Agenda
Advisory Committee on Model Civil Jury Instructions

February 12, 2018
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome, announcements, and approval of minutes	Tab 1	Judge Andrew Stone, Chair
Subcommittees and subject area timelines	Tab 2	Judge Andrew Stone
Injurious Falsehood	Tab 3	David Reymann
Other business		Judge Andrew Stone

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

March 12, 2018
April 9, 2018
May 14, 2018
June 11, 2018
September 10, 2018
October 15, 2018
November 19, 2018
December 10, 2018

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
January 8, 2018
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Marianna Di Paolo, Tracy H. Fowler, Honorable Keith A. Kelly, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Nancy Sylvester, Christopher M. Von Maack. Also present: David C. Reymann, chair of the Injurious Falsehood subcommittee; Chloe Fleischer (an intern in Mr. Von Maack's office)

Excused: Joel Ferre, Patricia C. Kuendig, Peter W. Summerill

1. *Minutes.* On motion of Ms. Shapiro, seconded by Mr. Von Maack, the committee approved the minutes of the November 13, 2017 meeting (as revised) and the December 11, 2017 meeting.

2. *Injurious Falsehood Instructions.* The Committee continued its review of the Injurious Falsehood instructions.

a. *CV1902, Elements of an Injurious Falsehood Claim.* Mr. Reymann noted that he had added language to the committee note saying that the instruction is not intended to address statutory claims for wrongful liens.

b. *CV1904: Definition: Disparaging Statement.* Dr. Di Paolo questioned whether an average juror would understand "disparage," "personal property" and "intangible property" as used in the instruction. She thought that lay people generally think of "disparage" as referring to a person. Mr. Reymann explained that "disparage" is commonly used more broadly than the situations covered by subparts (a) and (b) of the instruction but that statements that disparage a person's character are covered by defamation law. Dr. Di Paolo also questioned the use of the term "recipient." She noted that most people think that "receiving" a communication means to receive a written communication. She suggested saying "hearing or receiving." She also thought the second paragraph was hard to understand and suggested moving the third paragraph up to the second paragraph.

Mr. Fowler joined the meeting.

Mr. Reymann explained that the jury's role was to decide whether the statement was understood in a disparaging sense. Mr. Simmons noted that, as written, the last paragraph would require that all recipients of the statement understand the statement in a disparaging sense, and if one recipient did not, the claim would fail. The committee revised the instruction to read--

> I have already determined that the following statement[s] [is/are] capable of having a disparaging meaning: [Insert statements.]
>
> You must determine whether the person to whom the statement was published actually understood the statement[s] in [its/their] disparaging sense. You must also determine whether that person understood the statement as referring to [name of plaintiff's] [interests]. "Published" has a special meaning and is defined in the previous instruction.
>
> A statement is disparaging when it
>
> (a) calls into question in a negative way the quality of [name of plaintiff's] property, goods, or services; or
>
> (b) casts doubt on [name of plaintiff's] property rights. "Property rights" can mean an interest in land, personal property, or other types of property.
>
> Some statements may convey more than one meaning. For example, a statement may have one meaning that is disparaging and another meaning that is not. To support an injurious falsehood claim, [name of plaintiff] must prove, for any particular statement, that someone to whom the statement was published actually understood it in its disparaging sense and as referring to [name of plaintiff's] [interests]. If no one actually understood a particular statement in its disparaging sense and understood it as referring to [name of plaintiff's] [interest], then that statement cannot be used to support an injurious falsehood claim.

On motion of Ms. Shapiro, seconded by Mr. Simmons, the committee approved the instruction as revised.

Judge Kelly joined the meeting.

c. *CV1905, Definition: False Statement.* Mr. Reymann pointed out that the instruction was the same as the equivalent instruction in the defamation instructions and that there is no independent case law in Utah defining "false statement" in an injurious falsehood case. Dr. Di Paolo objected to the word "literally" because its meaning in common usage has changed; it is no longer understood to mean "literally." Judge Kelly asked whether we can vary from the language used in appellate court opinions. The committee thought that its charge

was to make the instructions more understandable for lay audiences and that it could depart from the language of appellate decisions when necessary to make the law more understandable, as long as it did not change the law's meaning. Mr. Simmons moved to take out "literally" from the third paragraph of this instruction and CV1605 (the equivalent instruction in the Defamation instructions). His motion failed for lack of a second. Judge Kelly asked whether "literally" has a different meaning from "absolutely" and "totally"; if not, it would be unnecessary. Mr. Reymann thought it did. Mr. Von Maack looked up synonyms for "literally." Ms. Shurman suggested "technically." On motion of Mr. Von Maack, seconded by Ms. Shapiro, the committee approved the instruction as written, with Dr. Di Paolo dissenting. She noted that one cannot make words mean what people do not use them to mean, and as much as the committee may want to retain the traditional meaning of "literally," people today will not understand it in that sense.

