Judicial Council Standing Committee
Model Utah Civil Jury Instructions

Agenda

October 3, 2022
4:00 to 6:00 p.m.
Hybrid

Matheson Courthouse, Judicial Council Room and via Webex

Welcome and Approval of Minutes	Tab 1	Alyson / Lauren
Implicit Bias Instructions	Tab 2	Judge Kelly
Easement by Necessity	Tab 3	Robert Cummings and Robert Fuller
New General Instruction – Pretrial Delay	Tab 4	Alyson McAllister
CV632 Threshold – Caselaw Update	Tab 5	Alyson / Judge Kelly
CV 1605 Defamation, Definition: False Statement – Review after public comment	Tab 6	Alyson / Lauren
CV1206 Nuisance – Review after public comment	Tab 7	Alyson / Lauren
Progress on Instruction Topics	Tab 8	(Informational)
Upcoming topics: • Insurance		Stacy / Alyson / Lauren

Committee Web Page

Published Instructions

Next meeting: November 14; December 12 at 4:00 p.m.

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
September 12, 2022
4:00 p.m.

Present: Judge Kent Holmberg, Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, Ruth A. Shapiro, William Eggington, Douglas G. Mortensen, Randy Andrus, Ricky Shelton, Adam D. Wentz, Stacy Haacke (staff)
Also present:

Excused: Mark Morris, Samantha Slark

1. *Welcome.*

Lauren Shurman welcomed the Committee.

2. *Approval of Minutes.*

August 2022 meeting minutes approved.

3. *Discussion of Implicit Bias.*

Judge Kelly updated the Committee on the status of the implicit bias subcommittee's work on drafting instructions. Subcommittee is making good progress. Judge Kelly welcomed additional input on the latest version of the instructions. Several small revisions suggested for the subcommittee's consideration.

4. *Discussion of Public Comments*

The Committee addressed several public comments on various instructions.

- CV131 - Spoliation. It was suggested that the instruction strike the word "intentionally" as spoliation precedent does not require clear intent. Committee agreed and revisions approved.
- CV155 and CV 156. It was suggested that these instructions be revised to remove redundancy. Committee agreed and revisions approved.
- CV1605 – False Statement. It was suggested that the instruction use "reasonably" as a qualifier in the defamation-by-implication instruction. There was some confusion as to where precisely the commenter wanted the qualifier to be added in the latest version of the instruction and whether such a change is consistent with precedent. Judge Kelly suggested that Stacy reach out to the commenter for clarification. He also suggested that the comment be forwarded to the subcommittee for review. The Committee agreed.
- CV1206 – Nuisance. Commenter concerned that the remedy of nuisance that is available to the State of Utah acting in its sovereign capacity has different

elements than the remedy available to subdivisions or private parties. Judge Kelly suggested that the comment be forwarded to the subcommittee for review. Committee agreed.

- Proposed New Instruction. "Time taken for case to arrive at trial." Committee debated whether such an instruction would be beneficial. Alyson McAllister agreed to look into whether this instruction is used elsewhere and the Committee agreed to discuss at its next meeting.

5. *Discussion of Future Instructions.*

Committee addressed upcoming queue.

6. *Virtual vs. In-person vs. Hybrid Meetings.*

The committee again addressed the option of holding an in-person meeting once quarterly.

7. *Adjournment.*

The meeting concluded at 5:13 PM.

Tab 2

Avoiding Bias

Our system of justice requires all of us—attorneys, judges, and jurors—to minimize the impact of our biases, whether conscious or subconscious, on our decision making. Researchers have identified several techniques we can use to accomplish this difficult, but necessary task:

First, reflect carefully and consciously about the evidence presented. Focus on the facts and on the evidence you hear and see. The law requires that jurors' decision(s) are to be based on the evidence, and not simply on intuition or a gut reaction.

Second, take the time you need to challenge what might be bias in your own thinking. Don't jump to conclusions that may be influenced by stereotypes about the parties, witnesses, or events.

Third, try taking another perspective. Ask yourself if your opinion of the parties or witnesses would be different if the people participating looked different or if they belonged to a different group or if they had a different accent or if they spoke in a more educated manner.

Fourth, listen to the opinions of the other jurors, who may have different backgrounds and perspectives from your own. Working together with the other jurors will help achieve a fair result. However, keep in mind that your decision(s) must be your own.

I have found these techniques helpful in lessening the impact of my own biases on my decision-making as a judge, and I therefore ask you to use these techniques as you consider the evidence in this case.

Tab 3

[220808 First Draft Easement by Necessity]

CV _____ Easement by Necessity

An easement by necessity arises when there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world.

[Plaintiff] and [Defendant] are adjoining landowners. [Plaintiff] asserts that because its parcel is completely landlocked, it should be granted an "easement by necessity" across [Defendant's] parcel for the purpose of ingress and egress from [Plaintiff's] parcel to the [public highway]. [Defendant] asserts that [Plaintiff] has no right to enter or use [Defendant's] parcel to access [Plaintiff's] parcel of land.

In order for the [Plaintiff] to establish an easement by necessity across [Defendant's] parcel, [Plaintiff] must prove by clear and convincing evidence that each of the following factual elements are satisfied:

(1) Unity of title followed by severance;

(2) That at the time of the severance the servitude was apparent, obvious, and visible;

(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and

(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.

I will now define some of the words from these elements and offer more guidance:

First, "Unity of title followed by severance" means that the [Plaintiff's] property and the [Defendant's] property were once owned by a single person or entity who then divided the land into two tracts and conveyed away one tract of land.

[Authority: "¶ 15 An easement by necessity requires that " 'all the property is once owned by a single person' " who then " 'divides it into two tracts and conveys away one tract.' " *Id.* (quoting *Savage*, 197 P.2d at 121)." *Abraham & Assocs. Tr. v. Park*, 2012 UT App 173, ¶ 15, 282 P.3d 1027, 1031.]

Second, a "servitude" is an encumbrance consisting in a right to the limited use of a piece of land without possession of it. For example, a servitude and encumbrance could be a roadway crossing a parcel of land.

> [Authority: Black's Law Dictionary, 1103 (Abr. 7th Ed.)("[A]n encumbrance consisting in a right to the limited use of a piece of land without possession of it.")

Finally, the "dominant estate" is an estate that benefits from an easement.

