Agenda
Advisory Committee on Model Civil Jury Instructions

April 8, 2019
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 and approval of minutes	Tab 1	Judge Andrew Stone, Chair
Subcommittees and subject area timelines	Tab 2	Judge Andrew Stone
Trespass and Nuisance Instructions	Tab 3	Cameron Hancock, Ryan Beckstrom
Uniformity	Tab 4	Judge Keith Kelly, Alyson McAllister, Lauren Shurman
Other business		Judge Andrew Stone

Committee Web Page

Published Instructions

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

May 13, 2019
June 10, 2019
September 9, 2019
October 15, 2019 (Tuesday)
November 12, 2019 (Tuesday)
December 9, 2019

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 11, 2019
4:10 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Marianna Di Paolo, Alyson McAllister, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill

Excused: Joel Ferre, Tracy H. Fowler, Honorable Keith A. Kelly, Douglas G. Mortensen

1. *Minutes*. On motion of Mr. Simmons, seconded by Ms. McAllister, the committee approved the minutes of the February 11, 2019 meeting.

2. *Trespass and Nuisance Instructions*. Because no one from the Trespass and Nuisance subcommittee was present, the committee deferred further review of the proposed trespass and nuisance instructions until the next meeting.

3. *Uniformity*. Judge Stone noted that judges are encouraged to use the MUJI 2d instructions. He thought that, as much as possible, the model instructions should be the same regardless of whether the case is a civil case or a criminal case. A subcommittee of Judge Kelly, Ms. McAllister, and Ms. Shurman reviewed the general criminal instructions, compared them with the general civil instructions, and made recommendations to bring the two sets of instructions more in line with each other. Judge Stone noted that, if the committee thinks the relevant civil instruction is better, it should stick with it, but if the committee thinks the relevant criminal instruction is better, it should adopt it and not let pride of authorship stand in the way. But if both instructions are equally good, Judge Stone thought the committee should favor uniformity with the criminal instructions.

Ms. McAllister explained that the subcommittee came up with two subsets of instructions--(1) those instructions that are in the criminal instructions but are not in the civil instructions (CR201-06, proposed CV151-56), and (2) those criminal instructions that it thought were better than the current civil instructions (CR105, CR110, CR210 modified, CR207, and CR216-17 modified). The subcommittee also thought that the current civil general instructions should be divided up between those that are best given at the beginning of the trial and those that are best given at the close of evidence.

The committee discussed the following proposed instructions:

a. *CV151, Closing Roadmap*. Judge Stone noted that none of the proposed instructions had titles. The committee adopted the titles for the corresponding criminal instructions. Judge Stone also thought that new CV151 was already covered in CV104, Order of trial. Ms. McAllister noted that CV104 is

meant to be given at the beginning of the trial, and CV151 is meant to be given before the jury starts its deliberations. Dr. Di Paolo thought that CV151 did not tell the jury *what* to discuss, whereas CV104 says that the jurors are to discuss "the evidence and the instructions among yourselves until you reach a verdict." She suggested adding this language to CV151. Some committee members thought that the next instruction, CV152, told the jury what to discuss. Dr. Di Paolo thought that it was not clear how the instructions fit together. Ms. Shapiro thought that it may be more harmful than helpful to give too many general instructions; she thought that jurors tended to tune out after a while. Judge Stone noted that, in his experience, jurors do not complain about the length of the instructions; they complain about the length of argument. But he also thought that CV152 interrupted the flow of the instructions. The committee revised the instructions to combine CV151 and CV152 so that CV151 now reads:

> Members of the jury, you now have all the evidence. Three things remain to be done:
>
> First, I will give you additional instructions that you will follow in deciding this case.
>
> Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal.
>
> Finally, you will go to the jury room to decide the case.
>
> In the jury room you will have two main duties as jurors.
>
> First, you will decide from the evidence what the facts are. You may draw all reasonable inferences from that evidence.
>
> Second, you will take the law I give you in the instructions, apply it to the facts, and reach a verdict.

The committee deleted the rest of CV152/CR202 because the concepts are covered in the introductory general instructions.

b. *CV152, Closing Argument*. The committee adopted CR203 as CV152.

c. *CV154, Legal Rulings, and CV155, Judicial Neutrality*. Ms. Shapiro asked whether proposed CV154-55 (CR204-05) were adequately covered by

CV128, Objections and rulings on evidence and procedure. The committee decided to adopt CR204 and CR205 as CV153 and CV154 respectively.

