MINUTES

Advisory Committee on Model Civil Jury Instructions
December 12, 2016
4:00 p.m.

Present: Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Mark Dalton Dunn from the Emotional Distress subcommittee and Heather White from the Civil Rights subcommittee

Excused: Juli Blanch (chair), Gary L. Johnson, Patricia C. Kuendig

Mr. Fowler conducted the meeting in Ms. Blanch's absence.

1. *Minutes.* Mr. Fowler noticed a typo in the last line of paragraph 3.c of the minutes of November 14, 2016: the reference to CV1302 should be to CV1303 instead. Ms. Sylvester will make the correction. On motion of Mr. Von Maack, seconded by Judge Harris, the committee approved the minutes as corrected.

2. *Emotional Distress Instructions.* The committee continued its review of the Emotional Distress instructions. Mr. Dunn reported that the subcommittee had reviewed the instructions in light of *Candelaria v. CB Richard Ellis*, 2014 UT App 1, ¶ 1, 319 P.3d 708, and *Anderson Dev. Co. v. Tobias*, 2005 UT 36, 116 P.3d 323, as the committee had requested, and its review did not change its recommendations. Ms. Sylvester had circulated a memorandum before the meeting with the subcommittee's discussion of the cases and its conclusions.

a. *CV1505, Negligent infliction of emotional distress--direct victim; CV1506, Negligent infliction of emotional distress--bystander.* Judge Harris continued to question whether there was a meaningful legal difference between a direct-victim claim and a bystander claim. Mr. Simmons thought the distinction was in the damages recoverable; in a direct-victim claim the plaintiff is recovering for emotional distress the plaintiff suffered as a result of fearing for his or her own safety, whereas in a bystander claim the plaintiff is recovering for emotional distress the plaintiff suffers as a result of injury to a third person. But Judge Harris noted that in both cases the plaintiff is recovering for his or her own emotional distress. Judge Harris did not think the distinction affected the elements of the two claims and did not think that the current instructions adequately explained the distinction with respect to damages. In both cases, the plaintiff must have been within the zone of danger and can recover for his or her own emotional distress, whether from fearing for his or her own safety or fearing for the safety of another. Dr. Di Paolo did not think it mattered whether there was one instruction or two. Mr. Fowler agreed as long as a committee note explained that the committee intended the same instruction to apply to both so-called direct and bystander claims. The committee therefore revised CV1505 to

delete "Direct Victim" from the title and to list the elements of the claim as follows:

1. [name of defendant] was negligent;
2. [name of plaintiff] was in the zone of danger;
3. [name of plaintiff] feared for his own safety and/or witnessed injury to another; and
4. [name of plaintiff] suffered severe emotional distress.

Dr. Di Paolo noted that the last element needs to include a causation element. At her suggestion, the committee revised subparagraph 4 to read, "[name of plaintiff] suffered severe emotional distress as a result of [name of defendant]'s negligence."

Ms. Sylvester revised the committee note to delete the first paragraph, defining "zone of danger" (since a definition of "zone of danger" is included in the instructions themselves); to include a reference to CV202A for the definition of "negligent"; to include a reference to CV1507 for the definition of "zone of danger"; and to explain that the committee did not see any difference in the elements of a direct-victim and a bystander claim and intended the instruction to cover both. Mr. Dunn will consolidate the rest of the committee note to CV1505 with the committee note to CV1506, and CV1506 will be deleted. The subcommittee continued to think that bystander claims should be limited to cases involving an injury to a family member, but the committee thought that there was no controlling authority on point and that the committee note adequately addressed the issue. On motion of Judge Harris, seconded by Mr. Ferre, the committee approved the instruction as revised, subject to revisiting the final, revised committee note.

b. *CV1507, Definition of "zone of danger."* On motion of Judge Harris, seconded by Mr. Simmons, the committee approved the latest version of CV1507.

Mr. Dunn was excused.

3. *Civil Rights Instructions.* The committee continued its review of the Civil Rights instructions:

a. *CV1301, Section 1983 claim—elements.* Ms. White reported that the subcommittee had looked for a plain-language definition of "acting under color of state law." The Supreme Court has defined the term as "exercis[ing] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *W. v. Atkins,* 487 U.S. 42, 49 (1988).

