is a derogatory term for a company that generates revenue by licensing its technology. See, e.g., Kristen Osenga, *Formerly Manufacturing Entities: Piercing the “Patent Troll” Rhetoric*, 47 CONN. L.REV. 435 (2014).

²³ Business method patents cover, unsurprisingly, methods associated with doing business. Sometimes these methods are embodied in software, but they need not be. Often business method inventions revolve around handling and processing data. See, e.g., Kristen Osenga, *Ants, Elephant Guns, and Statutory Subject Matter*, 39 ARIZ. ST. L.J. 1087 (2007).

²⁴ See *eBay Inc.*, 547 U.S. at 396-97 (Kennedy, J., concurring). One example of devices that include a large number of patented components held by different patent owners includes smart phones. Technology standards, such as 4G and 5G, often include the technology of hundreds or thousands of patents, held by many different patent owners.

²⁵ See *id.*

Federal Circuit had stated that “where validity and continuing infringement have been clearly established, immediate irreparable harm is presumed.”²⁶ This permitted at least some patent owners to successfully obtain injunctive relief, even under the four-factor *eBay* test. However, in 2011, in *Robert Bosch v. Pylon Manufacturing*, the Federal Circuit concluded that *eBay* “jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief.”²⁷ This was mistaken, if only because *eBay* said nothing about the presumption of irreparable harm, remarking only that categorical or automatic rules do not apply to the issuance of injunctions. In fact, rebuttable presumptions are not automatic categorical rules and thus do not run afoul of *eBay*’s prohibition on such rules. The *Bosch* decision made it even more difficult for all patent owners to obtain injunctive relief against a defendant found to be infringing a valid patent.

II. Obtaining Injunctive Relief for Patent Infringement Has Become Uncertain

Since the *eBay* decision was rendered, the granting of injunctions has become significantly less reliable, which in turn has weakened the patent system.

Prior to *eBay*, it was presumed that permanent injunctions would be granted in most cases where infringement of a valid patent was found.²⁸ This was historically understood and makes sense given that a patent confers only an exclusive right, which is enforced by enjoining the infringer. Empirical studies support that, prior to *eBay*, permanent injunctions were routinely granted, finding injunctive relief granted in 94–100% of cases where patent infringement was found.²⁹ This high grant rate provided a level of certainty to both patent owners and infringers, providing the patent owner with a truly valuable right to exclude.

After *eBay*, everything has changed. Very few, if any courts, have considered the historical case law on injunctions or the Constitutional framing around providing an exclusive right. More often, the district courts focus narrowly on the alleged policy concerns that Justice Kennedy raised in his concurrence – patent licensing firms, business method patents, and products with many patented components where the patents are held by a diversity of firms. None of these policy concerns change the nature of the underlying patent. The patent was still granted as a reward for invention and innovation and was determined to be valid. The underlying patent still confers no rights, but the right to exclude. And yet, regularly, that right to exclude is being diminished by courts who now deny requests for injunctive relief, especially when the patent is owned by a patent licensing firm.

²⁶ *Smith Int’l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983) (cleaned up).

²⁷ *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1148-49 (Fed. Cir. 2011).

²⁸ See, e.g., *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005) (citing a “general rule that courts will issue a permanent injunction against patent infringement” absent a good reason, such as a public health concern, to deny it); *W.L. Gore & Assocs., v. Garlock, Inc.*, 842 F.2d 1275, 1281 (Fed. Cir. 1988) (stating that “injunctive relief against an adjudged infringer is usually granted).

²⁹ See Ryan T. Holte, *The Misinterpretation of eBay v. MercExchange and Why: An Analysis of the Case History, Precedent, and Parties*, 18 Chap. L.Rev. 677, 720 (citing studies).

Many studies were done, particularly in the immediate decade post-*eBay*, that illustrated the significant impact of that case on grants of permanent injunction. In a widely cited study covering the time period between the *eBay* decision in May 2006 and December 2013, Professor Christopher Seaman found that requests for permanent injunctions were granted in 72.5% of cases, representing a marked decrease “from the state of play before *eBay*, when injunctions were granted to prevailing patentees in almost all cases.”³⁰ Another study by Professor Jay Kesan and Kirti Gupta similarly found a statistically significant decrease in injunctions being granted on a finding of infringement of a valid patent; even more important, they found a decrease in courts awarding injunctions to both licensing and manufacturing companies after defendants were found liable for patent infringement.³¹ The decline in injunctive relief granted to patent licensing firms, Justice Kennedy’s so-called “patent trolls,” is even more significant, with these patent owners being almost certain to *not* receive injunctive relief.³²

