

MINUTES

Advisory Committee on Model Civil Jury Instructions

April 13, 2009

4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

Excused: John L. Young (chair), John R. Lund

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Minutes*. The minutes of the March 9, 2009 meeting were approved.
2. *CV101B. Further admonition on electronic devices*. The committee approved CV101B, which Mr. Carney had proposed.
3. *Fraud and Deceit Instructions*. The committee continued its review of the fraud and deceit instructions:
 - a. *CV1803. Negligent misrepresentation*. Mr. Shea asked whether the instruction should be included somewhere else, such as in the negligence instructions. The consensus was that it belonged with the fraud instructions, but it was moved up as new CV1802 and retitled "Elements of negligent misrepresentation." Mr. Simmons thought that the first element should be eliminated because it presented a question of law for the court and not a question of fact for the jury to decide. The committee agreed and added a committee note to the effect that, if the question of duty depends on disputed facts, the court and counsel should craft an instruction explaining what factual questions the jury must answer.

Dr. Di Paolo and Mr. Humpherys joined the meeting.

Mr. Carney questioned whether CV1803 was an accurate statement of the law. He read Restatement (Second) of Torts § 552 and CACI 1903. Ms. Blanch and Mr. Fowler noted that the instruction does not include negligence (the failure to use reasonable care) as an element. Messrs. West and Summerill suggested adding as an element "[name of plaintiff] failed to use reasonable care in determining whether the representation was true or false." Mr. Ferguson thought the instruction was also missing the element of reasonable reliance. Mr. Shea suggested adding, "(5) [name of plaintiff] reasonably relied on the representation." Dr. Di Paolo thought "reasonably relied" was too hard for lay people to understand and suggested "It was reasonable for [name of plaintiff] to rely on the representation." Mr. Summerill noted that the Restatement says "justifiably relied." Mr. Humpherys thought "justifiably relied" was a more subjective standard than reasonable reliance that depended on the circumstances,

whereas “reasonably relied” was a more objective standard. Dr. Di Paolo thought “justifiably” connoted “thought out,” whereas “reasonably” connoted a more emotional response. At Mr. Humpherys’s suggestion, the instruction was sent back to the subcommittee to provide authority for the statement that the burden of proof is clear and convincing evidence.

Ms. Blanch was excused.

b. *CV1809. Reliance on statement of opinion.* Mr. Shea noted that CV1809 was his attempt to deal with the issue raised at the last meeting as to when a statement of opinion is actionable. He based CV1809 on the Restatement (Second) of Torts §§ 538A, 539, 542, and 543. It was noted that the other authority cited (*Baird v. Eflow Inv. Co.*, 289 P.2d 112 (Utah 1930)) did not support the instruction. Dr. Di Paolo questioned the use of the term “disinterested,” noting that the lay understanding of “disinterested” is “uninterested.” Mr. Humpherys questioned whether the standard of proof required is clear and convincing evidence. Mr. West thought that the first option could not be an accurate statement of the law. Mr. Humpherys and Mr. Simmons thought that the instruction should be omitted if there is no Utah law to support it. Mr. Ferguson thought that it should be referred to the subcommittee to review. The instruction will be omitted unless the subcommittee comes up with Utah authority to support it.

c. *CV1811. Compensatory damages.* Mr. Simmons asked why prejudgment interest was deleted. Mr. West noted that it was a question of law for the court to decide. At Mr. Fowler’s suggestion, “Alternative B” was deleted from the references. On Mr. Summerill’s motion, the committee approved the instruction as revised.

d. *CV18##. Intent.* Mr. Humpherys questioned the use of “infer.” Mr. Summerill and Dr. Di Paolo suggested, “you may determine intent from the surrounding circumstances,” with a cross-reference to the instruction on circumstantial evidence (CV122). Messrs. Fowler, Humpherys, and Summerill thought the phrase “because there is no way of knowing the operations of [a corporation] [the human mind]” was confusing. At Mr. Ferguson’s suggestion, it was changed to “because there is no way to read people’s minds.” At Dr. Di Paolo’s suggestion, “However,” was added to the beginning of the next sentence. The committee approved the instruction as modified. Mr. Shea will place it where it makes the most sense.

e. *CV18##. Duty to speak the whole truth.* At Mr. Humpherys’s suggestion “of fact” was deleted after “statement” in the second line. Messrs.

Humpherys and Ferguson thought the phrase “duty to tell the whole truth” was problematic. Mr. Ferguson suggested revising the instruction to read: “If [name of defendant] made a statement, then he had a duty to tell the truth about the matter [and] to make a fair disclosure [about the matter] and to prevent a partial statement from being misleading or giving a false impression.” Mr. Fowler suggested replacing “to tell the truth” with “to be truthful.” The committee approved Mr. Ferguson’s suggestion.

f. *CV1899A & 1899B. Special verdict forms.* Mr. Humpherys noted that the committee needs a policy on how detailed the special verdict forms should be, so that they will be consistent. Mr. Carney noted that detailed special verdict forms may present a trap for the jury. Mr. Humpherys thought that version A was too detailed. Mr. Ferguson thought that version B was more orthodox. On Mr. Carney’s motion, CV1899A was eliminated. Mr. Simmons noted that the verdict forms ask the jury to award “economic” and “noneconomic” damages, but those terms are not defined in the fraud instructions. He suggested revising CV1811 to say, “[Name of plaintiff] claims the following economic damages: . . . [Name of plaintiff] claims the following noneconomic damages: . . .” Mr. West noted that prejudgment interest is not available for all economic damages. Mr. Summerill suggested adding a committee note saying that the verdict form should separate the damage elements into those for which prejudgment interest is available and those for which it is not available. Mr. Fowler asked whether question (4) in CV1899B, which deals with punitive damages, should be eliminated, which raised the question of whether punitive damages follow as a matter of course if the jury finds fraud. Mr. Humpherys suggested that punitive damages be dealt with in the punitive damage section. He also suggested that there be a separate special verdict form for negligent misrepresentation, but it will have to wait for the subcommittee to resolve the issue of whether negligent misrepresentation must be proved by clear and convincing evidence.

4. *Next Meeting.* The next meeting will be Monday, May 11, 2009, at 4:00 p.m.

The meeting concluded at 5:50 p.m.