

MINUTES

Advisory Committee on Model Civil Jury Instructions

May 8, 2017

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Dani N. Cepernich from the Civil Rights subcommittee

Excused: Peter W. Summerill, Christopher M. Von Maack

1. *Minutes*. On motion of Mr. Ferre, seconded by Mr. Fowler, the committee approved the minutes of the April 11, 2017 meeting.

2. *Civil Rights Instructions*. The committee continued its review of the Civil Rights instructions.

a. *State v. Martinez*. Judge Stone asked whether the Utah Supreme Court's recent decision in *State v. Martinez*, 2017 UT 26, affects any of the civil rights instructions. Ms. Blanch asked Ms. Cepernich to have the subcommittee consider what effect if any the case has on the instructions.

b. *CV1310, Search or entry of property, and CV1313, Lawful [entry/search] of property*. Ms. Cepernich explained that the plaintiff has the initial burden to show that the search was without a valid warrant. The burden then shifts to the defendant to offer proof of an exception (consent, or probable cause and exigent circumstances). But it is ultimately the plaintiff's burden to prove that the search or seizure was unreasonable (that is, to disprove the exception). This is contrary to the last paragraph of CV1313. At Judge Stone's suggestion, the paragraph was deleted.

Judge Harris and Dr. Di Paolo joined the meeting.

Judge Stone thought that the jury did not need to be instructed on this burden shifting, since it is for the court to decide whether the defendant has come forward with some evidence of an exception, such as consent. He suggested collapsing CV1310 and CV1313.

Judge Stone also asked if the issue of a warrant would ever be litigated. Ms. Cepernich said that it would be if the validity of the warrant were challenged, for example, where the plaintiff claimed that it was improperly obtained. Judge Harris noted that, in such a case, the complaint would be against the officer who obtained the warrant, not the officer who executed it. Ms. Cepernich explained that you could have a claim against the officer who lied (for example) to obtain the warrant and also against the officer who executed the warrant if the warrant

was facially invalid. At Judge Stone's suggestion, CV1313(1) was changed to "The officer has a valid warrant." At Ms. Kuendig's suggestion, "valid" was also inserted before "warrant" in CV1316, "[Entry/Search] of residence pursuant to search warrant."

At Ms. Blanch's suggestion, CV1310(3) was changed back to "The [search/entry] was unreasonable." Ms. Shapiro noted that "valid" and "reasonable" were not synonymous and cautioned that the committee should be careful in its use of the terms.

The committee moved CV1313 up to follow CV1310 and renumbered it CV1311. It also added a note to the effect that the jury should only be instructed on those exceptions for which there is evidence. Mr. Simmons noted that the way the committee has dealt with parts of instructions that may be unnecessary depending on the evidence is to bracket them. He suggested revising old CV1313 to read, "A search is unreasonable if [(1) the officer did not have a valid warrant;] [(2) the officer did not obtain consent]; [or] [(3) the officer did not have probable cause and exigent circumstances did not exist.]" The committee decided to change CV1310(3) to read, "The [search/entry] was not 'reasonable'" and add a sentence, "'Reasonable' has a special meaning here. I will now instruct you on what 'reasonable' means." It then revised old CV1313 to say,

A search is reasonable if

- (1) The officer had a valid warrant;
- (2) The officer had obtained consent; or
- (3) The officer had probable cause, and exigent circumstances existed.

Dr. Di Paolo thought the use of the term "exigent" was problematic. The committee noted that "exigent circumstances" is defined in CV1319.

Mr. Simmons expressed concern with the order of the instructions. He suggested dividing CV1310 into two instructions. The first would read, "A person has a constitutional right to be free from an unreasonable [search/entry] of [his/her] property." It would then include the definition of "search" from old CV1311. At Judge Harris's suggestion, old CV1311 was moved up ahead of CV1310. Judge Harris then asked what should be done with CV1312, defining "seizure." Ms. Cepernich suggested adding "seizure" to the bracketed phrase "[search/entry]" in the first line of CV1310 (and presumably also to the titles that refer to searches and/or entries). Judge Harris suggested asking the subcommittee whether seizures of property are treated the same as searches and entries. Dr. Di Paolo thought that former CV1311, "Searches of property," more accurately described an entry on property. She noted that she does not know what a "search" is from the

instructions. Mr. Fowler noted that there can be a search of real property without entering onto the property, such as by the use of a listening device. Judge Harris noted that we only need to define the terms “entry,” “search,” and “seizure” if there is a meaningful distinction among them; if not, we can stay with just one term, such as “search.”