d. *CV1906, Definition: Opinion.* Mr. Reymann noted that this instruction is also the same as the equivalent instruction in the Defamation instructions (CV1606). He further noted that the U.S. and Utah supreme courts have not held that the First Amendment applies to injurious falsehood, but there is Utah constitutional protection for pure opinions, Utah Constitution article I, sections 1 and 15. Mr. Simmons did not think the instruction clearly explained what the jury was supposed to do. The committee revised the instruction to read:

> A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot be used to support an injurious falsehood claim. A statement of an opinion can be the basis of an injurious falsehood claim only when it implies one or more facts that can be proved to be false, and [name of plaintiff] shows that [a fact/the facts] [is/are] both false and disparaging. I have determined that the following statement[s] are statements of opinion: [Insert specific statements.]
>
> You must determine whether any particular statement of opinion implies one or more facts that are both false and disparaging.

Mr. Reymann noted that the defamation instruction should be revised if necessary to conform to the revised CV1906. Dr. Di Paolo asked whether the instruction should be revised to cover statements of fact as well. She suggested revising it to refer to statements that "state or imply facts." The committee thought that statements of fact are covered by other instructions. Mr. Reymann noted that the burden of proving falsity is somewhat unsettled in defamation

claims but not here; the burden is clearly on the plaintiff. Mr. Reymann noted that there is a Supreme Court opinion on statements of opinion that should be added to the references (namely, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)). Judge Stone asked whether CV1906 should be used for a literal statement of opinion (that is, a statement that is a statement of opinion on its face). Mr. Reymann said that there is no clear guidance on whether prefacing a remark with "In my opinion" makes what follows a pure statement of opinion. One must look at such things as the context of the statement. It is up to the court to weed out which statements are opinions and which are assertions of fact couched as an opinion. The instruction should only be used if the court concludes that a statement is a statement of opinion but can be construed as also stating or implying facts. Mr. Von Maack questioned the use of the passive voice in the first sentence ("cannot be used to"). Dr. Di Paolo thought that the use of the passive voice was not a problem and can aid clarity in some cases. She said that the purpose of adding the phrase "cannot be used to" was to avoid someone from arguing that, in his mind, the statement supports an injurious falsehood claim even though he legally cannot rely on it to support his claim. On motion of Ms. Shapiro, seconded by Mr. Von Maack, the committee approved the instruction as revised, with the addition of the reference to the *Milkovich* case.

Mr. Reymann volunteered to draft a new instruction, to be added at the end of the instructions, on statements that are not actionable.

e. *CV1907, Definition: Malice.* Mr. Reymann noted that malice is different for injurious falsehood than it is for defamation. Defamation requires actual or common-law malice. Injurious falsehood requires more than reckless disregard. It requires that the defendant have actual knowledge of the falsity of the statement and the intent to injure the plaintiff or the defendant should have reasonably expected that the plaintiff would be injured by the statement. The test for actual knowledge of falsity is a subjective test. Dr. Di Paolo thought that the instruction did not clearly explain what the jurors were supposed to do. She thought that they would have to determine falsity. Judge Stone expressed concern with the third paragraph. He and other committee members thought that if a reasonable person would have known that the statements were false, it was probative of whether the defendant really knew that the statements were false. The committee agreed that self-serving denials of knowledge should not necessarily be enough to defeat the claim. The committee decided to delete the third paragraph. The committee revised the instruction to read:

> You must determine whether [name of plaintiff] has proved that the statements were published with "malice." Malice in this context does not mean simply ill will or spite, as the word is commonly

> understood. Rather, to show [name of defendant] published the injurious statements with malice, [name of plaintiff] must prove that--
>
> (1) [name of defendant] actually knew the injurious statements were false when [he/she/it] published them; and
>
> (2) [name of defendant] either;
>
> (a) intended to injure [name of plaintiff] by publishing the statements; or
>
> (b) reasonably should have expected that the statements would injure [name of plaintiff].

