

Judicial Council Standing Committee on
Model Utah Civil Jury Instructions

Agenda

February 13, 2023

4:00 to 6:00 p.m.

Via Webex

Welcome and Approval of Minutes	Tab 1	Alyson/Lauren
CV135 (pretrial delay) - Review after public comment	Tab 2	Alyson
CV1607 (defamation) - Review after public comment (none)		Alyson
Prescriptive Easement draft instruction	Tab 3	Doug Farr
Easement by Necessity draft instruction		Robert Cummings
CV632 Threshold and CV632A - draft revisions for caselaw and legislative update	Tab 4	Alyson/Samantha
Progress on Instruction Topics	Tab 5	(Informational)

[Committee Web Page](#)

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Meeting Schedule: Monthly on the 2nd Monday at 4 pm

Next meeting: March 13, 2023

TAB 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
January 9, 2023
4:00 p.m.

Present: Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, William Eggington, Ruth A. Shapiro, Douglas G. Mortensen, Samantha Slark, Ricky Shelton, Adam D. Wentz, Jace Willard (staff).

Also present: Robert Fuller, Doug Farr

Excused: Judge Kent Holmberg, Mark Morris, Stacy Haacke (staff).

1. *Welcome.*

Lauren Shurman welcomed the Committee.

Samantha Slack has given her notice and will be leaving the Committee following the appointment of her replacement. The Committee now has two vacancies to fill.

2. *Approval of Minutes.*

December 12, 2022 meeting minutes approved.

Judge Kelly expressed his willingness to speak to the Board of District Court Judges regarding the Avoiding Bias Instructions to see if they have substantive input and to determine whether there is a consensus that these instructions will be useful. Judge Kelly may prepare a memorandum to provide to the Board as well.

3. *CV___ Prescriptive Easement. Introduction.*

- Doug Farr and Robert Fuller joined the meeting to discuss the proposed instruction.
- Mr. Farr explained the growing importance of easement law and outlined generally the organization of the proposed instructions.
- The Committee considered whether the introductory instruction is even necessary or consistent with previous instructions. Multiple members of the Committee opined that it was duplicative and did not add substantive material not found in later instructions.
- The Committee agreed to strike this instruction altogether.

4. *CV___ Prescriptive Easement. Elements of a claim.*

- Introductory sentences were suggested and added to account for some of the language previously found in the introductory instruction.

- Judge Kelly suggested edits to account for the specific easement claims being made in the subject lawsuit, and not simply general concepts. These edits were incorporated into the draft.
- The Committee agreed that legalese in the instruction should be simplified. The Committee made multiple such edits and clarifications.
- A conclusory statement was suggested to include clarification that if the plaintiff can establish all elements of a prescriptive easement, plaintiff may continue to use the property *in a similar manner*. The Committee later concluded that this addition may be duplicative. The Committee discussed whether this language should be used in a separate instruction, as well as what precisely the jury must decide in an easement action versus what the judge must determine. These questions were reserved for a later meeting.

5. *CV___ Prescriptive Easement. “Open and Notorious” Defined.*

- Members of the Committee pointed out that these terms are previously defined in the adverse possession and boundary by acquiescence instructions.
- The language was edited to simplify and clarify.
- Doug Farr had to leave the meeting early but agreed to make additional changes to the defined terms and return for the next meeting.

6. *Evolving Meaning of “Reasonable”*

- Bill Eggington presented on Corpus Linguistics, the evolution of language, and, specifically, evolution of the term “reasonable.”

7. *CV632 Threshold.*

Alyson McAllister posed the question to the Committee whether a subcommittee should be assigned to draft this instruction, or if an individual could take on the responsibility. Judge Kelly suggested having specialist from both sides of the bar contribute. Alyson McAllister and Samantha Slark agreed to prepare a draft for the next meeting.

8. *Adjournment.*

The meeting concluded at 6:03 PM.

TAB 2

Instructions Returning from Public Comment

CV135 Pretrial Delay

I am responding to CV135. I generally support this type of instruction. I believe individuals who are not familiar with civil litigation underestimate the amount of time required for a case to reach trial, especially in complex matters.