d. *CV156, Evidence Closing*. Judge Stone thought that CV156 (CR206) was incomplete; it does not include judicially noticed facts, for example, and a pretrial ruling may establish a fact that the jury must accept as true. Mr. Simmons suggested adding to the list of "evidence" "any facts that I have told you to accept as true." Mr. Summerill agreed that the instruction was not a complete statement of the law. He thought it should use the definition of "evidence" in CV119, Evidence, namely, "'Evidence' is anything that tends to prove or disprove a disputed fact." He noted that once an instruction starts listing things, jurors think that they cannot consider anything else, and it would be too cumbersome to list everything that could possibly be considered "evidence," such as demonstrative exhibits and expert opinion testimony. Dr. Di Paolo and Ms. Shapiro thought that the important thing to say in CV156 was that arguments of counsel are not evidence. They questioned whether the instruction was necessary. Ms. McAllister thought that the sentence, "You may also draw all reasonable inferences from that evidence" was important to include in the instructions. The committee added it to new CV151. The committee decided that, with that change, CV156/CR206 was not necessary and deleted it.

e. *CV137-40*. Ms. Shurman explained that the subcommittee thought that the general instructions should be divided into those that should be given at the beginning of the trial and those that should be given at the end of the trial, after the presentation of evidence. A committee note could explain that it may be appropriate to include some instructions both in the introductory instructions and in the concluding instructions. The subcommittee recommended that current instructions CV137 through CV140 should be moved to the end of the instructions, that is, to the concluding or post-evidence instructions.

Ms. Sylvester volunteered to circulate revised general instructions so that the committee could review them in context. The committee deferred voting on whether to approve the instructions until the committee could review all the general instructions in context.

4. *Next meeting*. The next meeting is Monday, April 8, 2019, at 4:00 p.m.

On motion of Mr. Summerill, the meeting concluded at 5:40 p.m.

Tab 2

Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back/Notes
Trespass and Nuisance	Yes	Hancock, Cameron; Abbott, Nelson (P); Steve Combe (D)	November-18	April-19	
Uniformity	Yes	Judge Keith Kelly (chair), Alyson McAllister, Lauren Shurman	February-19	May-19	
Implicit Bias	TBD	Judge Su Chon (chair)	TBD	TBD	
Products Liability	Yes	Tracy Fowler, Nelson Abbott, and Todd Wahlquist	June-19	October-19	Time to update due to significant changes in case law.
Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	TBD	TBD	
Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	TBD	TBD	
Unjust Enrichment	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Abuse of Process	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	TBD	TBD	
Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	TBD	TBD	Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area.
Civil Rights: Set 2	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)	TBD	TBD	
Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	TBD	TBD	

Tab 3

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

MUJI Committee minutes

Ryan Beckstrom <rbeckstrom@kmclaw.com> Tue, Mar 5, 2019 at 10:51 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>
Cc: "Cameron M. Hancock" <chancock@kmclaw.com>, Diane Olson <dolson@kmclaw.com>

Nancy,

See my analysis and suggestions on the currently pending questions below:

DAMAGES

In Walker Drug, the Utah Supreme Court acknowledged implicitly that damages for trespass and nuisance are the same by lumping them together in explaining what damages are available "in trespass and nuisance cases." *See Walker Drug Co. v. La Sal Oil Co.,* 972 P.2d 1238, 1246 (Utah 1998). Accordingly, we recommend including in the nuisance damages instruction a comment/note similar to the one added to the trespass damages instruction, with one addition found in *Turnbaugh* related to "incidental" damages for nuisance. A proposed damages instruction, with a committee note, follows:

> CV1211 DAMAGES FOR NUISANCE
>
> Once you have determined that defendant is liable for creating a nuisance, you may consider evidence of the degree of a defendant's interference in the use and enjoyment of [name of plaintiff]'s land and the reasonableness of the interference in the context of wider community interests to determine the amount of damages recoverable once liability is established.
>
> Specifically, if you find that [name of Defendant]'s actions are a nuisance, you may award economic, non-economic, incidental, or nominal damages to [name of plaintiff].
>
> References:
>
> *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245 (Utah 1998)
>
> Committee note: For a definition of economic and non-economic damages, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a nuisance, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in a nuisance case may include the addition of discomfort and annoyance to CV2004's list of considerations. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998). As noted above, a possessor of land may be allowed to recover "incidental damages for harms to his person or chattels" in an action for nuisance. *See Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 942–43 (Utah Ct. App. 1990).

STATUTORY NUISANCE

It is apparent from a survey of cases that Utah courts have required nuisances to be "unreasonable" or "unlawful" to be actionable, even when the case is analyzed under the statute. Notably, it is still unclear if this stems from the historical conflation of common-law and statutory claims, as we have not found any cases that analyze common-law and statutory nuisance as separate and distinct claims. However, Utah law supports reading a "reasonableness" requirement into the statute because the right to be free from annoyance has never been "absolute" and "extreme rights" are not recognized. *See Dahl v. Utah Oil Ref. Co.,* 262 P. 269, 273 (Utah 1927). The plain statutory language, without a reasonableness check, would open property owners to nuisance suits simply because their otherwise lawful actions annoy their neighbors. The following redlines add a "reasonableness" requirement to the statutory elements.

CV1209 STATUTORY NUISANCE CLAIM

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;

2) [name of defendant]'s conduct was unreasonable or unlawful; and

3) [name of plaintiff]'s property was injuriously affected or plaintiff's personal enjoyment was lessened by [describe the conduct, action, or thing].

