MINUTES

Advisory Committee on Model Civil Jury Instructions
October 15, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill, David E. West, Craig R. Mariger (chair of the Professional Liability: Design Professionals subcommittee)

Excused: Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson

1. *Pro Se Litigants.* Mr. Young noted that Judge Toomey had asked the committee, on behalf of the Board of District Court Judges, to consider drafting a model jury instruction concerning pro se litigants (that they have the right to represent themselves, that they are equal in the eyes of the law to those parties represented by counsel, and that the court neither favors nor disfavors them). Mr. Young organized a subcommittee to draft such an instruction. The subcommittee is Mr. Young, Judge Harris, and Mr. Johnson.

2. *Design Professional Instructions.* The committee continued its review of the Design Professional Instructions. Mr. Mariger distributed a red-lined copy of the revised instructions and explained the changes.

a. *CV501. Standard of care for design professionals.* The first paragraph was revised to make it consistent with the other instructions, listing the different types of design professionals in brackets. "[A]nd the amount of the harm" was added to the last paragraph. At Mr. Humpherys's suggestion, it was revised to read, "and, if so, the amount of the harm." Several committee members questioned the bracketed paragraph on changes in the standard of care. Mr. West, for example, thought the court should just instruct on the standard of care. Mr. Mariger said that the standard of care is generally a question of fact for the jury to decide based on expert testimony. At Mr. Simmons's suggestion, the committee deleted the first two lines of the second paragraph so that it now reads:

> The "applicable standard of care" is the standard of care existing at the time of [name of defendant]'s services and in the same or similar locality as where [name of defendant]'s services were performed.

The committee approved the instruction as revised.

Mr. Springer joined the meeting.

b. *CV502. Standard of care of a specialist.* Mr. Mariger explained that he was asked to find a case to support CV502. He could not find a Utah case specific to design professionals. The closest he could find was *Steiner Corp. v. Johnson & Higgins,* a federal district court case involving an actuary. The cases hold that the act of holding oneself out to the public as a specialist is what triggers the higher standard of care. The design professional is not liable simply because he or she does not possess the skill and knowledge of a specialist but is only liable if he or she does not adhere to the standard of care of a specialist. The committee approved the instruction as revised.

c. *CV503. Evidence of standard of care where expert is required.* Mr. Shea had proposed a committee note saying to give instruction CV129 on lay opinion testimony if no expert is required. Mr. Mariger explained that, if the court determines that the applicable standard of care is within the knowledge of lay persons, the jury can generally decide the question itself, without either expert or lay opinion testimony. So the reference to CV129 was deleted. The committee approved the instruction as modified.

d. *CV504. Damages.* Mr. Mariger noted that most of the cases involving design professionals are contract cases, involving contract damages, because the economic loss rule bars tort damages unless there is a personal injury involved or damage to other property. The committee and Mr. Mariger questioned whether there should be an instruction number (CV504) for what is just a committee note. At Mr. Mariger's suggestion, CV504 was deleted, and the committee note was added to CV505. The rest of the instructions will be renumbered accordingly.

e. *CV505. Measure of damages. Defective improvements.* Mr. Mariger was asked to compare CV505 with CV2232 (avoiding unreasonable economic waste in commercial contracts). CV2232 is a modification of the rule stated in the Restatement (Second) of Contracts, which has not been adopted in Utah. It does not accurately state the law. Mr. Mariger traced the development of the law on this issue. Originally, the law was that the measure of damages was expectation damages, i.e., the cost to repair the property to its prior condition. This is the position taken in the Restatement (First) of Contracts and followed by the Utah Supreme Court in three cases–*Rex T. Fuhriman, Inc. v. Jarrell,* 445 P.2d 136 (Utah 1968); *Stangl v. Todd,* 554 P.2d 1316 (Utah 1976); and *Winsness v. M.J. Conoco Distributors,* 593 P.2d 1303 (Utah 1979). Judge Cardozo held in a 1921 New York case that a repair that cost more than the corresponding increase in market value could be considered economic waste. So some courts got away from the first Restatement rule and awarded either the repair cost or the loss of market value, whichever was lower. Some awarded the repair cost unless the repair required a substantial alteration of the structure. In the second

Restatement, the drafters returned to the principle that the plaintiff is entitled to the benefit of his or her bargain, so the presumptive measure of damages was the loss in the value of the property *to the plaintiff* as a result of the defective construction. It is only if the plaintiff cannot prove the loss in the value of the property to the plaintiff with sufficient certainty that the plaintiff recovers the diminution in the market value of the property or the reasonable costs of repair "if the costs are not clearly disproportionate to the probable loss in value to him." The second Restatement rule has not been followed by many courts, including Utah's. Economic waste is assumed if it would require a "substantial modification" to put the property back in its former state.