[Authority: *Id.*, p. 449.]

References:
Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916)
Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948)
Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280–81 (Utah 1976)
Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶¶ 11-12, 282 P.3d 1027, 1030–31
Potter v. Chadaz, 1999 UT App 95, ¶¶ 15-20, 977 P.2d 533, 538
Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 13, 447 P.3d 1278, 1281
David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021).

I. Points for Discussion and Possible Committee Comments:

1. Theory of an Easement by Necessity. The committee may want to include this comment from *Tschaggeny* which captures the essence of an easement by necessity:

> The theory upon which a way of necessity is based is that all the property is once owned by a single person. He divides it into two tracts and conveys away one tract. The physical location of the other tract is such that it is not reasonably accessible without crossing the tract conveyed away. If the grantor retains the tract which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right of way to and from the tract retained. If he sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate in himself to the extent of a right of way in favor of the other tract of land.

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280–81 (Utah 1976)

The following from *Abraham* is also useful:

> Key to this analysis is the proper identification of which conveyance created the claimed necessity. That is, we must look for the exact moment at which a loss of unity of property ownership landlocked one or more of the just-divided parcels of land.

Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶ 12, 282 P.3d 1027, 1031

2. Should Elements (2) and (4) be Omitted? All four easement by necessity elements from *Morris* are still referred to in some reported cases following *Tschaggeny.* (See, for example, *Abraham & Assocs. Tr. v. Park*, 2012 UT App 173, ¶¶ 11-12, 282 P.3d 1027, 1030–31.) However, the Utah Supreme Court mentioned the following in Tschaggeny about elements (2) and (4) when establishing an easement by necessity:

> The requirements for a way of necessity are set out in the case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132, as follows:
>
> '(1) Unity of title followed by severance;
>
> '(2) That at the time of the severance the servitude was apparent, obvious, and visible;
>
> '(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
>
> '(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.'
>
> 1 In both the case cited above and the one upon which it relied (Morris v. Blunt,) there were elements of and evidence about rights of way by prescription, as well as ways of necessity; and, therefore, ***elements (2) and (4) set out in the opinion above are not necessary elements in a case based solely upon a claim of a way of necessity***.[2]
>
> 2 Where a party conveys a portion of land which he owns, he impliedly conveys all those apparent or visible easements over the land retained, which at the time of the conveyance are used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use thereof. This is an implied easement and is not dependent upon the need for a way to go to and from a parcel of land entirely surrounded by land belonging to others or retained by the seller.

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976)(emphases added). F.N.2: "28 C.J.S.Easements s 35(a)." *Id.*

3. Alternative Easement Names. It may be helpful to mention in the comments that an "easement by necessity" is an implied easement:

> Implied easements are three specific types — implied easements based on a prior use, easements by necessity and easements implied from a subdivision plat.29 While express easements are created by written expressions of intent, implied easements arise from the circumstances of a transaction or the circumstances surrounding the properties involved30. Courts are willing to imply an easement because they are convinced that the parties intended to create an easement based on the circumstances accompanying a conveyance of property. The court thereby brings into existence the results of the perceived, unexpressed intent of the parties derived from the facts of the situation.

Thomas, p. 340. An "easement by necessity" is defined as "[a]n easement created by operation of law because the easement is indispensable to the reasonable use of nearby property, such as an easement connecting a parcel of land to a road." Black's Law Dictionary, p. 415 (Abr. 7th Ed.). There is reference to "easement by severance" (*Morris v. Blunt*, 49 Utah 243, 161 P. 1127, 1132 (1916)), and "way of necessity" (*Savage v. Nielsen*, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948)), and appearing to use the same test.

4. Clear and Convincing Evidence. Implied easement elements considered by the jury:

> The jury was tasked with deciding whether the factual elements of an implied easement were met, and it found each element was satisfied.[4] Specifically, the jury found, by clear and convincing evidence,[5] that Sorf's claimed easement was "apparent, obvious, and visible" at the time of severance in 2001; that the claimed easement was "reasonably necessary" to Sorf's use of the west property; that Sorf's use of the claimed easement was "continuous rather than sporadic"; and, finally, that Sorf and Partner at the time of severance "intended, or, having formed no conscious intent, probably would have intended, to create an easement" in favor of the west property.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 13, 447 P.3d 1278, 1281

> The trial court ruled as a matter "of first impression" that because implied easements " 'deprive an individual of an interest in real property,' " they must be established by clear and convincing evidence. (Quoting *Essential Botanical*

Farms, LC v. Kay, 2011 UT 71, ¶ 22, 270 P.3d 430.) The parties appear to accept the clear and convincing evidence standard. We therefore assume without deciding that that standard applies.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278, 1281, f.n.5.

II. Key Passages from Cases Cited (emphases added):

The elements essential to constitute an easement by severance are: (1) Unity of title followed by severance; (2) that at the time of the severance the servitude was apparent, obvious, and visible; (3) that the easement is reasonably necessary to the enjoyment of the dominant estate; and (4) it must usually be continuous and self–acting, as distinguished from one used only from time to time when occasion arises.

Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916)

That there must exist a reasonable necessity is apparent from an examination of the decided cases. Some of these cases go to the extent that, in order to create a servitude upon severance, there must be shown an absolute necessity. However, the requirement of reasonable necessity seems to be supported by the weight of authority and by reason.

Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132–33 (1916)(citations omitted).

