Agenda
Advisory Committee on Model Civil Jury Instructions

May 9, 2016
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome, announcements, and approval of minutes	Tab 1	Juli Blanch – Chair
Subcommittees and subject area timelines	Tab 2	Juli Blanch
Comments to Punitive Damages Instructions	Tab 3	Peter Summerill
Defamation/Slander/Libel Instructions (punitive damages)	Tab 4	David Reymann and Randy Dryer
Emotional Distress	Tab 5	George Waddoups

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

June 13, 2016
September 12, 2016
October 11, 2016
November 14, 2016
December 12, 2016

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 11, 2016
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester, Christopher M. Von Maack

Excused: Honorable Ryan M. Harris, Patricia C. Kuendig, Peter W. Summerill, David C. Reymann, from the Defamation subcommittee

1. *Minutes.* On motion of Mr. Johnson, seconded by Judge Stone, the committee approved the minutes of the February 22, 2016 meeting.

2. *Schedule.* Ms. Blanch is meeting with Mr. Summerill this week to discuss his taking over the remaining punitive damage instructions. The next set of instructions that the committee will review after that are the Civil Rights instructions. Mr. Von Maack will chair the Directors and Officers Liability subcommittee because of Mr. Gurmankin's untimely death. Mr. Simmons noted that the Economic Interference subcommittee is meeting this month and will likely complete its work, so its instructions should be ready to review earlier than those of some of the other subcommittees. Ms. Sylvester penciled them in for February 2018.

Dr. Di Paolo joined the meeting.

3. *Defamation Instructions.* The committee continued its review of the defamation instructions. Mr. Reymann was not present but had previously sent an e-mail explaining the proposed instructions.

a. *CV1616. Noneconomic Damages.* The committee deleted "Some" in the fourth line because it thought the word suggested that the jury's discretion was unlimited, changed "economic damages" in the fifth line to "noneconomic damages," and made other minor changes. It also revised the committee note to show that the types of general damages mentioned are disjunctive, that is, that a plaintiff need not prove every type of general damage mentioned. On motion of Judge Stone, seconded by Mr. Von Maack, the committee approved the instruction as revised.

b. *CV1617. Damages–Punitive Damages–Public Figure/Official and/or Issue of Public Concern.* Judge Stone questioned the use of "intentionally fraudulent" in subparagraph (2)(b). He noted that the term is redundant, since fraud is an intentional tort, and, in a defamation case, the plaintiff does not have to prove all of the elements of fraud, such as that the plaintiff relied on the false statement. Other committee members questioned whether the instruction needed to explain "willful and malicious" as used in subparagraph (2)(a). Mr.

Von Maack noted that "willful and malicious" and "intentionally fraudulent" are used in the punitive damage statute (Utah Code Ann. § 78B-8-201(1)(a)), and the committee was reluctant to vary from the statute. Dr. Di Paolo did not think that jurors would be confused by the terms. Ms. Sylvester questioned whether the terms should be bracketed, or whether each subparagraph of paragraph (2) should be bracketed. Judge Stone and Mr. Fowler asked whether the "willful and malicious" standard was met if a plaintiff met the "actual malice" standard of paragraph (1). Mr. Simmons and Mr. Von Maack thought that "malice" did not necessarily mean the same thing in paragraphs (1) and (2). "Actual malice" is a term of art meaning that the defendant must have made the statement with actual knowledge that the statement was false or actually entertaining serious doubts as to whether the statement was true, whereas "willful and malicious" in the context of punitive damages implies an intent to harm the plaintiff. Dr. Di Paolo noted that "willful" was synonymous with "intentional." Mr. Johnson questioned whether the "intentionally fraudulent" standard was met if the "actual malice" standard was met, since actual malice requires that the defendant know the statement was false (or that he entertain serious doubts as to whether the statement is true). Mr. Simmons questioned whether the instruction was necessary. It is essentially CV2026, the general tort instruction on punitive damages, with the addition of the "actual malice" requirement in paragraph (1). But CV1611 already requires a finding of actual malice for liability in a case involving a public official or figure, so the jury will have necessarily already found actual malice as required in paragraph (1) before it can reach the question of punitive damages. On motion of Mr. Fowler, seconded by Mr. Ferre, the committee voted to delete the instruction and add a statement to the committee note in CV1616 to the effect that, if punitive damages are at issue, the court and parties should see CV2026. The committee also added to the committee note part of the committee note to CV1617 to the effect that whether actual malice is also required in cases involving private figures and speech not involving a matter of public concern is an open issue.

c. *CV1618. Damages–Effect of Retraction.* Ms. Blanch questioned the phrase "in good faith due to a mistake," etc. At Dr. Di Paolo's suggestion, the committee added a comma between "faith" and "due to." Mr. Von Maack noted that the instruction does not cover the most common ways defamation is committed nowadays, such as through Facebook or other social media. Judge Stone pointed out that the defense is a statutory defense. As such, it is limited to newspapers and radio and television broadcasts. The committee deleted the last sentence. It could not find support for the language in the statute or case law, thought the concept was adequately covered in the remainder of the instruction, and thought that jurors would not understand such phrases as "without any untrue reservation." Mr. Fowler asked whether the only consequence of a retraction was that it prevented a plaintiff from recovering punitive damages and,

if so, whether the committee note should also say that the instruction is only necessary if there was a retraction made *and* the plaintiff is seeking punitive damages. The committee made a few other minor changes to the instruction. On motion of Mr. Simmons, seconded by Judge Stone, the committee approved the instruction as revised.

d. *CV1619. Affirmative Defense–Consent.* On Dr. Di Paolo's suggestion, the committee inserted the phrase "That means that," at the start of the second sentence. On motion of Dr. Paolo, seconded by Mr. Simmons, the committee approved the instruction as revised.

e. *CV1620. Affirmative Defense–Statute of Limitations.* Mr. Von Maack noted that the committee has avoided the phrase "as a matter of law" and suggested that it be deleted from the second sentence. Mr. Fowler noted that the instruction does not tell the jury what it is supposed to do. Mr. Simmons suggested replacing the second sentence with "You must decide when [name of plaintiff] could have reasonably discovered the publication." and moving the second sentence of the instruction to the committee note. On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the instruction as revised.

4. *Next meeting.* The next meeting will be Monday, May 16, 2016, at 4:00 p.m.

The meeting concluded at 5:45 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back?
1	Punitive Damages	Yes	Hoffman, Jeremy; Horvat, Steven; Humpherys, L. Rich; McGarry, Shawn; Schultz, Stuart; Slaugh, Leslie; Summerill, Peter	N/A	May-15	Yes: sub-c currently reviewing. Full committee review @ May 2016 mtg
2	Defamation	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	September-15	May-16	
4	Emotional Distress	Yes	Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P)	May-16	June-16	
3	Civil Rights	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	September-16	November-16	
5	Injurious Falsehood	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	December-16	February-17	
4	Directors and Officers Liability	Yes	Burbidge, Richard D.; Call, Monica;Von Maack, Christopher (chair)	March-17	May-17	
5	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	June-17	September-17	
6	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	October-17	November-17	
7	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	December-17	January-18	
8	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P)	February-18	May-18	
10	Insurance	No (more members needed)	Johnson, Gary (chair); Pritchett, Bruce	June-18	October-18	
11	Wills/Probate	No	Barneck, Matthew (chair)	November-18	January-18	
12	Unjust Enrichment	No (instructions from David Reymann)	David Reymann			
13	Abuse of Process	No (instructions from David Reymann)	David Reymann			

Tab 3

KIRTON | McCONKIE

September 1, 2015

Nancy J. Sylvester
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Comments re Proposed Utah Civil Jury Instructions 2027 and 2029

Dear Ms. Sylvester:

This letter responds to the Utah Judicial Council's invitation by offering comments on two of the proposed Utah Civil Jury Instructions regarding punitive damages. In general, we ask the Council to consider modifying Instructions 2027 and adding a new instruction to clarify Instruction 2029 to make the Utah Civil Jury Instructions more consistent with U.S. Supreme Court precedent.

First, juries should be instructed that punitive damage awards of more than $100,000 are presumed to be excessive if they go beyond a 4:1 ratio compared with actual damages. The committee's determination not to disclose presumptively valid ratios to the jury is inconsistent with the procedural due process rights a defendant enjoys under the Fourteenth Amendment.

As you know, the ratio between actual damages and punitive damages is one of three guideposts for evaluating whether a punitive damages award is unconstitutionally excessive. *See BMW v. Gore*, 517 U.S. 559, 575 (1996). A 4:1 ratio of punitive to compensatory damages is at the top end of ratios endorsed by state and federal courts. The Utah Supreme Court has held that its decisions "seldom" affirm a punitive damage award "beyond a 3 to 1 ratio" even when such an award is "well below $100,000" and "where the award is in excess of $100,000, [it has] indicated some inclination to overturn awards having ratios of less than 3 to 1." *Crookston v. Fire Insurance Exchange,* 817 P.2d 789, 811 (Utah 1991). The U.S. Supreme Court has adopted a somewhat more nuanced approach. While refusing to "impose a bright-line ratio which a punitive damages award cannot exceed," the Court has repeatedly cited the 4:1 ratio as "close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Supporting that conclusion is the Court's "instructive" review of centuries of

legislation imposing double, triple, or quadruple sanctions as fully adequate to serve the state's legitimate interests in punishment and deterrence. *See id.* "Single-digit multipliers are more likely to comport with due process," but exceeding the 4:1 ratio may transgress the Constitution if compensatory damages are high. *Id.* "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Although the committee did not question the relevance of presumptive ratios, it decided not to instruct the jury about them. In its view, "[t]he case law regarding presumptive ratios has been in the context of post-verdict motions addressed to the judge, and the committee felt that it did not provide guidance with regard to whether the ratio should be disclosed to the jury." Instruction No. 2027, Committee Notes.

The committee's reluctance to instruct juries about presumptive ratios is at odds with controlling decisions of the U.S. Supreme Court. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) held that the Fourteenth Amendment prohibits juries from awarding punitive damages to punish defendants for injuries to nonparties. *See id.* at 357. Identifying erroneous jury instructions as the source of the due process violation, the Court taught that "it is ***constitutionally*** important for a court to provide assurance that the jury will ask the right question, not the wrong one" and that "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance." *Id.* at 355 (emphasis added). Nor does *Philip Morris* stand alone. *State Farm*—reversing a decision by the Utah Supreme Court—again singled out jury instructions for special concern. "Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." 538 U.S. at 418 (citation omitted).

