MINUTES

Advisory Committee on Model Civil Jury Instructions
June 11, 2012
4:00 p.m.

Present: Diane Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Excused: John L. Young, Tracy H. Fowler, Ryan M. Springer

Messrs. Carney and Shea directed the meeting in Mr. Young's absence.

1. *Committee Membership*. Mr. Shea noted that Judge Himonas has resigned from the committee because of his other commitments. Mr. Carney suggested that Judge Ryan Harris be invited to take his place. Judge Toomey moved to adopt the recommendation without a quorum. The motion passed without opposition. Judge Toomey and Mr. Carney will invite Judge Harris to join the committee. Judge Toomey also suggested inviting Judge Todd Shaughnessy. Other suggestions for committee members from the bench were Judge Keith Kelly and Judge Andrew Stone. Judge Shaughnessy is already on the Rules advisory committee (as is Judge Toomey), and Judge Kelly is on the Evidence advisory committee. Judge Toomey and Ms. Blanch volunteered to invite Judge Stone to join the committee. Judge Toomey asked committee members to come to the next meeting prepared to propose names of attorneys who could be added to the committee, particularly those with expertise in the remaining substantive areas to be covered by the instructions.

2. *Minutes*. Mr. Carney moved to adopt the minutes of the May 14, 2012 meeting. Judge Toomey seconded the motion. The minutes were approved.

3. *Vicarious Liability Instructions*. The committee continued its review of the vicarious liability instructions:

a. *CV2814. Independent contractor defined*. Judge Toomey thought the instruction was a correct statement of the law. Mr. West thought that the instruction did not adequately tell the jury what an independent contractor is. Dr. Di Paolo and Mr. Humpherys agreed. They thought the "right of control" was not adequately explained, that a jury could think that if the employer had the right to hire or fire the actor, then he had the right to control the actor's work, and the actor was therefore an employee. Judge Toomey suggested dropping "and control" from the second paragraph and deleting subparagraph (2). Mr. Humpherys noted that an employee has to fill out a form W-4, and the employer is required to withhold taxes for the employee. Mr. West suggested adding language similar to MUJI 1st 25.9, that the most important factor is whether the employer retained the right to control the manner and means of doing the work. Judge Toomey noted that the second paragraph covered that concept. Dr. Di Paolo suggested changing the order of the sentences in the second paragraph.

Mr. Humpherys noted that the term "agent" was not used after the first sentence. Messrs. Carney and Summerill suggested dropping "agent" and explaining the change in a committee note. Mr. Shea asked whether the instruction needed to juxtapose "employee" with "independent contractor," that is, whether it should just define an independent contractor and not confuse the question by trying to distinguish an "employee." Dr. Di Paolo thought the distinction was useful. After further discussion, the committee revised CV2814 to read:

> [Name of defendant] claims that [name of actor] was an independent contractor.
>
> An independent contractor is one who has the right to control the manner and means of accomplishing the work, in his or her own way, subject only to minimal direction, and is responsible only for completing the job satisfactorily.
>
> To decide whether [name of actor] was an independent contractor, you must decide whether [name of defendant] had the right to control the manner and means of accomplishing the work. If you decide that [name of defendant] did, then [name of actor] is not an independent contractor. If you decide that [name of defendant] did not, then [name of actor] is an independent contractor.
>
> You may consider the following factors and weigh them as you think proper:
>
> (1) agreements between the parties about who had the right of direction or control;
> (2) the right to hire and fire;
> (3) the method of payment; and
> (4) who furnished the equipment.