One of the errors urged by counsel for the appellant is the failure of the trial court to make a finding in favor of the appellant that no such way of necessity existed, or any other finding as to a way of necessity. Let us first then consider this problem for a moment.
12 The theory upon which a way of necessity is based is that all the property is once owned by a single person. He divides it in two tracts and conveys away one tract. The physical location of the **122 other tract is such that it is not reasonably accessible without crossing the tract conveyed away. If the grantor retains the tract which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right of way to and from the tract retained. If he sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate in himself to the extent of a right of way in favor of the other tract of land. The requirements for a way of necessity are set out in the case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132, as follows:
'(1) Unity of title followed by severance;

(2) That at the time of the severance the servitude was apparent, obvious, and visible;
(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.'
See also: Adamson v. Brockbank, Utah, 185 P.2d 264; citing Morris v. Blunt, and reaffirming requirement number three above, and discussing generally the doctrine of easements by implication, and reasonable necessity; *32 Smith v. Sanders, Utah, 189 P.2d 701; Fayter v. North, 30 Utah 156, 83 P. 742, 6 L.R.A.,N.S., 410.
3 It is apparent then, from an analysis of the above requirements, that the doctrine has its basis in the theory of a grant by reason of the circumstances attendant at the time of the grant. It is inconsistent with the adversity contemplated in the theory of an easement based upon prescription.
4 ***A way of necessity arises from the existence of such necessity at the time of the dividing of the property.*** A right of way by prescription can only be attained by satisfying certain other requirements. . . .
567 The distinction between a way of necessity and a prescriptive right is set out in Bertolina v. Frates, 89 Utah 238, 57 P.2d 346, 350; as follows:
'Ways of necessity arise by virtue of conditions entirely different from ways created by prescription. A prescriptive right can be acquired by anyone. It may be appurtenant or in gross. There need be no connection so far as the chain of title is concerned between servient and dominant estates, but ***ways of necessity exist only where the title springs from a common source.'***
And, as indicated in 28 C.J.S., Easements, § 18, page 674:
'*A right of way of necessity* over another's land is distinguished from a right of way by prescription, and *cannot ripen into a prescriptive *33 easement while the necessity continues*. Where one has the right to use an easement by the grant of the owner as a way of necessity, the user cannot be adverse, at least where the user does not exceed the right, until after the necessity has ceased and the land owner has notice of a hostile claim.' (Italics added)

Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948)

A way of necessity is defined in the case of Savage v. Nielsen[1] as follows:
The theory upon which a way of necessity is based is that all the property is once owned by a single person. He divides it into two tracts and conveys away one tract. The physical location of the other tract is such that it is not reasonably accessible without crossing the tract conveyed away. If the grantor retains the tract which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right of way to and from the tract retained. If he sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate in himself to the extent of a

right of way in favor of the other tract of land. The ***requirements for a way of necessity*** are set out in the case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132, as follows:
'(1) Unity of title followed by severance;
'(2) That at the time of the severance the servitude was apparent, obvious, and visible;
'(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
'(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.'
1 In both the case cited above and the one upon which it relied (Morris v. Blunt,) there were elements of and evidence about rights of way by prescription, as well as ways of necessity; and, therefore, ***elements (2) and (4) set out in the opinion above are not necessary elements in a case based solely upon a claim of a way of necessity***.[2]
2 Where a party conveys a portion of land which he owns, he impliedly conveys all those apparent or visible easements over the land retained, which at the time of the conveyance are used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use thereof. This is an implied easement and is not dependent upon the need for a way to go to and from a parcel of land entirely surrounded by land belonging to others or retained by the seller.
34 An example is the sale of an apartment served by common halls and stairways. Easements in the halls and stairways are conveyed even though there is no express wording to that effect written into the deed of conveyance. This is true even if entrance and exit may be had by way of a fire escape attached only to the apartment in question. These are easements by implication. The inference is drawn from the surrounding circumstances under which the conveyance was made rather than from the language used. In such a case, the easement must be apparent, obvious, and visible.[3]
567 ***On the other hand, a way of necessity arises when there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world.*** In either *281 case, there is an implied grant or reservation of a way across the part not so surrounded unless it clearly appears that the parties to the conveyance did not intend such an easement. However, it is not necessary that the easement be visible, apparent, or obvious. There is no implied grant where the instrument of conveyance specifically provides for a way over the parcel not land locked. While the implied reservation applies to both the grantor and the grantee, an implied grant is more likely to be found in a disputed case where the grantee gets the land-locked parcel than it is where the grantor retains it.[4]

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280–81 (Utah 1976)

ANALYSIS

I. Easement By Necessity

4567 ¶ 12 Abraham asserts that because its parcel is completely landlocked, it should *1031 be granted an easement by necessity via the existing road that runs across the Parks' land. The Utah Supreme Court addressed the requirements for an easement by necessity in the seminal case of *Tschaggeny v. Union Pacific Land Resources Corp.,* 555 P.2d 277 (Utah 1976). The Court articulated the four requirements as follows:

(1) Unity of title followed by severance;

(2) That at the time of the severance the servitude was apparent, obvious, and visible;

(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and

(4) It must usually be continuous and self-acting,[5] as distinguished from one used only from time to time when occasion arises.

Id. at 280 (quoting *Morris v. Blunt,* 49 Utah 243, 161 P. 1127, 1132 (1916)) (minor changes in capitalization and structure as per *Tschaggeny;* internal quotation marks omitted). Further, " '[t]he physical location of the other tract [must be] such that it is not reasonably accessible without crossing the tract conveyed away.' " *Id.* (quoting *Savage v. Nielsen,* 114 Utah 22, 197 P.2d 117, 121–22 (1948)). *Tschaggeny* explained that where a property owner " 'sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate *in himself* to the extent of a right of way in favor of the other tract of land.' " *Id.* (quoting *Savage,* 197 P.2d at 122) (emphasis added). ***Key to this analysis is the proper identification of which conveyance created the claimed necessity. That is, we must look for the exact moment at which a loss of unity of property ownership landlocked one or more of the just-divided parcels of land***. Further, a landlocked property owner with no other means of access to the outside world does not have an automatic right to an easement by necessity across the most *convenient* parcel to invade, but across "the tract conveyed away." *Savage,* 197 P.2d at 122. Thus, once the conveyance that landlocked the property is identified, the proper course, if the doctrine of easement by necessity is to be employed, is to find an avenue for relief through the property from which the landlocked parcel was separated. *See Tschaggeny,* 555 P.2d at 280.

Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶¶ 11-12, 282 P.3d 1027, 1030–31

¶ 15 An easement by necessity requires that " 'all the property is once owned by a single person' " who then " 'divides it into two tracts and conveys away one tract.' " *Id.* (quoting *Savage,* 197 P.2d at 121).

Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶ 15, 282 P.3d 1027, 1031

> However, "the ultimate determination of whether an easement exists is a conclusion of law, which we review for correctness." *Judd v. Bowen*, 2018 UT 47, ¶ 8, 428 P.3d 1032 (cleaned up). Nevertheless, "such a determination is the type of highly fact-dependent question ... which accords the [district court] a broad measure of discretion when applying the correct legal standard to the given set of facts." *Id.* (cleaned up). Accordingly, we will "overturn the finding of an easement only if [we] find[ ] that the [district court's] decision exceeded the broad discretion granted." *Id.* (cleaned up).