Instructing the jury about presumptive ratios is necessary to prevent the violation of a defendant's procedural due process rights. Such ratios are one dimension of the due process framework for assessing the permissible limits of punitive damage awards. Declining to instruct the jury about presumptive ratios would transgress procedural due process by subjecting a defendant to arbitrary decision-making. And it would threaten the imposition of a punitive damages award beyond the limits set by the Fourteenth Amendment. Those limits come into

play, as *Philip Morris* and *State Farm* teach, long before an award is presented for post-verdict review.

We therefore recommend that the committee revise Instruction 2027 to educate the jury about presumptive ratios. A revision of Instruction 2027 might look like this:

> Now that you have decided to award punitive damages, you must determine the amount. Punitive damages should be the amount necessary to fulfill the two purposes of punitive damages: to punish past misconduct and to discourage future misconduct. Your decision should not be arbitrary. The amount must be reasonable and bear some relationship to [name of plaintiff]'s harm. Awarding more than four times the amount of actual damages is unusual and may be unconstitutional except in truly extreme circumstances. Punitive damages of more than $100,000 are especially suspect if they are more than four times the amount of actual damages. Whether or not to award a specific amount or any amount of punitive damages is left entirely up to you.

Second, juries should be instructed that evidence and argument regarding a defendant's wealth have limited relevance. Treating a defendant's wealth or financial condition as one of several factors for the jury to consider when deciding the amount of punitive damages invites arbitrary decision-making contrary to the constitutional guarantees of procedural and substantive due process.

Instruction 2029 describes seven elements "to consider in determining the amount of [punitive] damages," one of which is the defendant's "wealth or financial condition." Instruction No. 2029. Nothing in the proposed jury instructions offers specific guidance on how a defendant's financial condition fits within the framework of due process principles the Supreme Court has established. That omission invites violations of a defendant's due process rights for reasons that the Court itself has identified.

State Farm criticized the Utah Supreme Court for relying on the insurer's "massive wealth" in affirming an award of $145 million. 538 U.S. at 415. As the High Court explained, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 427. It quoted with approval an earlier opinion by Justice Breyer insisting that "'[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy…. That does not make its

use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensability,' to constrain significantly an award that purports to punish a defendant's conduct.'" *Id.* at 427-28 (quoting *BMW*, 517 U.S. at 591 (Breyer, J., concurring)). The Court further explained, "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*." *Id.* at 427. *State Farm* makes it clear, then, that a defendant's wealth or financial condition holds limited constitutional relevance. It may aid the jury in pursuing the state's valid objectives of punishment and deterrence, but only so long as it does not detract from the guideposts of a constitutionally permissible punitive damages award—reprehensibility, the ratio of punitives to actual damages, and a comparison of the punitive damages award with comparable civil penalties. *See BMW*, 517 U.S. at 575.

The principle that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," *State Farm*, 538 U.S. at 427, should be reflected in jury instructions. Only in that way can Utah courts meet their obligations to ensure that "the jury will ask the right question, not the wrong one" and that state procedures do not "deprive[ ] juries of proper legal guidance." *Philip Morris*, 549 U.S. at 355. Otherwise, a jury may be inclined (if it is not asked) to accept various "arguments that seek to defend a departure from well-established constraints on punitive damages." *State Farm*, 538 U.S. at 427. Looking to a defendant's wealth, unconstrained by the *BMW* guideposts, can easily mislead the jury into awarding punitive damages based on the defendant's ability to pay rather than on the state's interests in punishment and deterrence. Such awards easily trespass into the unconstitutionally excessive. Almost by definition, they violate the defendant's due process rights by imposing punishment for harm to nonparties and for out-of-state events. *See Philip Morris*, 549 U.S. at 357. And, perhaps worst of all, they can punish a defendant for actions that were lawful where they occurred, *See BMW*, 517 U.S. at 572—a particular concern where the defendant is a religious organization whose activities generally receive "special solicitude" under the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 702 (2012).

For these reasons, we also recommend that the committee add a new instruction clarifying the reference to wealth or financial condition in Instruction 2029. That new instruction could say this:

> In determining the appropriate amount of punitive damages you may consider the defendant's wealth or financial condition. This factor is relevant, however, only in deciding how much of an award is necessary to punish the defendant for his/her/its misconduct in this case and to deter him/her/it from repeating that misconduct in the future. But the defendant's wealth or financial condition is not an appropriate basis to punish the defendant for his/her/its financial or economic status, to punish him/her/it for misconduct toward nonparties, or to award excessive punitive damages.

In summary, we are convinced that these modest changes to the proposed jury instructions are necessary to comply with the Supreme Court's direction that it is "constitutionally important" to ensure that "the jury will ask the right question, not the wrong one" in the sensitive area of punitive damages. *Philip Morris*, 549 U.S. at 355. We appreciate this opportunity to provide comments on the committee's proposed jury instructions. Please contact R. Shawn Gunnarson at sgunnarson@kmclaw.com or at (801) 323-5907 if you have questions or concerns.

Sincerely,

KIRTON McCONKIE

/s/ Alexander Dushku
/s/ Randy T. Austin
/s/ R. Shawn Gunnarson
/s/ Jason W. Beutler

Tab 4

From: David C. Reymann [mailto:dreymann@parrbrown.com]
Sent: Wednesday, April 27, 2016 3:39 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: Jeffrey J. Hunt <jhunt@parrbrown.com>; Randy L. Dryer <RDryer@parsonsbehle.com>
Subject: RE: MUJI meeting minutes

Nancy,

The problem Paul identifies below is why we included the punitive damages instruction. In public figure/public official cases, the committee is right that the standard of fault already requires a showing of actual malice. But in a private figure case where the speech is on a matter of public concern, the standard of fault can be negligence. *Gertz* treated the issues of punitive damages and fault differently for that reason. In those cases (and they are many, because the "public concern" standard is very broad), punitive damages cannot be awarded unless actual malice is shown, even though you can access other actual injury damages with a showing of negligence. And even though public official/figure cases already require actual malice for fault, I don't think it's superfluous (and it is probably constitutionally required) to separately instruct the jury that punitives also require actual malice.

My preference (which I know doesn't count) would be to keep the instruction as we drafted it because I think it is helpful to have all of the requirements for punitive damages in such cases together in one instruction that can be substituted for 2026. But if you want to do as Paul suggests and have an instruction additional to 2026, I've attached how I'd draft it, along with revised committee notes explaining when to use it.

Let me know how I can help with any final issues.

David

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From: Nancy Sylvester [mailto:nancyjs@utcourts.gov]
Sent: Wednesday, April 27, 2016 2:38 PM
To: David C. Reymann <dreymann@parrbrown.com>
Subject: Fwd: MUJI meeting minutes

---------- Forwarded message ----------
From: **Paul Simmons** <psimm@dkolaw.com>
Date: Tue, Apr 12, 2016 at 12:10 PM
Subject: MUJI meeting minutes
To: "nancyjs@utcourts.gov" <nancyjs@utcourts.gov>, Juli Blanch <jblanch@parsonsbehle.com>

Here are the minutes of yesterday's MUJI committee meeting.

In preparing the minutes, I noticed a possible gap in the instructions. We did away with CV1617, the punitive damage instruction, because it only added the "actual malice" requirement to the general punitive damage instruction, CV2026, and CV1611 already requires a finding of "actual malice" before the jury can find liability for defamation in the case of a public official or public figure.

But CV1617 also required actual malice for punitive damages in a case involving an issue of public concern, and CV1610, dealing with the requisite degree of fault for a private figure in a case involving a matter public concern, only requires negligence. And the burden of proof is different under CV1611 (for public officials or public figures) and CV1610 (matters of public concern). The former requires clear and convincing evidence (the same as the punitive damage statute), whereas the latter only requires a preponderance of the evidence.

So maybe we should include a punitive damage instruction. It could say something to the effect that, in a case involving a public official, a public figure, or a matter of public concern, in addition to proving the other requirements of punitive damages (found in CV2026), the plaintiff must also prove by clear and convincing evidence that the defendant acted with actual malice (and then explain actual malice).

Paul

<image001.jpg>

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CV1617 Damages – Punitive Damages – Public Figure/Official and/or Issue of Public Concern

In addition to the requirements for recovering punitive damages I have already explained to you, in order to obtain punitive damages, [name of plaintiff] must also prove by clear and convincing evidence that [name of defendant] acted with actual malice in defaming [name of plaintiff]. To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statement[s], [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Utah Code § 78B-8-201(1)(a)

MUJI 1st Instruction

10.12

Committee Notes

Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), cases involving public figure or public official plaintiffs and/or speech relating to a matter of public concern, punitive damages cannot be awarded absent a showing of actual malice. In such cases, this instruction should be given in addition to the general punitive damages instruction set forth in CV2026. Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the *Gertz* actual malice requirement also applies in cases involving private figures and speech that does not relate to a matter of public concern. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). Because it is an unresolved question, the parties could argue that this instruction should also be used in cases involving private figures and speech unrelated to a matter of public concern.

Defamation Instructions

Defamation

CV1601 Defamation—Introductory Notes to Practitioners (not to be read to the jury). Approved 9/14/15.

The law of defamation is unique. Although defamation is a common law tort, it is bounded by protections for free speech embodied in the First Amendment to the United States Constitution and Article I, sections 1 and 15 of the Utah Constitution. These instructions are based on the law of defamation as interpreted by the Utah courts and, in certain areas, by governing precedent of the United States Supreme Court.

In some areas of the law, open questions remain. One of those areas is the standard of fault in cases involving a private plaintiff and speech that does not relate to a matter of public concern. The United States Supreme Court has held that the First Amendment requires the standard of fault to be actual malice for claims involving public officials, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and public figures, *see Curtis Publ'g Co. v. Butts*, 389 U.S. 889 (1967). It has also held that the standard of fault in cases involving speech relating to a matter of public concern must be at least negligence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). But a majority of the Court has never resolved whether the same constitutional limitations require a standard of fault above strict liability for private plaintiff, non-public concern cases. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). The Utah Supreme Court has likewise not resolved this issue. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. As a result, the committee has not included an instruction on the standard of fault for knowledge of falsity in such cases, leaving to the parties the task of arguing for a resolution of that question. *See* CV1604A-E for a discussion of the different types of plaintiffs.

Comment [A1]: Add reference to 1604 alternatives and the fact that one or more could be used.