To determine if a use is "reasonable" or "unreasonable," you should consider things such as the specific location where the nuisance is alleged, the nature and value of [name of defendant]'s use of its property, the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]'s life, health and property.

References:

Utah Code § 78B-6-1101 et al.

Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)

Dahl v. Utah Oil Ref. Co., 262 P. 269, 273 (Utah 1927)

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.

The statute provides specific instructions for when tobacco smoke, manufacturing and agricultural operations, and certain types of criminal activity may or may not be considered a nuisance. Those specific statutory causes of action and exceptions to

nuisance liability are not included herein, but specially tailored instructions may be warranted in cases involving those statutory provisions.

[Quoted text hidden]

MUJI 2nd Trespass and Nuisance Jury Instructions

CV1201 TRESPASS TO REAL PROPERTY. Approved January 15, 2019.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

1. [name of plaintiff] [owned/lawfully possessed] the property;
2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property by physically entering or encroaching upon [or causing some thing to physically enter or encroach upon] [name of plaintiff]'s land;
3. [name of defendant] intended to perform the act that resulted in the unlawful entry or encroachment upon [name of plaintiff]'s property; and
4. [name of defendant] had no right to do the act that constituted the unlawful entry or encroachment upon [name of plaintiff]'s property.

References:

Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., 2006 UT App 387, ¶ 4, 145 P.3d 1177

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

John Price Associates v. Utah State Conference, 615 P.2d 1210 (Utah 1980)

Wood v. Myrup, 681 P.2d 1255 (Utah 1984)

CV1202 TRESPASS TO PERSONAL PROPERTY. Approved January 15, 2019.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

1. [name of plaintiff] had [ownership/lawful possession] of the property at the time of the alleged trespass;

2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property, by [specify briefly the acts alleged to constitute wrongful interference with [name of plaintiff]'s personal property];

3. [name of defendant] intended to perform the act that amounted to the unlawful interference with the personal property of [name of plaintiff]; and

4. [name of defendant] had no right to do the act that constituted the interference with the personal property of [name of plaintiff].

References:

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

Peterson v. Petterson, 117 P. 70, 71 (Utah 1911)

CV1203 CONSENT. Approved January 15, 2019.

[Name of defendant] asserts that [he/she/it] was given consent by [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

[Name of defendant] is not liable for trespass if [he/she/it] can establish that [name of plaintiff] consented to the entry or encroachment upon the property, but only to the extent that the entire entry or encroachment was authorized.

Consent means permission to enter or encroach upon property was communicated. Consent can be expressed or implied.

Comment: The MUJI 1 instructions enumerated express and implied consent separately. But the Utah case law speaks only of consent, which may be express or implied.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

CV1204 IMPLIED CONSENT - CUSTOM AND USAGE. Approved January 15, 2019.

[name of defendant] asserts that [name of defendant] had the implied consent of [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

Consent is an absolute defense to an action for trespass. Consent for [use of/entry upon] real property need not be expressly given but may be implied from the circumstances. The implied consent may be derived from custom, usage, or conduct. Therefore, [name of defendant] is not liable for trespass if [name of defendant] can show that:

1. [name of defendant] was a member of a category of persons for whom [use of/entry upon] the property would be considered customary or common;
2. [name of defendant]'s [use of/entry upon] [name of plaintiff]'s property was within the fair and reasonable bounds of the implied consent to [use/enter upon] the property; and
3. [name of plaintiff] did not indicate, either verbally or by posted signs on the property, that [name of plaintiff] did not consent to the entry.

References:
Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33
Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Restatement (Second) of Torts § 252 (1965)

CV1205 DAMAGES - NOMINAL DAMAGES. Approved January 15, 2019.

If you found that [name of defendant] trespassed [name of plaintiff]'s [real/personal] property, you may award economic, non-economic, or nominal damages to [name of plaintiff].

Even if you find that no actual damage was suffered by [name of plaintiff] as a result of [name of defendant]'s trespass, you may still award [name of plaintiff] a trivial amount, called "nominal damages," to compensate [name of plaintiff] for the invasion of [name of plaintiff]'s property rights. "Nominal damages" has been defined as a trivial sum such as one dollar.

References:
Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988)

Comment: For a definition of economic and non-economic instructions, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a trespass, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in trespass may include the addition of discomfort and annoyance to CV2004's list of considerations. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998).

CV1206 NUISANCE - INTRODUCTORY INSTRUCTION. Approved February 11, 2019.

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.

References:
Utah Code § 76-10-801
Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah ~~Ct.~~ App. 1990)

CV1207 NUISANCE PER SE. Approved February 11, 2019.

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

References:
Utah Code § 78B-6-1101 (defining certain nuisances)
Erickson v. Sorensen, 877 P.2d 144, 149 (Utah App. 1994)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah ~~Ct.~~ App. 1990)

Committee note:
This instruction will only be given when the court has already made a determination that the conduct constitutes nuisance per se. Utah Code §§ 78B-6-1101 and 78B-6-1107 list some things that constitute nuisance per se, but there may be others. A nuisance per se exists when the conduct creating the nuisance is specifically prohibited by statute.