The committee thought this definition too hard for lay jurors to understand. The committee had proposed revising the first element of the instruction to read, "First, that [name of defendant] was a state employee acting or pretending to act in an official capacity or exercising [his/her] responsibilities under state law." Dr. Di Paolo asked what "pretending" meant in this context–acting? trying to act? trying to deceive? Mr. Fowler suggested using "purporting" rather than "pretending"; some committee members thought "pretending" implies an intent to deceive, which is not required. Judge Harris noted that the proposed definition requires the defendant (1) to have acted or pretended to act or (2) to have exercised responsibility under state law and asked whether there was a difference between the two standards. Judge Stone questioned whether the language was broad enough to cover a failure to act when a state employee has a duty to act. The committee questioned whether acting under color of state law was even a question for the jury. Mr. Von Maack said it was a mixed question of law and fact. Ms. White noted that the issue does not come up often. Judge Harris suggested saying that the defendant "exercised or attempted to exercise power possessed by virtue of state law." Mr. Von Maack suggested that the essential elements were (1) that the defendant was a state actor, and (2) that he or she acted or failed to act in some official capacity. Ms. Sylvester suggested stating the element as "the defendant was a state employee who acted or attempted to act in his or her official capacity." Judge Harris thought "under state law" did not add anything. Mr. Simmons pointed out that the California pattern instruction, CACI 3000, says, "That [name of defendant] was acting or purporting to act in the performance of [his/her] official duties." Dr. Di Paolo preferred "pretending" to "purporting," while some committee members preferred "purporting." Judge Stone suggested "seeming." At Judge Harris's suggestion, the committee rewrote the first element to read, "First, that [name of defendant] was a state employee acting, purporting, or pretending to act in the performance of [his/her] official duties." Dr. Di Paolo suggested including a committee note saying that "purporting" may need to be explained to the jury. Ms. Sylvester said in the committee note that the first element was meant to define "acting under color of state law" as explained in *W. v. Atkin*, 487 U.S. 42, 49 (1988). On motion of Mr. Ferre, seconded by Judge Harris, the committee approved the instruction as revised. Mr. Von Maack dissented on the inclusion of "pretending" in the instruction, and Dr. Di Paolo dissented on the inclusion of "purporting."

Mr. Summerill was excused.

b. *CF1303, Warrantless arrest.* The committee had asked the subcommittee to confirm that an officer can only arrest with a warrant or, if the officer does not have a warrant, with probable cause. The subcommittee confirmed that that is the law. At Mr. Ferre's and Dr. Di Paolo's suggestion, the committee reversed the order of the first two paragraphs, and at Judge Harris's

suggestion, the committee deleted the phrase "without probable cause to believe he committed a crime" from the end of the new second paragraph. The committee also deleted "In this case" from the start of the third paragraph and combined the new second and third paragraphs. It also substituted "[name of defendant]" for the first and third blanks and substituted "[date]" for the second blank. On motion of Mr. Simmons, seconded by Judge Stone, the committee approved the instruction as revised.

c. *CV1304, Probable cause.* Ms. White suggested bracketing the last sentence of the instruction and questioned whether it was even necessary. Mr. Simmons and Dr. Di Paolo thought it was helpful, especially if evidence is admitted showing that the charges were dismissed. The committee thought the first paragraph was hard to understand. Judge Harris suggested starting it by saying, "Probable cause exists when a reasonably prudent person would believe that a crime has been committed and that the person arrested committed the crime." Ms. White and Mr. Simmons questioned whether the standard should be "a reasonably prudent person" or "a reasonable officer." The committee thought it was a "reasonable person" standard, not a "reasonable officer" standard, but Mr. Fowler pointed out that an officer may know things that a reasonable person may not know, such as the requirements of the law and where jurisdictional boundaries are. Judge Stone thought that probable cause just relates to the facts and circumstances and that an officer is always entitled to rely on his knowledge of the law. The committee deferred further discussion of CV1304 until the next meeting.

4. *Next meeting.* The next meeting will be Monday, January 9, 2017, at 4:00 p.m.

The meeting concluded at 6:00 p.m.