This is not to suggest there is no constitutional protection in private figure, non-public concern cases. The Utah Supreme Court has, in other contexts, stated that defamation claims always implicate the First Amendment. *See Jensen v. Sawyers*, 2005 UT 81, ¶ 50, 130 P.3d 325 ("Defamation claims always reside in the shadow of the First Amendment."); *O'Connor v. Burningham*, 2007 UT 58, ¶ 27, 165 P.3d 1214 ("Defamation requires a departure from the standard treatment, however, primarily because it never arrives at court without its companion and antagonist, the First Amendment, in tow."). And though it declined to extend the actual malice fault standard to private figure, non-public concern cases, the plurality in *Greenmoss Builders* likewise recognized that such "speech is not totally unprotected by the First Amendment." 472 U.S. at 760. The Utah Supreme Court has also recognized that "[t]he First Amendment creates a broad, uniform 'floor' or minimum level of protection that state law must respect," *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994), but that Article I, section 15 of the Utah Constitution "is somewhat broader than the federal clause." *Provo City Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989); *cf. West*, 872 P.2d at 1004 n.4 ("The scope of the state constitutional protection for expression may be broader or narrower than the federal, depending on the state constitution's language, history, and interpretation. In any event, state tort law may not impair state constitutional guarantees and is properly confined to

constitutionally permissible limits."). It is thus possible that the standard of fault question in private figure, non-public concern cases would implicate the Utah Constitution even if strict liability is not precluded by the First Amendment.

Similarly, the United States Supreme Court has held that punitive and presumed damages may not be awarded in cases involving speech relating to matters of public concern absent a showing of actual malice. *Gertz*, 418 U.S. at 350. But other than addressing the issue in the plurality decision in *Greenmoss Builders* and declining to extend the rule, the Court has not resolved whether the same constitutional limitation applies in private figure, non-public concern cases. The committee has nonetheless included an instruction for punitive damages in that context stating the statutory requirements for punitive damages under Utah law, but notes that an argument could be made for applying the heightened actual malice standard for punitive damages in all defamation cases.

Finally, these instructions use the term "defamation" throughout, which refers to the claim regardless of the medium of expression. Historically, defamation claims were separated into "slander," which referred to oral communications, and "libel," which referred to written publications. That distinction has become increasingly anachronistic given certain forms of electronic communication (*e.g.*, SMS (text messages), IM (instant messaging), MMS (multi-media messaging services), and online video) that could arguably fall into either category, and it also fails to account for other non-verbal forms of communication that can, in some circumstances, form the basis of a defamation claim. In addition, the distinction between libel and slander is conceivably relevant only to one narrow legal issue—the test for whether a statement is defamatory *per se* for purposes of presumed damages. Because, as explained in the Committee Notes for CV1617 (Damages – Defamation *Per Se*), it appears the Utah Supreme Court has merged the historical tests for slander *per se* and libel *per se*, these instructions refer simply to defamation and do not draw any distinction between the medium or form of expression.

CV1602 Elements of a Defamation Claim. Approved 10/19/15.
[Name of plaintiff] claims that [name of defendant] defamed [him/her]. To succeed on this claim, [name of plaintiff] must prove the following elements:

(1) [name of defendant] published statement(s) about [name of plaintiff];
(2) the statements were false;
(3) the statements were defamatory;
[(4) the statements were not privileged;][1]
(5) the statements were published with the required degree of fault; and
(6) the statements caused damages to [name of plaintiff].

Some of these words have special meanings and they will be explained in the following instructions.

[1] The committee needs to ensure that the definition of privilege is adequately addressed.

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)

MUJI 1st Instruction

10.2, 10.3

Committee Notes

There has been some confusion in reported decisions regarding whether a defamation plaintiff bears the burden of proving falsity or whether truth is an affirmative defense for which the defendant bears the burden of proof. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985), the United States Supreme Court held that the First Amendment required a plaintiff to prove falsity in cases involving speech published by a media defendant relating to a matter of public concern. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties."). And although there are Utah decisions referring to truth as a "defense," *see, e.g., Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991) ("[T]ruth is an absolute defense to an action for defamation."), the Utah Supreme Court has consistently listed falsity as an essential element of a defamation claim. *See, e.g., Jacob v. Bezzant*, 2009 UT 37, ¶ 21, 212 P.3d 535 ("A prima facie case for defamation must demonstrate that … 'the statements were false….'") (quoting *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 68, 194 P.3d 956); *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994) ("To state a claim for defamation, [the plaintiff] must show that … the statements were false…."). The committee accordingly included falsity as an element of the claim and did not distinguish between defendants or public concern and non-public concern cases.

The Utah legislature has defined "libel" and "slander" in Utah Code § 45-2-2 for purposes of the statutory provisions in that chapter, which include several statutory privileges, retraction requirements, and matters relating to broadcasts. The definitions in that section, however, are inconsistent with the elements of a defamation claim consistently articulated by the Utah Supreme Court, *see, e.g., Jacob v. Bezzant*, 2009 UT 37, ¶¶ 21, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994), and may suffer from constitutional infirmities for failure to require falsity, *see I.M.L. v. State*, 2002 UT 110, ¶¶ 19, 23, 61 P.3d 1038; *Garrison v. Louisiana*, 379 U.S. 64, 70-73 (1964). For this reason, the committee has used the elements articulated in the caselaw rather than the statutory definitions in Utah Code § 45-2-2.

Element (4) is bracketed because it need not be given in a case where either no privilege has been asserted or the court has determined that the privilege is inapplicable.

CV1603 Definition: Publication. Approved 9/14/15.

[Name of plaintiff] must prove [name of defendant] "published" the allegedly defamatory statements. Publication means [name of defendant] communicated the statements to a person other than [name of plaintiff]. Publication can be oral, written, or non-verbal if a person's non-

verbal conduct or actions specifically communicate facts about the plaintiff. "Written" statements include statements that are communicated electronically or digitally.

References
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325

MUJI 1st Instruction
No analogue

Committee Notes
None

CV1604A Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable. Approved 10/19/15.
[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

1) [name of defendant] intended the statement to refer to [name of plaintiff], or
2) [name of defendant] knew or was intentionally blind to the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) to refer to [name of plaintiff].

References
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction
10.6

Committee Notes
This instruction should be used where the plaintiff is a public figure or public official, and the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff.

Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the requirement that a defamatory statement be about the plaintiff, often referred to as the "of and concerning" requirement, has been one of constitutional magnitude. *See* Restatement (Second) of Torts § 564 cmt. f (1977). *Sullivan* itself involved statements made generally about "police" in Alabama that did not name Mr. Sullivan specifically. 376 U.S. at 258. The Court found the evidence supporting the "of and concerning" requirement to be "constitutionally defective," explaining that the presumption employed by the Alabama Supreme Court struck "at the very center of the constitutionally

protected area of free expression." *Id.* at 288, 292. This holding and the constitutional defamation cases that followed, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), displaced the common law rule that imposed a form of strict liability on a defamer who did not intend a statement to refer to a plaintiff, but the statement was nonetheless reasonably understood to do so. *See* 1 Rodney A. Smolla, *Law of Defamation* § 4:42 (2d ed. 2013) ("[T]he consensus appears to be that in cases governed by *Gertz*, fault is required not merely on the truth or falsity issue, but for all aspects of the cause of action, including reference to the plaintiff."); *see also id.* § 4:40.50; 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:9.1 (4th ed. 2013).

As a result of the constitutional overlay on the "of and concerning" requirement, the requirements of this element will vary depending on whether the case involves a public figure/public official plaintiff, a statement relating to a matter of public concern, or a private plaintiff alleging speech unrelated to any matter of public concern. This is similar to the varying level of fault on truth/falsity discussed in later instructions. In public official/public figure cases, mere negligence is not sufficient; therefore, this instruction requires, in cases where the reference was unintended by the defamer, knowledge of or intentional blindness to the facts or circumstances that may lead a recipient to reasonably conclude the statement at issue refers to the plaintiff. The term "intentional blindness" is used here as a counterpart to the "reckless disregard" component of the actual malice standard in the truth/falsity context. Although there is little authority interpreting the contours of the actual malice test in the "of and concerning" context, the Committee determined that "reckless disregard" was imprecise in this context because the facts and circumstances the defamer would be disregarding are facts and circumstances of which he or she is purportedly *unaware*. Using "reckless disregard" in this context therefore risks collapsing that subjective test into an objective negligence test, which would be constitutionally problematic under *Sullivan*. "Intentional blindness" is a better fit for *unknown* facts and captures situations where a defamer intentionally avoids acquiring information that would reveal the reasonable connection between the statements at issue and the plaintiff—conduct that would go beyond mere negligence.

The "of and concerning" test will also vary depending on whether it is reasonable to understand a statement as referring to the plaintiff. Like the related threshold inquiry of defamatory meaning, this determination is a question of law for the court, not the jury. *See, e.g.*, *Gilman v. Spitzer*, 902 F. Supp. 2d 389, 394-95 (S.D.N.Y. 2012) ("Whether a challenged statement reasonably can be understood as of and concerning the plaintiff is a question of law for the Court, which 'should ordinarily be resolved at the pleading stage.'" (quoting *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001))). In cases where the defamer intended the statement to refer to the plaintiff, there is no requirement that the recipient's actual understanding of that reference be reasonable. The element is satisfied "if [the communication] is so understood by the recipient of the communication, no matter how bizarre or extraordinary it is that the communication was in fact so understood." *Law of Defamation* § 4:41; *see also* Restatement (Second) of Torts § 564 cmt. a ("If it is in fact intended to refer to him, it is enough that it is so understood even though he is so inaccurately described that it is extraordinary that the communication is correctly understood."). If there was no such intent, an unreasonable connection cannot sustain a defamation claim. Restatement (Second) of Torts § 564 cmts. b and f. For this reason, there are five possible scenarios, and thus five instructions, for the "of and concerning" element: if the

reference is reasonable, three varying levels of fault (with the open question of the standard of fault for purely private cases divided into two possible instructions); and if the reference is unreasonable, a requirement that the plaintiff show the reference was intended. Only one of these instructions should ordinarily be used, unless a case involves multiple statements or multiple plaintiffs that fall into different categories. In the unusual case where different standards apply to different statements, the court will have to instruct as to which instructions on standards accompany which statements.

The relevant inquiry for the "of and concerning" requirement is not whether any member of the "public" would understand a statement as referring to the plaintiff, as the MUJI 1st instruction on this element suggested. The issue is whether any of the *actual* recipients of the statement understood the statement to refer to the plaintiff (and, if the reference was unintended, did so reasonably). The actual recipients of a statement may have a basis for connecting a statement to the plaintiff that is not widely known or shared with the general public. *See* Restatement (Second) of Torts § 564 cmt. b ("It is not necessary that everyone recognize the other as the person intended; it is enough that any recipient of the communication reasonably so understands it. However, the fact that only one person believes that the plaintiff was referred to is an important factor in determining the reasonableness of his belief.").

