MINUTES

Advisory Committee on Model Civil Jury Instructions
April 16, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Timothy M. Shea, and Paul M. Simmons

Excused: John L. Young (chair)

1. Mr. Shea circulated with the meeting materials a revision of the introduction that included a new paragraph explaining why alternative instructions were sometimes included. The committee approved the new paragraph.

2. The committee then continued its review of the products liability instructions.

a. *1007. Strict liability. Definition of "adequate warning."* Mr. Shea had rewritten this instruction in light of the article on Nevada law regarding the adequacy of warnings discussed at the last meeting. Mr. Simmons noted that the law the Nevada Supreme Court relied on was identical to the law quoted by the Utah Court of Appeals in *House v. Armour of America*, 8886 P.2d 542, 551 (1994). Messrs. Ferguson and Fowler thought the first element (that the warning "catch the user's attention") was misleading. The warning may not catch the user's attention for reasons that do not have to do with the adequacy of the warning. This element was changed to read, "(1) be designed to reasonably catch the user's attention." Mr. Ferguson thought the phrase "ordinary knowledge common to foreseeable users" in the second element was cumbersome. At Mr. Shea's suggestion, the second element was revised to read, "(2) be understandable to foreseeable users." Mr. Ferguson thought that the third element was misleading in that it suggested that a manufacturer may have a duty to warn about dangers that could arise from unforeseeable uses of its product. He suggested changing it to read, "(3) identify dangers from the [product]'s foreseeable use." Mr. Carney suggested revising it to read simply, "(3) identify the specific danger." The committee noted that the phrase "identify the specific danger from the [product] or from its foreseeable use" was meant to require warnings for products that could be dangerous without being used and those that were only dangerous when used; it was not meant to require warnings of dangers that arose only from unforeseeable uses. Mr. King noted that "hazard," "risk," and "danger" were sometimes used interchangeably and suggested that we use one term consistently. Mr. Shea noted that the instructions use "danger." Mr. Shea asked whether the third element should say "identify" or "indicate." The committee did not have a strong preference for one word over the other. Based on the authority cited for the instruction, the third element was revised to read, "(3) fairly indicate the danger from the [product] or its foreseeable use." Mr. Fowler thought that the word "intense" in the fourth element was inapt. At his suggestion, it was changed to "conspicuous." At Mr. Ferguson's and Mr.

Shea's suggestion, the last paragraph of the instruction was deleted, and the third paragraph was made new instruction 1008.

b. *1008 [renumbered 1009]. Strict liability. Definition of "unreasonably dangerous" in failure-to-warn cases.* Mr. Ferguson asked whether the instruction should say that a product "was" unreasonably dangerous or "is" unreasonably dangerous. Mr. Shea noted that he had tried to use the past tense throughout the instructions because it fit better in most cases. Mr. Shea noted that alternative A was the regular instruction on "unreasonably dangerous," based on Utah Code section 78-15-6(2); the first paragraph of alternative B was based on the Utah Supreme Court's decision in *House,* 929 P.2d 340 (Utah 1996), and the second paragraph was based on *Brown v. Sears, Roebuck & Co.,* 328 F.3d 1274 (10th Cir. 2003). Mr. King questioned the need for a separate definition of "unreasonably dangerous" for failure-to-warn cases. Mr. Fowler noted that, if *House* established a new standard for failure-to-warn cases, the instruction did not capture it because the instruction was not substantially different from instruction 1005. Mr. King proposed doing away with instruction 1008 and having a single instruction (1005) defining "unreasonably dangerous." The phrase "[or inadequate warning]" could be added to the introductory sentences of alternatives A and B in instruction 1005.

Mr. Shea will revise instruction 1005, and the committee will review the revised version and compare it to instruction 1008 at the next meeting.

c. *1009. Strict liability. Failure to warn. Heeding presumption.* Judge Barrett questioned whether jurors would understand the word "heeding." The committee noted that the presumption is referred to as the "heeding presumption" in the case law but suggested synonyms for "heeded," including "followed" and "obeyed." Mr. King noted that he agreed with the substance of the instruction but questioned whether it needed to be given at all since the issue rarely comes up. Mr. King also suggested revising the first sentence of the advisory committee note to say, "This instruction is appropriate only if it cannot be demonstrated what the plaintiff would have done if he had been adequately warned." Mr. Simmons thought that a plaintiff should have the benefit of the presumption where he could not say what he would have done, since he had been deprived of the opportunity to know what he would have done by not having been given an adequate warning; any testimony as to what the plaintiff would or would not have done would be speculative. Other committee members thought that if the plaintiff could not say what he would have done, he could not meet his burden of proof and that the presumption only applied where the plaintiff was unable to say what he would have done because of the nature of his injuries (such as where he had lost his memory or was dead). Mr. Shea noted that the instruction required "some extreme mental gymnastics" because of its structure--three conditional "if" clauses, one of which negates the other two. Mr. Carney questioned whether the first clause was necessary. Mr. King suggested revising

the instruction to read, "You can presume that if [name of defendant] had provided an adequate warning, [name of plaintiff] would have heeded it." Mr. Fowler noted that that version assumes that the warning was not adequate. Mr. Shea suggested revising the instruction to read, "If you find that [name of defendant] did not provide an adequate warning, you can presume that [name of plaintiff] would have followed an adequate warning." Mr. King suggested another alternative: "In this case, there is no evidence of what the plaintiff would have done if [name of defendant] provided an adequate warning. Therefore, you should presume that [name of plaintiff] would have followed an adequate warning." Mr. Ferguson asked whether there were other instructions that explained to the jury what a presumption was and its effect. Committee members were not aware of any. Mr. Simmons noted that the law is not clear on the effect of a presumption. He read passages from *House v. Armour of America,* 886 P.2d 542, 552 (Utah Ct. App. 1994), which says the heeding presumption "shifts the plaintiff's burden on causation," and from *Mecham v. Allen,* 1 Utah 2d 29, 262 P.2d 285, 290-91 (1953), which suggests that a presumption meets the plaintiff's burden of establishing a prima facie case but disappears when contrary evidence is presented. He concluded from these cases that the effect of the presumption may vary, depending on whether the presumption just establishes a prima facie case, in which case it disappears as soon as the other side comes forward with contrary evidence, and the jury should not be instructed on the presumption, or whether it shifts the burden of proof, in which case, the jury should probably be instructed on the changed burden of proof. Mr. King suggested that the committee re-read the two decisions in *House v. Armour of America,* 886 P.2d 542 (Utah Ct. App. 1994), and 929 P.2d 340 (Utah 1996), before the next committee meeting.

3. *Next Meeting.* The next meeting will be Monday, May 14, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.