CV1208 STATUTORY NUISANCE CLAIM

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;
2) [name of defendant]'s conduct was unreasonable or unlawful; and
3) [name of plaintiff]'s property was injuriously affected or plaintiff's personal enjoyment was lessened by [describe the conduct, action, or thing].

To determine if a use is "reasonable" or "unreasonable," you should consider things such as the specific location where the nuisance is alleged, the nature and value of [name of defendant]'s use of its property, the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]'s life, health and property.

References:
Utah Code § 78B-6-1101 et al.
Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)

Dahl v. Utah Oil Ref. Co., 262 P. 269, 273 (Utah 1927)

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.

The statute provides specific instructions for when tobacco smoke, manufacturing and agricultural operations, and certain types of criminal activity may or may not be considered a nuisance. Those specific statutory causes of action and exceptions to nuisance liability are not included herein, but specially tailored instructions may be warranted in cases involving those statutory provisions.

CV1209 COMMON LAW PRIVATE NUISANCE CLAIM

A private nuisance is any activity that substantially and unreasonably interferes with the use and enjoyment by another of that person's property, other than by entering upon it.

[Name of plaintiff] claims that [name of defendant] has interfered with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property by [specify nature of alleged nuisance].

To establish [name of Plaintiff]'s claim for private nuisance, you must find that:
1. [name of plaintiff] owned or possessed an actual property interest in the real property that is the subject of this action;
2. Defendant caused or was responsible for a substantial interference with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property;
3. [name of plaintiff][name of defendant]'s use of the property was either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable.

[Name of defendant]'s use of its property may be "unreasonable" under circumstances where the harm caused by [name of defendant]'s activity outweighs any benefits it produces, and the activity is not suitable to the location.

Comment [NS1]: Is this "and" or "or?"

A "substantial interference" with [name of plaintiff]'s use and enjoyment of the land is typically one that results in substantial annoyance, discomfort, or harm, which is measured by what would be offensive to a reasonable person—or one who has ordinary health and ordinary and reasonable sensitivities.

An unintentional use that is "otherwise actionable" is generally one that negligent or reckless, or that results in abnormally dangerous conditions or activities in an inappropriate place.

Comment [RB2]: Not sure if these should be their own definitional instructions or included here under the elements for the benefit of the jury in interpreting the elements.

References:
Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Stanford v. Univ. of Utah, 488 P.2d 741 (Utah 1971)
Johnson v. Mount Ogden Enterprises, Inc., 460 P.2d 333 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

CV1210 PUBLIC NUISANCE

To establish [name of plaintiff]'s claim that defendant created a public nuisance, you must find:

1. The alleged nuisance consists of unlawfully doing any act or omitting to perform any duty;
2. [name of defendant]'s conduct was unreasonable;
3. The act or omission either
    a. Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;
    b. Offends public decency;
    c. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway; or
    d. In any way renders three or more persons insecure in life or the use of property.
4. Plaintiff has suffered damages different from those of society at large.

An act which affects three or more persons in any of the ways specified in this instruction is still a nuisance regardless of the extent of annoyance and regardless of whether the damage inflicted on individuals is unequal.

References:
Utah Code § 76-10-803 (2009)
Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d (Utah 1976)
Monroe City v. Arnold, 452 P.2d 321 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Erickson v. Sorensen, 877 P.2d 144, 148 (Utah App. 1994)

CV1211DAMAGES FOR NUISANCE

Once you have determined that defendant is liable for creating a nuisance, you may consider evidence of the degree of a defendant's interference in the use and enjoyment of [name of plaintiff]'s land and the reasonableness of the interference in the context of wider community interests to determine the amount of damages recoverable once liability is established.

Specifically, if you find that [name of defendant]'s actions are a nuisance, you may award economic, non-economic, incidental, or nominal damages to [name of plaintiff].

References:
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

Committee note:
For a definition of economic and non-economic damages, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a nuisance, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in a nuisance case may include the addition of

discomfort and annoyance to CV2004's list of considerations. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998). As noted above, a possessor of land may be allowed to recover "incidental damages for harms to his person or chattels" in an action for nuisance. See *Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 942–43 (Utah Ct. App. 1990).

Tab 4

MUJI 2D GENERAL INSTRUCTIONS

Table of Contents

MUJI 2d GENERAL INSTRUCTIONS

OPENING INSTRUCTIONS

CV101 GENERAL ADMONITIONS.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, ~~Blackberries,~~ iPhones, Smartphones, ~~PDAs,~~ or any social media or electronic device.

You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, Twitter~~MySpace~~, LinkedIn, or any other social media.

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References

CACI 100

MUJI 1st Instruction

1.1; 2.4.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:

~~9/2011.~~

CV101A GENERAL ADMONITIONS. (SELF-REPRESENTED LITIGANT VERSION)

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, ~~Blackberries,~~ iPhones, Smartphones, ~~PDAs,~~ or any social media or electronic device. You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, Twitter~~MySpace,~~ LinkedIn, or any other social media. You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

[Name of plaintiff] [name of defendant] is representing him/herself.