A new research paper by Professor Kristina Acri confirms that grants of injunctive relief for both manufacturing firms and licensing firms are still uncertain.³³ Professor Acri studied patent infringement cases filed between 2000-2023, comparing the rates of seeking and being granted injunctive relief before and after *eBay*.³⁴ Professor Acri found not only that the rate of receiving grants of permanent injunction continue to be significantly lower than pre-*eBay* for both manufacturing and licensing firms,³⁵ but that patent owners, regardless of business type, are not even seeking injunctive relief at the same rate as before *eBay*.³⁶

This new data, combined with previous studies, demonstrates rather clearly that the imposition of *eBay*’s four-factor test and a disregard for both the Constitutional underpinning of the patent system and historical practice has led uncertainty about injunctive relief where patent infringement has been found. In fact, the uncertainty is so great that more and more firms are not even seeking that remedy from the courts. Unfortunately, this uncertainty gives rise to a number of policy and economic concerns that are weakening the United States patent system and this country’s innovation economy.

³⁰ Christopher B. Seaman, *Permanent Injunctions in Patent Litigation after eBay: An Empirical Study*, 101 Iowa L.Rev. 1949, 1982-83 (2016); see also Colleen V. Chien & Mark Lemley, *Patent Holdup, the ITC, and the Public Interests*, 98 Cornell L.Rev. 1, 9-10 (2012) (concluding that between July 2006 and August 2011, “courts have granted about 75% of requests for injunctions, down from an estimated 95% pre-*eBay*”).

³¹ Kirti Gupta v. Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases*, at 12-14 (Univ. Ill. Legal Stud. Res., Paper No. 17-93, 2016), <https://ssrn.com/abstract=2816701>.

³² *Id.* at 22-26 (showing that patent licensing firms are far less likely to seek or obtain injunction after *eBay*).

³³ Kristina M.L. Acri nee Lybecker, *Injunctive Relief in Patent Cases: the Impact of eBay*, ___ HARVARD J.L. & TECH. ___ (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4866108.

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ *Id.*

III. Uncertain Injunctive Relief Leads to Other Policy & Economic Concerns

As noted above, the patent system is built upon the Constitution which provides for exclusive rights, as well as a rich history of injunctive relief being granted for patent infringement. The fact that *eBay* essentially ignored both those foundations is a serious issue in and of itself. However, the uncertainty of receiving an injunction when a valid patent is found infringed has given rise to other important concerns.

Uncertain injunctive relief and, in some cases, near certainty that injunctive relief will be denied has led to a phenomenon of predatory infringement. Predatory infringement is an intentional choice, made by an infringer, to “infringe now, pay later,” with an understanding that – at worst – the infringer will be made to pay a royalty for past infringement and an ongoing royalty to continue to infringe. The existence of predatory infringement is difficult to measure; yet, the simple idea that reduced legal protection may result in predatory infringement is being confirmed by some empirical studies.³⁷

Because patents are property rights, it maybe helpful to think about predatory infringement of an apartment. As a landlord, you generally have the right to exclude people who are not legitimate tenants. But the predatory infringer is a squatter – one that you cannot make leave unless you bring them to court, which will likely take a couple of years. During that time, the infringer is not paying rent at all. Without injunctive relief, even if a court finds that squatter to be infringing, the court will continue to let them stay in the apartment, they will just have to pay past rent and also ongoing rent, but not at the landlord’s rate. Instead, the court will set a rate, which is likely to be less than the stated rent.

If patents were apartments, there would be outrage. Drawing on various threads of the above analogy, there are a number of issues which cause the property right to lose value, which is exactly what is happening in the patent space. The property owner’s typical right to exclude is subordinated to the squatter, who chooses to intentionally trespass. The bad actor is rewarded. The property owner’s right to set the cost for those who wish to use the property is subordinated to whatever the court deems appropriate and is delayed until such time as litigation concludes. The bad actor ultimately pays less and has been granted an interest-free loan through litigation. And because the property owner is not receiving payments during the period prior to and during litigation, the property owner may not be able to continue to conduct their business as planned. Many patent owners are small businesses that count on licensing revenue to continue to invent and innovate, or even move into the manufacturing space themselves. When they are required to allow a predatory infringer to squat “rent free” during this time, they may not be able to grow their own companies. This defeats an important part of the patent system, as well as the innovation ecosystem.

³⁷ See, e.g., Kirti Gupta & Urska Petrovcic, *Evidence of Systematic “Patent Holdout”*, 38 Berkeley Tech. L.J. 575, 585 (2023); Bowman Heiden & Nicolas Petit, *Patent “Trespass” and the Royalty Gap: Exploring the Nature and Impact of Patent Holdout*, 34 Santa Clara High Tech L.J. 179 (2018).

