MINUTES

Advisory Committee on Model Civil Jury Instructions
May 13, 2019
4:35 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Alyson McAllister, Paul M. Simmons

Excused: Honorable Keith A. Kelly, Douglas G. Mortensen, Ruth A. Shapiro, Lauren A. Shurman, Peter W. Summerill

1. *Minutes*. On motion of Mr. Ferre, seconded by Mr. Fowler, the committee approved the minutes of the April 8, 2019 meeting.

2. *Trespass and Nuisance Instructions*. The committee continued its review of the Trespass and Nuisance Instructions.

a. *CV1211, Damages for Nuisance, and CV 1212, Noneconomic Damages for Nuisance*. The committee discussed whether a separate instruction on noneconomic damages for nuisance cases was necessary or whether it could be handled by adding a sentence to the committee note to the tort damage instruction on noneconomic damages, CV2004, that says that the court and parties may need to modify the instruction if inconvenience, annoyance, or discomfort are part of the claim. Judge Stone thought that a separate instruction was appropriate. The committee decided to go with a separate instruction but added a committee note to the instruction saying that the instruction "reflects the language of the case law on nuisance," but the parties "may also consider adapting CV2004." The instruction was not meant to foreclose other forms or descriptions of non-economic damages. For example, in a given case the parties or court may decide that "pain" better describes the plaintiff's damages than "discomfort" does. Mr. Ferre thought that the instructions contemplate a single instruction on noneconomic damages in nuisance cases--either CV1212, CV2004, or some combination or variation of the two instructions. Mr. Ferre moved to approve CV1211 and CV1212. Mr. Simmons noted that the first element of CV1211--"the degree of [name of defendant]'s interference in the use and enjoyment of [name of plaintiff]'s land"--may not apply in a public nuisance case, since a public nuisance does not necessarily have to involve an interference with land, and that other considerations might apply. The committee added a sentence to the committee note that says, "In public nuisance claims, the first element of interference in the use and enjoyment of land may not apply; there may be other factors to consider." With that addition, Mr. Ferre renewed his motion to approve CV1211 and CV1212. Mr. Simmons seconded the motion. The motion passed without opposition.

b. *CV1208, Statutory Nuisance Claim*. Dr. Di Paolo questioned the use of "statutory" in the title and the instruction, noting that most jurors' familiarity with the term begins and ends with "statutory rape." At Ms. McAllister's suggestion, the committee changed "statutory nuisance claim" to "a claim under the nuisance statutes." At Dr. DiPaolo's suggestion, subparagraph (1) was revised to list "indecent" before the other items ("injurious to health, "offensive to the senses," etc.). Ms. McAllister objected to the use of the work "things" and proposed deleting the phrase "things such as" in the last paragraph, but Mr. Simmons pointed out that, without some such modifier, jurors could think that the list was exclusive or exhaustive. Judge Stone noted that there are other factors to consider in determining the reasonableness of a use; for example, *Dahl v. Utah Oil Refining Co.,* 262 P. 269, 273 (Utah 1927), refers to "priority of occupation" as a consideration. The committee added "when [name of defendant]'s [conduct, action, or thing] began" to the list of considerations in the last paragraph. Mr. Simmons moved to approve CV1208 as revised, and Mr. Fowler seconded the motion. The committee approved the instruction without opposition.

c. *CV1209, Common Law Private Nuisance Claim*. Judge Stone thought that the instruction should incorporate the definition of "unreasonable" from CV1208. Mr. Simmons pointed out that CV1208 did not define "reasonable" or "unreasonable" but just listed things for the jury to consider in deciding the reasonableness of the defendant's conduct. Mr. Simmons read from *Whaley v. Park City Municipal Corporation,* 2008 UT App 234, ¶ 22, which says that private nuisance is not so much concerned with the nature of the conduct causing the damage as with the relative importance of the interests interfered with: "[d]istinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct." (Quoting *Branch v. Western Petroleum, Inc.,* 657 P.2d 267, 274 (Utah 1982).) Judge Stone thought this was contrary to other Utah Supreme Court decisions that suggest that the jury must decide the reasonableness of the defendant's conduct before ever reaching the question of the plaintiff's injury. Dr. Di Paolo asked what "unintentional and otherwise actionable" meant in subparagraph (3)(b) and suggested deleting "otherwise." She understood it to mean that the conduct had to violate some law, such as a criminal statute. Other committee members thought that negligence or recklessness was sufficient but raised the question of whether, in that case, the jury would have to be instructed on the elements of negligence or recklessness and noted that the instructions do not contain a definition of "recklessness." The committee decided to ask the Trespass and Nuisance subcommittee for further guidance on these issues. Mr. Simmons suggested also asking the subcommittee if a common law public nuisance claim can exist apart from a statutory public nuisance claim.

Mr. Ferre was excused, so the committee no longer had a quorum.

3. *Next meeting*. The next meeting is Monday, June 10, 2019, at 4:00 p.m.

The meeting concluded at 5:50 p.m.