The committee deferred voting on revised CV1907 until the next meeting.

3. *Next meeting.* The next meeting is Monday, February 12, 2018, at 4:00 p.m.

On motion of Judge Kelly, seconded by Mr. Von Maak, the meeting adjourned at 6:05 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back?	
1	Civil Rights: Set 1	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	September-16	September 2017 (wrap up 1/2, then send for comment)	Projected: February 2018 Meeting	
2	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	October-17	December-17	Projected: June 2018 Meeting	
3	Injurious Falsehood	Yes	Dryer, Randy; Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David (Chair); Stevens, Greg	December-17	February-18		March meeting: Discussion on uniformity
4	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	April-18	June-18		
5	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P); Steve Combe (D)	September-18	November-18		
6	Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	November-18	January-19		
7	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	February-19	February-19		
8	Abuse of Process	No (instructions from David Reymann)	David Reymann	March-19	March-19		
9	Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	April-19	June-19		
10	Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	September-19	November-19		
11	Civil Rights: Set 2	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	December-19	February-20		
12	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	March-20	May-20		

Tab 3

MUJI 2d – Updates for February 12, 2018 Meeting

Add this cite to the references on CV1906:

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)

New instruction for the end of Injurious Falsehood:

CV1909 Non-actionable Statements.

During trial, you may have heard evidence about certain statements made by [name of defendant] that may be considered disparaging to [name of plaintiff]. Just because you heard evidence of those statements does not necessarily mean that those statements can legally be the basis of an injurious falsehood claim. I may have admitted evidence of those statements for some purpose other than proof of injurious falsehood. I have determined that certain statements cannot be the basis of a injurious falsehood claim. Even though you heard evidence of them, you are instructed that the following statements cannot be the basis of [name of plaintiff]'s injurious falsehood claim: [insert specific non-actionable statements].

References
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214

MUJI 1st Instruction
No analogue

Committee Notes
This instruction recognizes that even where the court makes a determination that certain statements are non-actionable as a matter of law, such as when they are privileged or pure opinion, those statements may still be presented to jury for some other purpose or may have been presented prior to the court's legal determination. For that reason, and to effectuate the court's gatekeeping function, this instruction is designed to cure any prejudicial implication that non-actionable but otherwise admitted statements can support a defamation claim.

New opinion instruction for Defamation:

CV1606 Definition: Opinion.

A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot be used to support a defamation claim. A statement of an opinion can be the basis of a defamation claim only when the statement implies [a fact/facts] that [name of plaintiff] shows [is/are] false and defamatory. I have determined that the following statement(s) [is/are] statements of opinion: [insert specific statement(s).]

You must determine whether any particular statement of opinion implies one or more facts that are both false and defamatory.

References
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Utah Const. art. 1, §§ 1, 15
Restatement (Second) of Torts § 566 cmt. c (1977)

MUJI 1st Instruction
No analogue

Committee Notes
The question of whether a statement is one of fact or opinion is a question of law for the court, not the jury. *West v. Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994); Restatement (Second) of Torts § 566 cmt. c (1977). Likewise, the questions of whether a statement of opinion reasonably implies verifiable facts, and whether those facts are capable of sustaining defamatory meaning, are also questions for the court. *Id*. at 1019. Only if the court determines that a statement of opinion can reasonably imply facts capable of sustaining defamatory meaning is there a question for the jury as to whether the statement did, in fact, convey that defamatory meaning. *Id*. This instruction should be used in the event the court determines as a matter of law that one or more statements are opinion, but the statement(s) may nonetheless be actionable because they reasonably imply verifiable facts capable of sustaining defamatory meaning. The question for the jury is whether those facts were, in fact, implied, and whether the defamatory meaning was, in fact, conveyed.

The test for whether a statement is "defamatory" is explained in CV1607 (Definition: Defamatory).

Injurious Falsehood

CV1901 Injurious Falsehood—Introductory Notes to Practitioners (not to be read to the jury).

