MINUTES
Advisory Committee on Model Civil Jury Instructions
February 11, 2019
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Joel Ferre, Marianna Di Paolo, Honorable Keith A. Kelly, Alyson McAllister, Douglas G. Mortensen, Lauren A. Shurman, Paul M. Simmons. Also present: Cameron M. Hancock of the Trespass and Nuisance subcommittee

Excused: Tracy H. Fowler, Ruth A. Shapiro, Peter W. Summerill

1. *Minutes*. On motion of Ms. McAllister, seconded by Mr. Mortensen, the committee approved the minutes of the January 15, 2019 meeting.

2. *Trespass and Nuisance Instructions*. The committee continued its review of the proposed trespass and nuisance instructions. At the last meeting, the committee had asked Ryan Beckstrom to ask the subcommittee to determine whether common-law claims for nuisance still exist given the nuisance statute. Mr. Hancock reported that Mr. Beckstrom looked into the matter and concluded that the two types of claims (statutory and common law) can co-exist. Mr. Beckstrom's memo, stating his conclusion and the reasons for it, was circulated with the agenda. Mr. Beckstrom found no evidence that the Utah Legislature intended the nuisance statute to preempt common-law nuisance claims. Mr. Beckstrom also proposed a new instruction stating the elements of a statutory nuisance claim, new CV1209.

Dr. Di Paolo joined the meeting

a. *CV1207, Nuisance--Introductory Instruction*. The committee revised the instruction to read:

> One person can interfere with the use or enjoyment of another person's property even without entering that other person's property. In some instances, the legal term for this is "nuisance."
>
> In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with [name of plaintiff]'s use or enjoyment of [his/her/its] property.
>
> [Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance, and seeks to recover damages from [name of defendant] for that harm.

At Mr. Mortensen's suggestion, the committee changed "economic injury" in the draft instruction to "harm." Mr. Hancock noted that, under *Turnbaugh v.*

Anderson, 793 P.2d 939 (Utah Ct. App. 1990), a private nuisance requires some interference with the use and enjoyment of land, but a possessor of land is allowed to recover "incidental damages for harms to his person or chattels" if there has been the necessary interference with the use and enjoyment of the plaintiff's property. *See* 793 P.2d at 942-43. Mr. Hancock offered to do more research on the damages recoverable in an action for private nuisance. On motion of Mr. Simmons, seconded by Ms. McAllister, the committee approved the instruction as revised.

b. *CV1208, Nuisance Per Se*. Mr. Simmons asked whether nuisance per se is defined as clearly as defamation per se, that is, whether there are certain activities that constitute nuisance as a matter of law. Mr. Hancock and Ms. Shurman noted that the activity has to be specifically prohibited by statute. Utah Code sections 78B-6-1101(2) & (3) & -1107 define certain activities as a "nuisance." But Mr. Hancock thought that there may be others, and the committee note was revised to say so. Dr. Di Paolo noted that the phrase "as a matter of law" is meaningless to lay people. The committee revised the instruction to read:

> The court has determined that, under the law, [name of defendant]'s conduct, [describe the conduct, action, or thing], constitutes a nuisance.

On motion of Ms. Shurman, seconded by Mr. Mortensen, the committee approved the instruction as revised.

Judge Kelly joined the meeting.

c. *CV1209, Statutory Nuisance Claim*. Ms. Shurman and Ms. McAllister questioned the phrase "enjoyment of life" in subparagraph 2. Mr. Hancock noted that that language is in the statute (section 78B-6-1101(1)). CV1209 was based on subsection (1) of section 78B-6-1101. The committee debated whether subsection (6) should also be included in the instruction. Subsection (6) states: "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance." Mr. Hancock thought that subsection (6) set forth a standing requirement and that standing was for the court, not the jury, to decide. The issue would necessarily be resolved before the case ever went to the jury. Judge Kelly, on the other hand, thought that if there was a chance that a losing defendant could get the verdict overturned because the jury had not made a specific finding as to the requirements of subsection (6), they should be included in the instruction defining a statutory nuisance claim. He suggested starting the instruction with

subsection (6). Dr. Di Paolo thought the statutory language, such as "injuriously affected," would be hard for jurors to understand. She thought subsection (6) was vague. Ms. Shurman agreed. She thought that the phrase "whose personal enjoyment is lessened by the nuisance" should be revised to make clear that it is the plaintiff's personal enjoyment of his property that must be lessened by the nuisance. Dr. Di Paolo also thought that the instruction did not clearly tell the jury what it was supposed to do. She noted that other instructions have been phrased, "You must decide . . . ," not "[Name of plaintiff] must show . . . ." Dr. Di Paolo and other committee members also noted that subsections (1) and (6) were not entirely consistent. Dr. Di Paolo also noted that the instruction should say to whom the activity must be injurious or offensive. Judge Stone noted that a property owner may have a claim for nuisance if, for example, a strip club goes in next door to his property, even though the activity may not be offensive to him personally, as long as it lowers the value of his property. Dr. Di Paolo noted that subsection (1) of the statute does not contain separate elements, joined by "so as to," but the "so as to" phrase limits the preceding phrase. She also recommended deleting "free" from before "use of property," noting that jurors will likely misunderstand "free" in that context and think it has to do with the use of property without charge. The committee was reluctant to stray too far from the statutory language and decided to leave it to the attorneys to argue what the statutory language means, absent statutory definitions or case law defining the terms. The committee revised the instruction to read:

> You must decide whether [name of plaintiff] has established a statutory claim for nuisance.
>
> To establish a statutory claim of nuisance, [name of plaintiff] must show that [name of defendant]'s [describe the conduct, action, or thing]:
>
> 1. Was injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property; and
>
> 2. [Name of plaintiff]'s property was injuriously affected or plaintiff's personal enjoyment was lessened by [describe the conduct, action, or thing].

The committee also added the following paragraph to the beginning of the committee note:

> The committee adhered to the statutory language and did not attempt to use plainer language. The Legislature has yet to define it, and an appellate court has yet to interpret it.

Judge Stone noted that the statute has existed for some time in one form or another and suggested that the subcommittee look at cases construing prior versions of the statute to see if they answer some of the questions committee members have raised about the proper interpretation of the statute. He noted, for example, that *Cannon v. Neuberger,* 1 Utah 2d 396, 268 P.2d 425 (1954), appears to superimpose a reasonableness standard on the statutory text. Mr. Hancock agreed to look at this and other cases to see if they clarify the meaning of the statute.

3. *Next meeting*. The next meeting is Monday, March 11, 2019, at 4:00 p.m.

Ms. McAllister moved to adjourn, seconded by Ms. Shurman. The meeting adjourned at 6:00 p.m.