Ross & Norma Allen Fam. Tr. v. Holt, 2019 UT App 197, ¶ 15, 455 P.3d 616, 620

> In support of the trial court's determination that the plaintiffs had an easement in the above-mentioned ditch for the purpose of conveying water to their property, reliance is placed on the doctrine of easement acquired by implication or necessity.
> 2 It has previously been recognized by this Court that such an easement may be found when these elements are present: a previous unity of title, followed by severance; that at the time of the severance the servitude was so plainly apparent that any prudent observer should have been aware of it; that the easement is reasonably necessary to the use and enjoyment of the dominant estate; and it must have been continuous, at least in the sense that it is used by the possessor whenever he desires.[2]

Ovard v. Cannon, 600 P.2d 1246, 1247 (Utah 1979)

> "The ultimate determination of whether an easement exists is a conclusion of law," but "the existence of an easement is also a highly fact-dependent question." *Carrier v. Lindquist*, 2001 UT 105, ¶ 11, 37 P.3d 1112. Thus, the jury found the factual elements of an implied easement, but the trial court ultimately granted the easement.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278, 1281

> ¶24 To imply an easement from prior use, the fact-finder must find evidence of four elements: "(1) that unity of title was followed by severance; (2) that the servitude was apparent, obvious, and visible at the time of severance; (3) that the easement was reasonably necessary to the enjoyment of the dominant estate; and (4) that the use of the easement was continuous rather than sporadic." *Butler v. Lee*, 774 P.2d 1150, 1152 (Utah Ct. App.
> 1989); *accord Morris v. Blunt*, 49 Utah 243, 161 P. 1127, 1132 (1916).

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 24, 447 P.3d 1278, 1282

II. The implied easement's scope includes parking.

12¶30 Now we must decide the easement's scope, specifically whether the implied easement grants Sorf the right to park in the alley.[7]

13¶31 ***Utah has not yet adopted a test for defining the scope of an implied easement***. The trial court determined the easement's scope based on "the parties' intent *1284 and necessity existing at the time of severance." And a number of other jurisdictions determine the scope of an implied easement based on the parties' probable expectations at the time of severance. *See, e.g.*, *Tobias v. Dailey*, 196 Ariz. 418, 998 P.2d 1091, 1095 (App. 2000); *Thorstrom v. Thorstrom*, 196 Cal.App.4th 1406, 127 Cal. Rptr. 3d 526, 539 (2011); *McCoy v. Barr*, 47 Kan.App.2d 285, 275 P.3d 914, 921 (2012); *Tungsten Holdings, Inc. v. Kimberlin*, 2000 MT 24, ¶ 27, 298 Mont. 176, 994 P.2d 1114, *overruled on other grounds by Shammel v. Canyon Res. Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912; *Barbour v. Pate*, 229 N.C.App. 1, 748 S.E.2d 14, 18 (2013); *see also* Restatement (First) of Property § 484 cmt. b (Am. Law Inst. 1944) (explaining that the extent of an easement by implication "is to be measured ... by such uses as the parties might reasonably have expected from future uses of the dominant tenement"). This approach is an "inherently factual" one, *McCoy*, 275 P.3d at 921, with the parties' reasonable expectations being "ascertained from the circumstances existing at the time of the conveyance," *Thorstrom*, 127 Cal. Rptr. 3d at 539 (cleaned up); *see also* Restatement (First) of Property § 484 cmt. b.

¶32 We agree with this approach.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶¶ 29-32, 447 P.3d 1278, 1283–84

The jury was tasked with deciding whether the factual elements of an implied easement were met, and it found each element was satisfied.[4] Specifically, the jury found, by clear and convincing evidence,[5] that Sorf's claimed easement was "apparent, obvious, and visible" at the time of severance in 2001; that the claimed easement was "reasonably necessary" to Sorf's use of the west property; that Sorf's use of the claimed easement was "continuous rather than sporadic"; and, finally, that Sorf and Partner at the time of severance "intended, or, having formed no conscious intent, probably would have intended, to create an easement" in favor of the west property.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 13, 447 P.3d 1278, 1281

The trial court ruled as a matter "of first impression" that because implied easements " 'deprive an individual of an interest in real property,' " they must be established by clear and convincing evidence. (Quoting *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶ 22, 270 P.3d 430.) The parties appear to accept the clear and convincing evidence standard. We therefore assume without deciding that that standard applies.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278, 1281,f.n.5.

2. Easement by Implication

9 ¶ 16 There are four elements necessary to constitute an easement by implication: (1) unity of title followed by severance; (2) at the time of severance the servitude was apparent, obvious, and visible; (3) the easement is reasonably necessary to enjoy the dominant estate; and (4) use of the easement was continuous rather than sporadic. *See Butler v. Lee,* 774 P.2d 1150, 1152 (Utah Ct.App.1989). Here, it is undisputed that Chadaz has never used the claimed right-of-way. Because the fourth requisite element has not been satisfied, an easement by implication cannot exist in this case. Therefore, we need not address the remaining elements.

* * *

4. Easement by Necessity

11 ¶ 18 ***An easement by necessity arises "when there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world."*** *Tschaggeny v. Union Pac. Land Resources Corp.,* 555 P.2d 277, 280 (Utah 1976). In this case, the undisputed evidence shows that Chadaz's property is not landlocked and that she has at least one, if not several, access routes to her property that were used in lieu of any claimed right-of-way across the Potter's land. Therefore, Chadaz cannot establish an easement by necessity over the claimed right-of-way.