[Name of defendant] [name of plaintiff] is represented by _____.

[Name of plaintiff], [name of defendant], attorneys for the [plaintiff][defense] and witnesses are not allowed to speak with you during the case. When you see [plaintiff's] [defendant's] attorneys at a recess or pass them in the halls and they do not speak to you, they are not being rude or unfriendly – they are simply following the law.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom. Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References

MUJI CV 101.

Preliminary Jury Instructions for use with self-represented litigants, U.S. District Court, Eastern District of California.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:

~~12/2013~~

CV101B FURTHER ADMONITION ABOUT ELECTRONIC DEVICES.

Removed 9/2011. Incorporated into CV 101.

CV102 ROLE OF JUDGE, JURY AND LAWYERS.~~ROLE OF THE JUDGE, JURY AND LAWYERS.~~

Replaced with CR105

All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:

As the judge I will supervise the trial, decide legal issues, and instruct you on the law.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

The lawyers will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

References

Utah Code Ann. § 77-17-10(1).

Utah Code Ann. § 78A-2-201.

State v. Sisneros, 631 P.2d 856, 859 (Utah 1981).

State v. Gleason, 40 P.2d 222, 226 (Utah 1935).

75 Am. Jur.2d Trial §§ 714, 719, 817.

~~You and I and the lawyers play important but different roles in the trial.~~

~~I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.~~

~~You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.~~

~~The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.~~

~~Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.~~

MUJI 1st Instruction

1.5; 2.2; 2.5; 2.6.

Amended Dates:

~~9/2011.~~

CV102A ROLE OF THE JUDGE, JURY, PARTIES, LAWYERS. (SELF-REPRESENTED LITIGANT VERSION)

You and I and [name of plaintiff] [name of defendant] and the lawyers play important but different roles in the trial.

I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.

You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.

The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.

It is the self-represented [plaintiff] [defendant] and [plaintiff] [defense] counsel's duty to object when the other side offers testimony or other evidence that the self-represented [plaintiff] [defendant] or [plaintiff][defense] counsel believes is not admissible. You should not be unfair or prejudiced against the self-represented [plaintiff] [defendant], [plaintiff] [defense] counsel, or [plaintiff] [defendant] because the self-represented [plaintiff] [defendant] or [plaintiff] [defense] counsel has made objections. Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.

References

MUJI CV 102.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

12/2013

CV103 NATURE OF THE CASE.

In this case [Name of plaintiff] seeks [describe claim].

[Name of defendant] [denies liability, etc.].

[Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.,] seeking [describe claim].

MUJI 1st Instruction

1.1.

Amended Dates:

9/2011.

CV104 ORDER OF TRIAL.

The trial will proceed as follows:

(1) The lawyers will make opening statements, outlining what the case is about and what they think the evidence will show.

(2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may allow the parties to later offer more evidence.

(3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law. You must follow the law as I explain it to you, even if you do not agree with it.

(4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.

(5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.

MUJI 1st Instruction

1.2.

Amended Dates:

9/2011.

CV105 SEQUENCE OF INSTRUCTIONS NOT SIGNIFICANT.

The order in which I give the instructions has no significance. You must consider the instructions in their entirety, giving them all equal weight. I do not intend to emphasize any particular instruction, and neither should you.

MUJI 1st Instruction

2.1.

Amended Dates:

9/2011.

CV106 JURORS MUST FOLLOW THE INSTRUCTIONS.

Removed 9/2011. Incorporated into CV 102.

MUJI 1st Instruction

1.5.

CV107 JURORS MAY NOT DECIDE BASED ON SYMPATHY, PASSION AND PREJUDICE.

You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice. You must not decide for or against anyone because you feel sorry for or angry at anyone.

MUJI 1st Instruction

2.3.

Amended Dates:

9/2011

CV108 NOTE-TAKING.

Replaced with CR110

Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.

~~You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. [I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.]~~

References

URCP 47(n).

MUJI 1st Instruction

1.6.

Committee Notes

The judge may instruct the jurors on what to do with their notes at the end of each day and at the end of the trial.

Amended Dates:

~~9/2011.~~

CV110 RULES APPLICABLE TO RECESSES.

Removed 9/2011. Incorporated into CV 101.

MUJI 1st Instruction

1.8; 1.7

CV111A DEFINITION OF "PERSON."

"Person" means an individual, corporation, organization, or other legal entity.

Amended Dates:

9/2011.

CV111B ALL PERSONS EQUAL BEFORE THE LAW.

The fact that one party is a natural person and another party is a [corporation/partnership/other legal entity] should not play any part in your deliberations. You must decide this case as if it were between individuals.

MUJI 1st Instruction

2.8.

Amended Dates:

9/2011.

CV112 MULTIPLE PARTIES.

