MINUTES
Advisory Committee on Model Civil Jury Instructions
May 14, 2012
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Honorable William W. Barrett, Jr., Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, John R. Lund, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Vicarious Liability Instructions. The committee continued its review of the vicarious liability instructions:

1. *CV2810. Joint venture defined.* Mr. Ferguson pointed out that the numbered subparagraphs start with (2). Mr. Shea will fix them so that they start with (1).

2. *CV2811. Liability of [partnership/joint venture] for acts of [partner/joint venturer].* The committee approved the instruction.

3. *CV2812. Liability of parents or legal guardians for property damage caused by a minor.* Mr. West noted that the two numbered subparagraphs at the end of the instruction need to be separated by "and" or "or." Since either condition is sufficient, Mr. Shea added "or" to the end of subparagraph (1). Mr. West also thought that subparagraph (1) was vague and did not give the jury much guidance; he questioned whether it was an accurate statement of the law. The committee reviewed the statutory language. It debated adding the language from section 78A-6-1113(5) until someone pointed out that subsection (5) says that "A court may waive part or all of the liability for damages" if certain conditions are met. The committee thought that this language meant that the question of whether the conditions were met was for the court, not the jury, to decide. On Mr. Lund's motion (Judge Toomey 2d), the committee approved the instruction as proposed, with the addition of the word "or" at the end of subparagraph (1).

4. *CV2813. Liability of a person who gives a minor permission to drive his vehicle.* On Mr. Ferguson's motion (Judge Toomey 2d), the committee approved CV2813.

5. *CV2814. Independent contractor defined.* Mr. Johnson noted that the Vicarious Liability Subcommittee had not had a chance to review the instructions dealing with vicarious liability for the acts of an independent contractor. Since the intent of CV2814 is to help the jury decide whether a given actor was an independent contractor or an employee, Mr. Shea suggested giving two instructions--one defining "employee," and one defining "independent contractor"–along with an instruction telling the jury that the defendant can be vicariously liable if the actor was an employee but not if he or she was an independent contractor, unless certain exceptions to the

general rule apply. Mr. Johnson noted that there is not an instruction defining "employee," just instructions defining scope of employment (CV2805-09). Mr. Ferguson suggested using the following language from *Utah Home Fire Insurance Company v. Manning,* 1999 UT 77, ¶ 11, 985 P.2d 243:

> [A]n employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his [or her] own way, subject to only minimal restriction or controls and is responsible only for its satisfactory completion.

Judge Toomey suggested that the two definitions be separate instructions. Mr. West thought that CV2814 was too vague. It lists some factors for the jury to consider but does not tell jurors how to weigh them, that they are not exclusive, or that no one factor is dispositive. He suggested prefacing the list with "Among the factors you may consider are the following:" Mr. Summerill noted that the factors were taken from workers' compensation cases, not from tort cases. He agreed with Mr. West that the jury should be told that no one factor is dispositive. Mr. Springer offered as authority for that position *Gourdin ex rel. Close v. Sharon's Cultural Education Recreational Association (SCERA),* 845 P.2d 242 (Utah 1992). Mr. Shea added the sentence, "You may consider the following factors, no one of which is controlling, and weigh them as you think appropriate." Mr. Young suggested bracketing the factors, so that the court would only give those for which there is evidence. Mr. Lund and Ms. Blanch questioned the sentence "An independent contractor is responsible only for the job's satisfactory completion," and noted that a jury could think from this sentence that the only way an independent contractor could be liable is for the unsatisfactory completion of the work. Ms. Blanch suggested deleting the word "only," and Judge Toomey suggested deleting the sentence altogether.

Mr. Johnson will rewrite CV2814 in light of the committee's discussion.