Potter v. Chadaz, 1999 UT App 95, ¶¶ 15-20, 977 P.2d 533, 538

Utah Real Property Law

§ 12.02(b)(2)(ii). Easement by Necessity. The easement by necessity is based on the public policy of maximizing the productive use of land.41 This type of implied easement is recognized because it is necessary in order for the easement holder to have reasonable use of the dominant property. Thus, a landlocked property would be cut off from access to any public roads unless the courts recognize an implied easement across a neighbor's property. The required circumstances are similar for both the easement by necessity and the implied easement based on prior use.42 The requirements are: **(1) unity of title followed by severance, (2) apparent,**

obvious and visible use, (3) necessity of the easement for enjoyment of the dominant estate, and (4) continuous use.43 The test for necessity is greater for the easement by necessity than in the case of an easement implied from prior use.44 Such an easement is based on the theory of a grant by reason of 35. Ovard v. Cannon, 600 P.2d 1246, 1247 (Utah 1979); Chournos v. Alkema, 494 P.2d 950, 952 (Utah 1972); Butler v. Lee, 774 P.2d 1150, 1152 (Utah Ct. App. 1989). 36. Southland Corp. v. Potter, 760 P.2d 320, 323 (Utah Ct. App. 1988). 37. Butler, 774 P.2d at 1154. 38. See Backman & Thomas, supra note 6, at § 2.02[3][b]; see Powell & Rohan, supra note 24, at § 34.08[3]. 39. Chournos, 494 P.2d at 952 . 40. Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278. 41. See Backman & Thomas, supra note 6, at § 2.02[3][b]. 42. Culbertson v. Bd. of County Comm'rs, 44 P.3d 642 (Utah 2001); Tschaggeny v. Union Pacific Land Resources Corp., 555 P.2d 277, 280 (Utah 1976). 43. Savage v. Nielsen, 197 P.2d 117, 122 (Utah 1948); see also Abraham & Associates Trust v. Park, 282 P.3d 1027 (Utah Ct. App. 2012) (holding that an easement by necessity did not exist over the most convenient land and route because there was not common ownership of the parcels followed by a division of that common ownership). 44. Alcorn v. Reading, 243 P. 922, 926 (Utah 1926). 342 the circumstances at the time of severance, and is inconsistent with the adversity contemplated in the prescription theory.45 Several limitations apply to recognition of an easement by necessity. A claimant cannot have the benefits of an easement by necessity if that person has created the conditions producing the necessity.46 An owner who blocks an existing access road by building a structure is not entitled to an easement by necessity over neighboring property. The claimant can remedy the lack of access by removing the obstructing building. The easement by necessity terminates if the need for the easement no longer exists.47

David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021)(emphasis added).

Link: https://www.utahbar.org/wp-content/uploads/2021/07/Utah-Property-Treatise-2021-final-5-26-2021.pdf

CV ____ Easement by Necessity.~~,~~ Introduction.

An easement by necessity arises when there is a transfer of property from one owner to another that results in a tract of land becoming landlocked. ~~there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world.~~

[Plaintiff] and [Defendant] are adjoining landowners. [Plaintiff] asserts that because [his/her/its] ~~parcel~~ property is completely landlocked, [he/she/it] should be granted an "easement by necessity" across [Defendant's] ~~parcel~~ property ~~for the purpose of ingress and egress from~~ so that [Plaintiff~~'s~~] ~~parcel~~ can get to or from [his/her/its] property from~~to~~ the [public highway]. [Defendant] asserts that [Plaintiff] has no right to enter or use [Defendant's] ~~parcel~~ property to access [Plaintiff's] ~~parcel of land~~property.

CV ~~Elements of~~ Easement by Necessity. Elements of a claim.

To succeed on this claim, [Plaintiff] ~~In order for the [Plaintiff] to establish an easement by necessity across [Defendant's] parcel, [Plaintiff]~~ must prove by clear and convincing evidence ~~that~~ each of the following ~~factual~~ elements ~~are satisfied~~:

(1) All of the property was once owned by a single person who then divided the land and transferred away one tract of land, also known as~~There was U~~ "unity of title followed by severance";

(2) ~~That at the time of the severance the servitude was a~~When one property was transferred, creating a landlocked property, the right to cross the other property was apparent, obvious, and visible;

(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and

(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.

Commented [AM1]: Does this always have to be an element in easement by necessity cases?

~~I will now define some of the words from these elements and offer more guidance:~~

CV Easement by Necessity. "Unity of Title Followed by Severance" Defined.

~~First,~~ "Unity of title followed by severance" means that the [Plaintiff's] property and the [Defendant's] property were once owned by a single person or entity who then divided the land into two tracts and conveyed away one tract of land.

References:

[Authority: "¶ 15 An easement by necessity requires that " 'all the property is once owned by a single person' " who then " 'divides it into two tracts and conveys away one tract.' " *Id.* (quoting *Savage,* 197 P.2d at 121)." *Abraham & Assocs. Tr. v. Park*, 2012 UT App 173, ¶ 15, 282 P.3d 1027, 1031.]

CV Servitude defined.

~~Second, a~~A "servitude" is an encumbrance consisting in a right to the limited use of a piece of land without possession of it. For example, a servitude and encumbrance could be a roadway crossing a parcel of land.

References:

[Authority: Black's Law Dictionary, 1103 (Abr. 7th Ed.)("[A]n encumbrance consisting in a right to the limited use of a piece of land without possession of it.")

CV Dominant Estate defined

~~Finally, t~~The "dominant estate" is an estate that benefits from an easement.

References:

[Authority: *Id.*, p. 449.]

References:

Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916)

Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948)

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280–81 (Utah 1976)

Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶¶ 11-12, 282 P.3d 1027, 1030–31

Potter v. Chadaz, 1999 UT App 95, ¶¶ 15-20, 977 P.2d 533, 538

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 13, 447 P.3d 1278, 1281

David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021).

Tab 4

Comment for new instruction re: Pretrial Delay

I frequently conduct focus groups and communicate with jurors after trials who ask or comment about "why it took so long to get a case to trial." Certainly there are lots of reasons, procedurally and for court scheduling purposes, why cases take years to get to trial. But this negatively effects plaintiffs more than defendants because jurors think it's the plaintiff's "fault" for taking so long. I believe we need an instruction to ameliorate this problem to be included with the general instructions. Here is my recommendation:
Time taken for case to arrive at trial.
There are many reasons cases take months or years to arrive at trial. These reasons vary from, among other things, procedural requirements and court system scheduling issues. You must not consider the time taken for a case to arrive at trial as a reflection of the strengths or weaknesses of a person's position.
Tyler Young

Proposed Instruction:

CV-- **Time taken for case to arrive at trial.**
There are many reasons cases take months or years to arrive at trial. These reasons vary from, among other things, procedural requirements and court system scheduling issues. You must not consider the time taken for a case to arrive at trial as a reflection of the strengths or weaknesses of a person's position.

