

MINUTES

Advisory Committee on Model Civil Jury Instructions

January 11, 2010

4:00 p.m.

Present: Hon. William Barrett, Francis J. Carney, Phillip S. Ferguson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West, and Perrin Love, chair of the eminent domain subcommittee

Excused: John L. Young (chair), Juli Blanch, Marianna Di Paolo, Tracy H. Fowler, John R. Lund

Mr. Carney conducted the meeting in the absence of Mr. Young.

1. *Schedule.* Mr. Carney suggested that the committee review vicarious liability and premises liability instructions before doing the accounting malpractice instructions. Mr. Shea noted that Mr. Lund chairs the vicarious liability subcommittee, but he did not know whether a subcommittee has been formed. Mr. Carney will check with Mr. Young.

2. *Feedback.* Mr. Carney noted that the committee is not receiving feedback on the instructions that have been approved. Judge Barrett noted that he recently used the MUJI 2d instructions in trial and noted that the Chief Justice's letter telling courts and counsel to use the instructions has been published in the *Utah Bar Journal*. Mr. Shea noted that there is a "Contact the Committee" link on the MUJI 2d website that allows a person to e-mail Mr. Shea with any comments. Mr. Summerill suggested sending a survey to the judge and attorneys after each civil jury trial and offered to prepare a form for the survey. The committee discussed how to learn when civil jury trials take place. Mr. Shea noted that trials are listed on the court calendars, but they do not always take place as scheduled. Someone suggested using *Rocky Mountain Verdicts & Settlements* as a source for information on jury trials. Mr. West offered to write an article for the *Utah Trial Journal* soliciting feedback.

Mr. Ferguson joined the meeting.

3. *Eminent Domain Instructions.* The committee continued its review of the eminent domain instructions.

a. *CV1609. Owner testifying.* The subcommittee will combine this instruction with CV1608, "Verdict based on testimony of witnesses."

b. *CV1610. Viewing of property.* Mr. Love noted that the instruction was based on MUJI 1st 16.18, which says that a view of the property is not evidence. Mr. Summerill thought the instruction was confusing. He suggested it be revised to read: "You cannot make any determination based on your personal opinion as to the property's value and should only use your viewing of the property to help you understand the testimony." Mr. Love noted that he has

never seen a court allow a view of the property and further noted that the expense makes it prohibitive in most cases. Mr. Shea suggested that the instruction say what a view is and not what it is not. He suggested revising the instruction to read: "You may consider your viewing of the property only to help you evaluate the evidence you have seen and heard in the courtroom to help you gain a better understanding of the testimony." Mr. West questioned whether it was the law that a view of the property is not evidence. Mr. West suggested saying, "Your viewing of the property is not itself evidence of *fair market value*," adding the italicized phrase. Mr. Carney noted that, according to C.J.S., there is a split of authority on whether a view of the property is evidence or not. He further noted that the cited authority, *Weber Basin Water Conservancy District v. Moore*, 272 P.2d 176 (Utah 1954), involved a bench trial, not a jury trial, so was not controlling. Mr. Simmons suggested omitting the instruction since there is no clear Utah authority for it. Mr. Summerill suggested that, if the parties can convince the court to allow the jury to view the property, then they should draft their own instruction to cover the situation. Mr. Carney asked Mr. Love to tell the subcommittee that the consensus of opinion on the committee was that the instruction should be deleted and to see if the subcommittee will concur. A committee note could be added to the beginning of the eminent domain instructions to explain which MUJI 1st instructions were dropped and why.

c. *CV1611. Project influence.* Mr. Carney questioned the need for the instruction, since the jury should never hear evidence of project influence. Others thought that jurors would speculate on the matter if not instructed otherwise and that the instruction was therefore needed. Mr. Summerill asked what the last sentence of the committee note meant. Mr. Love explained that the jury can take a change in property value into account if the change arises from something outside the scope of the original project. The committee approved the instruction.

d. *CV1612. Value of undeveloped land.* Mr. Love explained the purpose of CV1612, which is to prevent the jury from treating undeveloped land as if it were already subdivided. He asked whether it was okay to cite treatises such as *Nichols on Eminent Domain* in the committee notes. The committee said it was. Mr. Carney suggested updating the references in this and other instructions to include more recent cases, such as *Thorsen v. Johnson*, 745 P.2d 1243 (Utah 1987). Mr. Love will ask the Attorney General's office to update the references. The committee approved the instruction.