6. *CV2815. Liability of employer for acts of independent contractor.* Mr. Young questioned the use of the phrase "employer of an independent contractor." He noted that a jury may infer from the phrase that an independent contractor was an "employee." The committee deleted "of employer" from the title of the instruction and replaced references to the "employer" of an independent contractor with "[name of defendant]." It also replaced references to "independent contractor" or "contractor" with "[name of contractor]." Ms. Blanch suggested deleting "or participated in" from the third line. She thought that it would allow the jury to find an employer liable merely for

having provided some tools, for example. Mr. Ferguson suggested that whether the level of participation rose to the level of control, making the employer liable, was a question for the jury. Mr. Summerill thought that whether an employer's participation could make him liable depends on whether the employer participated in the injury causing act. Ms. Blanch thought that that would not be vicarious liability but that the employer would then be liable for its own negligence. Mr. Summerill noted that the "participation" standard comes from *Begaye v. Big D Construction Corp.,* 2008 UT 4, 178 P.3d 343, which in turn relied on *Thompson v. Jess,* 1999 UT 22, 979 P.2d 322, and thought it should not be abandoned. At the suggestion of Messrs. Lund and Johnson, the committee added "actively" before "participated in." Mr. Summerill noted that the last sentence of the first paragraph is stated in the negative and thought the committee had agreed to stay away from instructions of the type that "X is not enough." At Mr. Shea's suggestion, the sentence "The employer must exert sufficient control over the independent contractor such that the contractor could not carry out the injury-causing aspect of the work in his or her own way" was moved to the second sentence of the first paragraph, and the last sentence of the instruction was deleted as tautological. Mr. Lund thought that the instruction should tell the jury that it needs to find a causal relation between what the defendant/employer did and what the contractor did. Mr. Young suggested separating the concepts of active participation and control. Ms. Blanch thought that the two concepts are equivalent and should not be separated. At Mr. Johnson's suggestion, the committee agreed to revisit the instruction at the next meeting, after reviewing Mr. Shea's latest draft.

7. *CV2816. Liability of employer for physical harm caused by independent contractor when non-delegable duty is present.* Mr. Johnson noted that he was not sure how CV2816 differs from MUJI 1st 25.11. Mr Shea wondered what the jury was supposed to do with the instruction, since the court will have already determined whether or not a duty exists, and the only question for the jury is to determine whether any duty was breached. Mr. Ferguson agreed that the instruction does not say what the jury is supposed to decide. Mr. Lund thought the instruction was explanatory, that it explained to the jury why there was an exception in the particular case to the general rule that the employer of an independent contractor is not liable for the fault of the contractor, much like other instructions explain to the jury the effect of its finding of comparative fault. Mr. Summerill noted that Judge Hadfield had given an instruction on non-delegable duty in a trial Mr. Summerill had. He will try to find the instruction and give it to Mr. Johnson to consider in revising CV2816. The committee deferred further discussion of the instruction.

8. *CV2817. Liability of employer for physical harm caused by independent contractor if work is inherently dangerous.* Mr. Johnson noted that the authority for the instruction is *Thompson v. Jess.* Ms. Blanch thought that the instruction could be improved by giving an example, such as the use of explosives. Mr. Lund thought the

instruction could give more guidance on what is considered "a special danger." Mr. Ferguson thought the instruction, like CV2816, did not clearly say what the jury was supposed to decide. He and Mr. Carney asked whether the existence of a special or inherent danger was a question for the court or the jury. Mr. Young suggested adding an introductory instruction explaining the claims of the parties, for example: "[Name of defendant 1] claims that [name of defendant 2] was an independent contractor and that [name of defendant 1] is therefore not liable for [name of defendant 2]'s fault. [Name of plaintiff] claims that [name of defendant 1] can be liable for [name of defendant 2]'s fault because [describe the reason, e.g., retained control, non-delegable duty, inherently dangerous work]." Mr. Lund thought that whether the retained control doctrine applies is probably a question of fact, whether a case involves a nondelegable duty is probably a question of law, and whether a case involves inherently dangerous work is probably somewhere in between. Mr. Young suggested further research on the issue of whether an activity is "inherently dangerous" is a question of law or fact. If there is no clear answer under Utah law, he suggested providing alternative instructions (instruction A if the court decides it is a question of law, in which case the court would instruct the jury, "I have determined that [describe the activity] was inherently dangerous," or instruction B if the court decides it is a question of fact).

9. *CV2818. Vicarious punitive damages liability.* Mr. Ferguson questioned whether this instruction should go with the vicarious liability instructions or whether it should go with the punitive damage instructions. The committee thought it should probably go with the vicarious liability instructions. In the interest of time, the committee deferred further discussion of the instruction and of CV1005 for a later meeting.

Next Meeting. The next meeting is Monday, June 11, 2012, at 4:00 p.m. The committee will then take July and August off.

The meeting concluded at 5:55 p.m.