On Judge Toomey's motion (Mr. Summerill 2d), the committee approved the instruction as revised.

b. *CV2815. Liability for independent contractor.* On Judge Toomey's motion (Mr. Summerill 2d), the committee approved CV2815.

c. *CV2815A. Principal controls manner and means of work.* CV2815A is meant to state the law governing the retained control doctrine. At Mr. Carney's suggestion, the title was changed to "Principal retains control over the injury causing aspect of the work." Judge Toomey suggested, "actively

participated in the injury-causing aspect of the work." Mr. Carney noted that in the case of *Gonzalez v. Russell Sorensen Construction,* 2012 UT App 154, the court held that a general contractor who asserted control over the property could be liable under the retained control doctrine. Mr. Shea suggested breaking the instruction up into two parts: (1) actively participated, or (2) exerted control. Judge Toomey asked whether "actively participated" was a form of vicarious liability, or whether it was properly considered liability for one's own negligence. Mr. Carney noted that if "active participation" is removed from the instruction, then the reason needs to be explained in a committee note. Mr. Summerill agreed. Mr. Humpherys suggested adding a note that says that active participation can be the basis for either direct or vicarious liability. Dr. Di Paolo suggested substituting "the part of the work that caused the injury" for "the injury-causing aspect of the work." The committee revised CV2815A to read:

> . . . [name of defendant] is liable for physical harm caused by [name of actor]'s negligence if [name of defendant] exerted so much control over the manner and means of the part of the work that caused the injury that [name of actor] could not carry out that work in [his] own way.

On Judge Toomey's motion (Mr. Summerill 2d), the committee approved the revised instruction.

d. *CV2815B. Principal prohibited from delegating duty.* CV2815B is meant to state the law governing nondelegable duties. Mr. Summerill thought the title was wrong, that it should be "Principal liable for nondelegable duty" or "Employer of an independent contractor is not relieved of liability for delegation of a duty negligently performed." He noted that he had a nondelegable duty instruction in a recent trial, but he could not find it. He suggested striking *Yazd v. Woodside Home Corp.* from the references and adding *Bowen v. Riverton City,* 656 P.2d 454 (Utah 1982); *Price v. Smith's Food & Drug Centers,* 2011 UT App 66, 252 P.3d 365; and *Johnson v. DOT,* 2004 UT App 284, 98 P.3d 773, as references. Mr. Summerill further noted that the doctrine does not prohibit delegation of a duty; it just adds a potentially liable party (the principal). In other words, the principal may remain liable despite having delegated the duty. Mr. Ferguson asked what the jury was supposed to decide, since the question of duty is for the court to decide. In other words, is an instruction even necessary? Messrs. Carney and Humpherys and Judge Toomey did not think so. They thought the instruction was just informational. With that in mind, the committee revised the instruction to read:

> . . . [name of defendant] is liable for physical harm caused by [name of actor's] negligence because I have determined that a [law or contract] imposes liability even though [name of defendant] delegated the duty to perform the part of the work that caused the injury.

At Mr. Ferguson's suggestion, the committee decided to hold the instruction for Mr. Johnson's review.

e. *CV2815C. Inherently dangerous work.* Mr. Carney asked whether it is ever a jury decision to decide whether particular work is "inherently dangerous." Mr. Ferguson thought it almost always is. Dr. Di Paolo asked whether the actor has to be told that the work is inherently dangerous. The committee thought not, but the employer must know or have reason to know of the special danger. Mr. Humpherys asked what the issue was for the jury to decide and whether the instruction needs to define "special danger." Mr. Shea suggested adding, "You must decide whether the work involved a special danger and whether the defendant knew or had reason to know that the special danger was inherent in or normal to the work." Mr. West noted that the committee needs to know whether the special danger doctrine (also called the peculiar risk doctrine) presents a jury question or not. If not, Mr. Shea suggested revising the instruction similar to CV2815B, to read:

> . . . [name of defendant] is liable for [name of actor's] negligence because I have determined that the work involved a special danger that [name of defendant] knew or had reason to know was inherent in or normal to the work.

Mr. Shea suggested having the subcommittee answer the question of whether the doctrine presents a question for the jury. Mr. Carney suggested comparing CV2815C with CACI 3708.

4. *Next Meeting*. There will be no committee meeting in July or August 2012. The next meeting will be Monday, September 10, 2012, at 4:00 p.m. Mr. Humpherys noted that the punitive damage subcommittee is waiting for the Utah Supreme Court to decide a recent punitive damage case before it finishes its work.

The meeting concluded at 6:00 p.m.