

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 8, 2014

4:00 p.m.

Present: Juli Blanch (acting chair), Alison Adams-Perlac, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester

Excused: Gary L. Johnson, John R. Lund, Ryan M. Springer

Ms. Blanch presided.

1. *Minutes.* Mr. Humpherys moved to approve the minutes of the June 8, 2014 meeting. Mr. Fowler 2d. The motion passed without opposition.

2. *Introduction of New Staff Attorney.* Ms. Adams-Perlac introduced Nancy Sylvester, who is the new staff attorney assigned to the committee and will be taking Ms. Adams-Perlac's place.

3. *Committee Update.* Ms. Adams-Perlac reported that the Judicial Council has voted on the concept of moving this and the criminal instructions committee from the courts' oversight and putting it under the Judicial Council's oversight. The Judicial Council's policy and planning committee is reviewing the proposal. If approved, it could become effective November 1, 2014. There will be three-year term limits. A member may renew for an additional three years, and the chair can renew for a third three-year term. There will not be a permanent chair until the new rule is passed, after a comment period.

Dr. Di Paolo joined the meeting.

4. *CV2015. Survival claim.* The committee reviewed a proposed amendment to the committee note to the survival-claim instruction in light of an amendment to the statute in the 2014 general session of the Utah Legislature. At Mr. Fowler's suggestion, "wrongful death" was deleted from the last paragraph of the committee note, and the reference to the wrongful death statute (Utah Code Ann. § 78B-3-106) was also deleted. At Mr. Humpherys's suggestion, "general damages" was changed to "noneconomic damages." Mr. Summerill moved to approve the instruction as modified. Judge Stone 2d. The motion passed without opposition.

5. *Punitive Damage Instructions.* The committee continued its review of the punitive damage instructions.

a. *CV2026. Punitive damages—introduction.* The committee reviewed the revised committee note. Mr. Humpherys noted that paragraphs 3 and 4 were meant for the committee and not for publication. The committee

discussed whether punitive damages must be bifurcated in every case. Judge Stone did not think so. But Mr. Humpherys noted that the statute (section 78B-8-201(2)) says that one cannot introduce evidence of wealth without a finding as to liability for punitive damages, and there is case law that says that an award of punitive damages cannot be sustained absent evidence of the defendant's net worth (*see Bundy v. Century Equip. Co.*, 692 P.2d 754 (Utah 1984), and *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983); *but see Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109, 113 (Utah 1998) ("While evidence of the defendant's wealth is a relevant factor in the award of punitive damages, it is not a necessary factor.")). Judge Harris thought that the committee note should give some general guidance on when to bifurcate and when the court might *not* have to bifurcate the trial, though he thought the issue needed to be decided case by case. For example, a finding of intentional fraud is a sufficient predicate for punitive damages without a finding that the defendant's conduct was willful and malicious or manifested a knowing and reckless indifference toward and disregard of the rights of others. In a fraud case, the jury may be able to determine liability for and the amount of punitive damages in the same proceeding. Judge Harris thought that some cases may require trifurcation: the jury first makes a finding as to liability; it then makes a finding as to liability for punitive damages; and it then decides the amount of punitive damages. Ms. Blanch volunteered to work on a committee note.

b. *CV2027. Punitive damages discretionary.* The committee reviewed the revised committee note to CV2027. Mr. Humpherys again said that the first two paragraphs were meant only for the committee, not for publication. Ms. Blanch and Judge Harris thought that the first paragraph should be left in if the instruction is going to talk about presumptive ratios. Mr. Fowler asked what basis there was for not disclosing presumptive ratios to the jury. Ms. Blanch suggested that the ratios are meant to guide the trial court's discretion in ruling on a motion for remittitur. Mr. Humpherys noted that the question of ratios arises in the context of whether a jury's award was excessive. He said that some attorneys do not want ratios disclosed to the jury because they think it sets a floor or a ceiling on the amount of punitive damages the jury can award. Because the ratios are only presumptive, if the court were to instruct on them it should also instruct on what factors to consider if the jury wants to go beyond the presumptive ratio. Mr. Humpherys noted that the *Crookston* court did its own analysis as to whether the punitive award in that case was excessive and did not remand the case for the jury to consider the issue under instructions on ratios. On the other hand, Mr. Fowler noted, there is no Utah case that specifically says the jury should *not* be instructed on presumptive ratios. Mr. Simmons asked, If the jury is instructed on presumptive ratios, should it also be instructed on constitutional ratios? Mr. Summerill asked whether the committee should offer any commentary on the issue. Mr. Ferguson thought there may be value in

letting attorneys know that the committee considered the issue and giving them our thoughts on the matter; he added that the parties can always argue the issue one way or the other. Ms. Adams-Perlac noted that attorneys may be able to draw their own conclusions and make their own arguments from the cases cited in the references. Dr. Di Paolo thought that including the first paragraph in the note may give the impression that the jury is to decide if the award fits within the parameters the courts have set. Judge Stone suggested saying in the committee note that the law regarding ratios has developed in the context of post-trial review of a punitive damage award, addressed to the judge. There is no law on whether the jury should be told about ratios, and the committee did not feel that the case law provided guidance on whether ratios should be disclosed to the jury. At Ms. Blanch's suggestion, the last paragraph was deleted from the committee note. The committee thought that it went too far, in effect giving the bar a treatise on punitive damages. The committee approved the committee note as revised.

c. *CV2028. Purpose of punitive damages.* Judge Harris questioned why CV2028 was a separate instruction. He thought that it could be combined with CV2027 but that, if they stayed separate, it should have a different title. Dr. Di Paolo thought the first three sentences needed to be reconsidered. The first deals with conduct outside of Utah; the second deals only with the plaintiff; and the third deals with third parties. Mr. Summerill asked if we could get by with just one sentence. Mr. Ferguson suggested: "In determining the amount of punitive damages, you may award punitive damages only for the purpose of punishing the defendant and only for (1) his conduct in the state of Utah that caused (2) harm to the plaintiff, and (3) not harm to other people. A punitive damage award is not for the purpose of deterring harm to other people or conduct in other states." Mr. Simmons questioned limiting the jury's consideration to conduct in Utah. The defendant may have harmed the plaintiff in another state, and Utah may have been the only jurisdiction in which the plaintiff could get personal jurisdiction over the defendant. Dr. Di Paolo thought that the phrase "directed towards Utah" implied directed toward the government of Utah. Judge Harris suggested saying, "Punitive damages may not be awarded for the purpose of deterring harm or attempted harm to others." The committee tabled further discussion on the instruction until the next meeting.

6. *Next meeting.* The next meeting will be Tuesday, October 14 (Monday, October 13 being Columbus Day), at 4:00 p.m.

The meeting concluded at 6:00 p.m.