

Agenda

Advisory Committee on Model Civil Jury Instructions

May 11, 2009
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

Approval of minutes	Tab 1	John Young
Negligent Misrepresentation	Tab 2	Tim Shea
Attorney Negligence	Tab 3	Frank Carney Bob Gilchrist

Committee Web Page: <http://www.utcourts.gov/committees/muji/>

Published Instructions: <http://www.utcourts.gov/resources/muji/>

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

June 8, 2009	Construction Contracts
July 13, 2009	Eminent Domain
August 10, 2009	Premises Liability
September 14, 2009	Insurance Obligations
October 13, 2009	Probate
November 9, 2009	Professional Liability
December 14, 2009	Employment

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

April 13, 2009

4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

Excused: John L. Young (chair), John R. Lund

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Minutes*. The minutes of the March 9, 2009 meeting were approved.
2. *CV101B. Further admonition on electronic devices*. The committee approved CV101B, which Mr. Carney had proposed.
3. *Fraud and Deceit Instructions*. The committee continued its review of the fraud and deceit instructions:
 - a. *CV1803. Negligent misrepresentation*. Mr. Shea asked whether the instruction should be included somewhere else, such as in the negligence instructions. The consensus was that it belonged with the fraud instructions, but it was moved up as new CV1802 and retitled "Elements of negligent misrepresentation." Mr. Simmons thought that the first element should be eliminated because it presented a question of law for the court and not a question of fact for the jury to decide. The committee agreed and added a committee note to the effect that, if the question of duty depends on disputed facts, the court and counsel should craft an instruction explaining what factual questions the jury must answer.

Dr. Di Paolo and Mr. Humpherys joined the meeting.

Mr. Carney questioned whether CV1803 was an accurate statement of the law. He read Restatement (Second) of Torts § 552 and CACI 1903. Ms. Blanch and Mr. Fowler noted that the instruction does not include negligence (the failure to use reasonable care) as an element. Messrs. West and Summerill suggested adding as an element "[name of plaintiff] failed to use reasonable care in determining whether the representation was true or false." Mr. Ferguson thought the instruction was also missing the element of reasonable reliance. Mr. Shea suggested adding, "(5) [name of plaintiff] reasonably relied on the representation." Dr. Di Paolo thought "reasonably relied" was too hard for lay people to understand and suggested "It was reasonable for [name of plaintiff] to rely on the representation." Mr. Summerill noted that the Restatement says "justifiably relied." Mr. Humpherys thought "justifiably relied" was a more subjective standard than reasonable reliance that depended on the circumstances,

whereas “reasonably relied” was a more objective standard. Dr. Di Paolo thought “justifiably” connoted “thought out,” whereas “reasonably” connoted a more emotional response. At Mr. Humpherys’s suggestion, the instruction was sent back to the subcommittee to provide authority for the statement that the burden of proof is clear and convincing evidence.

Ms. Blanch was excused.

b. *CV1809. Reliance on statement of opinion.* Mr. Shea noted that CV1809 was his attempt to deal with the issue raised at the last meeting as to when a statement of opinion is actionable. He based CV1809 on the Restatement (Second) of Torts §§ 538A, 539, 542, and 543. It was noted that the other authority cited (*Baird v. Eflow Inv. Co.*, 289 P.2d 112 (Utah 1930)) did not support the instruction. Dr. Di Paolo questioned the use of the term “disinterested,” noting that the lay understanding of “disinterested” is “uninterested.” Mr. Humpherys questioned whether the standard of proof required is clear and convincing evidence. Mr. West thought that the first option could not be an accurate statement of the law. Mr. Humpherys and Mr. Simmons thought that the instruction should be omitted if there is no Utah law to support it. Mr. Ferguson thought that it should be referred to the subcommittee to review. The instruction will be omitted unless the subcommittee comes up with Utah authority to support it.