There are multiple parties in this case, and each party is entitled to have its claims or defenses considered on their own merits. You must evaluate the evidence fairly and separately as to each plaintiff and each defendant. Unless otherwise instructed, all instructions apply to all parties.

Amended Dates:

9/2011.

CV113 MULTIPLE PLAINTIFFS.

Although there are _____ plaintiffs, that does not mean that they are equally entitled to recover or that any of them is entitled to recover. [Name of defendant] is entitled to a fair consideration of [his] defense against each plaintiff, just as each plaintiff is entitled to a fair consideration of [his] claim against [name of defendant].

MUJI 1st Instruction

2.21.

Amended Dates:

9/2011.

CV114 MULTIPLE DEFENDANTS.

Although there are _____ defendants, that does not mean that they are equally liable or that any of them is liable. Each defendant is entitled to a fair consideration of [his] defense against each of [name of plaintiff]'s claims. If you conclude that one defendant is liable, that does not necessarily mean that one or more of the other defendants are liable.

MUJI 1st Instruction

2.22.

Amended Dates:

9/2011.

CV115 SETTLING PARTIES.

[Name of persons] have reached a settlement agreement.

There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling person], were at fault.

You must not consider the settlement as a reflection of the strengths or weaknesses of any person's position. You may consider the settlement in deciding how believable a witness is.

References

Slusher v. Ospital, 777 P.2d 437 (Utah 1989).

Paulos v. Covenant Transp., Inc., 2004 UT App 35 (Utah App. 2004).

Child v. Gonda, 972 P.2d 425 (Utah App. 1998).

URE 408.

MUJI 1st Instruction

2.24.

Committee Notes

The judge and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).

Substitute other legal concepts if "fault" is not relevant. For example, in commercial disputes.

Amended Dates:

9/2011.

CV116 DISCONTINUANCE AS TO SOME DEFENDANTS.

[Name of defendant] is no longer involved in this case because [explain reasons]. But you must still decide whether fault should be allocated to [name of defendant] as if [he] were still a party.

MUJI 1st Instruction

2.23.

Committee Notes

This instruction should be given at the time the party is dismissed. The court should explain the reasons why the defendants have been dismissed to the extent possible. If allocation of fault to the dismissed party is not appropriate under applicable law the final sentence should not be given.

CV117 PREPONDERANCE OF THE EVIDENCE.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence, that the fact is more likely to be true than not true.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

[Now] [At the close of the trial] I will instruct you in more detail about the specific elements that must be proved.

References

Johns v. Shulsen, 717 P.2d 1336 (Utah 1986).

Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972).

Alvarado v. Tucker, 268 P.2d 986 (Utah 1954).

Hansen v. Hansen, 958 P.2d 931 (Utah App. 1998)

MUJI 1st Instruction

2.16; 2.18.

Amended Dates:

9/2011

CV118 CLEAR AND CONVINCING EVIDENCE.

Some facts in this case must be proved by a higher level of proof called "clear and convincing evidence." When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact.

Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

References

Essential Botanical Farms, LC v. Kay, 2011 UT 71.

Jardine v. Archibald, 279 P.2d 454 (Utah 1955).

Greener v. Greener, 212 P.2d 194 (Utah 1949).

See also, *Kirchgestner v. Denver & R.G.W.R. Co.*, 233 P.2d 699 (Utah 1951).

MUJI 1st Instruction

2.19.

Committee Notes

In giving the instruction on clear and convincing evidence, the judge should specify which elements must be held to this higher standard. This might be done in an instruction and/or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case.

Amended Dates:

9/2011.

CV119 EVIDENCE.

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

The lawyers might stipulate—or agree—to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually are not evidence.

You are to consider only the evidence in the case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

MUJI 1st Instruction

1.3; 2.4.

Amended Dates:

9/2011.

CV119A EVIDENCE. (SELF-REPRESENTED LITIGANT VERSION)

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by pro se [plaintiff] [defendant] and [plaintiff] [defense] counsel are not evidence. Pro se [plaintiff] [defendant] when acting as counsel and [plaintiff] [defense] counsel are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way they have stated them, your memory of them controls. However, pro se [plaintiff] [defendant]'s statements as a witness are evidence.

(2) Questions and objections by pro se [plaintiff] [defendant] and [plaintiff] [defense] counsel are not evidence.

The lawyers might stipulate -- or agree -- to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually is not evidence.

You are to consider only the evidence in this case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

References

CV 119.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

November 2013.

CV120 DIRECT ~~AND~~ /CIRCUMSTANTIAL EVIDENCE.

Replaced with CR210 (modified)

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

~~A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.~~

MUJI 1st Instruction

2.17.

References

29 Am. Jur.2d Evidence § 4.
29 Am. Jur.2d Evidence § 1468.

Amended Dates:

~~9/2011.~~

CV121 ~~BELIEVABILITY OF WITNESSES.~~WITNESS CREDIBILITY.

CV121-123 replaced with CR207

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?

- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

References

Utah Code Ann. § 78B-1-128.

United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).

Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).

Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955).