When allegedly defamatory statements refer to a group rather than a specific individual, they are subject to the group defamation rule, which is addressed in a separate instruction. *See* CV1618 (Group Defamation Rule).

CV1604B Definition: About the Plaintiff – Private Plaintiff – Matter of Public Concern – Connection to Plaintiff is Reasonable. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

1) [name of defendant] intended the statement to refer to [name of plaintiff], or
2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) as referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) relate to a matter of public concern, and the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff.

Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the minimum level of fault required to impose liability for statements relating to a matter of public concern is negligence. *See also Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶¶ 22-23, 221 P.3d 205. "It is therefore necessary for the plaintiff to prove that a reasonable understanding on the part of the recipient that the communication referred to the plaintiff was one that the defamer was negligent in failing to anticipate. This is particularly important when the recipient knew of extrinsic facts that make the communication defamatory of the plaintiff but these facts were not known to the defamer." Restatement (Second) of Torts § 564 cmt. f (1977).

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1604C Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Negligence. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

1) [name of defendant] intended the statement to refer to [name of plaintiff], or
2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) as referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) do not relate to a matter of public concern, the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court has determined that the plaintiff must show at least negligence to hold the defendant liable.

As discussed in CV1601, whether strict liability may be constitutionally imposed in cases involving a private plaintiff and speech that does not relate to a matter of public concern has not

been resolved by either the United States Supreme Court or the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines negligence is required, this instruction should be used. If the court determines strict liability is the standard of fault, the subsequent instruction (CV1607 Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Strict Liability Allowed) should be used. Until this open question is resolved by binding appellate authority, parties will need to argue this particular issue in their individual cases.

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1604D Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Strict Liability. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. To do so, [name of plaintiff] must prove that one or more of the recipients of the statement(s) actually understood the statements(s) to be referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) do not relate to a matter of public concern, the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court has determined that the relevant standard of fault is strict liability.

As discussed in CV1601, whether strict liability may be constitutionally imposed in cases involving a private plaintiff and speech that does not relate to a matter of public concern has not been resolved by either the United States Supreme Court or the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines strict liability is the standard of fault, this instruction should be used. If the court determines negligence is required, the previous instruction (CV1606 Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Negligence Required) should be used. Until this open question is resolved by binding appellate authority, parties will need to argue this particular issue in their individual cases.

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1604E Definition: About the Plaintiff – Connection to Plaintiff is Unreasonable. Approved 10/19/15.

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her]. To do so, [name of plaintiff] must prove that

(1)[name of defendant] intended the defamatory statement(s) to refer to [name of plaintiff], and

(2) one or more of the recipients of the statement(s) actually understood the statements(s) to be referring to [name of plaintiff].

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Pratt v. Nelson, 2007 UT 41, 164 P.3d 366

Restatement (Second) of Torts § 564 (1977)

MUJI 1st Instruction

10.6

Committee Notes

This instruction should be used where the court has determined that it is not reasonable to understand the statement(s) at issue to be referring to the plaintiff, regardless of whether the plaintiff is a public figure or public official, or whether the statement(s) relate to a matter of public concern.

Because the varying standard of fault only arises when the reference to the plaintiff is unintended, and because reasonableness is an essential element of liability for an unintended reference, the varying standard of fault is not relevant where the court has determined the statements cannot reasonably be understood as referring to the plaintiff. This instruction therefore applies where the connection is unreasonable regardless of the status of the plaintiff or the subject matter of the speech.

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

CV1605 Definition: False Statement. Approved 11/9/15.

The allegedly defamatory statement must state or imply facts which can be prove~~n~~d to be false, and [name of plaintiff] must show the statement to be false.

"False" means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, a defamatory statement must be materially false. A statement is "materially false" if it is false in a way that matters; that is, if it has more than minor or irrelevant inaccuracies.

A true statement cannot be the basis of a defamation claim, no matter how annoying, embarrassing, damaging, or insulting it may be. "Truth" does not require that the statement be absolutely, totally, or literally true. The statement need only be substantially true, which means the gist of the statement is true.

You should determine the truth or falsity of the statement according to the facts as they existed at the time [name of defendant] published the statement.

References

Air Wis. Airlines Corp. v. Hoeper, __ U.S. __, 134 S. Ct. 852 (2014)
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)

Auto West, Inc. v. Baggs, 678 P.2d 286 (Utah 1984)

MUJI 1st Instruction

10.4

Committee Notes

Although material falsity is usually a question of fact for the jury, where "the underlying facts as to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a matter of law." *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations omitted). See also *Air Wis. Airlines Corp. v. Hoeper*, __ U.S. __, 134 S. Ct. 852, 868 (2014) ("[U]nder the First Amendment, a court's role is to determine whether '[a] reasonable jury could find a material difference between' the defendant's statement and the truth.") (Scalia, J., concurring and dissenting) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522 (1991)) (second alteration in original).

In addition to explaining that "[m]inor inaccuracies" do not make a statement materially false, *Masson*, 501 U.S. at 517, the United States Supreme Court has further explained the concept of whether an inaccuracy is "material" as follows: "[A] materially false statement is one that "'would have a different effect on the mind of the reader [or listener] from that which the … truth would have produced.'" *Air Wis*., 134 S. Ct. at 863 (quoting *Masson*, 501 U.S. at 517) (further citation omitted) (second alteration and ellipses in original).

There is a potentially open question regarding the standard of proof for falsity in some types of defamation cases. In *Hart-Hanks Communications, Inc. v. Cannaughton*, 491 U.S. 657, 661 n.2 (1989), the United States Supreme Court took note of a split of authority as to whether, in a

public figure or public official plaintiff case (where actual malice must be proven~~n~~d by clear and convincing evidence), material falsity must also be proven~~n~~d by clear and convincing evidence. At that time, the Court "express[ed] no view on this issue." Id. Since that time, however, the Supreme Court has twice emphasized that the issues of material falsity and actual malice are inextricably related, such that the definition of the latter requires a finding of the former. See *Masson*, 501 U.S. at 512; *Air Wis*., 134 S. Ct. at 861 ("[W]e have long held … that actual malice entails falsity."). As a result, many courts have concluded that in public figure and public official cases, material falsity must also be proven~~n~~d by clear and convincing evidence. See, e.g., *Brokers' Choice of Am., Inc. v. NBC Universal, Inc*., 757 F.3d 1125, 1136 (10th Cir. 2014) ("If the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by 'clear and convincing proof.'" (citation omitted) (applying Colorado law)); *DiBella v. Hopkins*, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only "a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence"); 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 3:4 (4th ed. 2013) (collecting cases).

If a case involves a public figure or public official plaintiff, and the court determines that the higher standard of proof applies to material falsity, the first paragraph of the instruction should be amended to state: "The allegedly defamatory statement must state or imply facts which can be proven to be false, and [name of plaintiff] must show the statement to be false by clear and convincing evidence."

CV1606 Definition: Opinion. Approved 1/11/16.

A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot support a defamation claim. A statement of opinion can be the basis of a defamation claim only when it implies facts which can be proven~~n~~d to be false, and [name of plaintiff] shows the statement is false and defamatory. ~~The court has~~I have determined that the following statement(s) are statements of opinion: [insert specific statement(s).]

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Utah Const. art. 1, §§ 1, 15
Restatement (Second) of Torts § 566 cmt. c (1977)

MUJI 1st Instruction

No analogue

Committee Notes

The question of whether a statement is one of fact or opinion is a question of law for the court, not the jury. *West v. Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994); Restatement (Second) of Torts § 566 cmt. c (1977). Likewise, the questions of whether a statement of opinion reasonably implies verifiable facts, and whether those facts are capable of sustaining defamatory meaning, are also questions for the court. *Id*. at 1019. Only if the court determines

that a statement of opinion can reasonably imply facts capable of sustaining defamatory meaning is there a question for the jury as to whether the statement did, in fact, convey that defamatory meaning. *Id*. This instruction should be used in the event the court determines as a matter of law that one or more statements are opinion, but the statement(s) may nonetheless be actionable because they reasonably imply verifiable facts capable of sustaining defamatory meaning. The question for the jury is whether those facts were, in fact, implied, and whether the defamatory meaning was, in fact, conveyed.

The test for whether a statement is "defamatory" is explained in instruction 1607, entitled "Defamatory."

CV1607 Definition: Defamatory. Approved 1/11/16.
To support a defamation claim, [name of plaintiff] must prove the statement at issue is defamatory. A statement may be false but not necessarily defamatory.

A statement is defamatory if it calls into question a person's honesty, integrity, virtue, or reputation and thereby exposes that person to public hatred, contempt, or ridicule in the eyes of the person to whom it is published or, if published to more than one person, to at least a substantial and respectable minority of its audience. A statement is not necessarily defamatory if it reports only that a person did things that you would not have done, or things of which you or other people might disapprove. A publication that is merely unpleasant, embarrassing, or uncomplimentary is not necessarily defamatory.

~~The court~~ I already determined that the following statement(s) is/are capable of conveying a meaning that is defamatory: [insert statements].

Some statements may convey more than one meaning. For example, a statement may have one meaning that is defamatory and another meaning that is not. To support a defamation claim, [name of plaintiff] must prove, for each of these statements, that one or more of the recipients of the statement actually understood it in its defamatory sense—the sense that would expose [name of plaintiff] to public hatred, contempt, or ridicule. If a recipient did not actually understand a particular statement in its defamatory sense, then that statement cannot support a defamation claim.

You must determine whether the recipient actually understood the statement(s) in [its/their] defamatory sense.

References
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998)
Hogan v. Winder, 762 F.3d 1096 (10th Cir. 2014)
Restatement (Second) of Torts §§ 559, 614 (1977)

MUJI 1st Instruction
10.5

Committee Notes
The jury has a very limited role in the determination of whether a plaintiff has satisfied the "defamatory" element of a defamation claim, often referred to as "defamatory meaning." It is the court's role to decide, as a matter of law, whether a statement is capable of bearing a particular meaning and, if so, if that meaning is defamatory. *See Jacob v. Bezzant*, 2009 UT 37, ¶ 26, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994); Restatement (Second) of Torts § 614 (1977). "If the court decides against the plaintiff upon either of these questions, there is no further question for the jury to determine and the case is ended." Restatement (Second) of Torts § 614 cmt. b (1977). Thus, even though this instruction includes a description of what it means to be defamatory—i.e., that a statement exposes the plaintiff to public hatred, contempt, or ridicule—the determination of whether a statement satisfies that standard is for the court. The description is included in the instruction so the jury can differentiate between a defamatory meaning and a non-defamatory one if a statement is capable of more than one meaning.