c. *CV1811. Compensatory damages.* Mr. Simmons asked why prejudgment interest was deleted. Mr. West noted that it was a question of law for the court to decide. At Mr. Fowler’s suggestion, “Alternative B” was deleted from the references. On Mr. Summerill’s motion, the committee approved the instruction as revised.

d. *CV18##. Intent.* Mr. Humpherys questioned the use of “infer.” Mr. Summerill and Dr. Di Paolo suggested, “you may determine intent from the surrounding circumstances,” with a cross-reference to the instruction on circumstantial evidence (CV122). Messrs. Fowler, Humpherys, and Summerill thought the phrase “because there is no way of knowing the operations of [a corporation] [the human mind]” was confusing. At Mr. Ferguson’s suggestion, it was changed to “because there is no way to read people’s minds.” At Dr. Di Paolo’s suggestion, “However,” was added to the beginning of the next sentence. The committee approved the instruction as modified. Mr. Shea will place it where it makes the most sense.

e. *CV18##. Duty to speak the whole truth.* At Mr. Humpherys’s suggestion “of fact” was deleted after “statement” in the second line. Messrs.

Humpherys and Ferguson thought the phrase “duty to tell the whole truth” was problematic. Mr. Ferguson suggested revising the instruction to read: “If [name of defendant] made a statement, then he had a duty to tell the truth about the matter [and] to make a fair disclosure [about the matter] and to prevent a partial statement from being misleading or giving a false impression.” Mr. Fowler suggested replacing “to tell the truth” with “to be truthful.” The committee approved Mr. Ferguson’s suggestion.

f. *CV1899A & 1899B. Special verdict forms.* Mr. Humpherys noted that the committee needs a policy on how detailed the special verdict forms should be, so that they will be consistent. Mr. Carney noted that detailed special verdict forms may present a trap for the jury. Mr. Humpherys thought that version A was too detailed. Mr. Ferguson thought that version B was more orthodox. On Mr. Carney’s motion, CV1899A was eliminated. Mr. Simmons noted that the verdict forms ask the jury to award “economic” and “noneconomic” damages, but those terms are not defined in the fraud instructions. He suggested revising CV1811 to say, “[Name of plaintiff] claims the following economic damages: . . . [Name of plaintiff] claims the following noneconomic damages: . . .” Mr. West noted that prejudgment interest is not available for all economic damages. Mr. Summerill suggested adding a committee note saying that the verdict form should separate the damage elements into those for which prejudgment interest is available and those for which it is not available. Mr. Fowler asked whether question (4) in CV1899B, which deals with punitive damages, should be eliminated, which raised the question of whether punitive damages follow as a matter of course if the jury finds fraud. Mr. Humpherys suggested that punitive damages be dealt with in the punitive damage section. He also suggested that there be a separate special verdict form for negligent misrepresentation, but it will have to wait for the subcommittee to resolve the issue of whether negligent misrepresentation must be proved by clear and convincing evidence.

4. *Next Meeting.* The next meeting will be Monday, May 11, 2009, at 4:00 p.m.

The meeting concluded at 5:50 p.m.

Tab 2

(1) CV 1802 Elements of negligent misrepresentation.

[Name of plaintiff] claims [he] was harmed when [name of defendant] negligently misrepresented an important fact. To succeed in this claim [name of plaintiff] must prove that:

(1) [name of defendant] represented to [name of plaintiff] that an important fact was true;

(2) [name of defendant] had a financial interest in the transaction;

(3) [name of defendant] failed to use reasonable care to determine whether the representation was true;

(4) [name of defendant] was in a better position than [name of plaintiff] to know the true facts;

(5) it was reasonable for [name of plaintiff] to rely on the representation;

(6) [name of defendant]'s representation of fact was not true; and

(7) [name of plaintiff] suffered damage as a result of relying on the representation.

References:

West v. Inter-Financial, Inc., 139 P.3d 1059, Court of Appeals (Utah 2006).