State v. Shockley, 80 P. 865, 879 (1905).

75 Am. Jur.2d Trial § 819.

~~Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:~~

~~(1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?~~

~~(2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?~~

~~(3) Demeanor. Is there anything about the witness's appearance, conduct or actions that causes you to give more or less weight to the testimony?~~

~~(4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?~~

~~(5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?~~

~~(6) Memory. Does the witness's memory appear to be reliable?~~

~~(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?~~

~~These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.~~

MUJI 1st Instruction

2.9, 2.10, 2.11.

~~**CV122 INCONSISTENT STATEMENTS.**~~

~~You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.~~

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

~~2.10.~~

~~**CV123 EFFECT OF WILLFULLY FALSE TESTIMONY.**~~

~~If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.~~

~~**References**~~

~~*Gittens v. Lundberg*, 3 Utah 2d 392, 284 P.2d 1115 (1955).~~

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

~~2.11.~~

CV124 STIPULATED FACTS.

A stipulation is an agreement. Unless I instruct you otherwise, when the lawyers on both sides stipulate or agree to a fact, you must accept the stipulation as evidence and regard that fact as proved.

The parties have stipulated to the following facts:

[Here read stipulated facts.]

Since the parties have agreed on these facts, you must accept them as true for purposes of this case.

MUJI 1st Instruction

1.3; 1.4

Committee Notes

This instruction should be given at the time a stipulated fact is entered into the record.

CV125 JUDICIAL NOTICE.

I have taken judicial notice of [state the fact] for purposes of this trial. This means that you must accept the fact as true.

MUJI 1st Instruction

1.3.

Committee Notes

This instruction should be given at the time the court takes judicial notice of a fact.

CV126 DEPOSITIONS.

A deposition is the sworn testimony of a witness that was given previously, outside of court, with the lawyer for each party present and entitled to ask questions. Testimony provided in a deposition is evidence and may be read to you in court or may be seen on a video monitor. You should consider deposition testimony the same way that you would consider the testimony of a witness testifying in court.

MUJI 1st Instruction

2.12.

Amended Dates:

9/2011.

CV127 LIMITED PURPOSE EVIDENCE.

Some evidence is received for a limited purpose only. When I instruct you that an item of evidence has been received for a limited purpose, you must consider it only for that limited purpose.

MUJI 1st Instruction

1.3.

Amended Dates:

9/2011.

CV128 OBJECTIONS AND RULINGS ON EVIDENCE AND PROCEDURE.

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers. Lawyers on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to decide. Please be patient even though the case may seem to go slowly.

MUJI 1st Instruction

2.5.

CV129 STATEMENT OF OPINION.

Under limited circumstances, I will allow a witness to express an opinion. Consider opinion testimony as you would any other evidence, and give it the weight you think it deserves.

You may choose to rely on the opinion, but you are not required to do so.

If you find that a witness, in forming an opinion, has relied on a fact that has not been proved, or has been disproved, you may consider that in determining the value of the witness's opinion.

References

Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).

MUJI 1st Instruction

2.13; 2.14.

Committee Notes

This instruction may be given if an expert or another witness is permitted to express an opinion on a matter that the jury is capable of deciding with or without expert testimony. This instruction should not be given if the jury is required to rely on expert testimony to establish the standard of care or some other fact. See, for example, Instruction CV 326. Expert testimony required..

If the jury is required to rely on expert testimony for some decisions and is allowed to decide other facts with or without expert testimony, the court's instructions should distinguish for the jury which matters the jury must decide based only on expert testimony and which matters they may decide by giving the expert testimony the weight they think it deserves.

Amended Dates:

September, 2011; November 13, 2012.

CV130A CHARTS AND SUMMARIES AS EVIDENCE.

Charts and summaries that are received as evidence will be with you in the jury room when you deliberate, and you should consider the information contained in them as you would any other evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are introduced as evidence under URE 1006.

Amended Dates:

9/2011.

CV130B CHARTS AND SUMMARIES OF EVIDENCE.

Certain charts and summaries will be shown to you to help explain the evidence. However, these charts and summaries are not themselves evidence, and you will not have them in the jury room when you deliberate. You may consider them to the extent that they correctly reflect the evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are used only as demonstrative aids.

Amended Dates:

9/2011.

CV131 SPOLIATION.

I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You may assume that the evidence would have been unfavorable to [name of party].

References

Hills v. United Parcel Service, Inc., 2010 UT 39, 232 P.3d 1049.

Daynight, LLC v. Mobilight, Inc., 2011 UT App 28, 248 P.3d 1010.

Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994).

URCP 37(~~g~~e).

