MINUTES
Advisory Committee on Model Civil Jury Instructions
May 13, 2024
4:00 p.m.-6:00 p.m.

Present: Judge Brian D. Bolinder, William Eggington, Stewart Harmon, Michael Lichfield, John Macfarlane, Alyson McAllister, Doug Mortensen, Ricky Shelton, Jace Willard (staff), Kara H. North (staff)

Excused: Mark Morris, Ben Lusty

Guests: Mitch Rice, Monica Howard

1. *Welcome and Approval of Minutes*

Ms. McAllister welcomed the Committee. The Minutes from the April meeting were approved.

2. *Welcome to Judge Bolinder*

Ms. McAllister welcomed Judge Brian D. Bolinder, from the 7th District, who is the newest Committee member. All members of the Committee introduced themselves.

3. *CV 324 - Use of Alternative Treatment Methods*

The Committee previously voted to remove CV324 and the only remaining issue is whether to include a Committee Note explaining the reason for removing the instruction. Following discussion, Mr. Macfarlane moved to include a Committee Note providing as follows:

> The wording of the removed instruction could have suggested bias in favor of the Defendant. However, there may be circumstances in which some version of an alternative treatment methods instruction would be appropriate.

Ms. McAllister seconded. The Committee unanimously supported the motion.

4. *Public Comments re CV920, 930, 940 Series of Easement Instructions*

No public comments were received in response to the recently added CV920, CV930, and CV940 series of easement instructions. Accordingly, no further action is needed as to those instructions.

5. *Public Comments re CV301B and 301C – Establishing Breach of Standard of Care*

The Committee reviewed public comments received (including a letter signed by a number of defense attorneys) in response to the Committee Note recently added to CV301C.

Ms. McAllister noted that there was a lengthy discussion in the last meeting wherein the majority of the Committee felt that instructions CV301B and 301C as written are correct, and that the jury is specifically instructed to take the instructions as a whole regarding the burden of proof, and

there's no need to reiterate those instructions again in CV301C. Thus, the Committee previously added the *Meeks* case to the references, and added a Committee Note that confirms the Committee met and revisited the issue and felt it was an accurate representation of the law, and states that if someone wants to give 301B and 301C together, they can request that from the court. There was a minority on the Committee that felt that there could be more clarification in the instruction. This is what went out for public comment.

The Committee didn't change the instruction language, just added a Committee Note. The comments received request changes to the CV301C language. The concern is that the instruction as written creates a perception that the defense has a burden that the defense doesn't have.

Following discussion, the Committee agreed that the concerns raised in the public comments have already been considered by the Committee. Mr. Shelton moved that no action be taken in response to the public comments. Mr. Mortensen seconded the motion. The Committee unanimously supported the motion. No further action will be taken at this time.

6. CV___ Assault

Ms. McAllister welcomed Mitch Rice and Monica Howard to present proposed instructions on assault, malicious prosecution, and false arrest. They began with a draft instruction setting forth the elements for assault:

> [Name of plaintiff] claims that [name of defendant] assaulted [him]. To succeed on this claim, [name of plaintiff] must prove the following:
>
> (1) [name of defendant] acted with the intent
>
> (a) to cause harmful or offensive contact with [name of plaintiff]; or
>
> (b) to put [name of plaintiff] in imminent apprehension of a harmful or offensive contact; and
>
> (2) [name of plaintiff] was aware of [name of defendant]'s action and recognized the harmful or offensive contact was about to occur.

Members of the Committee expressed concerns regarding whether a lay jury would have difficulty understanding the phrase "imminent apprehension of," and discussed replacing that phrase with "fear of an imminent." Dr. Eggington will review corpus linguistics for the phrase "imminent apprehension" and consider whether alternate language might be preferable.

Ms. McAllister asked whether there are any recent federal district court cases using different language. Ms. Howard will research this issue.

7. CV___ Harmful of Offensive Physical Contact Defined

Mr. Rice presented a draft instruction defining "harmful or offensive contact" as follows:

> Contact is harmful or offensive if any of the following is true:

(1) [Name of plaintiff] did not consent to the contact either expressly or by implication; or

(2) [Name of plaintiff] expressly communicated that the contact was unwanted; or

(3) No reasonable person would consent to the contact.

Mr. Rice observed that the prior instruction didn't include a definition and felt including that would be helpful. The definition used in the draft is from *Wagner v. Utah Dep't of Human Servs*., 2005 UT 54, ¶ 51, 122 P.3d 599.

