MINUTES

Advisory Committee on Model Civil Jury Instructions
November 13, 2006
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Kamie F. Brown (member of the Products Liability subcommittee), L. Rich Humpherys, Tracy H. Fowler, Jathan Janove (by telephone), Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, Robert H. Wilde, and John L. Young (chair)

Excused: Paul M. Belnap, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson.

Draft Instructions

The committee continued its review of the employment instructions.

1. *1911. Breach of employment contract. Just cause.* Mr. Wilde drafted a committee note in accordance with the discussion at the October meeting. Mr. Simmons pointed out that the instruction did not track the note. The instruction says that the defendant has the burden of proof to show that the termination was for just cause, whereas the note sets out a burden-shifting approach similar to that used in disparate treatment discrimination cases under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Mr. Young suggested drafting an instruction applying the *McDonnell Douglas* approach and including it as 1911A. Mr. Simmons did not think that would solve the problem. Mr. Wilde thought that 1911 is a proper instruction in cases involving direct evidence of a dismissal for other than just cause and that the burden-shifting approach is proper where there is only indirect evidence of the employer's intent. Mr. Simmons thought that if there was unrebutted, direct evidence of the employer's bad intent, then the issue should not go to the jury and that in all other cases the burden-shifting approach would apply.

Mr. Janove and Ms. Brown joined the meeting.

The committee discussed whether alternatives should be included in the same instruction, whether they should be separate instructions designated "A" and "B," or whether they should be given separate, consecutive numbers, as in MUJI 1st. Mr. Shea pointed out that in other instructions alternatives have been listed in the same instruction, as "A" and "B," and that the numbering of the instructions cannot be changed once the instructions are approved, because they are then published on the courts' website.

Mr. Jemming joined the meeting.

Mr. Nebeker asked whether "objective good faith reason" had to be defined. Mr. Wilde thought not. Mr. Young read the comparable California instruction (CACI 2405).

Mr. Wilde will draft an instruction explaining the *McDonnell Douglas* burden-shifting approach, and the committee will revisit the issue at a later meeting.

2. *1913. Fiduciary duty.* Mr. Simmons suggested separating the jury's determination of the existence of a duty from its determination of a breach of the duty. Mr. Humpherys questioned whether the jury finds the existence of a fiduciary duty. The existence of a duty is a question of law for the court; the jury just finds whether the factual predicate for the existence of a fiduciary duty exists. The committee discussed how best to instruct the jury on its proper role. Mr. Young suggested that the matter be handled through the special verdict form. Mr. Humpherys suggested that the jury be instructed that, if it finds certain facts, then they give rise to a fiduciary duty, that is, to an extraordinary duty of confidentiality, etc. Then the jury must decide whether that duty has been breached. The jury would not have to deliberate twice, but can be guided through the two-step process by the special verdict form, just as they are guided through the necessary determinations in a negligence case, where they are required to determine, first, whether the defendant was negligent and, second, whether the defendant's negligence was a proximate cause of the plaintiff's injuries. Mr. Humpherys suggested that the jury be instructed first on when a fiduciary duty arises and second on what constitutes a breach of the duty. Mr. Janove noted that the claim usually arises as a contract claim or a trade secret claim and that the line for when an employee breaches a fiduciary duty may not be clear; it may depend on such things as the employee's position and the way the allegedly confidential information the employee took was compiled, which could involve disputed issues of fact. The committee agreed that the instruction needed to be modified so that the jury is not asked to determine the existence of a duty. Mr. King suggested deleting the phrase "both had and" from the third line. He and Mr. Young also suggested adding a comment to the effect that in some cases the jury may have to be instructed to find the necessary facts giving rise to a duty, but that such an instruction should be case specific. Mr. Young thought that the instruction itself should presuppose that the court has found that a fiduciary duty exists and should just instruct the jury to determine whether or not the duty has been breached. Mr. Young also thought that the instruction should include three elements–(1) a breach of duty, (2) harm, and (3) causation. Mr. King questioned whether the duty should be described as an "extraordinary" duty, and he and Mr. Young questioned whether it needs to be defined at all. The committee thought that the duty needs to be defined because most jurors will not know what "fiduciary" means. Ms. Blanch questioned whether the duty should be defined in the disjunctive ("confidentiality, honor, . . . *or* dependability"), rather than the conjunctive (*"and").* Mr. Humpherys asked whether it is a breach for an employee to fail to "honor" his employer if he does not breach a duty of confidentiality, loyalty, or trust. Mr. Wilde noted that an employment relationship without more does not create a fiduciary duty. Mr. Humpherys suggested that the instruction be more generic, with blanks for the court and counsel to fill in based on the facts of the case, for example: "[Name of defendant] claims that [name of plaintiff] breached a duty of [insert specific duty, e.g., confidentiality, loyalty, or trust]. . . ." Mr. Young compared California's instruction on breach of

fiduciary duty in an attorney-client context (CACI 605). Mr. West suggested rewriting the instruction to read: "A fiduciary duty exists in this case if [insert the relevant factual predicate that the jury must find]."