The only role for the jury, assuming the court decides for the plaintiff on both threshold questions, is "whether a communication, capable of a defamatory meaning, was so understood by its recipient." Restatement (Second) of Torts § 614 (1977). This issue would generally arise only "[i]f the court determines that the statement is capable of two or more meanings, of which at least one is capable of a defamatory meaning[.]" 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:4.16 (4th ed. 2013). In that circumstance, it is for the jury to decide which meaning was in fact understood by the recipients of the communication." *Id*.; *see also* Restatement (Second) of Torts § 614 cmt. b (1977) (jury must decide "whether the communication was in fact understood by its recipient in the defamatory sense").

CV1608 Conditional Privilege. Approved 2/22/16.
An otherwise defamatory statement cannot support a defamation claim if the statement is privileged. I have already determined that the statements [insert privileged statements] are covered by the [insert] privilege recognized under Utah law. The purpose of the [insert] privilege is [insert]. This privilege protects allegedly defamatory statements [insert applicable description].

Because the [insert] privilege applies to [name of defendant]'s statements, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] abused the privilege. The defendant can abuse a conditional privilege by [common law malice,] [actual malice,] [and/or excessive publication].

[To prove abuse by common law malice, [name of plaintiff] must prove that in making the allegedly defamatory statements, [name of defendant] was motivated primarily by ill will and spite towards [name of plaintiff], rather than some other reason.]

[To prove abuse by actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication.]

[To prove abuse by excessive publication, [name of plaintiff] must prove that [name of defendant] published the statements to more persons than needed to serve the purpose of the privilege described above.]

If you find that [name of plaintiff] has failed to prove [common law malice,] [actual malice,] [or excessive publication,] then [name of plaintiff] cannot base [his/her/its] defamation claim on [insert privileged statement].

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Wayment v. Clear Channel Broad., Inc., 2005 UT 25, 116 P.3d 271
Krouse v. Bower, 2001 UT 28, 20 P.3d 895
Russell v. Thomson Newspapers, Inc., 842 P.2d 896 (Utah 1992)
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)
Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981)
Combes v. Montgomery Ward & Co., 228 P.2d 272 (Utah 1951)

MUJI 1st Instruction

No analogue

Committee Notes

A party claiming that a statement is subject to a privilege bears the burden of proving the existence and application of the privilege, which determination is a question of law for the court.

Because applicability of a privilege is a matter of law for the court, *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992), this instruction assumes, and should be used only if, the court has already made that determination and will instruct the jury as to its effect. The instruction should be adapted to describe whatever particular privilege is at issue. Likewise the instruction should be adapted to reflect the particular types of abuse the plaintiff is alleging, if he/she/it is not alleging all three.

Examples of conditional privileges recognized under Utah law include, but are not limited to:

- the public interest privilege, *see Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, Utah Code § 45-2-3(5);
- publisher's interest privilege, *see Brehany v. Nordstrom*, 812 P.2d 49 (Utah 1991);

- police report privilege, *Murphree v. U.S. Bank of Utah, N.A.*, 293 F.3d 1220, 1223 (10th Cir. 2002);
- common interest privilege, *see Lind v. Lynch*, 665 P.2d 1276 (Utah 1983), Utah Code § 45-2-3(3);
- family relationships privilege, *see O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214;
- fair report privilege, *see Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992), Utah Code § 45-2-3(4) and (5); and
- neutral reportage privilege, *see Schwarz v. Salt Lake Tribune*, No. 20030981, 2005 WL 1037843 (Utah Ct. App. May 5, 2005) (unpublished).

The court's determination of whether a privilege applies to a particular statement is based on the circumstances surrounding its publication, such as what was said, to whom, and in what context. In most cases, the relevant aspects of those circumstances are not in dispute, allowing the court to make the applicability determination without the aid of the jury. Importantly, dispute as to the circumstances of publication is not the same as dispute as to the applicability of the privilege. For instance, the parties may dispute whether a particular statement has sufficient connection to a legal proceeding to be covered by the judicial proceedings privilege, or whether a speaker had a legitimate interest to protect for purposes of the publisher's interest privilege, or whether a statement implicates a sufficiently important interest for purposes of the public interest privilege, or whether two parties share a sufficient interest for purposes of the common interest privilege, or whether a statement was a fair and true report of public proceedings for purposes of the fair report privilege. But all of those issues are not factual questions for the jury; they are applicability determinations for the court.

In the event the circumstances of publication are in legitimate dispute in a way that matters to applicability of the privilege, however, such as where the parties dispute what was said in a way that matters to the privilege, or dispute the identity of the speaker (i.e., whether he or she was a litigant for purposes of the judicial proceedings privilege), those disputes may need to be resolved by the jury before the court can determine whether the privilege applies. See, e.g., 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 9:5 (4th ed. 2013). In such circumstances, a different instruction may need to be given, tailored to that situation, in which the jury is asked to make that specific factual determination. Because those instances are not common, the Committee opted not to include a standard instruction for such circumstances.

With regard to the test for actual malice, the requirement of subjective knowledge is based on the discussion in *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 30, 221 P.3d 205, which held that "[t]o prove knowledge of falsity, a plaintiff must present evidence that shows the defendant knows the defamatory statement is untrue. Likewise, acting with reckless disregard as to falsity involves a showing of subjective intent or state of mind." Nonetheless, *Ferguson* did recognize certain rare circumstances in which the reckless disregard test could have an objective element: "But while reckless disregard is substantially subjective, certain facts may show, regardless of the publisher's bald assertions of belief, that 'the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation' or that 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' Therefore, reckless disregard as to the falsity of a statement that a defendant honestly believed to be true is

determined by a subjective inquiry as to the defendant's belief and an objective inquiry as to the inherent improbability of or obvious doubt created by the facts." *Id*. (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Because not all defamation claims involve allegations of inherent improbability, the committee opted not to include the objective test in the standard instruction, leaving to parties to adapt that portion depending on the facts of their cases.

In addition to conditional privileges, Utah law also recognizes certain absolute privileges that cannot be overcome by a showing of abuse. Examples of absolute privileges include, but are not limited to, the judicial proceedings privilege, *see DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, and legislative proceedings privilege, *see Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128. Because, like a conditional privilege, application of an absolute privilege is a question of law for the court, and because there is no subsequent issue for the jury regarding abuse of an absolute privilege, the committee has not included an instruction regarding absolute privileges. In the event that the court decides certain statements are absolutely privileged, but those statements have come into evidence for some other purpose, they should be listed as part of the curative instruction set forth in CV1609 (Non-actionable Statements).

CV1609 Non-actionable Statements. Approved 1/11/16.

During trial, you may have heard evidence about certain statements made by [name of defendant] that may be considered insulting or damaging to [name of plaintiff]. Just because you heard evidence of those statements does not necessarily mean that those statements can legally be the basis of a defamation claim. I may have admitted evidence of those statements for some purpose other than proof of defamation. I have determined that certain statements cannot be the basis of a defamation claim. Even though you heard evidence of them, you are instructed that the following statements cannot be the basis of [name of plaintiff]'s defamation claim: [insert specific non-actionable statements].

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214

MUJI 1st Instruction

No analogue

Committee Notes

This instruction recognizes that even where the court makes a determination that certain statements are non-actionable defamation as a matter of law, those statements may still be presented to jury for some other purpose or may have been presented prior to the court's legal determination. For that reason, and to effectuate the court's gatekeeping function in defamation cases, this instruction is designed to cure any prejudicial implication that non-actionable but otherwise admitted statements can support a defamation claim.

CV1610 Definition: Requisite Degree of Fault – Private Figure – Matter of Public Concern. Approved 1/11/16.

I have already determined that [name of plaintiff] is a private figure and that the subject matter of the allegedly defamatory statements pertains to a matter of public concern. As a result, [name of plaintiff] cannot recover on [his/her/its] defamation claim unless you find [he/she/it] has proved by a preponderance of the evidence that [name of defendant] made the allegedly defamatory statements with negligence. To prove negligence, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] did not take reasonable care to avoid the publication of statements that are substantially false. Reasonable care is the degree of care and caution or attention that a reasonable person would use under similar circumstances.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
Wayment v. Clear Channel Broad. Inc, 2005 UT 25, 116 P.3d 271
Russell v. Thomson Newspapers, Inc., 842 P.2d 896 (Utah 1992)
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Van Dyke v. KUTV, 663 P.2d 52 (Utah 1983)
Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981)

MUJI 1st Instruction

No analogue

Committee Notes

Because the public/private figure and public concern determinations are questions for the court, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271; *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (Powell, J.) (in plurality opinion, applying test as a matter of law); *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Arndt v. Koby*, 309 F.3d 1247, 1252 (10th Cir. 2002), this instruction assumes, and should be used only if, the court has already made those determinations. As explained in CV1601 (Defamation – Introduction), no instruction is included on the standard of fault for private figure cases where the speech does not relate to a matter of public concern because that question has not yet been answered by the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205.

CV1611 Definition: Requisite Degree of Fault –Public Official or Public Figure. Approved 1/11/16.

I have already determined that [name of plaintiff] is a [public official, general purpose public figure, or limited purpose public figure]. As a result, [name of plaintiff] cannot recover on [his/her/its] defamation claim unless you find that [he/she/it] has proved by clear and convincing evidence that [name of defendant] made the allegedly defamatory statements with actual malice. To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The

question is not whether a reasonable person would have known that the statements were false or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication.

References

St. Amant v. Thompson, 390 U.S. 727 (1968)
Curtis Publ'g Co v. Butts, 388 U.S. 130 (1967)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
Wayment v. Clear Channel Broad. Inc, 2005 UT 25, 116 P.3d 271
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Van Dyke v. KUTV, 663 P.2d 52 (Utah 1983)
Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981)

MUJI 1st Instruction

10.2

Committee Notes

Because the public official/public figure determination is one for the court, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271, this instruction assumes, and should be used only if, the court has already made that determination. For a discussion of the subjective nature of the actual malice standard, *see* CV1611 (Conditional Privilege), Committee Notes.

CV1612 Group Defamation Rule. Approved 2/22/16.

To be actionable, a defamatory statement must refer to [name of plaintiff]. In general, statements that refer only to a group or class of people are not actionable. [Name of plaintiff] can maintain a defamation claim based on such a statement if and only if [he/she/it] shows either:

(1) the referenced group or class is so small that a reasonable person would understand the statement as specifically referring to [name of plaintiff]; or

(2) given the circumstances of publication, a reasonable person would understand the statement as specifically referring to [name of plaintiff]. The fact that a referenced group is large does not by itself preclude [name of plaintiff] from satisfying this requirement.