Committee Note:
This instruction may not be appropriate in every case.

MEMORANDUM

TO: CIVIL MUJI Committee
FROM: Chandler Blount, Judicial Extern & Judge Keith Kelly
DATE: September 22, 2022
RE: Proposed Model Utah Jury Instruction on Pretrial Delays

Dear Civil MUJI Committee Members:

I attach below a memo drafted by Chandler Blount, a U of U law student who is working with me this fall as an Extern. Based upon his research, there does *not* appear to be a standard model jury instruction on the issue of delay in getting a case to trial.

I look forward to discussing this issue with you at our next Civil MUJI Committee meeting.

Best wishes, Keith Kelly

Chandler Blount's Memo:

In this Memo, I have analyzed the following proposed model jury instruction and attached comment for originality among other jurisdictions:

> I frequently conduct focus groups and communicate with jurors after trials who ask or comment about "why it took so long to get a case to trial." Certainly[sic] there are a lot of reasons, procedurally and for court scheduling purposes, why cases take years to get to trial. But this negatively affects plaintiffs more than defendants because jurors think it's the plaintiff's 'fault' for taking so long. I believe we need an instruction to ameliorate this problem to be included with the general instructions. Here is my recommendation:
>
> **Time taken for the case to arrive at trial.**
>
> **There are many reasons cases take months or years to arrive at trial. These reasons vary from, among other things, procedural requirements and court system scheduling issues. You must not consider the time taken for a case to arrive at trial as a reflection of the strengths or weaknesses of a person's position.**

This Memo is broken down into three sections that address the issue; beginning with a Short Answer section, continuing with a Discussion section, and concluding with an Analysis section.

Issue 1: <u>Is the proposed Model Jury Instruction utilized in a similar fashion in other jurisdictions?</u>

(1) Short Answer

No.

Other jurisdictions have adopted model jury instructions that touch on delays regarding prosecutorial discretion, court scheduling, and judicial procedure. *See* instructions cited *infra* pp. 25. But none have model instructions that outright recite the language of Mr. Young's proposed MUJI. So, in considering whether or not to adopt such a MUJI, the committee should try to come to a consensus on whether or not the current instructions implicitly instill a sense of 'strength of a case ≠ how quickly a complaint was filed.' This can be done by deciding whether the framework of Utah's Model Jury Instructions sufficiently advises juries of the dangers of prejudicially ascertaining liability based on durational issues. And if it does not, what kind of language would be best suited to accomplish this goal.

(2) Discussion

I began my search through a series of Boolean inquiries on Westlaw, LexisNexis, and Bloomberg Law under each database's respective "Secondary Sources" & "Jury Instructions" compilations. Some common phrases and search terms that I included in these searches included; "time elapsed between incident and trial", "time to arrive at trial", and "long period between incident and trial." These phrases where also frequently modified with connectors (such as; "AND", "NOT", "OR", "!", and "/s") to ensure the order and/or syntax of these phrases did not preclude potential Model Jury Instructions from presenting themselves. Further, these inquiries were modified with various 'catch-all' phrases like; "must/may not consider", "end of statute of limitations", "court schedul!", and "procedur! requirement". And to be comprehensive, similar searches were conducted through Google to ensure that jurisdictionally-specific jury instructions were not missed because they may only be posted on a state-specific database.

The following section will present and analyze the most significant results of these searches and compare them to the proposed Model Jury Instruction listed above in order to ascertain the proposed MUJI's relative originality.

(3) Analysis

Model Utah Jury Instruction CV102 states that a jury "must follow the law as [it] weigh[s] the evidence and decide[s] the factual issues. Factual issues relate to what did, or did not happen in this case." MUJI 2d CV102. And while CV107 dictates that juries "must decide [a] case based on the facts and the law, without regard to . . . prejudice . . . ," the jury instructions do not explicitly proscribe the jury from correlating a delay in bringing a case with argument weakness. MUJI 2d CV107. Some jurisdictions seem to deal with this by adding a clarifying sentence to this instruction that is something to the effect of "[t]hat means that you must decide the case *solely* on the evidence before you." *See, e.g.*, Manual of Model Civ. Jury Instructions For the D. Cts. of the Ninth Cir., 1.4 Duty of Jury (emphasis added); *See also* MUJI 2d CV101 ("[Y]ou must not try to get information from any source other than what you see and hear in this courtroom."). So, clearly, while there were no Model Jury Instructions in other jurisdictions that were exactly on point for this issue, there were several that impliedly disallowed the jury from considering external, prejudicial factors (such as the time elapsed before a trial begins). Another such Model Jury Instruction reads as follows:

> Any party to a crime who did not directly commit the crime may be prosecuted for commission of the crime upon proof that the crime was committed and that the person was a party to it, *even though the person alleged to have directly committed the crime has not been prosecuted* or convicted, has been convicted of a different crime or degree of crime, is not amenable to justice, or has been acquitted.

1.42.11 Principal, Failure to Prosecute; Other Involved Persons, Georgia Suggested Pattern Jury Instructions – Criminal 1.42.11 (emphasis added). This model jury instruction hints at a very similar concept to the one at issue. It suggests that even though a case has or has not been levied against a specified criminal defendant, the strength of the case does not falter due to mere prosecutorial discretion. It is conceivable for a prosecutor to take an extended amount of time to prepare for a difficult or very important case. And it is almost universally agreed upon that this does not affect the strength of that case. So, it should be considered unreasonable for a jury members to rely on variations in the prosecutorial timelines of certain defendants when they are making decisions of guilt. And a similar strand of logic is ascertainable in the civil context. Civil plaintiffs may seek to settle their cases through various methods of alternate dispute resolution (arbitration, mediation, etc.) before actually bringing a case to the attention of the court. Therefore, just as there are extraneous prosecutorial decisions that may delay a case being brought, the same is true of civil plaintiffs' discretionary choices. And it is reasonable to assume that a Model Jury

Instruction standing for the proposition that the 'strength of a case should not be measured by the time elapsed before trial' can be gleaned in the above criminal instruction—and subsequently, can be applied in a civil context.