Smith v. Frandsen, 94 P.3rd 919, (Utah Sup. Ct. 2004).

Price v Orem Investment Company v. Rollins, Brown & Gunnel, Inc., 713 P.2d 55 (Utah Sup. Ct. 1986).

Jardine v. Brunswick Corporation, 423 P.2d 659 (Utah Sup. Ct. 1967).

Restatement 2d Torts, Section 552.

Committee Note

The standard of proof for negligent misrepresentation has not been established in Utah. Because a different standard is not stated in the instruction, this instruction assumes the burden to be preponderance of the evidence, rather than clear and convincing evidence. Compare State ex rel. Nichols v. Safeco Ins. Co., 100 N.M. 440, 671 P.2d 1151, 1154, certiorari denied 100 N.M. 327, 670 P.2d 581 (1983) and Hughes v. Holt, 140 Vt. 38, 435 A.2d 687, 689. (1981) with Duffy v. Brown, 708 P.2d 433, 437 (Wyo.1985).

Tab 3

Attorney Negligence

(1) CV401. Committee Note on Attorney Negligence Instructions 1

(2) CV402. Elements of claim for attorney’s negligence. 1

(3) CV403. Attorney-client relationship. 2

(4) CV404. Duty of care. 2

(5) CV405. Scope of representation..... 2

(6) CV406. Standard of care for plaintiff..... 3

(7) CV407. Fiduciary relationship..... 3

(8) CV408. “Cause” defined. 4

(9) CV409. Damages caused by a judicial mistake..... 4

(1) CV401. Committee Note on Attorney Negligence Instructions

The Committee intentionally omitted MUJI 1st Instructions 7.45 and 7.46 because there is no Utah case law supporting them.

If the defendant claims not to be liable because the law is uncertain, the court decides as a matter of law whether the law is uncertain. *Watkiss & Saperstein v. Williams*, 931 P.2d 840 (Utah 1997).

(2) CV402. Elements of claim for attorney’s negligence.

[Name of plaintiff] claims that [name of defendant] negligently performed legal services. To succeed on this claim, [name of plaintiff] must prove that:

- (1) [he] and [name of defendant] had an attorney-client relationship;
- (2) because of that relationship [name of defendant] owed a duty to [name of plaintiff];
- (3) [name of defendant] breached that duty; and
- (4) [name of defendant]’s breach was a cause of [name of plaintiff] injury, loss or damage.

MUJI 1st Reference

7.42

References

Crestwood Cove Apartments Business Trust v. Turner, 2007 UT 48, 164 P.3d 1247.

Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17.

Committee Notes

Approved

(3) CV403. Attorney-client relationship.

An attorney-client relationship can be established by an express contract between the parties, or by an implied contract based upon [name of defendant]'s statements or conduct. An implied attorney-client relationship exists when [name of plaintiff] reasonably believes that [name of defendant] represents [name of plaintiff]'s legal interests. The reasonableness of that belief must be weighed in light of all of the facts.

MUJI 1st Reference

7.43

References

Roderick v. Ricks, 2002 UT 84, 54 P.3d 1119.

Kilpatrick v. Wiley, Rein & Fielding, 2001 UT 107, 37 P.3d 1130.

Utah State Bar Ethics Advisory Opinion No. 05-04, Issued September 8, 2005.

Committee Notes

If the attorney-client relationship is not disputed, rather than give this instruction, the court should instruct the jury that that fact is stipulated.

Approved

(4) CV404. Duty of care.

[Name of defendant] has a duty to use the same degree of care, skill, judgment and diligence used by qualified lawyers under similar circumstances. Failure to do so is negligence.

MUJI 1st Reference

7.44

References

Watkiss & Saperstein v. Williams, 931 P.2d 840 (Utah 1997).

Williams v. Barber, 765 P.2d 887 (Utah 1988).

Committee Notes

Approved

(5) CV405. Scope of representation.