References

Pratt v. Nelson, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564A (1977)

MUJI 1st Instruction

No analogue

Committee Notes
The Restatement provides the following illustrative examples of this rule: "A newspaper publishes the statement that the officials of a labor organization are engaged in subversive activities. There are 162 officials. Neither the entire group nor any one of them can recover for defamation…. A newspaper publishes a statement that the officers of a corporation have embezzled its funds. There are only four officers. Each of them can be found to be defamed." Restatement (Second) of Torts § 564A cmt. a (1977).

CV1613 Causation. Approved 2/22/16.
In order to prove a claim for defamation, [name of plaintiff] must prove by a preponderance of the evidence that the allegedly defamatory statement[s] caused damage to [name of plaintiff].

You should only award [name of plaintiff] damages that were caused by the defamation. You may not award damages which were the result of other acts of [name of the defendant], such as publication of statements that are true, non-defamatory, privileged, or otherwise fail to satisfy the elements of a defamation claim. You also may not award damages that were caused by [name of plaintiff's] own activities.

References
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Proctor v. Costco Wholesale Corp., 2013 UT App 226, 311 P.3d 564
Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, 83 P.3d 391

MUJI 1st Instruction
10.11

Committee Notes
This instruction is not intended to capture the concept of proximate causation. This instruction should be given along with some version of CV209.

CV1614 Presumed Damages. Approved 2/22/16.
I have determined that the following statement[s] [is a/are] statement[s] that the law presumes will cause some type of damages to the plaintiff: [text of statement]. If you find that [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant] published that statement, you may presume that [name of plaintiff] has been damaged and thus is entitled at least to nominal damages. The term "nominal damages" means an insignificant amount, such as one dollar. If [name of plaintiff] seeks more than nominal damages, [he/she/it] must prove the amount of damage.

References
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Larson v. SYSCO Corp., 767 P.2d 557 (Utah 1989)

Baum v. Gillman, 667 P.2d 41 (Utah 1983)
Westmont Mirador, LLC v. Miller, 2014 UT App 209, __ P.3d __

MUJI 1st Instruction
10.8, 10.9

Committee Notes
This instruction uses the term "presumed damages" to capture the concept of defamation *per se*. As explained in CV1601 (Defamation – Introduction), there was a historical distinction between the tests for defamation *per se* depending on whether the statements were slander or libel. At least one older case in Utah suggests in dicta that the four-category test requiring (1) criminal conduct, (2) having contracted a loathsome disease, (3) unchaste behavior (but only if the plaintiff is a woman), or (4) conduct incongruous with the exercise of a lawful business, trade, profession, or office applies only to slander, while the test for libel *per se* is whether the "words must, on their face, and without the aid of [extrinsic] proof, be unmistakably recognized as injurious." *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 977 n.7 (Utah 1981) (dicta) (quoting *Lininger v. Knight*, 226 P.2d 809, 813 (Colo. 1951)). (The actual quote in *Seegmiller* uses the phrase "intrinsic proof," rather than "extrinsic proof." *Id.* But that phrase appears to be either an error or an anachronism that actually means "extrinsic proof," consistent with what it means to be defamatory *per se*. *See, e.g.*, *Gordon v. Boyles*, 99 P.3d 75, 78-79 (Colo. Ct. App. 2004) (citing *Lininger* for the proposition that "[t]o be actionable without proof of special damages, a libelous statement must be … on its face and without extrinsic proof, unmistakably recognized as injurious…. (emphasis added)); 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:8.3 (4th ed. 2013) (statement is libelous *per se* if it is defamatory without the aid of "extrinsic facts")).

Subsequent to *Seegmiller*, however, Utah courts have applied the four-category test to written statements, rather than the more amorphous test for libel *per se*. *See, e.g.*, *Larson v. SYSCO Corp.*, 767 P.2d 557, 560 (Utah 1989); *Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 2, __ P.3d __. In *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, the Utah Supreme Court addressed this issue and explained that the tests for libel and slander *per se* were not distinct, but that "the *Larson* categories merely define injurious words as mentioned in *Seegmiller*." *Id.* at ¶ 26. Accordingly, and due to the increasingly anachronistic nature of a distinction between oral and written communication, this instruction employs the *Larson* categories and does not distinguish between libel *per se* and slander *per se*.

There is no clear Utah authority on what "presumed damages" encompass in defamation cases. Although the Utah Supreme Court has not addressed the issue, the Utah Court of Appeals has suggested that a plaintiff who proves defamation *per se* but presents no proof of actual injury is not entitled to recovery beyond nominal damages. *See Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 5, __ P.3d __. This instruction reflects that principle. Although the non-binding plurality in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) construed the holding of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as applying only to statements relating to matters of public concern, other authorities, including the Restatement, have more broadly interpreted *Gertz* to constitutionally prohibit presumed damages in all defamation contexts, requiring proof of actual injury. *See* Restatement (Second) of Torts § 621

& cmt. b (1977) ("Though the action in the *Gertz* case was one of libel and the defendant would be classified within the term, news media, and the defamatory statement involved a matter of public concern, there is little reason to conclude that the constitutional limitation on recoverable damages will be confined to these circumstances."). Because nominal damages likely do not offend the constitutional protections against presumed and punitive damages established in *Gertz*, limiting presumed damages absent proof of actual injury to nominal damages avoids this potential constitutional problem and makes it unnecessary in this instruction to distinguish between purely private cases and cases involving public officials, public figures, or speech relating to matters of public concern.

CV1615 Damages – Economic Damages. Approved 2/22/16.

Economic damages are awarded to compensate a plaintiff for actual and specific monetary losses that are caused by the publication of a defamatory statement. Economic damages are out-of-pocket losses and can include such things as loss of salary, employment, income, business, and other similar economic losses. [Name of plaintiff] must prove each item of economic damages with specific evidence.

References

Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Baum v. Gillman, 667 P.2d 41 (Utah 1983)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Prince v. Peterson, 538 P.2d 1325 (Utah 1975)
Cohn v. J.C. Penney Co., Inc., 537 P.2d 306 (Utah 1975)
Nichols v. Daily Reporter Co., 83 P. 573 (Utah 1905)
Utah R. Civ. P. 9(g)
Restatement (Second) of Torts § 575 cmt. b (1977)

MUJI 1st Instruction

10.11

Committee Notes

This instruction uses the term "economic damages" to capture the concept of special damages. Utah courts have not addressed whether medical expenses incurred as a proximate result of defamation are recoverable as special damages, and courts in other jurisdictions are split on that issue. With regard to attorneys' fees, it is important to distinguish between a claim for defamation and a claim for "slander of title." Although the two claims share some nomenclature, they are distinct claims. *See Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988). While attorneys' fees incurred in clearing a cloud placed on a title are recoverable as special damages in a slander of title claim, *see id*., Utah courts have not recognized attorneys' fees as special damages in a defamation claim. *See Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1299-1300 & n.15 (10th Cir. 2002) (distinguishing slander of title and holding attorneys' fees on defamation claim are "an element of special damages not recognized by Utah law").

CV1616 Damages – Noneconomic Damages. Approved 4/11/16.
Noneconomic damages are awarded to compensate a plaintiff for actual injury to [his/her] reputation that is caused by publication of a defamatory statement, but that has not been compensated by economic damages. Noneconomic damages do not include specific monetary losses covered by economic damages. Factors you may consider in calculating non-economic damages are harm to reputation, impaired standing in the community, humiliation, shame, mental anguish and suffering, emotional distress and related physical injury, and other similar types of injuries. In making this determination, you may consider the state of [name of plaintiff's] reputation prior to the alleged defamation.

To award noneconomic damages to [name of plaintiff], you must find:
(1) [name of plaintiff] has proved by a preponderance of the evidence that [he/she] has actually been injured by the allegedly defamatory statement[s]; and
(2) either:

(a) the statement[s] at issue [is/are] the type for which damages are presumed; or
(b) [name of plaintiff] has proved by a preponderance of the evidence that [he/she] has suffered economic damages.

References
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Baum v. Gillman, 667 P.2d 41 (Utah 1983)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Prince v. Peterson, 538 P.2d 1325 (Utah 1975)
Proctor v. Costco Wholesale Corp., 2013 UT App 226, 311 P.3d 564
Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, 83 P.3d 391
Restatement (Second) of Torts § 621 (1977)

MUJI 1st Instruction
10.11

Committee Notes
This instruction uses the term "noneconomic damages" to capture the concept of general damages; use of the term "general damages" in these notes is thus interchangeable with the term "noneconomic damages." The term "actual injury" in this context refers to a determination that the plaintiff has actually suffered damages, as opposed to merely relying on the *presumption* of injury for statements that are defamatory *per se*, which entitles a plaintiff only to nominal damages. "Actual injury" can refer either to general or special damages, the former concerned with harm to reputation, standing in the community, and the other factors listed in this instruction, and the latter concerned with pecuniary, out-of-pocket losses. Actual injury in the context of general damages typically requires the plaintiff to put on evidence that his or her reputation has been diminished, or that he or she has suffered humiliation, shame, mental anguish, suffering, or other similar types of injuries.

The requirements for an award of general damages in this instruction reflect the longstanding common law rule that a plaintiff who does not prove defamation *per se* is entitled to general damages only if he or she also pleads and proves special damages. In cases of defamation *per se*, the jury may award general damages without special damages. *See, e.g.*, *Baum v. Gillman*, 667 P.2d 41, 42 (Utah 1983) ("Inasmuch as the complaint contains no allegation of special damages, in order to state a claim upon which relief can be granted the statements attributed to Gillman must constitute defamation *per se*."); *Allred v. Cook*, 590 P.2d 318, 320-21 (Utah 1979) ("The general rule is that if special damages are not alleged, the slander must amount to slander per se before recovery is allowed."). Because the court determines whether the statements at issue are defamatory *per se*, *see* CV1614 (Presumed Damages), if the case does not involve defamation *per se*, this instruction may be modified to remove the disjunctive (2)(a) and require both actual injury and special damages.

If the jury will also take up the issue of punitive damages, *see* CV2026. Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the *Gertz* actual malice requirement for punitive damages in cases involving public officials, public figures, and/or speech relating to a matter of public concern also applies in cases involving private figures and speech that does not relate to a matter of public concern. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule).