Next, a Mississippi Model Jury Instructions includes a sentence that reads "It may be necessary that I conduct some of the hearings . . . outside your presence. I will try to estimate the time needed for the hearing and for recesses, but frequently they last longer than we estimate because new issues arise." Miss. Prac. Model Jury. Instr. Civil § 1:13 (2d ed.). And while this sentence is a very tangential issue, it does touch on very important components found in the proposed MUJI mentioned above—court scheduling and procedural requirements. It notes that the court must remain temporally flexible in order to most efficiently facilitate its docket. So, it stands to reason that informing the jury of the issues surrounding scheduling and procedure, just as in the proposed MUJI, is not ground-breaking in and of itself.

Similarly Model Utah Jury Instruction CV 101 informs the jury that "you must not try to get information from any source other than what you see and hear in this courtroom. . . [t]his includes visiting any of the places involved in this case . . . ." MUJI 2d 101. In *Egbert v. Nissan*, the District Court of Utah expanded on this issue by stating that "In view of the time that elapses before a case comes to trial, substantial changes may have occurred at the location after the event that gives rise to this lawsuit." *See, e.g., Egbert v. Nissan*, 2006 Jury Instr. LEXIS 1465; *See also Egbert v. Nissan*, Case NO. 2:04-CV-00551 PGC, 2006 U.S. Dist. LEXIS 28730 (D. Utah, Mar. 1, 2006) (unpublished) (providing background knowledge about the case undergirding the pertinent jury instruction). In clarifying this issue, the Federal court seems to imply that the reasoning behind disallowing jurors to investigate the scene of an incident is because the long periods of time elapsed may give rise to prejudicial inferences in jury members—probably because the scene has likely changed in some regards. *Egbert v. Nissan*, 2006 Jury Instr. LEXIS 1465. But this implicitly demonstrates to the jury that it is commonplace for cases to be brought after extended periods of time. So, *explicitly* informing jurors of the often, extended periods of delay before litigation is brought is something that the jurors have already been *implicitly* told.

And finally, the most glaringly similar jury instruction propounded to further the desired result in the proposed MUJI was an instruction set forth in *Tamburo v. Ross/West View Emergency med. Servs. Auth.*, 2:04-cv-1237, 2007 WL 1175633 (W.D. Pa., Feb. 22, 2007) (unpublished). The instruction reads in part as follows:

> You may not draw any adverse inferences against any party based on the lapse of time between the time of the alleged discriminatory acts which

> culminated in the termination of Ms. Tamburo's employment in 2004 and the date of this trial in 2007. The timing of that, between the time of the termination and this trial have nothing to do with the parties but rather court schedules and the like.

TAMBURO v. ROSS/WEST VIEW EMERGENCY MED. SERVS. AUTH., 2007 JURY INSTR. LEXIS 238; *See also id.* (providing background knowledge about Tamburo's case, which supports the pertinent jury instruction). It is clear from the language of this case-specific instruction that the proposed MUJI and Tamburo's instruction get at the same idea. However, it does employ some differing language and is not a 'Model' instruction. Both of these considerations should be noted by the committee if/when the committee chooses to adopt a MUJI with similar content.

Summarily, it is clear that other jurisdictions have adopted model jury instructions that touch on delays regarding prosecutorial discretion, court scheduling, and judicial procedure. *See* instructions cited *supra* pp. 25. But none have model instructions that outright recite the language of Mr. Young's proposed MUJI. So, in considering whether or not to adopt such a MUJI, the committee should try to come to a consensus on whether or not the current instructions implicitly instill a sense of 'strength of a case ≠ how quickly a complaint was filed.' This can be done by deciding whether the framework of Utah's Model Jury Instructions sufficiently advises juries of the dangers of prejudicially ascertaining liability based on durational issues. And if it does not, what kind of language would be best suited to accomplish this goal.

Tab 5

CV632 Threshold.

[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.
A person may recover non-economic damages resulting from an automobile accident only if [he] has:
[(1) permanent disability or permanent impairment based on objective findings.] or
[(2) permanent disfigurement.] or
[(3) reasonable and necessary medical expenses in excess of $3,000.]

References
Utah Code Section 31A-22-309(1)(a).

Committee Notes
Neither the statute nor case law has provided clear boundaries on the definitions of disability and impairment. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.

Tab 6

Comment re: Defamation – False Statement

Dear Committee-

I write to comment on Model Jury Instruction No. CV1605 ("Definition: False Statement").

I suggest the Committee use "reasonably" as a qualifier in the defamation-by-implication instruction. So, the instruction would read "that it ***reasonably*** implies a fact that is true."

There is not much guidance from Utah courts on the implied defamation doctrine. The one case from the Utah Supreme Court—*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)—seemed to at least implicitly endorse the doctrine. The Court explained that it was the "implication arising from the statement and the context in which it was made, not the statement itself, which forms the basis of [the plaintiff's] claim." *Id.* at 1011. Which, in turn, made "this is a defamation-by-implication claim." *Id.* Then, in a footnote, the Court cited a leading treatise's explanation of the doctrine. *Id.* at 1011 n. 18.

But that was the beginning and the end of the Court's analysis, because the defendant had "not appealed [the] ruling" that the implication of its republished statements was false. *Id.* at 1011.

Trial courts in Utah have applied their own gloss to defamation by implication, but they have generally supported using a "reasonable" modifier. In *Mile High Contracting, Inc. v. Deseret News Pub. Co.*, No. 170906024, 2018 WL 7374786, at *8 (Utah Dist.Ct. Mar. 16, 2018), Judge Scott explained that to "state a defamation-by-implication claim, [the plaintiff] must show that the claimed implication could reasonably be drawn from the article itself." The Tenth Circuit, in interpreting Utah law, used the same qualifier. *See, e.g.*, *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) ("In this evaluation of context, we should examine . . . the likely effect on the reasonable reader."). And, for whatever its worth, the *West* court cited Professor Smolla's explanation of the false-by-implication doctrine, which explained suggested factfinders consider "the inference that the ordinary reasonable recipient may draw *West*, 872 P.2d at 1011 n.18 (quoting odney A. Smolla, Law of Defamation § 4.05(1) (1994)).

Others Utah courts, however, have not imposed a "reasonable" implication requirement. *E.g.*, *Layton Companies, Inc v. SIRQ, Inc.*, No. 070908853, 2014 WL 12661713, at *8 (Utah Dist.Ct. Jan. 11, 2014) (plaintiff's "defamation claim consists of statements or implications the jury properly could have concluded were defamatory").