The tort of injurious falsehood encompasses two related claims known at common law as "slander of title" and "trade libel." "Slander of title has traditionally addressed statements casting doubt upon the fact or the extent of a plaintiff's ownership of property, most often real estate…. More recently, slander of title has been expanded to apply to interests other than title and to property other than land." 2 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 13:1.1 (4th ed. 2016) (hereinafter, "*Sack on Defamation*"). "The tort of disparagement of quality, or 'trade libel,' developed from slander of title. It provides compensation for false derogatory statements about the quality, rather than the ownership, of property, most often a product or service being sold." *Id*. "In both cases it is the plaintiff's interest in property, real or personal, tangible or intangible, that is protected." *Id*. Because both claims involve essentially the same elements, the only difference being whether the injurious statements concern ownership or quality of property, they are treated together as a claim for injurious falsehood.

The use of "slander" and "libel" is largely anachronistic. Disparagement of property can be either oral (slander) or written (libel), or even non-verbal—and the same is true of trade libel (sometimes called "business disparagement"). Given the confusion associated with these common law terms, these instructions refer to both types of claims as "injurious falsehood."

Injurious falsehood shares a vocabulary with the tort of defamation. "However, despite the similarity in the names of the torts, there is a basic distinction between the two. They protect separate and unrelated interests. The tort of slander of title and the related tort of disparagement of property are based on an intentional interference with economic relations. They are not personal torts; unlike slander of the person, they do not protect a person's reputation." *Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988); *see also Sack on Defamation* § 13:1.4[B] ("The law of defamation protects the personal reputation of the defamed party; the law of business or commercial disparagement, or injurious falsehood, protects the economic interests of the injured party."). "[I]njurious falsehood is a far more difficult cause of action than defamation to sustain, because it is an action only for special damages caused by the false statement, and the burden of proving falsity, damages, and 'malice' in its many forms is generally higher than in defamation." *Sack on Defamation* § 13:1.4[A].

Nonetheless, despite the different interests protected by defamation and injurious falsehood, many courts and commentators have recognized that the First Amendment protections incorporated into defamation law should apply with equal force to an injurious falsehood claim, as both torts implicate freedom of speech. As one commentator has put it, "[t]here is no reason to accord lessened protection because the plaintiff's claim is denominated 'disparagement,' 'trade libel,' or 'injurious falsehood' rather than 'libel' or 'slander' or because the injury is to economic interests rather than to personal reputation. Since only economic injury and not injury to reputation and psyche is at issue, perhaps the balance should tip even further to the side of free expression." *Sack on Defamation* § 13:1.8. In Utah, this remains an open question because neither the United States Supreme Court nor the Utah appellate courts have ever addressed

whether the constitutional protections of defamation apply to injurious falsehood. The issue has, however, been addressed by a federal district court in Utah. *See SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1293 (D. Utah 2010) ("Having reviewed the relevant authority, the Court finds that slander of title claims are subject to the First Amendment."); *cf. Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (applying First Amendment opinion protection to injurious falsehood claim under Colorado law); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249 (D. Mass 1981) (applying First Amendment actual malice standard to product disparagement claim), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *SIRQ, Inc. v. Layton Cos.*, 2016 UT 30, ¶ 50, 379 P.3d 1237 ("[F]alse light claims that arise from defamatory speech raise the same First Amendment concerns as are implicated by defamation claims.").

Because application of the First Amendment to injurious falsehood remains an open question in Utah, the Committee has not drafted these instructions to incorporate the constitutional requirements of defamation law. However, should a party wish to argue for such protections, the modifications to these instructions would not be extensive. This is because, in Utah, the "malice" element of injurious falsehood already requires a plaintiff to prove the defendant published statements with actual knowledge of falsity. *See Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, ¶¶ 35-36, 326 P.3d 656. This is not the rule in all jurisdictions, some of which allow "malice" for injurious falsehood to consist of common law malice, or ill will, at least in private figure cases. *See Sack on Defamation* § 13:1.4[E].

The Utah standard of malice for injurious falsehood, therefore, is already higher than the standard for constitutional "actual malice" set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which must be met in public official and public figure defamation cases, and which can be satisfied *either* by actual knowledge of falsity *or* reckless disregard for the truth. As a result, in Utah there is no need to distinguish between the types of plaintiffs in injurious falsehood cases, nor to include a separate instruction on punitive damages. In addition, there is no need for an instruction on conditional privilege, as conditional privileges are abused and vitiated by actual malice. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 28, 221 P.3d 205.