~~**CV1617 Damages – Punitive Damages – Public Figure/Official and/or Issue of Public Concern**~~

~~In addition to compensatory damages, [name of plaintiff] also seeks to recover punitive damages against [name of defendant]. Punitive damages are intended to punish a wrongdoer for extraordinary misconduct and to discourage others from similar conduct. They are not intended to compensate [name of plaintiff] for [his/her/its] loss.~~

~~Punitive damages may only be awarded if [name of plaintiff] has proven both of the following by clear and convincing evidence:~~

~~(1) [name of defendant] acted with actual malice in defaming [name of plaintiff]. To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statement[s], [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication; and~~

~~(2) [name of defendant]'s conduct:~~

~~(a) was [willful and malicious]; or~~
~~(b) was [intentionally fraudulent]; or~~
~~(c) manifested a knowing and reckless indifference toward, and a disregard of, the rights of others, including [name of plaintiff].~~

"Knowing and reckless indifference" means that (a) [name of defendant] knew that such conduct would, in a high degree of probability, result in substantial harm to another; and (b) the conduct must be highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger or harm would be apparent to a reasonable person.

Punitive damages are not awarded for mere inadvertence, mistakes, errors of judgment and the like, which constitute ordinary negligence.

Punitive damages are awarded only to punish a defendant and as a warning to others not to engage in similar conduct. Punitive damages are not designed to compensate the plaintiff for actual injuries suffered. Punitive damages should be awarded with caution and may only be awarded if three conditions are met.

First, you must have awarded either special or general damages (or both) on [name of plaintiff]'s defamation claim.

Second, [name of plaintiff] must have provedn by clear and convincing evidence that [name of defendant] acted with actual malice in defaming [name of plaintiff]. To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false, but whether [name of defendant] actually had such knowledge at the time of publication.

Third, [name of plaintiff] must have provedn by clear and convincing evidence that [name of defendant]'s defamation of [name of plaintiff] was the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of [name of plaintiff].

All three of these conditions must be met for you to consider an award of punitive damages. If you choose to award punitive damages, the amount of that award should bear some relation to the amount of special and/or general damages awarded on the defamation claim. Punitive damages that are many multiples of the amount awarded in special and/or general damages may be held unreasonable.

References

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Utah Code § 78B-8-201(1)(a)

MUJI 1st Instruction

10.12

Committee Notes

This instruction is a modified version of the general instruction for punitive damages (CV2026). The primary modification is the addition of the constitutional requirement of proving actual malice in cases involving public officials, public figures, and/or speech relating to matters of public concern. This instruction also removes from the general instruction the possibility of harm "to property" in the definition of knowing and reckless indifference because defamation claims are always for personal harm to reputation; property damage caused by speech is covered by other torts, such as injurious falsehood. The other modification to this instruction is the removal of the optional brackets around the last paragraph in the instruction regarding negligence. For a discussion of the subjective nature of the actual malice standard, *see* CV1608 (Conditional Privilege), Committee Notes.

The Model Utah Jury Instructions 2d contains a general instruction for punitive damages (CV2026). Due to the unique nature of defamation claims and the constitutional interests at stake, this instruction should be used for defamation claims, rather than the general instruction. For a discussion of the subjective nature of the actual malice standard, *see* CV1611 (Conditional Privilege), Committee Notes.

Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the *Gertz* actual malice requirement for punitive damages in cases involving public officials, public figures, and/or speech relating to a matter of public concern also applies in cases involving private figures and speech that does not relate to a matter of public concern. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). Because it is an unresolved question, the parties could argue that this instruction should also be used in cases involving private figures and speech unrelated to a matter of public concern instead of the general punitive damages instruction set forth in CV2026.

CV1618 Damages – Punitive Damages – Private Figure and No Issue of Public Concern

Punitive damages are awarded only to punish a defendant and as a warning to others not to engage in similar conduct. Punitive damages are not designed to compensate the plaintiff for actual injuries suffered. Punitive damages should be awarded with caution and may only be awarded if two conditions are met.

First, you must have awarded either special or general damages (or both) on [name of plaintiff]'s defamation claim.

Second, [name of plaintiff] must have provend by clear and convincing evidence that [name of defendant]'s defamation of [name of plaintiff] was the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of [name of plaintiff].

Both of these conditions must be met for you to consider an award of punitive damages. If you choose to award punitive damages, the amount of that award should bear some relation to the amount of special and/or general damages awarded on the defamation claim. Punitive damages

~~that are many multiples of the amount awarded in special and/or general damages may be held unreasonable.~~

~~**References**~~

~~*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)~~
~~*Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205~~
~~*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325~~
~~*Cox v. Hatch*, 761 P.2d 556 (Utah 1988)~~
~~Utah Code § 78B-8-201(1)(a)~~

~~**MUJI 1st Instruction**~~

~~10.12~~

~~**Committee Notes**~~

~~Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the *Gertz* actual malice requirement for punitive damages in cases involving public officials, public figures, and/or speech relating to a matter of public concern also applies in cases involving private figures and speech that does not relate to a matter of public concern. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). Because the rule has not been extended, the committee has included this instruction, which incorporates only the statutory requirements for punitive damages. Because it is an unresolved question, however, an argument could be made that the law should be extended to require a showing of actual malice to obtain punitive damages in this context.~~

CV1617 Damages – Effect of Retraction. Approved 4/11/16

If you find the allegedly defamatory statement[s] [was/were] [published in the newspaper] [broadcast on radio or television] by [name of defendant] in good faith, due to a mistake or misunderstanding of the facts, and that [name of defendant] made a full and fair retraction of the statements within [the time prescribed by statute] of [name of plaintiff]'s demand for a retraction or filing of this lawsuit by [the method prescribed by statute], then [name of plaintiff] may recover only those actual damages incurred by [name of plaintiff] as a direct result of the [publication] [broadcast] of the allegedly defamatory statements and no punitive damages may be awarded.

References

Utah Code §§ 45-2-1 to 1.5

MUJI 1st Instruction

10.13

Committee Notes

Several different retraction methods are prescribed by statute, Utah Code §§ 45-2-1 to 1.5, depending on the circumstances of the newspaper publication or radio or television broadcast.

This instruction should be modified to reflect those methods. This instruction is necessary only if there was a retraction made or issued by the defendant.

CV1618 Affirmative Defense – Consent. Approved 4/11/16.
Consent is an absolute defense to a claim for defamation. That means if [name of defendant] proves by a preponderance of the evidence that [name of plaintiff] consented, by words or conduct, to [name of defendant]'s communication of the statement[s] at issue to others, there is no liability for defamation.

References
Cox v. Hatch, 761 P.2d 556 (Utah 1988)
Restatement (Second) of Torts § 583 (1977)

MUJI 1st Instruction
No analogue.

Committee Notes
None

CV1619Affirmative Defense – Statute of Limitations. Approved 4/11/16.
An action for defamation must be filed within one year of the time that [name of plaintiff] could have reasonably discovered publication of the statement. You must decide when [name of plaintiff] could have reasonably discovered the alleged defamatory statement.

References
Russell v. The Standard Corp., 898 P.2d 263 (Utah 1995)
Allen v. Ortez, 802 P.2d 1307 (Utah 1990)
Utah Code § 78B-2-302(4)

MUJI 1st Instruction
No analogue.

Committee Notes
Application of a statute of limitations can be a question of law for the court, particularly when the statements at issue are published in a widely-available publication, but in certain circumstances a court may determine that a question of fact exists as to when a plaintiff should have reasonably discovered the allegedly defamatory statement. This instruction is intended for such circumstances.

Tab 5

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November 19, 2015

Juli Blanch
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, UT 84111

JBlanch@parsonsbehle.com

Re: Emotional Distress Jury Instructions

Dear Ms. Blanch:

Our subcommittee, made up of George T. Waddoups, Michael A. Katz, Steven A. Combe and Mark Dalton Dunn, met several times regarding these jury instructions. Enclosed are our recommendations. The committee was unanimous with the exception of **MUJI 22.7.** Enclosed are the instructions agreed to by three of the members of the committee and the one dissenting recommendation for **MUJI 22.7** submitted by George. Also included is the reference to the case, *Harnicher v. University of Utah Medical Center*, 962 P2d 67, Utah, 1998, that is at controversy between the members of the committee.

I am happy to speak with you at any time regarding the foregoing and the enclosures.

Best personal regards,

TRYSTAN SMITH & ASSOCIATES

Mark Dalton Dunn

MDD/cam

Enclosures

cc: George T. Waddoups, Michael A. Katz, Steven A. Combe

MUJI 22.1

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To prove a claim for intentional infliction of emotional distress, *[name of plaintiff]* ~~[the plaintiff]~~ must prove each of the following elements:

1. Outrageous *[and intolerable]* conduct by *[name of defendant]* ~~[the defendant]~~; and

2. *[name of defendant]* ~~[the defendant]~~ intended to cause emotional distress or acted with reckless disregard of the probability of causing emotional distress; and

3. *[name of plaintiff]* ~~[the plaintiff]~~ suffered severe or extreme emotional distress which was proximately caused by the *[name of defendant]* ~~[the defendant's]~~ ~~[outrageous]~~ conduct.

References:

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961)

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)

Nelson v. Target Corporation, 334 P.3d 1010 (Utah App. 2014)

Anderson Development Company v. Tobias, et al, 116 P.3d 323 (Utah 2005)

MUJI 22.2

OUTRAGEOUS CONDUCT

For conduct to be considered [~~"~~]outrageous[~~"~~] [~~or~~] *and* intolerable, it must be such that it offends the generally accepted standards of decency and morality. This has also been described as conduct which is so extreme as to exceed all bounds of what is usually tolerated in a civilized community. Conduct which is merely unreasonable or offensive is not considered sufficiently outrageous.

References:

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961)

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)

[~~Davidson v. City of Westminster,~~ ~~649 P.2d 894 (Cal. 1982)~~] Restatement (Second) of Torts § 46 comment d (1964)

Nelson v. Target Corporation, 334 P.3d 1010 (Utah App. 2014)

Anderson Development Company v. Tobias, et al, 116 P.3d 323 (Utah 2005)

MUJI 22.3

SEVERE DISTRESS

To recover, *[name of plaintiff]* ~~[the plaintiff]~~ must prove that the distress was severe. Emotional distress could include such things as mental suffering, mental anguish, mental or nervous shock, or highly unpleasant reactions, such as fright, horror, grief or shame. However, it is only when *[name of plaintiff's]* ~~[the plaintiff's]~~ distress is severe that liability arises.

The intensity and duration of the distress are factors to be considered in determining its severity. Severe distress may be shown either by a physical manifestation of the distress or by subjective testimony. The character of ~~the~~ *[name of defendant's]* ~~[the defendant's]~~ conduct, if found to be outrageous, can be treated as evidence that severe distress existed.