But putting the (somewhat contradictory) state of Utah law aside, including a reasonability modifier makes doctrinal sense. As one Court put it, "because the Constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true." *Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087, 1092–93 (4th Cir. 1993) (imposing an intent requirement).

Though a minor change, including a reasonability modifier should make a difference. Borrowing from the commercial speech world, courts and juries have used the reasonability framework to limit out "a mere possibility that the advertisement might

conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (2003).

Finally, adding a one-word reasonability modifier shouldn't confuse juries. That standard is often used in tort law, and a reasonability requirement is used throughout other defamation instructions. *See* Model Jury Instruction Nos. CV1604A-E; *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (using a reasonability limit for the fact/opinion question).

Thank you for your consideration,
Kade N. Olsen

Instruction:

CV1605 Definition: False Statement.

The allegedly defamatory statement must state or reasonably imply facts which can be proved to be false. [[Name of plaintiff] must show the statement to be false.] [[Name of Defendant] can defeat a defamation claim by showing the statement to be true.]

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

A true statement cannot be the basis of a defamation claim, no matter how annoying, embarrassing, damaging, or insulting it may be. To be considered "true" in a defamation case, a statement need not be completely accurate. The statement need only be substantially true, which means the gist of the statement is true.

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

References

Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014)
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)
Auto West, Inc. v. Baggs, 678 P.2d 286 (Utah 1984)
Pipkin v. Acumen, 2020 UT App 111, 472 P.3d 315
Davidson v. Baird, 2019 UT App 8, 438 P.3d 928

MUJI 1st Instruction

10.4

Committee Notes

The first sentence of this instruction includes alternative instructions in brackets because the burden of proof for truth/falsity can vary depending on the nature of the case. See CV1602. The first alternative should be given in cases where the plaintiff is a public official and/or public figure, or where the speech at issue relates to a matter of public concern. The second alternative should be given in cases where the plaintiff is neither a public official nor a public figure, and the speech at issue does not relate to a matter of public concern.

Although material falsity is usually a question of fact for the jury, where "the underlying facts as to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a matter of law." Hogan v. Winder, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations omitted). See also Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) ("[U]nder the First Amendment, a court's role is to determine whether '[a] reasonable jury could find a material difference between' the defendant's statement and the truth.") (Scalia, J., concurring and dissenting) (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 522 (1991)) (second alteration in original).

In addition to explaining that "[m]inor inaccuracies" do not make a statement materially false, Masson, 501 U.S. at 517, the United States Supreme Court has further explained the concept of whether an inaccuracy is "material" as follows: "[A] materially false statement is one that "'would have a different effect on the mind of the reader [or listener] from that which the … truth would have produced.'" Air Wis., 571 U.S. at 250 (quoting Masson, 501 U.S. at 517) (further citation omitted) (second alteration and ellipses in original).

There is a potentially open question regarding the standard of proof for falsity in some types of defamation cases. In Hart-Hanks Communications, Inc. v. Cannaughton, 491 U.S. 657, 661 n.2 (1989), the United States Supreme Court took note of a split of authority as to whether, in a public figure or public official plaintiff case (where actual malice must be proved by clear and convincing evidence), material falsity must also be proved by clear and convincing evidence. At that time, the Court "express[ed] no view on this issue." Id. Since that time, however, the Supreme Court has twice emphasized that the issues of material falsity and actual malice are inextricably related, such that the definition of the latter requires a finding of the former. See Masson, 501 U.S. at 512; Air Wis., 571 U.S. at 246 ("[W]e have long held … that actual malice entails falsity."). As a result, many courts have concluded that in public figure and public official cases, material falsity must also be proved by clear and convincing evidence. See, e.g., Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1136 (10th Cir. 2014) ("If the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by 'clear and convincing proof.'" (citation omitted) (applying Colorado law)); DiBella v. Hopkins, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only "a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence"); 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 3:4 (4th ed. 2013) (collecting cases).

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

Amended Dates:

3/12/18

Tab 7

Comment re: Nuisance – Introductory Instruction

The White Collar and Commercial Enforcement Division submits the following comments.

Our primary concern is that the distinct remedy of nuisance that is available to the State of Utah acting in its sovereign capacity has different elements than the remedy available to subdivisions or private parties. In recent litigation, the Attorney general has employed a nuisance cause of action to address injury to the health and welfare of Utah citizens arising from the opioid epidemic. Our comments address those concerns. We suggest the following revisions:

CV1206 NUISANCE – INTRODUCTORY INSTRUCTION.
One person can interfere *with a public right, or* 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." Since this instruction is the introductory instruction, applicable to both private and public nuisance, as currently drafted, the limitation to property is narrower than the actual cause of action. damages apply only to private nuisance and this instruction doesn't include abatement, the equitable remedy for a public nuisance.

We suggest the following insertion:

"A nuisance is anything that is 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 (Utah Code Ann. 78B-6-1101(1). A public nuisance is one that affects an interest common to the general public. Turnbaugh for Benefit of Heirs of turnbaugh v. Anderson, 793 P.2d 939, 942 (Utah Ct. App. 1990); Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d 286, 289 (Utah 1976).

The instruction continues, with our revision,

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 a public right or [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 *abate, or end, the nuisance and/or* recover damages from [name of defendant] for that harm.

CV1210 appears to be forwarded for a private nuisance suit. We have two concerns:

1. We suggest deleting (2). the statute does not use the term “unreasonable” and it is duplicative. An unlawful act is by definition unreasonable. Similarly, acts which “offend [] public decency” would also be unreasonable as the impetus for specific inclusion in the statute.

To clarify that this instruction applies to private nuisance suits rather than nuisance suits brought by the State, we suggest the following at theend of the instruction:

“These instructions are intended to address claims of private parties, and not to affect the State’s authority to proceed on behalf of the public.”

Thomas Melton

Instruction:

CV1206 Nuisance - introductory instruction

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 App. 1990)

Tab 8

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
	Implicit Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Judge Kelly has scheduled meetings for this group. Alyson will give an update at August meeting.	Oct. 2022
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Easement by Necessity last on agenda for August 2022.	Oct. 2022
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	?
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, where these completed? Marianna could only find notes as to intention to form this subcommittee.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	
	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022