

Judicial Council Standing Committee
Model Utah Civil Jury Instructions

Agenda

March 14, 2022
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Alyson / Lauren
Defamation and False Statements <ul style="list-style-type: none">• Updates to instructions based upon new case law.	Tab 2	David Reymann
Insurance Instructions <ul style="list-style-type: none">• Discussion for new working group.		Stewart Harman
Wills / Probate <ul style="list-style-type: none">• Discussion for new working group.		Stacy Haacke
Updates on upcoming topics	Tab 3	Stacy Haacke

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Next meeting: April 11, 2022 at 4:00 p.m.

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 14, 2022

4:00 p.m.

Present: Stacy Haacke (staff), Douglas G. Mortensen, Randy Andrus, Lauren A. Shurman, Judge Kent Holmberg, Ricky Shelton, Samantha Slark, Judge Keith A. Kelly, Alyson McAllister, Joel Ferre, Marianne Di Paolo
Also present: Robert Cummings, Robert Fuller

Excused: Ruth A. Shapiro, Adam Wentz

1. Welcome.

Alyson McAllister welcomed everyone.

2. Approval of Minutes.

January 2022 meeting minutes approved.

3. Discussion of Easements and Boundary Instructions.

Robert Cummings and Robert Fuller are present. They are working on the instructions together and would like additional time to present the Committee with further instructions related to easements. Mr. Cummings will send a clean copy of the Boundary by Acquiescence instructions that were reviewed at the last meeting for final approval. They will return at a future meeting

4. Re-Appointments and Chair / Vice -chair appointments

Stacy updates the Committee that the re-appointments and chair / vice-chair appointments have been approved by the Management Committee. These will be on the consent calendar for the Judicial Council this month.

5. New Appointments

The Committee discusses the new appointments for defense counsel. Several members know Mark Morris, Michael Dodge and Gary Wight. Members believe Mark would be fair and capable. Michael would bring a different perspective than from a large firm. After discussions, the Committee would have a preference for appointment of Gary Wight or Mark Morris.

The Committee discusses the new appointments for a linguist. Marianne Di Paolo indicates Brett Hashimoto or William Eggington would be legitimate candidates. Marianna knows Mr. Eggington and believes his experience would make him a better candidate. After discussions, the Committee would have a preference for appointment of William Eggington.

6. *Adjournment.*

The meeting concluded at 4:45 PM.

Tab 2

CV1602 Elements of a Defamation Claim.

[Name of plaintiff] claims that [name of defendant] defamed [him/her]. To succeed on this claim, [name of plaintiff] must prove the following elements:

(1) [name of defendant] published statement(s) about [name of plaintiff];

~~[(2) the statements were false;]~~

(3) the statements were defamatory;

~~[(4) the statements were not privileged;]~~

(5) the statements were published with the required degree of fault; and

(6) the statements caused damages to [name of plaintiff].

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

References

Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535

Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956

West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)

[Pipkin v. Acumen, 2020 UT App 111, 472 P.3d 315](#)

[Davidson v. Baird, 2019 UT App 8, 438 P.3d 928](#)

MUJI 1st Instruction

10.2, 10.3

Committee Notes

~~Element (2) is bracketed because There has been some confusion in reported decisions regarding~~ whether a defamation plaintiff bears the burden of proving falsity or whether truth is an affirmative defense for which the defendant bears the burden of proof depends on the nature of the case. If the plaintiff is a public official or public figure, the plaintiff bears the burden of proving material falsity, which is entailed in the requisite showing of actual malice. See Air Wis. Airlines Corp. v. Hooper, 571 U.S. 237, 250 (2014) (“[W]e have long held ... that actual malice entails falsity.”). In addition, regardless of the status of the plaintiff, if the speech at issue involves a matter of public concern, the plaintiff likewise bears the burden of proving material falsity. See, e.g., Davidson v. Baird, 2019 UT App 8, ¶ 25 n.3, 438 P.3d 928; Pipkin v. Acumen, 2020 UT App 111, ¶ 16 n.10, 472 P.3d 315. “Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’” Snyder v. Phelps, 562 U.S. 443, 453 (citations omitted). This rule is of constitutional magnitude under the First Amendment. See In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1985); ~~the United States Supreme Court held that the First Amendment required a plaintiff to prove falsity in cases involving speech published by a media defendant relating to a matter of public concern. Cf.;~~ cf. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (“Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.”). If the case involves a private plaintiff and speech that does not involve a matter of public concern, the defendant bears the burden of proving substantial

truth, and the falsity element should be removed from this instruction. ~~And although there are Utah decisions referring to truth as a “defense,” see, e.g., Brehany v. Nordstrom, Inc., 812 P.2d 49, 57 (Utah 1991) (“[T]ruth is an absolute defense to an action for defamation.”), the Utah Supreme Court has consistently listed falsity as an essential element of a defamation claim. See, e.g., Jacob v. Bezzant, 2009 UT 37, ¶ 21, 212 P.3d 535 (“A prima facie case for defamation must demonstrate that ... ‘the statements were false....’”) (quoting Oman v. Davis Sch. Dist., 2008 UT 70, ¶ 68, 194 P.3d 956); West v. Thomson Newspapers, 872 P.2d 999, 1007 (Utah 1994) (“To state a claim for defamation, [the plaintiff] must show that ... the statements were false....”). The committee accordingly included falsity as an element of the claim and did not distinguish between defendants or public concern and non-public concern cases.~~

The Utah legislature has defined “libel” and “slander” in Utah Code § 45-2-2 for purposes of the statutory provisions in that chapter, which include several statutory privileges, retraction requirements, and matters relating to broadcasts. The definitions in that section, however, are inconsistent with the elements of a defamation claim consistently articulated by the Utah Supreme Court, see, e.g., Jacob v. Bezzant, 2009 UT 37, ¶¶ 21, 212 P.3d 535; West v. Thomson Newspapers, 872 P.2d 999, 1007-08 (Utah 1994), and may suffer from constitutional infirmities for failure to require falsity, see I.M.L. v. State, 2002 UT 110, ¶¶ 19, 23, 61 P.3d 1038; Garrison v. Louisiana, 379 U.S. 64, 70-73 (1964). For this reason, the committee has used the elements articulated in the caselaw rather than the statutory definitions in Utah Code § 45-2-2.