References:

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961)

~~*[Evans v. Twin Falls County,* 796 P.2d 87 (Idaho 1990)]~~ Restatement (Second) of Torts § 46 comment j (1964)

See also, Anderson Development Company v. Tobias, et al, 116 P.3d 323 (Utah 2005)

MUJI 22.4

DEFINITION OF* INTENT *AND RECKLESS DISREGARD

To prove intentional infliction of emotional distress, it is not enough that *[name of defendant]* ~~[the defendant]~~ acted negligently in causing the distress. Rather, *[name of plaintiff]* ~~[the plaintiff]~~ must show that *[name of defendant]* ~~[the defendant]~~ either intended to cause emotional distress, or acted with reckless disregard of the probability of causing that distress. This means that *[name of plaintiff]* ~~[the plaintiff]~~ must show that ~~the~~ *[name of defendant's]* ~~[the defendant's]~~ conduct (1) was for the purpose of inflicting emotional distress, or (2) that a reasonable person would have known that emotional distress would result.

References:

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)

MUJI 22.5

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
PART 1

If *[name of defendant]* ~~[the defendant]~~ unintentionally caused *[name of plaintiff]* [~~the plaintiff~~] emotional distress, *[name of defendant]* ~~[the defendant]~~ may be held liable for resulting illness or bodily harm suffered by *[name of plaintiff]* [~~the plaintiff~~] where the defendant:

1. Should have realized that such conduct involved an unreasonable risk of causing the emotional distress; or

2. From the facts known to *[name of defendant]* ~~[the defendant]~~, *[name of defendant]* ~~[the defendant]~~ should have realized that the emotional distress, if it were caused, might result in illness or bodily harm.

However, where the unintentional acts of *[name of defendant]* ~~[the defendant]~~ created only a risk of bodily harm or peril to a third person and not to *[name of plaintiff]* [~~the plaintiff~~], *[name of plaintiff]* [~~the plaintiff~~] may not recover for emotional distress resulting solely from the knowledge of harm or peril to the third person. In such case, [name of plaintiff] must be in the zone of danger.

Comments

This instruction is based upon Restatement (Second) of Torts § 313 (1964) pursuant to the references cited below. Comnwnt (d) provides the explanation utilized for this instruction.

References:

Johnson v. Rogers, 763 P.2d 771 (Utah 1988)
White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990) Restatement (Second) of Torts § 313 (1964)
Hanson v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah 1992)
Harnicher v. University of Utah Medical Center, 962 P.2d 67 (Utah 1998)

MUJI 22.6

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
PART 2

You may not find *[name of defendant]* ~~[the defendant]~~ liable for the illness or bodily harm experienced by *[name of plaintiff]* [~~the plaintiff~~] if such condition was caused by emotional distress arising solely from harm or peril experienced by a person other than *[name of plaintiff]* [~~the plaintiff~~]. If you find that *[name of defendant's]* ~~[the defendant's]~~ negligence created an unreasonable risk of illness or bodily harm to *[name of plaintiff]* [~~the plaintiff~~], then you may find *[name of defendant]* ~~[the defendant]~~ liable. In such case, [name of plaintiff] must be in the zone of danger.

References:

Johnson v. Rogers, 763 P.2d 771 (Utah 1988)
White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990) Restatement (Second) Torts § 313 (1964)
Hanson v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah 1992)
Harnicher v. University of Utah Medical Center, 962 P.2d 67 (Utah 1998)

Created by Michael A. Katz, Steven A. Combe, and Mark Dalton Dunn

MUJI 22.7

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS ZONE OF DANGER

Only those plaintiffs placed in actual peril of physical harm as a result of a defendant's breach of duty are allowed recovery for negligent infliction of emotional distress caused by witnessing the injury of others. [Name of plaintiff] need not suffer physical harm. Such plaintiffs must show [name of defendant's] negligence is of the type that is likely to cause severe and unmanageable mental distress in a reasonable person normally constituted.

References:

Hanson v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah 1992)
Harnicher v. University of Utah Medical Center, 962 P.2d 67 (Utah 1998)

Created by George T. Waddoups

MUJI 22.7

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
ZONE OF DANGER

Only those plaintiffs placed in actual peril of physical harm as a result of a defendant's breach of duty are allowed recovery for negligent infliction of emotional distress caused by witnessing the injury of others. [Name of plaintiff] need not suffer physical harm. Such plaintiffs must show [name of defendant's] negligence is of the type that is likely to cause ~~severe~~ emotional and unmanageable mental distress in a reasonable person normally constituted.

References:

Hanson v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah 1992)
Harnicher v. University of Utah Medical Center, 962 P.2d 67 (Utah 1998)

Note: Part of the committee suggests that the injury for negligent infliction of emotional distress should be emotional and unmanageable mental distress. This is to distinguish the injury necessary for the tort of intentional infliction of emotional distress which requires "severe or extreme emotional distress." Part of the committee suggests that injury necessary to establish negligent infliction of emotional distress should be less than intentional infliction of emotional distress.

David HARNICHER and Stephanie Harnicher, Plaintiffs and Appellants,

v.

UNIVERSITY OF UTAH MEDICAL CENTER, Defendant and Appellee.

No. 960204.

Supreme Court of Utah.

July 31, 1998.

Parents of triplets born after in vitro fertilization using donor sperm brought medical malpractice action against university medical center for using sperm from a donor other than the one that the couple had allegedly selected. The Third District, Salt Lake County, Frank G. Noel, J., granted summary judgment in favor medical center, and parents appealed. The Supreme Court, Howe, C.J., held that: (1) parents failed to raise a triable issue of fact that they have suffered bodily harm, and (2) parents failed to show that medical center's alleged negligence was of the type that was likely to cause severe and unmanageable mental distress in a reasonable person.

Affirmed.

Russon, J., concurred in the result.

Durham, Associate C.J., filed a dissenting opinion, in which Stewart, J., joined.

1. Damages ⇨49.10

If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor: (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from facts known to him, should have realized that the distress, if it were caused, might result in illness or bodily harm. (Per Howe, C.J., with one Justice concurring, and one Justice concurring in the result.) Restatement (Second) of Torts § 313(1).

2. Damages ⇨51

Under the "zone of danger" rule, one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family. (Per Howe, C.J., with one Justice concurring, and one Justice concurring in the result.) Restatement (Second) of Torts § 313(2).

See publication Words and Phrases for other judicial constructions and definitions.

3. Damages ⇨50

Parents of triplets born after in vitro fertilization using donor sperm failed to establish that they suffered any bodily harm or physical injury supporting action for negligent infliction of emotional distress, due to university medical center's using sperm from a donor other than the one that the couple had allegedly selected; despite psychologist's affidavit that each parent suffered various physical conditions as a result of their emotional distress, parents denied having suffered any bodily harm as a result of alleged donor sperm mix-up in their sworn depositions. (Per Howe, C.J., with one Justice concurring, and one Justice concurring in the result.)

4. Judgment ⇨185(6)

In a summary judgment proceeding, when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy. (Per Howe, C.J., with one Justice concurring, and one Justice concurring in the result.)

5. Damages ⇨49.10

Parents of triplets born after in vitro fertilization using donor sperm failed to establish that alleged negligence of university medical center in using sperm from a donor other than the one that the couple had allegedly selected was of the type that was likely to cause severe and unmanageable mental distress in a reasonable person normally con-

distress suffered must be severe; it must be such that 'a reasonable [person,] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " 858 P.2d at 975. Such a threshold test is particularly necessary because the existence of and cause of a mental illness often is not obvious in a manner comparable to a physical injury or illness.

As a result of their fertility treatment, the Harnichers became the parents of three normal, healthy children whom the couple suggest do not look as much like David as different children might have and whose blood type could not be descended from his. This result thwarted the couple's intention to believe and represent that the triplets are David's biological children. Exposure to the truth about one's own situation cannot be considered an injury and has never been a tort. Therefore, destruction of a fiction cannot be grounds for either malpractice or negligent infliction of emotional distress.

The Harnichers' assertion that David did not want children unless they were biologically his own is belied by the couple's knowing consent to the use of donor sperm. Stephanie testified that she could say "with probability," without ever having seen either donor, that the children of donor # 183 would have been better looking than her triplets and that in her mind, she was damaged by that fact. During her deposition, she was asked and testified as follows:

> Q. Do you claim that you have been damaged any by the difference in personality or traits and characteristics inherited by your children versus what you think they would have inherited from 183?
>
> A. Definitely.
>
> Q. How have you been damaged?
>
> A. Feeling-wise, it hurts. I mean, it just—it saddens me.

Realistically, however, it is impossible to know whether the children of donor # 183 would have been superior in any way to the triplets or, indeed, whether the same number of babies or none at all would have resulted from the use of the less effective frozen sperm. The supposition that the road not taken would have led to a better result is a common human fallacy; it cannot support an action for negligent infliction of emotional distress. The Harnichers do not allege that the triplets are unhealthy, deformed, or deficient in any way. Nor do they claim any racial or ethnic mismatch between the triplets and their parents. In fact, the couple has presented no evidence at all that the physiological characteristics of three normal healthy children, which could not have been reliably predicted in any event, present circumstances with which " 'a reasonable [person,] normally constituted, would be unable to adequately cope.' " *Mountain Fuel*, 858 P.2d at 975.

CONCLUSION

As noted above, the section 313(1) rule does not give protection to mental and emotional tranquility per se. Consequently, much of the " 'emotional distress' which we endure ... is not compensable." *Thing v. La Chusa*, 48 Cal.3d 644, 257 Cal.Rptr. 865, 771 P.2d 814, 829 (1989) (denying recovery for negligent infliction of emotional distress where mother of injured child arrived at the scene after accident had already occurred). The Harnichers have failed to raise a triable issue of fact that they have suffered bodily harm. Furthermore, they have not shown that the Medical Center's alleged negligence is of the type that is likely to cause severe and unmanageable mental distress in a reasonable person normally constituted. *See Mountain Fuel*, 858 P.2d at 975. Therefore, we hold that the Harnichers have failed to "state a claim for negligent infliction of emotional distress, as this claim is defined in Utah." *Boucher*, 850 P.2d at 1182.

Affirmed.

ZIMMERMAN, J., concurs in Chief Justice HOWE's opinion.

RUSSON, J., concurs in the result.

DURHAM, Associate Chief Justice, dissenting:

On review of summary judgment, this court is obligated to view the facts in the light most favorable to the non-moving party and to find that there are no disputed issues