However, it may also be appropriate to distinguish the delay that occurs after a case is initiated and a plaintiff's delay in initiating a case. For example, in *Fehr v. Stockton*, 2018 UT App 136, 427 P.3d 1190, a lawyer claimed he was owed fees based on an oral contract for services performed between 2003 and 2015. The plaintiff did not file until 2015. Many other examples can be found with substantial delays between the alleged claim and the filing of a complaint.

If, as in *Fehr*, the defendant disagrees that an oral agreement ever existed or disputes the amount now claimed for work allegedly performed 12-years earlier, it seems appropriate for the jury to consider the plaintiff's pre-litigation conduct/delay. Effectively, the jury should be allowed to ask, "If defendant really promised to pay plaintiff in 2003, why did plaintiff wait 12 years to collect?"

Instructing the jurors that they "must not consider the time taken for the case to arrive at trial" potentially calls into question the jury's ability to weigh a plaintiff's pre-litigation delay as part of an overall finding of credibility. I suggest adding a final sentence akin to the following: "You may, however, still consider the parties' pre-litigation conduct, including any delay in initiating this civil proceeding."

--Mitch Stephens

CV1607 (Defamation)

No public comments.

TAB 3

CV ___ Easement Defined.

An easement is a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.

A prescriptive easement is an easement that a person obtains through longstanding use of another's property.

CV ___ Prescriptive Easement. Elements of a claim.

~~This is a prescriptive easement action. A prescriptive easement is a legal right to continue to use property of another based on longstanding use.~~ [Plaintiff] claims a prescriptive easement right to continue to use [Defendant's] property in the following manner: [describe the particular use]. To establish this prescriptive easement, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

1. That [Plaintiff] has been using [Defendant's] property for [describe the particular use];
2. That [Plaintiff's] use of [Defendant's] property in this manner was open and notorious;
3. That [Plaintiff's] use of [Defendant's] property in this manner was adverse; and
4. That [Plaintiff's] continuously used [Defendant's] property in this manner for at least 20 years.

If you find that [Plaintiff] has proved each of these elements by clear and convincing evidence, then [Plaintiff] is entitled to a ~~has established a right to prescriptive easement to continue using [Defendant's] the~~ property for [describe the particular use]. “While the conclusion that a prescriptive easement has been acquired is a question of law, because that determination is fact-intensive, [appellate courts] afford the trial court a ‘broad measure’ of discretion in its application of the correct legal standard to a particular set of facts and will overturn the determination only if the trial court exceeded its discretion.” Judd v. Bowen, 2017 UT App 56, ¶ 12 (citation omitted); see also Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

Commented [A1]: Maybe use this as part of a separate instruction. Need to look at role of jury vs judge in defining the easement.

Commented [A2]: This is included to try and assist in understanding the role of the fact-finder versus the judge in determining the existence of a prescriptive easement.

CV ___ Prescriptive Easement. “Open and Notorious” Defined.

[Plaintiff's] use of [Defendant's] property was “open and notorious” if [Defendant] knew about the use, or if [Defendant] could have learned about the use through the exercise of reasonable diligence.

The “open and notorious” requirement means that the affected landowner knew about the claimant's use of the property. Judd v. Bowen, 2017 UT App 56, ¶ 22, 397 P.3d 686, 694; see also Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953). The “open and notorious” requirement means that the use is generally known or the landowners could learn of it through reasonable diligence. But “open and notorious” does not require that the landowner has actual notice or knowledge. Judd v. Bowen, 2017 UT App 56, at ¶ 22, 397 P.3d 686, 694; see also Jensen v.

Gerrard, 85 Utah 481, 39 P.2d 1070, 1072 (1935). A use is “open and notorious” if the landowner could learn of the use through reasonable diligence. *Id.*

CV ____ Prescriptive Easement. “Adverse” Defined.

[Plaintiff’s] use of [Defendant’s] property was “adverse” if [Plaintiff] did not obtain permission for the use, for example by obtaining an easement agreement or license from [Defendant] or a previous owner of [Defendant’s] property that authorized the use.