Following review of the *Wagner* case, Ms. McAllister thought the first sentence should be combined with subdivision (1) to define harmful or offensive conduct, and that subdivisions (2) and (3) described the conduct included. Mr. Rice and Ms. Howard both agreed, resulting in the following:

Contact is harmful or offensive if [name of Plaintiff] did not consent to the contact either expressly or by implication. This includes all physical contact that:

(1) [Plaintiff] expressly communicated was unwanted; or

(2) No reasonable person would consent to the contact.

Ms. McAllister pointed out that the case says "directly," and asked Dr. Eggington whether "directly" or "expressly" was better. Dr. Eggington thought "directly" would be better. Following discussion, "directly" was substituted for "expressly" in the first sentence.

8. CV___ Malicious Prosecution

Mr. Rice presented the following draft malicious prosecution instruction:

[Name of plaintiff] claims [name of defendant] harmed [him] through a malicious prosecution. To succeed on this claim, [name of plaintiff] must prove the following four elements:

(1) [name of defendant] actively initiated or helped to continue criminal proceedings against [name of plaintiff]; and

(2) [name of defendant] did not have probable cause to initiate or help to continue criminal proceedings; and

(3) [name of defendant]'s primary motivation was something other than bringing a criminal to justice; and

(4) The criminal proceedings against [name of plaintiff] ended in [name of plaintiff]'s innocence.

Mr. Rice referenced *Neff v. Neff*, 2011 UT 6, ¶ 52, 247 P.3d 380, for the instruction basis. The "helped to continue" language in subdivision (1) was used in place of "procured." After

discussion, the language "actively initiated" and "initiate" in subparagraphs (1) and (2) was simplified to "began" and "begin."

Mr. Macfarlane and Ms. McAllister suggested that additional language may be needed to clarify what is meant by a proceeding ending in a plaintiff's "innocence" in subparagraph (4), given the *Neff* court's indication that dismissal as part of a plea deal would not suffice. Mr. Rice and Ms. Howard will consider the need for other language to capture this aspect of the *Neff* decision.

9. CV___ Definition of Probable Cause in Malicious Prosecution Claim

Mr. Rice presented the following draft instruction defining "probable cause" for malicious prosecution:

> [Name of defendant] has probable cause for initiating or helping to initiate criminal proceedings against [name of plaintiff] if:
>
> (1) [name of defendant] believes [name of plaintiff] was guilty; and
>
> (2) A reasonable man in [name of defendant]'s position would believe [name of plaintiff] was guilty; and
>
> (3) [name of defendant] is sufficiently informed as to the facts and applicable law to justify [name of defendant] initiating or helping to continue the criminal proceeding.

Mr. Rice again referenced *Neff v. Neff*, 2011 UT 6, 247 P.3d 380, to support this instruction. A citation to *Neff* was added to the listed references for this instruction. Other language was simplified, including changing the phrase "initiating or helping to initiate" in the first sentence and a similar phrase in subdivision (3) to "beginning or continuing."

10. CV___ False Imprisonment

Mr. Rice presented the following draft instruction on false imprisonment:

> [Name of plaintiff] claims [name of defendant] falsely imprisoned [him]. To succeed on this claim, [name of plaintiff] must prove all the following elements:
>
> (1) [Name of defendant] acted with intent to confine or restrain [name of plaintiff]; and
>
> (2) [Name of plaintiff] was [unlawfully or wrongfully] confined or restrained by [name of defendant]; and
>
> (3) [Name of plaintiff] knew that [he] was confined or restrained without [his] consent; or [name of plaintiff] was harmed by the confinement or restraint.
>
> [Name of plaintiff] can be confined or restrained by physical force or by verbal threats or by other conduct leading [him] to reasonably believe [he] is not free to leave.

Ms. McAllister raised questions about the definitions of unlawful and wrongful. Mr. Rice suggested that defining these terms might be challenging and would likely be addressed through attorney argument. Ms. McAllister suggested including a note to use "unlawful" with the option for attorneys to use "wrongfully" depending on the case.

Ms. McAllister questioned the need to add a provision regarding "direct or indirect conduct" from the Restatement (Second) of Torts, § 35(1)(b) to the instruction elements or a Committee Note. Mr. Rice and Ms. Howard to consider this question, which will be addressed further at the next meeting.

11. Summer schedule, other pending instructions, and adjournment

The next Committee meeting will be on August 12th and Mr. Willard will follow up with the product liability subcommittee. The meeting adjourned shortly after 6 PM.