

MINUTES

Advisory Committee on Model Civil Jury Instructions

December 8, 2008

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and David E. West

1. *Fraud Instructions.* The committee continued its review of the fraud instructions.

a. *CV 1703. Recovery for misrepresentation of fact.* Mr. Shea asked whether “representation” in the first line should be “misrepresentation.” The committee thought it should not; the instruction is meant to distinguish between representations of fact and opinions, not between representations and misrepresentations. The committee revised the instruction to read:

You must decide whether the defendant’s statement was a representation of fact as opposed to an opinion. Generally, a plaintiff may recover for fraud only if the defendant’s statements were misrepresentations of facts.

The committee approved the instruction as revised.

b. *CV 1704. Recovery for statement of opinion.* Dr. Di Paolo suggested adding the following introductory language: “[Name of plaintiff] alleges that [name of defendant] stated an opinion as a fact. [Name of defendant] claims it was just a statement of opinion.” At Mr. Young’s suggestion, the first paragraph was replaced with the following: “Generally, a plaintiff may not recover for fraud if the defendant’s statements were opinions. However, an opinion is treated as a representation of fact if:” The committee asked whether each of the subparagraphs has to be proved or only one of them. Citing the Restatement (Second) of Torts, Mr. Carney said that only one had to be proved. Messrs. King and Nebeker suggested adding a committee note to the effect that one or more conditions may apply in a given case. Mr. Humpherys noted that a given case may involve both a representation of fact and a statement of opinion. Each of the paragraphs after the new introductory paragraph was bracketed, to suggest that only those that have evidentiary support should be included. If more than one is included, they should be separated by “or.” Dr. Di Paolo and Mr. Simmons thought that the instruction did not make it clear that the other elements of a fraud claim must also be met. They suggested that the instruction be clearly linked to CV 1701. Mr. Simmons also thought that the instruction was misleading because it implied that an opinion is fraudulent if it turns out to be wrong. He thought that an opinion is not fraudulent if it is honestly held. Dr. Di Paolo asked whether the requirement that the representation be made in a way that implies it is true rather than just an expression of belief applied to each of the

other bracketed paragraphs. Mr. Young noted that it is not the committee's position to argue over what the law is. At his suggestion, the committee sent the instruction back to the subcommittee to answer the committee's questions.

c. *CV 1710. Compensatory damages.* The committee noted that the difference between Alternative A and Alternative B is that the former applies to cases involving property, whereas the latter appears to apply to all other fraud cases. Mr. West asked whether the law is different for fraud cases involving property than for other fraud cases. Mr. Simmons questioned whether consequential damages should be available under Alternative A as well as Alternative B. At the suggestion of Messrs. Humpherys and King, the following language from Alternative A was added to Alternative B, and Alternative A was eliminated: "[(1) the difference between the value of the property that [name of plaintiff] [bought/sold] and the value the same property would have had if [name of defendant]'s statements about it had been true.]" The second paragraph of the committee note was also deleted. At Mr. West's suggestion, the committee deleted former subparagraph (4) ("prejudgment interest"), on the grounds that determining prejudgment interest is a job for the judge and not the jury. The subparagraphs were renumbered accordingly. Dr. Di Paolo thought that "expenditures in mitigation of damages" should be explained. Mr. Nebeker noted that there is a separate instruction on mitigation of damages. The committee deleted the second paragraph (beginning "In deciding how much money . . ."). Mr. Young noted that we need a special verdict form that itemizes the categories of damages. He will ask George Haley, the chair of the fraud subcommittee, to have the subcommittee prepare a suggested verdict form.

d. *Other instructions.* Mr. Humpherys thought there needed to be other fraud instructions, such as an instruction that says once one undertakes to speak, he has a duty to speak the whole truth, and an instruction telling the jury it can infer intent from the circumstances. Mr. Young asked whether there should be a "puffing" instruction. Mr. Ferguson noted that he and Mr. Johnson were in favor of including one but had been voted down. Mr. Young asked the committee members to get any suggestions for additional instructions to Mr. Shea, who can pass them on to the subcommittee. The committee suggested that the instructions also cover negligent misrepresentation.

2. *CV 1057. Safety risks.* Mr. Young reported that he was prepared to break the tie vote on CV 1057, but the matter was continued until the February 9, 2009, meeting, when both Mr. Fowler and Mr. King can be present.

3. *CV 1052. Learned intermediary.* Mr. Carney proposed adding a citation to the recent decision of *Downing v. Hyland Pharmacy*, 2008 UT 65. The committee

approved the recommendation. The medical malpractice subcommittee will consider whether there should be a separate instruction on *Downing*.

4. *Committee Membership.* Mr. Young reported that Mr. Carney would like to resign from the committee. Mr. Carney noted that he is no longer doing medical malpractice cases. He suggested that Jack Ray take his place on the committee and on the medical malpractice subcommittee. The committee approved Mr. Ray to take Mr. Carney's place on the medical malpractice subcommittee, but the committee prevailed on Mr. Carney to remain as a member of the committee, at least for the time being. Mr. Young proposed that John Lund take Mr. Johnson's place on the committee. The committee approved the proposal.

5. *Introduction.* Mr. Carney proposed adding language to the introduction to say that when a section of MUJI 2d appears, MUJI 1st should no longer be used. Mr. Shea recommended against the change. He noted that the introduction already says that MUJI 2d is intended to replace MUJI 1st. He thought that attorneys should be able to argue for a particular instruction based on whatever authority they can find for it. The committee thought that a statement that MUJI 1st should no longer be used would need to be approved by the Utah Supreme Court. Mr. Nebeker suggested that, where MUJI 1st instructions have not been carried over to MUJI 2d, the committee include a note explaining the reasons. Mr. Carney noted that the medical malpractice subcommittee did that with respect to the medical malpractice instructions. Mr. Young suggested a similar approach be taken in each section. As an alternative, he suggested that MUJI 2d include tables cross-referencing MUJI 1st and explaining why some MUJI 1st instructions have been omitted.

6. *CV 104. Order of trial. CV 101. General admonitions.* Mr. Humpherys proposed changes to CV 104 and 101, based on a recent trial he had. The committee approved his suggestions.

7. *CV 128. Objections and rulings on evidence and procedure.* At Dr. Di Paolo's suggestion, the last sentence of the first paragraph was revised to read: "And if a lawyer objects and I sustain the objection, you should disregard the question and any answer."

8. *Vicarious liability.* The committee approved John Lund to chair a subcommittee to draft instructions on vicarious liability.

9. *Verdict forms.* Mr. Young noted that special verdict forms are needed for each section. He suggested that the committee approve special verdict forms for the negligence section that can then be used as a template for preparing special verdict forms for other sections. Mr. Carney noted that the medical malpractice subcommittee

drafted special verdict forms. He suggested that the committee agree on the style and noted common issues, such as, how should the forms deal with the burden of proof and with special damages? He noted various ways of asking the jury whether the defendant was at fault, such as:

- Was the defendant at fault?
- Did the evidence establish that the defendant was at fault?
- Do you find by a preponderance of the evidence that the defendant was at fault?
- Did the plaintiff prove by a preponderance of the evidence that the defendant was at fault?

Mr. Humpherys cautioned against including long prefaces to the verdict forms. Mr. King thought the forms should focus on the process of arriving at a verdict rather than on the substantive law, which will be covered in the instructions.

10. The next meeting will be Monday, January 12, 2009, at 4:00 p.m. The next two meetings will focus on construction contract instructions.

The meeting concluded at 6:00 p.m.