[Plaintiff’s] use of [Defendant’s] property is presumed to be adverse if it was open and notorious and continued for a period of twenty years. In order to rebut this presumption of adverse use, [Defendant] must prove that either [Defendant] or a previous owner of [Defendant’s] property gave permission to [Plaintiff] for the use when it first began.

Harrison v. SPAH Family Ltd., 2020 UT 22.

“Adverse” use is presumed if the claimant’s use of the property is “open and continuous” for twenty-years. *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998). There is a presumption of “adverse” use where a claimant has shown an open and continuous use of the land for 20 years. *Zollinger v. Frank*, 110 Utah 514, 175 P.2d 714, 716 (1946); see also *Zollinger v. Frank*, 175 P.2d 714, 716; *Jacob v. Bate*, 2015 UT App 206, ¶ 18, 358 P.3d 346. The “adverse” use is presumed, the burden is on the shifts to the landowner to rebut the presumption of adverse use by “establish[ing] that the landowner initially permitted the use. the use was initially permissive.” *Jacob*, 2015 UT App 206 at ¶ 19.

CV ____ Prescriptive Easement. “Continuous” Defined

[Plaintiff’s] use of [Defendant’s] property was continuous if [Plaintiff] used [Defendant’s] property as often as required by the nature of the use and [Plaintiff’s] needs for the use, for an uninterrupted period of at least twenty years.

[Plaintiff’s] use of [Defendant’s] property was uninterrupted if [Plaintiff] actually and continuously used [Defendant’s] property throughout the twenty-year period, and [Plaintiff] did not accept permission from [Defendant] or a previous owner of [Defendant’s] property to continue the use sometime during the twenty-year period, for example, by initially starting the use without permission, but then agreeing to accept a license or easement agreement.

Harrison v. SPAH Family Ltd., 2020 UT 22.

The “cContinuous” requirement means the use occurs “use be” as often as required by the nature of the use and the needs of the claimant.” *Judd v. Bowen*, 2017 UT App 56, ¶ 16, 397 P.3d 686, 693 (quoting *Crane v. Crane*, 683 P.2d 1062, 1064 (Utah 1984)). The “continuousContinuous” use requirement does not require frequent or constant use. *Id.* To be “continuous”, the use cannot be interrupted by the landowner. *Id.*

References:

Judd v. Bowen, 2017 UT App 56, 397 P.3d 686

[*Valcarce v. Fitzgerald*, 961 P.2d 305, 311 \(Utah 1998\)](#)

Marchant v. Park City, 788 P.2d 520 (Utah 1990)

SRB Inv. Co., Ltd v. Spencer, 2020 UT 23, 463 P.3d 654

Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953)

Jacob v. Bate, 2015 UT App 206, 358 P.3d 346

Jensen v. Gerrard, 39 P.2d 1070 (Utah 1935)

Zollinger v. Frank, 175 P.2d 714 (Utah 1946).

For the definition of clear and convincing, see CV118.

TAB 4

CV632 Threshold.

[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.

~~In order to A person may~~ recover non-economic damages resulting from an automobile accident ~~[name of Plaintiff] must prove only if~~ [he/she] has ~~suffered one of the following~~:

~~[(1) death.] or~~

~~[(2) dismemberment.] or~~

~~[(3) permanent disability or permanent impairment based on objective findings.] or~~

~~[(24) permanent disfigurement.] or~~

~~[(5) a bone fracture.] or~~

~~[(36) reasonable and necessary medical expenses in excess of \$3,000.]~~

References

Utah Code Section 31A-22-309(1)(a).