Were the full scope of First Amendment protections from defamation law to apply to injurious falsehood claims, the Committee anticipates only two potentially necessary modifications to these instructions. First, under *Sullivan*, actual malice must be proven by clear and convincing evidence in public official and public figure cases. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Second, although the United States Supreme Court has never explicitly said so, the same heightened standard may apply in public plaintiff cases to the standard for falsity. *See* CV1605 (Definition: False Statement), Committee Notes. The below instructions do not specify a standard of proof other than preponderance of the evidence, but they could be modified in an appropriate case to be consistent with the constitutional standards of proof for defamation claims.

Finally, although Utah courts have not directly addressed the issue, it is generally acknowledged that "the absolute privileges that apply to defamation actions apply also to injurious falsehood suits." *Sack on Defamation* § 13:1.5[A]; *see also* Restatement (Second) of Torts § 635 (1977) ("The circumstances under which there is an absolute privilege to publish an injurious falsehood

are in all respects the same as those under which there is an absolute privilege to publish matter that is personally defamatory"). Examples of absolute privileges include, but are not limited to, the judicial proceedings privilege, *see DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, and the legislative proceedings privilege, *see Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128. In the injurious falsehood context, other courts have found privileged "the filing of a lis pendens, a mechanic's lien, or a judgment[.]" *Sack on Defamation* § 13:1.5[A] (footnote citations omitted). Whether a statement is privileged, however, is typically a question for the court, not the jury, to decide. *See Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992); *see also* CV1608 (Conditional Privilege). Therefore, as with the MUJI 2d instructions for defamation, *see* CV1608 (Conditional Privilege), Committee Notes, the Committee has not included an instruction on absolute privilege. If, during trial, the jury has heard evidence of statements the court has determined are absolutely privileged, and there is some concern the jury may assume those statements are actionable, the parties may wish to request a curative instruction similar to that set forth in CV1609 (Non-actionable Statements).

Utah statutes may provide additional remedies for conduct that also constitutes injurious falsehood. Utah Code §§ 38-9-101, et seq., and Utah Code §§ 38-9a-101, et seq., for example, provide remedies for the recording of wrongful liens, which may also be actionable as slander of title. See, e.g., Rehn v. Christensen, 2017 UT App 21, 392 P.3d 872 (analyzing both claims). These instructions deal only with the common law tort of injurious falsehood and are not intended to be used for any related or overlapping statutory claims.

CV1902 Elements of an Injurious Falsehood Claim. Approved 12/11/17.
[Name of plaintiff] claims that [name of defendant] injured [him/her] by publishing one or more ~~harmful~~ statements known as "injurious falsehoods." To succeed on this claim, [name of plaintiff] must prove the following elements:

(1) ~~(1)~~ [name of defendant] published statement(s) that disparaged ~~either~~
a. the quality of [name of plaintiff's] [property, goods, or services]; or
~~a.~~b. [name of plaintiff's] property rights in [land, personal property, or intangible property];
(2) the statements were false;
(3) the statements were made with malice; and
(4) the statements caused specific monetary loss to [name of plaintiff].

Some of these words have special meanings, and they will be explained in the following instructions.

References
Rehn v. Christensen, 2017 UT App 21, 392 P.3d 872
Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
Neff v. Neff, 2011 UT 6, 247 P.3d 380
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Jack B. Parson Cos. v. Nield, 751 P.2d 1131 (Utah 1988)
Direct Import Buyers Assoc. v. KSL, Inc., 572 P.2d 692 (Utah 1977)

Restatement (Second) of Torts §§ 623A, 624, 626 (1977)

MUJI 1st Instruction
19.17, 19.18

Committee Notes
The first element in this instruction is intended to encompass both slander of title and trade libel claims, and is worded generally regarding the specific target of the injurious statements. It could be modified to be more specific if the parties and court so choose.

This instruction is not intended to address statutory causes of action for wrongful liens. See Utah Code sections 38-9-101 to 38-9-305 and 38-9a-101 to 38-9a-205 (2017).

CV1903 Definition: Publication. Approved 12/11/17.
[Name of plaintiff] must prove [name of defendant] "published" the alleged injurious falsehoods. Publication means [name of defendant] communicated the statements to a person other than [name of plaintiff]. Publication can be oral, written, or non-verbal if a person's non-verbal conduct or actions specifically communicate the injurious falsehoods. "Written" statements include statements that are communicated electronically or digitally.