e. *CV1613. Value of improved property.* Mr. Love explained the rationale for CV1613, which is that the sum of the parts cannot be greater than the whole; one may make improvements to property for which he may never recoup

the cost. Mr. Shea suggested adding “[diminish]” as an alternative to “enhance” in the last line. Others thought it was unnecessary. Mr. Ferguson thought the first and last sentences were contradictory. Mr. Love noted that the last sentence was included to make sure that the jury did not ignore improvements. Mr. Summerill noted that the *Brown* case cited deals with fixtures, not improvements. Mr. Carney thought that the easiest way to explain the concept was with examples but questioned whether it was proper to use examples in jury instructions. The rest of the committee thought it was. At the suggestion of Judge Barrett and Mr. Ferguson, the last sentence was deleted. The committee approved the instruction as modified.

f. *CV1614. Business injury or loss of profits.* Mr. Summerill questioned the use of “[separate]” in line 4 of alternative 2. Mr. Love noted that business income may affect the value of the property, but it cannot be compensated for as a separate item of damage. The theory is that the business is not being taken but can relocate to another property. The committee deleted the brackets around “[separate]” and approved the instruction as modified.

g. *CV1615. Interest and moving expenses.* Mr. Carney thought that the instructions should track the special verdict form and asked whether the special verdict form asked the jury to find “just compensation” or “fair market value.” If the latter, he thought the instruction was unnecessary. Mr. Love, however, thought the instruction was necessary in either event because the jury might think that it can consider interest and moving expenses in arriving at fair market value as well as in arriving at just compensation. Judge Barrett and Mr. Carney suggested deleting the phrase, “In determining just compensation.” Mr. Shea suggested revising the instruction to read: “You must not award any amount for interest, moving expenses or costs of these proceedings.” Mr. Carney questioned whether the instruction merely told the jury what the law is not. Mr. Summerill thought it told the jury what the law is: the law is that you cannot award damages for these items. He thought instructing the jury on the matter was analogous to instructing the jury on the collateral source rule. Mr. Ferguson thought the instruction was similar to other instructions the committee had approved. The committee approved the instruction as drafted.

h. *CV1616. Severance damages.* Mr. Summerill thought the instruction was confusing because it uses the term “severance damages” before defining it. He suggested deleting “severance” from the first sentence or changing the order of the second and third sentences. Mr. Ferguson questioned whether “severance” was plain English. Mr. Love noted that it was a term of art that has a long history behind it and that it would be defined for the jury. Mr. Ferguson asked what the phrase “as part of the entire property” meant in the second

paragraph. Mr. Carney thought the third paragraph was unnecessary because it singled out severance damages for special treatment; all damages must be reasonably certain and not remote or speculative. Mr. Love noted that other instructions, such as the instruction on “highest and best use,” contain similar language. Mr. Shea asked whether “completed” at the end of the second paragraph of the committee note should be changed to “started.” Mr. Love thought not, since the idea is that the jury may consider severance damages that may take place during the course of construction, which may not be completed before trial. The committee approved the instruction as drafted.

i. *CV1617. Access.* Mr. Love noted that “reasonable access” in Utah is defined negatively (by what it is not). For that reason, the subcommittee considered using the Arizona model instruction’s definition of “reasonable access” but decided against it. Mr. Summerill thought that the last sentence of the committee note was inconsistent with the last sentence of the first paragraph of the instruction. Mr. Love noted that, as a general rule, there is no right of access at a specific point, but a contract, for example, may give such a right. If there were a right to access at a specific point, CV1617 would not be used. In that situation, the court and parties would have to come up with their own instruction. The committee note was meant to explain this concept. Mr. Ferguson suggested that the subcommittee propose two instructions: (1) one for loss of reasonable access, and (2) one for loss of a legally established right of access. The committee approved CV1617 for the first situation. The subcommittee will consider a separate instruction for the second situation.

j. *CV1618. Special benefits.* Mr. Love explained the concept behind CV1618 and gave examples. He noted that the issue rarely comes up. The instruction is an extrapolation from the cited references. The committee approved the instruction.

k. *CV1619. Apportionment of just compensation among multiple interests.* Mr. Love noted that the subcommittee is going to revise CV1620, “Apportionment of just compensation between owner and tenant.” The committee deferred discussion of CV1619 until the subcommittee completes that task.

4. *Future Meetings.* Mr. Carney suggested the following agenda for future meetings:

a. Finish the eminent domain instructions.

b. Special verdict forms. (Reach agreement on a general form that can be adapted for each area of law.)

c. Gross negligence instruction (based on *Pearce v. Utah Athletic Foundation*, 2008 UT 13).

d. Revisit the causation instructions in light of *Scott v. HK Contractors*, 2008 UT App 370, with regard to the “substantial factor” issue, an issue raised by Scott DuBois.

e. Premises liability. Mr. Summerill will replace Jeff Eisenberg as chair of the premises liability subcommittee.

f. Vicarious liability.

5. *Next Meeting*. The next meeting will be Monday, February 8, 2010, at 4:00 p.m.

The meeting concluded at 5:45 p.m.