Mr. Mariger stated that CV2232 does not accurately state Utah law. CV505 has been brought into line with Utah law as stated in the *Winsness* line of cases. The committee thought CV505 was cumbersome and redundant. Mr. Humpherys suggested deleting "to be constructed" in the second line. Mr. West suggested deleting "receipt of" in the fourth line. Mr. Humpherys asked whether "unreasonably wasteful" is a fact question or a legal question. Mr. Mariger thought it was factual but noted that the *Fuhriman* case reviewed the issue de novo. Mr. Young asked whether it is waste if the cost of repair exceeds the increase in market value by $1. Mr. Mariger said that the standard is "unreasonably wasteful," so $1 is probably not enough; it must be significant. Mr. Humpherys questioned what "sufficiently larger" meant. Mr. Johnson noted that it is a two-step process: first, the jury calculates the difference between the cost of repair and the increase in fair market value; second, the jury must make a value judgment as to whether the repair would be "unreasonably wasteful." Mr. Mariger noted that the concept is whether a reasonable person would make the repair. Mr. Young asked whether "fair market value" needs to be defined. The committee noted that it is defined in CV2010 and CV2605. The committee revised the instruction to read:

> If [name of defendant]'s breach of the standard of care has caused a defective improvement, the amount of money that will reasonably compensate [name of plaintiff] for the injury resulting from the defective improvements will be either (1) a "repair" measure of damages or (2) a "loss in market value" measure of damages.
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> "Repair" Measure of Damages: If repairing the improvements is possible and would not be unreasonably wasteful, you must award [name of plaintiff] the reasonable cost to repair the improvements to the condition they would have been in if [name of defendant] had not breached the standard of care. This is called the "repair" measure of damages.

> "Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is unreasonably wasteful, then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had if [name of defendant] had not breached the standard of care and the fair market value of the improvements received by [name of plaintiff] following [name of defendant]'s breach of the standard of care. This is called the "loss in market value" measure of damages.
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> The repair is unreasonably wasteful if the cost of repair is sufficiently more than the loss in fair market value of the improvements caused by the breach of the standard of care, so that a reasonable person would not make the repair under the circumstances. If you find that a repair is unreasonably wasteful, then you should award to [name of plaintiff] the "loss in market value" measure of damages.

The committee approved the instruction as revised.

Mr. Summerill was excused.

f. *CV506. Betterment or value added.* The committee corrected a typographical error on line 2 and approved the instruction.

g. *CV507. Creation of a warranty.* Mr. Mariger noted that he had added references. The committee approved the instruction.

h. *CV508. Breach of warranty essential elements.* and *CV509. Implied warranties. Accuracy and fitness for purpose.* Mr. Mariger noted that he added to the committee notes to CV508 and CV509 a definition of an "*SME*-type warranty." The committee approved the instruction.

The committee thanked Mr. Mariger for all his and his subcommittee's good work on the design professional instructions. Mr. Mariger was then excused.

3. *CV324. Use of alternative treatment methods.* Mr. Springer noted that the Utah Supreme Court's opinion in *Turner v. University of Utah Hospitals & Clinics,* 2013 UT 52, calls into question the continued use of CV324. The court in *Turner* did not expressly disapprove of the instruction, nor did it give any guidance as to what a proper instruction should say. The holding in *Turner* was that it was error to give the

instruction because the case did not involve "alternative treatment methods." But there is no Utah case law to support the instruction. Mr. Springer reviewed the apparent genesis of the instruction. The MUJI 1st instruction was based on instructions from Georgia and Wisconsin, but added the provision that "it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection." This provision is inconsistent with Utah tort law. The Georgia and Wisconsin instructions were in the context of informed consent. The Utah informed consent statute does not talk about alternative methods of treatment. Mr. Simmons asked why it is not sufficient to simply instruct on what the standard of care is, and not on what medical malpractice is not. Mr. Humpherys thought the instruction would only apply where the plaintiff was claiming that the defendant chose the wrong method. Messrs. West and Johnson thought that the court in *Turner* acknowledged the principle contained in the instruction and merely found that there was no evidence to support giving the instruction in that case. Judge Harris noted that the instruction would only apply if one expert was saying that there were equally viable alternative treatment methods and another expert disagreed. Judge Harris thought that, if there is a disagreement among the experts as to what the standard of care required, the choice of the standard of care should be left to the jury. The instruction short-circuits the jury's analysis by in effect telling the jury that it is not medical malpractice to select one method over another, even if a reasonable provider would not have chosen that method under the circumstances. Mr. Springer proposed deleting the instruction. Mr. Young thought that the committee should hear from the medical malpractice subcommittee on the issue before making a final decision. Mr. Springer agreed to get the subcommittee's input for the next meeting. In the meantime, Messrs. Young and Humpherys suggested saying on the MUJI 2d website that the instruction is "under review."

4. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions.

a. *CV2407. Notice of loss.* Mr. Humpherys noted that a notice of loss and proof of loss are not the same thing. Adequacy is more of an issue with proof of loss than it is with notice of loss. The committee bracketed the first three paragraphs. Judge Stone noted that the statute (Utah Code Ann. § 31A-21-312) only requires that the notice give "particulars sufficient to identify the policy." Some committee members thought the notice should also identify the nature of the loss or indicate that the claimant is making a claim under the policy. Mr. Humpherys noted that sometimes the claimant is not the insured and may not be able to correctly identify the policy, such as where a pedestrian is making a claim for personal injury protection (PIP) coverage under an auto policy, or where a permissive user was operating a covered auto. Mr. West asked whether the insurer must show prejudice if it was reasonably possible for the claimant to give notice within the required time and simply failed to do so, for no good reason. The fourth paragraph suggests not. Judge Stone suggested that the insurer must

show that it was prejudiced by the lack of notice or untimely notice in every case, citing § 31A-21-312(2). Mr. Humpherys thought that there might be an administrative rule that addressed the issue. The committee suggested dropping the introductory clause of the fourth paragraph ("If it was not reasonably possible to give the notice of loss within the required time"). Mr. Humpherys offered to research the issue further.

5. *Next meeting.* The next meeting will be on Tuesday, November 12, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.