References
Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Restatement (Second) of Torts §§ 623A cmt. e, 630 (1977)

MUJI 1st Instruction
19.19

Committee Notes
Utah cases do not address whether publication of an injurious falsehood must be intentional, or at least negligent, to create liability. The Restatement requires at least negligence. *See* Restatement (Second) of Torts § 630 (1977). In some ways, however, this concept is subsumed within the malice requirement, as a non-negligent, unintentional publication would rarely be published with the requisite degree of malice.

CV1904 Disparaging Statement. Approved 1/8/18.
I have already determined that the following statement(s) is/are capable of having a disparaging meaning: [insert statements].

You must determine whether the person to whom the statement(s) [was/were] published actually understood the statement(s) in [its/their] disparaging sense. You must also determine whether that person understood the statement(s) as referring to [name of plaintiff's] [interests]. "Published" has a special meaning and is defined in the previous instruction.

A statement is disparaging when it

(a) calls into question in a negative way the quality of [name of plaintiff's] property, goods, or services; or
(b) casts doubt on [name of plaintiff's] property rights. Property rights can mean an interest in land, personal property, or other types of property.

Some statements may convey more than one meaning. For example, a statement may have one meaning that is disparaging and another meaning that is not. To support an injurious falsehood claim, [name of plaintiff] must prove, for any particular statement, that someone to whom the statement was published actually understood it in its disparaging sense and understood it as referring to [name of plaintiff's] [interests]. If no one actually understood a particular statement in its disparaging sense and as referring to [name of plaintiff's] [interests], then that statement cannot be used to support an injurious falsehood claim.

References
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Restatement (Second) of Torts §§ 629, 652 (1977)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998)
Hogan v. Winder, 762 F.3d 1096 (10th Cir. 2014)
Restatement (Second) of Torts §§ 559, 614 (1977)

MUJI 1st Instruction
19.20

Committee Notes
The element of "disparaging" has not been extensively addressed by Utah courts in the injurious falsehood context, including the question of the court's role in determining whether a statement is capable of conveying a disparaging meaning. The element is analogous, however, to the element of defamatory meaning for defamation claims, which has been addressed by Utah courts, and with respect to which the court's role is clearly defined. References are therefore included to defamation authority for this instruction. *See also* CV1607 (Definition: Defamatory); Restatement (Second) of Torts § 652 (1977) ("In an action for injurious falsehood, the court determines … whether the statement is capable of disparaging or other injurious meaning; … the jury determines whether … the statement complained of was understood by the recipient as disparaging or otherwise injurious" and "the statement was understood to be published of and concerning the plaintiff's interest").

The definition of "disparaging" as "casting doubt" on the plaintiff's interests comes from the Restatement. *See* Restatement (Second) of Torts §§ 629 (1977). Because the phrase "casting doubt" may not be as inclusive of the types of statements that would constitute business disparagement, the instruction also uses the phrase, "calls into question in a negative way."

As with CV1902 (Elements of an Injurious Falsehood Claim), the third paragraph of this instruction could be narrowed and stated more specifically depending on the types of statements at issue in a particular case. The bracketed word [interests] could be used as a general descriptor, or the parties and court could decide to be more specific about the interests at issue in a particular case, *i.e.*, the plaintiff's title in land, ownership of intangible property, quality of services, etc.

CV1905 Definition: False Statement. Approved 1/8/18. <u>(Take up again at 2/12 meeting)</u>
The allegedly injurious statement must state or imply facts which can be proved to be false, and [name of plaintiff] must show the statement to be false.

"False" means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, the statement must be materially false. A statement is "materially false" if it is false in a way that matters; that is, if it has more than minor or irrelevant inaccuracies.

A true statement cannot be the basis of an injurious falsehood claim, no matter how annoying, embarrassing, damaging, or insulting it may be. "Truth" does not require that the statement be absolutely, totally, or literally true. The statement need only be substantially true, which means the gist of the statement is true.

You should determine the truth or falsity of the statement according to the facts as they existed at the time [name of defendant] published the statement.

References
Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Air Wis. Airlines Corp. v. Hoeper, __ U.S. __, 134 S. Ct. 852 (2014)
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)
Auto West, Inc. v. Baggs, 678 P.2d 286 (Utah 1984)
Restatement (Second) of Torts § 634 (1977)

MUJI 1st Instruction
19.22

Committee Notes
The issue of falsity has not been extensively discussed in the injurious falsehood context, but it is essentially the same as the requirement of falsity for defamation claims. References are therefore included to defamation authority for this instruction. *See also* CV1605 (Definition: False Statement).