Mr. Wilde will rewrite the instruction in light of the committee's comments.

Mr. Simmons noted that the last paragraph of the committee note was misplaced. It belongs in instruction 1914. The committee made that change.

3. *1914. Contract damages.* Mr. Humpherys questioned the sentence "The level of evidence required to prove the *amount* of damages is not as high as what is required to prove the *occurrence* of damages." He thought a jury would not understand the concepts "level of evidence" and "high." Mr. Young suggested deleting the sentence. Mr. Fowler asked whether the same change needed to be made in the comparable tort damage instruction (no. 2002). Mr. Young suggested incorporating instruction 2002 into 1914. Mr. Wilde thought that the last paragraph of the instruction should be included.

Mr. Humpherys was excused.

Mr. Simmons noted that the comment refers to statutory damages under title VII and asked whether we needed instructions covering title VII claims. Mr. Young checked the California instructions and noted that they apparently do not include instructions on federal statutory causes of action. Mr. Young thought that if federal law governs a claim, the court should use federal instructions. Mr. Simmons noted that there is no single approved set of federal instructions.

Mr. Nebeker was excused.

4. *1917. Damages for wrongful termination in violation of public policy.* Mr. Shea noted that he had revised the instruction to incorporate the instruction on noneconomic damages in tort actions but that some of the elements of noneconomic damages in a personal injury case may not apply in a wrongful termination case. Judge Barrett suggested that noneconomic damages in a termination case may be limited to item (2) (mental and physical pain and suffering). Mr. Fowler suggested that damage to reputation might also be included, although some of that damage may be economic. Mr. Young thought that item (1) (the nature and extent of injuries) covered damage to reputation. The committee decided to leave that part of the instruction as written, on the grounds that it was broad enough to cover any noneconomic damages that might arise in such a case. At Mr. Simmons's suggestion, the first part of the instruction was revised to read:

> If you find that [name of defendant] wrongfully terminated [name of plaintiff], then you may award [name of plaintiff] both economic and noneconomic damages. Economic damages are damages--
>
> (1) for the salary and other benefits . . . ; and
>
> (2) for [list other items of damage].
>
> Noneconomic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for losses other than economic losses. . . .

Mr. Wilde noted that the explanatory note was missing something.

Mr. Wilde will look for his original note and resend it to Mr. Shea.

Mr. Simmons noted that the comments to instructions 1914 and 1917 were inconsistent. The former says that punitive damages are not available for breach of contract, and the latter says that they are. The comment to 1917 was revised to say that punitive damages are available for termination in violation of public policy (a tort). Mr. Young asked whether a separate instruction on punitive damages should be added.

5. *1918. Duty to mitigate damages.* At Mr. Simmons's suggestion, the committee struck "comparable" from the first line of the third paragraph, on the grounds that the plaintiff is not entitled to recover damages to the extent he has actually earned other income, regardless of whether the other employment was comparable or not. The instruction was approved as modified.

6. *1919. Special damages.* At Mr. Jemming's suggestion, "payment" was struck from the fourth line. Mr. Young questioned whether the instruction was necessary, since evidence of collateral sources should not come into evidence. Messrs. King, Wilde, and Simmons thought the instruction was necessary to prevent the jury from speculating on the effect of unemployment or workers' compensation, even where there is no evidence of such benefits. At Mr. Young's suggestion, an advisory committee note was added that says: "The collateral source rule normally prohibits the introduction of such evidence." As modified, the instruction was approved.

The hour being late, the committee reserved discussion of the products liability instructions for its next meeting, which Mr. Fowler will conduct. Remaining issues with the employment instructions were reserved for the January 2007 meeting.

The meeting concluded at 5:50 p.m.

Next Meeting. The next meeting will be Monday, December 11, 2006, at 4:00 p.m.