MINUTES

Advisory Committee on Model Civil Jury Instructions
October 11, 2016
4:00 p.m.

Present: Juli Blanch (chair), Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig, Paul M. Simmons, Peter W. Summerill, Keisa Williams (filling in for Nancy Sylvester). Also present: Mark Dalton Dunn from the Emotional Distress subcommittee

Excused: Marianna Di Paolo, Joel Ferre, Gary L. Johnson, Honorable Andrew H. Stone, Nancy Sylvester, Christopher M. Von Maack

1. *Minutes.* On motion of Mr. Fowler, seconded by Mr. Summerill, the committee approved the minutes of the September 19, 2016 meeting.

2. *Schedule.* Ms. Blanch reviewed the schedule.

3. *Emotional Distress Instructions.*

a. *CV1503, Severe or Extreme Emotional Distress, and CV1504, Definition of Intent and Reckless Disregard.* On motion of Mr. Simmons, seconded by Ms. Kuendig, the committee reversed the order of CV1503 and CV1504 so that the instructions follow the same order as the elements of intentional infliction of emotional distress listed in CV1501.

b. *CV1507. Zone of Danger.* The instructions that Messrs. Simmons and Fowler proposed (CV1505 and CV1506) did not include a "zone of danger" instruction. They had tried to encompass the concept within the instructions themselves to avoid having to define another term. Some members of the committee thought it would be helpful to use the term "zone of danger," in which case a definition would be necessary. Judge Harris asked where the requirement that the plaintiff fear for his or her own safety came from and thought that it should be struck if it was not supported by the case law. He thought that the concept is implicit in the third element of a negligent infliction of emotional distress (NIED) claim, namely, that the plaintiff suffer severe emotional distress resulting in illness or bodily harm. Judge Harris favored using the term "zone of danger" and defining it.

c. *CV1506. Negligent Infliction of Emotional Distress–Injury to Another.* Judge Harris thought the instruction was confusing because it was not clear if the third person (the "other") had to have been injured. He suggested taking out "caused by harm to another" in the first sentence and referring to the plaintiff in this situation as a "bystander." Ms. Kuendig thought that "bystander" would be easily understood by jurors. Judge Harris suggested rewriting the instruction to read:

> A bystander can recover for negligent infliction of emotional distress even if [he] [she] was not physically injured.
>
> In this case, [name of plaintiff] claims to have suffered emotional distress as a bystander. In order for [name of plaintiff] to recover on this claim, [name of plaintiff] must prove all of the following:
>
> 1. [name of defendant] was negligent;
>
> 2. [name of other] was hurt;
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> 3. [name of plaintiff] was in danger of a physical injury;
>
> 4. [name of plaintiff] either feared for [his] [her] own safety or witnessed injury to [name of other];
>
> 5. [name of plaintiff] suffered severe emotional distress resulting in illness or bodily harm.

If the committee adopts a "zone of danger" instruction, elements 3 and 4 could be collapsed into "[name of plaintiff] was within the zone of danger." Mr. Simmons suggested that CV1505 and CV1506 could be collapsed into one instruction saying that if the plaintiff was in the zone of danger he could recover for his severe emotional distress resulting in illness or bodily harm, whether his emotional distress was caused by his fear for his own safety or from witnessing harm to another. The committee thought that two instructions were preferable.

Mr. Dunn thought that both fear for one's own safety and witnessing harm to another were required for bystander claims. Mr. Summerill disagreed, citing *Straub v. Fisher & Paykel Health Care*, 1999 UT 102, ¶ 14, 990 P.2d 384, which says that one not in the zone of danger cannot recover for NIED whether her emotional distress "resulted from fear for her own safety *or* from witnessing harm to another" (emphasis added), suggesting that the two are disjunctive. Mr. Dunn thought that if one feared for his own injury, he would have a direct action, covered by CV1505, but for a claim based on an injury to another, he had to not only fear for his own safety but also witness the injury to the other. Mr. Summerill noted that one can be in the zone of danger without fearing for his own safety, and Mr. Simmons noted that the Utah Supreme Court in *Johnson v. Rogers*, 763 P.2d 771, 785 (Utah 1988) (Zimmerman, J., concurring in part), had adopted Restatement (Second) of Torts § 313 "as written," and section 313 only requires that the plaintiff be within the zone of danger. Because Mr. Summerill

had to leave, leaving the committee without a quorum, the committee adjourned without resolving the issue.

Ms. Blanch asked Mr. Dunn to have the subcommittee review CV1505 and CV1506 in the next two weeks and try to resolve the issue among themselves. She then asked him to e-mail Ms. Blanch, Ms. Sylvester, Mr. Fowler, and Mr. Simmons with the committee's conclusion. She provisionally scheduled a telephone conference with Messrs. Dunn, Fowler, and Simmons and her for November 7 at 10:00 a.m. to discuss the subcommittee's conclusions.

4. *Next meeting.* The next meeting will be Monday, November 14, 2016, at 4:00 p.m.

The meeting concluded at 5:05 p.m.