CV1906 Definition: Opinion. Approved 1/8/18.
A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot be used to support an injurious falsehood claim. A statement of an opinion can be the basis of an injurious falsehood claim only when ~~it~~ the statement implies [a fact/facts] ~~which~~ that ~~can be proved to be false, and~~ [name of plaintiff] shows [is/are] both ~~the statement is~~ false and disparaging. I have determined that the following statement(s) [is/are] statements of opinion: [insert specific statement(s).]

You must determine whether any particular statement of opinion implies one or more facts that are both false and disparaging.

References
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)
Direct Import Buyers Assoc. v. KSL, Inc., 572 P.2d 692 (Utah 1977)
Utah Const. art. 1, §§ 1, 15
Restatement (Second) of Torts §§ 566 cmt. c, 626 cmt. c, 634 (1977)

MUJI 1st Instruction
19.22

Committee Notes
The issue of protected opinion has not been extensively discussed in the injurious falsehood context, but it is similar to the issue that arises in the defamation context. References are therefore included to defamation authority for this instruction. In *West v. Thomson Newspapers*, 872 P.2d 999, 1015-19 (Utah 1994), the Utah Supreme Court held that the Utah Constitution protects statements of pure opinion. The Committee discerns no reason the same protection would not apply in the injurious falsehood context. *Cf. Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (applying First Amendment opinion protection to injurious falsehood claim). This instruction also assumes that, as in the defamation context, whether a statement constitutes pure opinion is a question for the court to decide. *See West*, 872 P.2d at 1018. *See also* CV1606 (Opinion).

This instruction should be used in the event the court determines as a matter of law that one or more statements are opinion, but the statement(s) may nonetheless be actionable because they reasonably imply verifiable facts capable of sustaining a disparaging meaning. The question for the jury is whether those facts were, in fact, implied, and whether the disparaging meaning was, in fact, conveyed.

CV1907 Definition: Malice. (done with instruction; need to look at note)
You must determine whether [name of plaintiff] has proved that the statements at issue were published with "malice."~~[Name of plaintiff] must prove [name of defendant] published the injurious statements with "malice."~~ ~~"~~Malice~~"~~ in this context does not mean simply ill will or spite, as the word is commonly understood. Rather, to ~~prove~~ show that [name of defendant] published the injurious statements with malice, [name of plaintiff] must prove:

(1) [name of defendant] actually knew the injurious statements were false when [he/she/it] published them; and
(2) [name of ~~plaintiff~~defendant] either:
(a) intended to injure [name of plaintiff] by publishing the statements; or
(b) reasonably should have expected that the statements would injure [name of plaintiff].

~~Regarding the first requirement – that [name of plaintiff] actually knew the statements were false – the question is not whether a reasonable person would have known that the statements were false, but whether [name of defendant] actually had such knowledge at the time of publication.~~

References
Rehn v. Christensen, 2017 UT App 21, 392 P.3d 872
Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Direct Import Buyers Assoc. v. KSL, Inc., 572 P.2d 692 (Utah 1977)
Howarth v. Ostergaard, 515 P.2d 442 (Utah 1973)
Restatement (Second) of Torts §§ 623A (1977)

MUJI 1st Instruction
19.23

Committee Notes
The meaning of "malice" in the injurious falsehood context has not always been clear in Utah. Some older cases suggest that malice requires actual knowledge of falsity, while others appear to endorse mere intent to injure or ill will, traditionally known as common law malice. *Compare Direct Import Buyers Assoc. v. KSL, Inc.*, 572 P.2d 692, 696 (Utah 1977) (requiring "actual malice" for disparagement of quality claim) *with First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1257 (Utah 1989) (appearing to allow a showing of malice from proof "that the wrong was done with an intent to injure, vex, or annoy"); *see also Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 n.1 (Utah 1988) ("We forgo defining the term 'malice' in this opinion. We note, however, that the concept is not altogether clear under Utah law." (collecting cases)). This confusion may have stemmed from some courts' reliance on cases discussing conditional privilege in the defamation context, in which both actual malice and common law malice can constitute abuse of the privilege. In *Dillon v. Southern Management Corporation Retirement Trust*, 2014 UT 14, ¶¶ 34-40, 326 P.3d 656, the Utah Supreme Court resolved this confusion, "clarify[ing] that to show malice in a claim for slander of title, the plaintiff must prove that the defendant had actual knowledge that the statements at issue were false." *Id*. ¶ 35. This is a subjective, not objective, inquiry. *Id*. The court explained that the "intent to injure" and reasonable foreseeability requirements are alternative ways of showing malice, but that actual knowledge of falsity is required regardless. *Id*. ¶ 36. The latter method of