Ms. Cepernich thought that instructions CV1310 through CV1319 were meant to apply only to real property and not necessarily to all searches of property, including such things as vehicles, backpacks, and computer files, as the note the committee added to CV1310 at the last meeting suggested. Old CV1313, for example, was focused on entry into a residence. Ms. Cepernich noted that the conditions for a valid search listed in old CV1313 were not complete, not even for searches of real property. A search may also be valid if it is a protective sweep of property, if it is incident to an arrest, or if it is an inventory search of a car, for example. Moreover, a search with a valid warrant could be invalid if the search exceeds the scope of the warrant. The committee asked if it was possible to write a general instruction that would cover searches in every situation. The committee thought it may not be possible. Mr. Simmons suggested looking at model instructions from other jurisdictions to see how they handle searches and seizures. Judge Stone suggested keeping general instructions and adding a committee note explaining that the instruction addresses the most common situations, that the reasonableness of a search may need to be defined in the context of the specific case, and that it is beyond the scope of the instructions to state every exception for every type of search.

Judge Stone asked what the damages are for an unreasonable search of property. Mr. Ferre noted that a prevailing plaintiff can recover his attorney’s fees, which may be the most significant recovery in this type of case. Ms. Shapiro asked whether the plaintiff could also recover his defense costs from the underlying case and thought that general damages, such as for loss of reputation, may also be available. Mr. Simmons pointed out that CV1340 allows for recovery of general (or “non-economic”) damages.

3. *Negligent Infliction of Emotional Distress (NIED) Instructions.* The committee continued its discussion of Judge Harris’s proposed changes to the NIED instructions. Judge Stone thought that the zone-of-danger requirement applied even in direct victim cases and that the plaintiff had to have suffered some physical impact in direct victim cases. He cited *Straub v. Fisher & Paykel Health Care*, 1999 UT 102, 990 P.2d 384, as support, noting that, in ¶ 12 of the opinion, the court notes that Straub was claiming to have been a direct victim of the defendant’s negligence; the court did not reject this claim but instead held that the plaintiff’s claim failed because she was not in physical peril. Judge Harris disagreed that a zone-of-danger analysis applies in direct

victim cases, citing *Harnicher v. University of Utah Medical Center*, 962 P.2d 67 (Utah 1998), and *Candelaria v. CB Richard Ellis*, 2014 UT App 1, 319 P.3d 708, as support. He noted that those decisions do not expressly so hold, but the courts in those cases could have decided them without reaching the other issues in those cases if the plaintiff had to be within the zone of danger. Ms. Blanch suggested offering alternative instructions--the current instructions, and Judge Harris's proposed instructions. The committee did not want to do that. Mr. Fowler suggested adopting Judge Harris's proposed instructions but adding a committee note to the effect that the case law is less than clear. Judge Harris asked if the committee could agree on his proposed CV1506, covering bystander cases. Mr. Simmons noted that he disagreed that the fourth element, namely, that the plaintiff actually witnessed the third party sustain physical harm, was required. It is not required under Restatement (Second) of Torts § 313(2) but is based on dicta from *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995). Judge Harris indicated that he would be okay with a committee note acknowledging Mr. Simmons's view, but Ms. Blanch did not think that the disagreement of one committee member was sufficient to warrant a committee note. On motion of Judge Harris, the committee approved new CV1506 as drafted, with Mr. Simmons dissenting. The question then was whether there should be a separate instruction for direct victims. Mr. Simmons noted that Judge Harris's proposed CV1505 tracked section 313(1) of the Restatement, which the court adopted as written in *Johnson v. Rogers*, 763 P.2d 771, 785 (Utah 1998). On motion of Mr. Simmons, seconded by Dr. Di Paolo, the committee approved CV1505 as written, with the understanding that Judge Stone would draft a committee note stating that it is unclear from the case law whether the plaintiff has to be in actual physical peril in a direct victim case. Ms. Sylvester will circulate Judge Stone's proposed committee note by e-mail. The motion passed without opposition.

4. *Next meeting.* The next meeting is Monday, June 12, 2017, at 4:00 p.m.

The meeting concluded at 6:00 p.m.