

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 13, 2010

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Diane Abegglen (the new appellate court administrator), and Perrin Love (chair of the Eminent Domain subcommittee)

Excused: Honorable William W. Barrett, Jr., and David E. West

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

a. *CV1609. Verdict based on testimony of witnesses.* This instruction was previously approved but was revised to incorporate former CV1609, Owner testifying. “[T]estimony]” was deleted from the last sentence. The committee approved the instruction as modified.

b. *CV1610. Viewing of property.* Mr. Young suggested deleting the instruction because judges rarely allow the jury to view the property. Mr. Love noted that it has been allowed in Utah and thought the instruction accurately stated the law. Mr. Young asked whether the subject should be covered in a generic instruction for all property damage cases. Mr. Lund asked whether including the instruction would lead to more requests to view the property. Mr. Love noted that the Attorney General’s Office felt strongly about including it. The committee approved the instruction.

Dr. Di Paolo joined the meeting.

c. *CV1605. Fair market value.* The instruction defines “fair market value” in terms of what a “prudent and willing” buyer and seller would agree on. CV2010, the comparable instruction in the tort section, leaves out “prudent and.” The committee discussed whether to delete the phrase from CV1605. Messrs. Lund and Love thought the phrase was useful to show that the standard is an objective one and to eliminate the eccentric who would be willing to pay (or would ask for) much more than the property is worth. Dr. Di Paolo thought it was a legal question; she did not know how lay jurors would understand or react to “prudent.” Mr. Love noted that FIRREA uses “prudent” in its definition of “fair market value,” but the Property Act does not. He also noted that the Attorney General’s Office felt strongly about keeping it in the definition. The committee approved CV1605 as written. Mr. Love suggested that other instructions defining “fair market value” be consistent.

d. *CV1616. Severance damages.* Mr. Young suggested that the instruction first set out the parties' claims. Mr. Carney asked whether the instruction presented a jury question or whether it was a matter of the court controlling the evidence that comes in. He also thought the instructions could benefit from examples. Mr. Lund suggested revising the beginning of the instruction to read: "In this case only a portion of the owner's property has been taken. In addition to the fair market value of the property taken, you must determine severance damages to the property that remains." Dr. Di Paolo questioned the use of the term "the taking" and suggested "the condemnation" instead. Ms. Blanch and Mr. Summerill suggested defining "the taking." Dr. Di Paolo suggested "the action on the property which was taken." The committee revised the second sentence of the first paragraph to read: "Severance damages' means any loss of fair market value to the remaining property caused by the taking and/or by the proposed construction of [describe public improvement] on the property taken." The committee also deleted "as part of the entire property" from the second paragraph. The committee approved the instruction as revised.

e. *CV1617. Reasonable cost of repair or restoration as measure of severance damages.* Mr. Love noted that CV 1616 can be given without CV1617, but CV1617 should not be given without CV1616. Mr. Love also said that the jury needs to know the fair market value of the property to decide severance damages using the cost of repair because repair is only appropriate if the property can be restored to its former value. Dr. Di Paolo thought the instruction was hard to understand. Mr. Ferguson asked whether "as part of the whole" was necessary in the first sentence. Mr. Shea suggested deleting "repair or." Mr. Love noted a distinction between "repair" and "restore": "repair" applies to buildings and structures, whereas "restore" applies to the land. Mr. Lund suggested revising the instruction to say "[repair] [restore]," with the court selecting the word that best applies in the particular case. He also suggested using "[taking] [construction of public improvement]." Ms. Blanch asked what happens if the jury finds that the remaining property can be repaired or restored to its pre-taking fair market value but the cost of doing so is greater than the diminution in fair market value. Mr. Love said that in that case the jury should award severance damages under CV1616. He noted that CV1617 was based on CV2009. He thought the instructions should be consistent. Dr. Di Paolo thought that the last paragraph was confusing in that it says that the measure of damages includes the cost of repair even though the property cannot be fully repaired. Mr. Young suggested separating the instruction into two separate instructions--one where it is possible to repair or restore the property to its pre-taking value, and one where it is not. Mr. Lund noted that it is possible to repair the property without returning it to its fair market value. Mr. Love suggested adding the word "substantially" before "repair or restore," but was not sure if the law would