proof (reasonable foreseeability) is sometimes referred to as "implied malice." *Id.* ¶ 38; *see also Rehn v. Christensen*, 2017 UT App 21, ¶ 62, 392 P.3d 872. This holding conformed Utah law to the Restatement position. *See* Restatement (Second) of Torts § 623A (1977). *Dillon* was a slander of title case, but the Committee discerns no reason the same definition of malice would not apply equally to disparagement of quality claims.

Notably, the *Dillon* court did not hold that malice for injurious falsehood can be shown by proof of the defendant's reckless disregard for the truth. The malice standard for injurious falsehood in Utah, therefore, appears to be higher than the actual malice standard mandated by the First Amendment in defamation law, which incorporates the reckless disregard concept. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205. *Cf.* CV1608 (Conditional Privilege).

CV1908 Economic Damages.
[Name of plaintiff] must prove that the alleged injurious statements directly caused [him/her/it] economic damages. Economic damages are specific monetary losses. Examples of such loss include, but are not limited to, lost sales of products, sale of an interest in land at a reduced price, or legal expenses reasonably necessary to remove a cloud on [name of plaintiff's] title in property. A mere reduction in estimated value of property that [name of plaintiff] continues to own does not constitute a specific monetary loss.

References
Rehn v. Christensen, 2017 UT App 21, 392 P.3d 872
Neff v. Neff, 2011 UT 6, 247 P.3d 380
Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361 (Utah 1997)
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co., 505 F. Supp. 2d 1178 (D. Utah 2007)
Watkins v. Gen. Refractories Co., 805 F. Supp. 911 (D. Utah 1992)
Restatement (Second) of Torts § 633 (1977)

MUJI 1st Instruction

Committee Notes
This instruction uses the term "economic damages" to capture the concept of special damages. This concept is similar (though not identical) to the concept of special damages in the defamation context. *See* CV1615 (Damages – Economic Damages). Among the differences, the Utah Supreme Court has held that attorneys' fees directly and necessarily incurred in clearing a cloud on title resulting from disparagement of property can constitute special damages for injurious falsehood. *See Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 569 (Utah 1988); *Neff v. Neff*, 2011 UT 6, ¶ 80, 247 P.3d 380; *see also Rehn v. Christensen*, 2017 UT App 21, ¶ 69, 392 P.3d 872. Utah courts have not addressed whether the same rule applies to a disparagement of quality claim.

To constitute special damages, the loss must be liquidated. The last sentence of this instruction is intended to convey that requirement. *See Neff*, 2011 UT 6, ¶ 81 ("[W]here a party's claim for

harm to the value of his property has been based on appraisal value instead of sale of the land at a reduced price, we have denied recovery because the damages had not yet been realized."); *Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361, 364 (Utah 1997) ("Proof of special damages usually involves demonstrating a sale at a reduced price or at greater expense to the seller. It is not sufficient to show that the land's value has dropped on the market, as this is general damage, not a realized or liquidated loss.").

CV1909 Non-actionable Statements.

During trial, you may have heard evidence about certain statements made by [name of defendant] that may be considered disparaging to [name of plaintiff]. Just because you heard evidence of those statements does not necessarily mean that those statements can legally be the basis of an injurious falsehood claim. I may have admitted evidence of those statements for some purpose other than proof of injurious falsehood. I have determined that certain statements cannot be the basis of a injurious falsehood claim. Even though you heard evidence of them, you are instructed that the following statements cannot be the basis of [name of plaintiff]'s injurious falsehood claim: [insert specific non-actionable statements].

References
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214

MUJI 1st Instruction
No analogue

Committee Notes
This instruction recognizes that even where the court makes a determination that certain statements are non-actionable as a matter of law, such as when they are privileged or pure opinion, those statements may still be presented to jury for some other purpose or may have been presented prior to the court's legal determination. For that reason, and to effectuate the court's gatekeeping function, this instruction is designed to cure any prejudicial implication that non-actionable but otherwise admitted statements can support a defamation claim.