Committee Notes

Utah appellate courts have not recognized a cause of action for first-party spoliation (a claim against a party to the underlying action – or the party's attorney – who spoliates evidence

necessary or relevant to the plaintiff's claims against that party), or a cause of action for third-party spoliation (a stranger to the underlying action or a party not alleged to have committed the underlying tort as to which the loss or destroyed evidence is related). *Hills v. United Parcel Serv., Inc.*, 2010 UT 39, 232 P.3d 1049; *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415 (Utah Ct. App. 1994). Rule 37(~~g~~b), (e), however, expressly provides authority to trial courts to address spoliation of evidence by a litigant, including instructing the jury regarding an adverse inference. See, URCP 37(b)(7).~~2)(F).~~l

In *Daynight, LLC v. Mobilight, Inc.*, 2011 UT App. 28, 248 P.3d 1010, the Utah Court of Appeals observed that "spoliation under [Rule 37(e~~g~~)], meaning the destruction and permanent deprivation of evidence, is on a qualitatively different level than a simple discovery abuse under [Rule 37(b)~~(2)~~] which typically pertains only to a delay in the production of evidence. . . . [~~f~~R]ule 37(e~~g~~)] of the Utah Rules of Civil Procedure does not require a finding of 'willfulness, bad faith, fault or persistent dilatory tactics' or the violation of court orders before a court may sanction a party." Id. at ¶ 2.

The standard announced by the *Daynight* court differs from that employed by the United States Court of Appeals for the Tenth Circuit. Spoliation sanctions are proper in federal court when (1) a party has a duty to preserve evidence because it knew, or should have known the litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. If the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. Without a showing of bad faith, a district court may only impose lesser sanctions. *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009). In addition, it is appropriate for a federal trial court to consider "the degree of culpability of the party who lost or destroyed the evidence." *North v. Ford Motor Co.*, 505 F. Supp. 2d 1113, 1116 (D.Utah 2007).

The discussion by the Utah Court of Appeals in *Daynight* appears to indicate that even the negligent destruction of evidence will be sufficient to trigger a spoliation instruction without a finding of willfulness or bad faith.

Amended Dates:

9/2011.

~~CV135~~ CV132 OUT-OF-STATE OR OUT-OF-TOWN EXPERTS.

You may not discount the opinions of [name of expert] merely because of where [he] lives or practices.

References

Swan v. Lamb, 584 P.2d 814, 819 (Utah 1978).

MUJI 1st Instruction

6.30

Committee Notes

The committee was not unanimous in its approval of this instruction. Use it with caution.

~~CV136~~ CV133 CONFLICTING TESTIMONY OF EXPERTS.

In resolving any conflict that may exist in the testimony of [names of experts], you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

MUJI 1st Instruction

6.31

~~CV137 Selection of jury foreperson and deliberation.~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~Amended Dates:~~

~~9/2011.~~

~~CV138 Do not speculate or resort to chance.~~

~~When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.~~

~~If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.~~

~~References~~

~~Day v. Panos, 676 P.2d 403 (Utah 1984).~~

~~CV139 Agreement on special verdict.~~

~~I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.~~

~~Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.~~

~~As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.~~

~~Amended Dates:~~

~~9/2011.~~

~~CV140 Discussing the case after the trial.~~

~~Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.~~

~~You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them – or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.~~

~~If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.~~

~~Again, thank you for your service.~~

~~CV141~~ CV134 NO RECORD OF TESTIMONY.

At the end of trial, you must make your decision based on what you recall of the testimony. You will not have a transcript or recording of the witnesses' testimony. I urge you to pay close attention to the testimony as it is given.

Amended Dates:

~~Added 9/2011.~~

CLOSING INSTRUCTIONS

CV-151. CLOSING ROADMAP.

[from CR201, CR202]

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal.

Finally, you will go to the jury room to ~~discuss the evidence and the instructions and~~ decide the case.

~~INSTRUCTION NO. CV 152~~

~~[from CR202]~~

In the jury room you will ~~You~~ have two main duties as jurors.

First, you will decide from the evidence ~~The first is to decide from the evidence~~ what the facts are. You may draw all reasonable inferences from that evidence. ~~Deciding what the facts are is your job, not mine.~~

Second, you will ~~The second duty is to~~ take the law I give you in the instructions, apply it to the facts, and reach a verdict.

CV-152~~3~~. CLOSING ARGUMENTS.

[from CR203]

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the

lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

CV-1543. LEGAL RULINGS.

[from CR204]

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

• if I sustained an objection,

• if I did not accept evidence offered by one side or the other, or

• if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

CV-155154. JUDICIAL NEUTRALITY.

[from CR205]

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

CV137 CV155. FOREPERSON SELECTION AND DUTIES AND JURY DELIBERATIONS.SELECTION OF JURY FOREPERSON AND DELIBERATION.

CV 137 replaced with CR 216-217 (modified) and renumbered

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach an agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach an agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment.

~~In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~CV138~~ CV156. DO NOT SPECULATE OR RESORT TO CHANCE.

When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.

If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.

References

Day v. Panos, 676 P.2d 403 (Utah 1984).

~~CV139~~ CV157. AGREEMENT ON SPECIAL VERDICT.

I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.

Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.

As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.

~~CV140~~CV158. DISCUSSING THE CASE AFTER THE TRIAL.

Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.

You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them - or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.

If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.

Again, thank you for your service.