support the addition. Mr. Young suggested revising the instruction to read, "The measure of damages is the lesser of" Mr. Summerill suggested providing a flow chart. Mr. Young suggested using the first two paragraphs of CV2009 or simply cross-referencing CV2009 and citing to condemnation cases as authority. Mr. Shea suggested adding, "If you find that the remaining property can be fully repaired or restored, then the damages are the reasonable cost of repair or restoration." Mr. Ferguson suggested saying, "The measure of damages is (1) the fair market value of the property taken, plus (2) severance damages, plus (3) the cost of [repair] [restoration]." Mr. Summerill suggested something along the following lines:

Please determine the cost of returning the property to fair market value through repair or restoration. If you find that the property cannot be fully returned to fair market value, then determine:

1. The cost of returning the property as close as possible to fair market value, and
2. The difference between the fair market value of the property before the taking and after the [repair] [restoration].

Mr. Young asked whether the jury is entitled to know the effect of its determination. Mr. Lund thought the instruction eliminates the idea of severance damages as diminution in fair market value and elevates the cost of repair or restoration ahead of diminution in fair market value. He questioned whether the instruction accurately stated the law. Mr. Love thought the instruction was inconsistent with CV1616 in that it seems to say that severance damage is the cost of repair. Messrs. Lund and Shea suggested saying, "The measure of severance damages is the reasonable cost to [repair] [restore] the remaining property and the difference between the fair market value of the remaining property before the taking and the fair market value after the taking." Mr. Lund suggested adding, "Restoration should substantially restore the value." Mr. Young noted that CV2009 does not say that, and he did not know of any Utah case saying that one is entitled to the cost of restoration to substantially restore the property and the difference in fair market value. He thought the law may be that one is only entitled to severance damages (as determined under CV1616) if one cannot fully restore the property. Mr. Young suggested using the second and third paragraphs of CV2009 and substituting "taking" for "injury." Mr. Lund suggested ending CV1617 after the first paragraph.

The committee decided that it needs more research on what the law is regarding repair or restoration costs as a measure of severance damages.

f. *CV1619. Vested right of access.* Mr. Love noted that Mr. Shea had questioned the necessity of this instruction. The subcommittee split over whether it was necessary but agreed that it accurately stated the law. The committee approved the instruction.

Mr. Love will provide references for the instruction.

g. *CV1621. Apportionment of just compensation among multiple interests.* At Mr. Love's suggestion, the committee deleted "if any" from the second paragraph. It also deleted "as a whole" at the end of the instruction. The committee approved the instruction as modified.

2. *Schedule.*

a. *Premises Liability.* At the next meeting, the committee will consider premises liability instructions. Mr. Summerill volunteered to draft the instructions based on the instructions given in a recent trial he had.

b. *Design Professional Liability.* After premises liability, the committee will consider design professional liability. Craig Mariger chairs the subcommittee for design professional liability. Mr. Young offered to help with the instructions. He will call Mr. Mariger.

c. *Accountant Liability.* The committee has decided against doing a set of accountant liability instructions.

3. *Causation Instructions Revisited.* Mr. Carney noted that he has had second thoughts about including foreseeability as an element of causation, based on an arbitration where the defendant argued that 56 chiropractic visits were not "caused" by the defendant's negligence because they were not reasonably foreseeable. Mr. Carney thought this was a misuse of the causation instruction.

4. *Next Meeting.* The next meeting will be Tuesday, October 12, 2010, at 4:00 p.m. (Monday, October 11, being Columbus Day).

The meeting concluded at 6:00 p.m.