Element (4) is bracketed because it need not be given in a case where either no privilege has been asserted or the court has determined that the privilege is inapplicable.

CV1605 Definition: False Statement.

The allegedly defamatory statement must state or imply facts which can be proved to be false, ~~and~~ [\[\[Name of plaintiff\] must show the statement to be false.\]](#)
[\[\[Name of defendant\] can defeat a defamation claim by showing the statement to be true.\]](#)

“False” means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, a defamatory 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 a defamation claim, no matter how annoying, embarrassing, damaging, or insulting it may be. To be considered “true” in a defamation case, a statement need not be completely accurate. 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

Air Wis. Airlines Corp. v. Hooper, ~~—571 U.S. —, 237~~~~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)

[Pipkin v. Acumen, 2020 UT App 111, 472 P.3d 315](#)

[Davidson v. Baird, 2019 UT App 8, 438 P.3d 928](#)

MUJI 1st Instruction

10.4

Committee Notes

[The first sentence of this instruction includes alternative instructions in brackets because the burden of proof for truth/falsity can vary depending on the nature of the case. See CV1602.](#)

Although material falsity is usually a question of fact for the jury, where “the underlying facts as to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a matter of law.” Hogan v. Winder, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations omitted). See also Air Wis. Airlines Corp. v. Hooper, ~~—571 U.S. —, 237, 258~~~~134 S. Ct. 852, 868~~ (2014) (“[U]nder the First Amendment, a court’s role is to determine whether ‘[a] reasonable jury could find a material difference between’ the defendant’s statement and the truth.”) (Scalia, J., concurring and dissenting) (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 522 (1991)) (second alteration in original).

In addition to explaining that “[m]inor inaccuracies” do not make a statement materially false, *Masson*, 501 U.S. at 517, the United States Supreme Court has further explained the concept of whether an inaccuracy is “material” as follows: “[A] materially false statement is one that “would have a different effect on the mind of the reader [or listener] from that which the ... truth would have produced.” *Air Wis.*, ~~134 S. Ct. at 863~~[571 U.S. at 250](#) (quoting *Masson*, 501 U.S. at 517) (further citation omitted) (second alteration and ellipses in original).

There is a potentially open question regarding the standard of proof for falsity in some types of defamation cases. In *Hart-Hanks Communications, Inc. v. Cernaughton*, 491 U.S. 657, 661 n.2 (1989), the United States Supreme Court took note of a split of authority as to whether, in a public figure or public official plaintiff case (where actual malice must be proved by clear and convincing evidence), material falsity must also be proved by clear and convincing evidence. At that time, the Court “express[ed] no view on this issue.” *Id.* Since that time, however, the Supreme Court has twice emphasized that the issues of material falsity and actual malice are inextricably related, such that the definition of the latter requires a finding of the former. See *Masson*, 501 U.S. at 512; *Air Wis.*, ~~134 S. Ct. at 861~~[571 U.S. at 246](#) (“[W]e have long held ... that actual malice entails falsity.”). As a result, many courts have concluded that in public figure and public official cases, material falsity must also be proved by clear and convincing evidence. See, e.g., *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014) (“If the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by ‘clear and convincing proof.’” (citation omitted) (applying Colorado law)); *DiBella v. Hopkins*, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only “a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence”); 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 3:4 (4th ed. 2013) (collecting cases).

If a case involves a public figure or public official plaintiff, and the court determines that the higher standard of proof applies to material falsity, the first paragraph of the instruction should be amended to state: “The allegedly defamatory statement must state or imply facts which can be proven to be false, ~~and~~ ~~[n]~~[Name of plaintiff](#) must show the statement to be false by clear and convincing evidence.”

Tab 3

MUJI Civil Upcoming Queue:

Subject	Members	Progress
Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back
Implicit Bias	TBD	TBD
Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Appeared on Agenda February 2021.
Assault / False Arrest	Mitch Rice	Mitch is circulating instructions with the group and will report back.
Insurance	Andrew Wright, Richard Vazquez, Stewart Harman	Appeared on Agenda March 2022. Would like feedback from Committee.
Unjust Enrichment	David Reymann	Instructions were shared in the past, where these completed?
Abuse of Process	David Reymann	Instructions were shared in the past, where these completed?
Directors and Officers Liability	Adam Buck	Adam is willing to work on this topic and would like more feedback from the Committee.
Wills / Probate	Matthew Barneck	Matthew is willing to work on the topic but asking for others to join this group.
Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.
Defamation	David Reymann	Appeared on Agenda March 2022 with redline of instructions.
Case law updates	TBD	

Archived Topics:

Subject	Completed
Emotional Distress	December 2016
Fault / Negligence	October 2017
Civil Rights: Set 1 and 2	September 2017
Economic Interference	December 2017
Injurious Falsehood	February 2018
Trespass and Nuisance	October 2019
Uniformity	February 2020