[Name of defendant] may limit the scope of representation if the limitation is reasonable under the circumstances and if [name of plaintiff] gives informed consent. In general, [name of defendant] has no duty to act beyond the scope of representation.

MUJI 1st Reference

7.47

References

Lundberg v. Backman, 11 Utah 2d 330, 358 P.2d 987 (1961).

Bruer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990).

Rule of Professional Conduct 1.2. Scope of Representation.

Utah State Bar Ethics Advisory Opinion No. 05-04.

Committee Notes

There may be some circumstances in which there is a duty to act beyond an agreed upon limit.

(6) CV406. Standard of care for plaintiff.

[Name of plaintiff]'s actions that caused [him] to hire [name of defendant] cannot be considered when you decide who was at fault.

[Name of plaintiff]'s negligent actions after hiring [name of defendant] can be considered when you decide who was at fault.

MUJI 1st Reference

7.48

References

Steiner v. Johnson & Higgins, 996 P2d 531 (Utah 2000).

Committee Notes

(7) CV407. Fiduciary relationship.

[Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim [name of plaintiff] must prove that [he] and [name of defendant] have a fiduciary relationship that requires [name of defendant] to:

[(1) not take advantage of [his] legal knowledge and position;]

[(2) have undivided loyalty to [name of plaintiff];]

[(3) treat all of [name of plaintiff]'s matters as confidential;]

[(4) not conceal any facts or law from [name of plaintiff]; and]

[(5) not deceive [name of plaintiff] in any way.]

A breach of a fiduciary duty is a breach of the standard of care.

MUJI 1st Reference

7.49

References

Kirkpatrick v. Wiley, Rein & Fielding, 909 P2d 1283 (Utah 1996).

Smoot v. Lund, 13 Utah 2d 168, 369 P2d 933 (1962).

Committee Notes

This list of fiduciary duties is not exhaustive. This instruction should be given only in cases that involve claims of breach of fiduciary duty, for example, mishandling client

funds, breach of confidentiality, conflict of interest, etc. Include in the instruction only those items for which there is evidence.

(8) CV408. "Cause" defined.

[Name of plaintiff] must prove that if [name of defendant] had done the act [he] failed to do, or not done the act complained about, [name of plaintiff] would have benefitted.

I've instructed you before that the concept of fault includes a wrongful act or failure to act that causes harm.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence;

and

(2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

There may be more than one cause of the same harm.

MUJI 1st Reference

7.50

References

Kilpatrick v. Wiley, Rein & Fielding, 909 P2d 1283 (Utah 1996).

Harline v. Barker, 854 P2d 595 (Ut App. 1992).

Dunn v. McKay, Burton, McMurray & Thurman 584 P2d 894 (Utah 1978).

Young v. Bridwell, 20 Utah 2d 332, 437 P2d 686 (1968).

See http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=2#209 Instruction CV209, "Cause" defined.

Committee Notes

(9) CV409. Damages caused by a judicial mistake.

[Name of defendant] claims that any damages [name of plaintiff] may have suffered were caused by mistakes made by a judge. [Name of defendant] is not liable for damages that result from mistakes by a judge.

MUJI 1st Reference

References

Crestwood Cove Apartments Business Trust v. Turner, 2007 UT 48, 164 P.3d 1247.

Committee Notes

Approved

Damages is described as an element of the claim in 402, but there is no instruction on calculating damages. The following is from MUJI 1st, citing only BAJI as its authority. It does not instruct on calculating damages, but has the same concept as the MUJI 1st instruction on proximate cause. (Highlighted text in 408.)

MUJI 7.52 PLAINTIFF MUST PROVE DAMAGES RESULTING FROM ATTORNEY NEGLIGENCE

In order to recover damages from an attorney for negligence in the handling of a lawsuit, the plaintiff must not only establish that the attorney was negligent but also must establish that, but for such negligence, the prior lawsuit [would have resulted in a collectible judgment in the plaintiff's favor] [would have been successfully defended].

References:

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