The lack of certain injunctive relief for patent infringement also has economic implications, beyond simply delaying payment to the patent owner for use of their technology. As noted above, the court will set an ongoing royalty rate in lieu of enjoining the infringer and that rate is often less than what the patent owner had or would have sought. But the diminution of royalty rate is not limited to the predatory infringer. The lack of injunctive relief more generally means that the patent is worth less in all licensing transactions. Where injunctive relief is uncertain, a patent owner will not be able to offer an exclusive license (at least not successfully), because there will always be a concern that a predatory infringer will also be able to use that technology. Understandably, an exclusive license is a higher-valued transfer of property rights, because the buyer is the only person legally allowed to use and commercially benefit from the patented technology. In legal and economic terms, an exclusive license is the transfer of the exclusive right to make, use, or sell something—it is the sale of the entire property right—and so it is worth more to the buyer. Nonexclusive licenses are generally lower-valued assets and cost less because the technology is made available to multiple parties that are in competition with each other in the marketplace. Because the nonexclusive licensee is purchasing fewer rights, the royalty rate a patent owner can seek will be lower, distorting the market for patents and devaluing patents as an asset class.

Because most patent licensing occurs in secret, this phenomenon of devaluing patents is difficult to observe. However, a recent study conducted by AUTM (known previously as the Association of University Technology Managers) provides an insight into the *eBay* effect: exclusive licenses, which are generally higher-valued, have *decreased* while non-exclusive licenses, which are generally lower-valued, have increased in the years since the *eBay* decision.³⁸ This is evidence of how the loss of injunctions, resulting in a zero value for exclusivity in a license deal, has negatively impacted commercial transactions and devalued patents generally. Though overall licensing activity has increased over the period studied by AUTM, the growth is almost entirely attributable to nonexclusive licenses.

The AUTM data is an initial empirical insight into the negative commercial effects of the loss of injunctions as a remedy for patent infringement. It requires more study and analysis based on rigorous statistical methods. However, it provides support for the supposition that *eBay* not only has fostered the practice of predatory infringement, but has devalued patents as assets generally. Exclusion is no longer one of the terms a patent owner can offer for sale in a license. Where an injunction is unavailable, patents have become less valuable. This creates significant concerns for both future research and development, as well as growth in the innovation economy.

IV. The RESTORE Patent Rights Act Addresses These Concerns

As discussed above, the Supreme Court's decision in *eBay* ignored the Constitution and historical practices. After *eBay*, injunctive relief for patent infringement is uncertain for all types of patent holders, to the point where many patent holders choose not to seek injunctive relief. The impact of uncertain injunctive relief includes the perverse behavior of predatory infringement, where the bad actor is rewarded and the patent owner ends up in a worse position, as well as the devaluation

³⁸ Osenga, *supra* note 6, at 5-6 (discussing the AUTM data).

of patents more broadly. For all of those reasons, the Supreme Court’s decision in *eBay* must be overturned and injunctive relief for patent infringement should be restored.

Remember that before a remedy is determined, a court has already found a valid patent to be infringed. The patent owner has already shown that the infringer used their technology without permission. At that point, all that is left is for the court to decide whether to enjoin the infringer or allow them to continue to infringe the patent owner’s property rights. Their liability has already been decided – they are, for all purposes, squatters.

The RESTORE Patent Rights Act states, very simply, “If ... the court enters a final judgment finding infringement of a right secured by patent, the patent owner shall be entitled to a rebuttable presumption that the court should grant a permanent injunction with respect to that infringing conduct.”

This essentially restores the patent system to the state it was prior to *eBay* and reflects the fact that patents are property rights. As with all property rights, such as when someone trespasses on someone’s land—or, as in one famous property case, a trespasser cut down a landowner’s trees without permission³⁹—the property owner has lost the right of exclusive control over his or her assets.⁴⁰ This loss of control—in patent law, the loss of the right to exclude others from using the patented technology—creates a presumption of irreparable harm. That presumption of irreparable harm means the patent owner should receive an injunction, unless the defendant can assert and prove other legal claims that weigh against injunctive relief. In legal terms, the presumption of an injunction is not automatic, because it is *rebuttable* by the defendant.

Under this scheme, injunctive relief would generally be granted, unless there were a compelling reason to not do so. In doing so, injunctions regain the ability to serve as a deterrent to infringement, especially predatory infringement. Additionally, certain injunctive relief facilitates market transactions in which fair market values are set through commercial negotiations. With these qualities, the patent system provides effective and reliable patent rights, which in turn drive the United States innovation ecosystem.

Thank you. I look forward to your questions.

³⁹ *Pardee v. Camden Lumber Co.*, 73 S.E. 82 (W.V. 1911).

⁴⁰ *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).