Pinney v Carrera, 2020 UT 43, 469 P.3d 970

Committee Notes

~~Neither Both the statute nor and case law has have provided clear boundaries examples and on the definitions of for disability and impairment. For example, a herniated disc and permanent scar tissue restricting range of motion have both been held to constitute permanent injury. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.~~

Here is the case law and statutory law that I used to update the instruction:

First, it relied on one of our earlier cases to conclude that a disability or impairment is “permanent” “whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.”¹⁴ Then it interpreted the term “disability” to mean “the inability to work” and the term “impairment” to mean “the loss of bodily function.”¹⁵ Finally, the court interpreted the phrase “objective finding.”¹⁶ The court of appeals interpreted the phrase “objective findings” in two steps. First, it cited Black’s Law Dictionary, which defines “objective” as “[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual’s perceptions, feelings, or intentions.”¹⁷ And second, it cited one of its previous cases, in which it held that a plaintiff had failed to provide “objective findings” of a permanent injury where the plaintiff did not support his claim “with something more than his say so.”¹⁸ After considering these sources, the court concluded that, to be considered “objective,” “a finding need only be demonstrated through evidence other than the plaintiff’s own subjective testimony.”¹⁹

Pinney v. Carrera, 2020 UT 43, ¶¶ 19-20, 469 P.3d 970, 977

Commented [SS1]: I think there is a danger of interpreting this as saying these injuries are a disability as a matter of law. I think the case law says it is sufficient evidence for a jury to conclude . . . , which is a little different. I am not sure this note is helpful anymore so just removing it seems the better option.

Commented [AM2R1]: I think having the examples in there are helpful, but we should word it in such a way to make it clear those are not per se disability.

¶24 The statute imposes a burden on the plaintiff to prove that one of the circumstances enumerated in the statute exists.²

Pinney v. Carrera, 2020 UT 43, ¶ 24, 469 P.3d 970, 978

a permanent herniated disc in her back. And he specifically testified that the herniated disc constituted “a permanent injury.” He also testified that scar tissue, stemming from injuries sustained in the crash, inhibited Ms. Pinney's range of motion, and that treatment failed to restore her range of motion back to “100 percent.” He further testified that “the scar tissue is permanent.”

Pinney v. Carrera, 2020 UT 43, ¶ 28, 469 P.3d 970, 979

(1)(a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (i) death;
- (ii) dismemberment;
- (iii) permanent disability or permanent impairment based upon objective findings;
- (iv) permanent disfigurement;
- (v) a bone fracture; or
- (vi) medical expenses to a person in excess of \$3,000.

Utah Code Ann. § 31A-22-309 (West)

CV 632A – Threshold - Definitions

A “permanent disability” is ~~the-an~~ inability to work ~~where-it-that~~ is reasonably certain to continue throughout the life of the person suffering from it.

A “permanent impairment” is the loss of a bodily function that is reasonably certain to continue throughout the life of the person suffering from it.

~~You cannot make a finding that [plaintiff] is “permanently disabled” or “permanently impaired” based on [plaintiff’s] testimony that they believe they are permanently disabled or permanently impaired. A finding that [plaintiff] is permanently disabled or permanently impaired must be based-demonstrated by externally verifiable evidence, which means something other than [plaintiff’s] own testimony. on-externally-verifiable evidence of a permanent disability or permanent impairment.—~~Testimony of an expert or [plaintiff’s] treating physician are examples of externally verifiable evidence.

A “permanent disfigurement” is a disfigurement that is reasonably certain to continue throughout the life of the person suffering from it.

References

Utah Code Section 31A-22-309(1)(a).

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902 aff'd, 2020 UT 43, ¶ 24, 469 P.3d 970, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970

Committee Notes

~~Unlike disability and impairment, what is meant by "disfigurement" under this statute does not appear to have been defined so this definition just focusses on the "permanent" aspect. (In fact, the Supreme court specifically declined to reach the issue of disfigurement in *Sheppard v. Geneva Rock*, 2021 UT 31, n. 8 because it resolved the case on other grounds.)~~ Only provide the jury with these definitions if applicable to the threshold or thresholds the plaintiff claims to meet.

TAB 5

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
	Avoiding Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Approved in October 2022. Presented to Judicial Council November 2022. Discussed at December meeting. Going to Board of District Court Judges.	
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Prescriptive Easement draft presented at January 2023 meeting and continued to February 2023. Easement by Necessity last on agenda October 2022. Presentation at February 2023.	Feb. 2023
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	?
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, were these completed? Marianna could only find notes as to intention to form this subcommittee.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	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.	

	Case law updates	TBD	Previous chairs or group leads may have feedback.	
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Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022