

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 10, 2008

4:00 – 6:00 p.m.

Present: Juli Blanch, Frank Carney, Phillip Ferguson, Tracy Fowler, Gary Johnson, Stephen Nebeker, Timothy Shea, Peter Summerill,

Excused: Judge William Barrett, Professor Marianna Di Paolo, Rich Humpherys, Colin King, Paul Simmons, David West; John Young

In Mr. Young's absence, Mr. Carney called the meeting to order.

The committee decided to defer consideration of all but the fraud instructions so more members could attend.

CV1701. Elements of fraud.

The committee decided in the second sentence to change "this claim" to "fraud."

The committee decided in item (2) to change "knew the statement was false" to "made the statement knowing it was false."

The committee approved the instruction as amended.

CV1702. Intentional or reckless false statement.

The committee deleted the first paragraph and deleted "intentional" from the title. The committee changed "a false statement is reckless" to a false statement is made recklessly."

The committee approved the instruction as amended.

CV1703. Opinion as statements of fact.

The committee decided to split the instruction into two separate instructions. 1703 would cover the general rule that recovery for fraud is limited to misrepresentation of facts. The committee redrafted the instruction to read:

"You must decide whether the defendant's statement was a representation of fact. Generally, a plaintiff may recover for fraud only if the defendant's statements were misrepresentations of facts and not opinions."

The committee deleted the committee note.

The committee created a new instruction to follow 1703 to focus on the special circumstances in which a plaintiff can recover for representations of an opinion. The committee drafted the instruction to read:

[Name of plaintiff] may recover for fraud for [name of defendant]'s statement of opinions if:

[Name of defendant] claimed to have special knowledge about the subject matter that [name of plaintiff] did not have.

[Name of defendant] made a representation in a way that implied the matter to be true, rather than just as an expression of belief.

[Name of defendant] had a relationship of trust and confidence with [name of plaintiff].

[Name of defendant] has some other special reason to expect that [name of plaintiff] would rely on [name of defendant]'s opinion.

The committee decided to return this instruction to the subcommittee.

CV1704. Promises and statements of future performance.

The committee changed "act in the future" to "future act."

The committee approved the instruction as amended.

CV1705. Important statement of fact or promise.

The committee deleted "or promise" from the title and approved the instruction as amended.

CV1706. Intent to induce reliance.

In the first sentence, the committee changed "you may find that" to "you must decide whether." The committee changed "intended to make plaintiff rely" to "intended plaintiff to rely." The committee changed "the false statement of fact" to "it."

In the first and second sentences, the committee changed "false statement about a fact" to "false statement."

The committee approved the instruction as amended.

CV1707. Reasonable reliance.

The committee amended the instruction to read: "In deciding whether [name of plaintiff]'s reliance on the false statement was reasonable, you must take into account all relevant circumstances, such as [his] age, mental capacity, knowledge, experience, and [his] relationship to [name of defendant]."

The committee approved the instruction as amended.

CV1708. Concealment or fraudulent non-disclosure.

In the second sentence, the committee changed "what you must decide is if" to "you must decide whether." In items (1), (2), and (3) the committee changed "an important fact" to "[describe the important fact]."

The committee approved the instruction as amended.

CV1709. Compensatory damages.

In Alternative B, the committee deleted paragraphs (2) and (3) and amended the remainder to read:

You may award damages for the harm [name of plaintiff] experienced because of [name of defendant]'s fraud as long as you determine that the damages were

reasonably foreseeable, and that [name of plaintiff] has proven these damages with reasonable certainty. [Name of plaintiff] claims the following damages:

[(1) loss of good will;]

[(2) expenditures in mitigation of damages;]

[(3) lost earnings;]

[(4) prejudgment interest;]

[(5) loss of interest on loans required to finance the business;]

[(6) lost profits;]

[(7) emotional distress;]

[(8) describe other items claimed.]

The committee deleted the last paragraph of the committee note.

The committee returned this instruction to the subcommittee to determine the standard of proof for emotional distress.

The meeting was adjourned.