

MINUTES

Advisory Committee on Model Civil Jury Instructions

March 12, 2012

4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons

Excused: Tracy H. Fowler, John R. Lund, Honorable Kate A. Toomey, David E. West

1. *Vicarious Liability Instructions.* The committee continued its review of the vicarious liability instructions:

a. *CV2805. "Scope of employment" defined.* At the last meeting, the committee had tentatively approved CV2805 as revised, subject to the approval of Mr. Simmons (who had drafted the instruction). Mr. Simmons said he approved of the changes, and the committee approved the instruction.

b. *CV2803. Apparent authority.* The committee had deferred further discussion of CV2803 to allow the subcommittee and Mr. Lund (who drafted the instruction) to look more into the issue of whether reliance was an element of apparent authority. The subcommittee (including Mr. Lund) concluded that it was not, although reliance may be relevant to the issue of causation. The committee approved the instruction.

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

c. *CV2807. Scope of employment; travel to and from work.* The committee had deferred approval of CV2807 until Mr. Simmons (who drafted the instruction) could be present. Mr. Simmons said that he approved of the committee's changes, and the committee approved the instruction.

d. *CV2808. Scope of employment; dual purpose.* Some committee members questioned how CV2808 fit with CV2807. Mr. Young said that CV2808 was a limitation on CV2807. Mr. Humpherys questioned whether the phrase "over the same route" was necessary. Although the language comes from the case law, the committee thought that it was not a legal requirement, that whether or not someone was acting within the scope of his employment should not depend on whether the employee decided to go, for example, south on Main Street and then east on 400 South or east on South Temple and then south on State Street to arrive at the courthouse. At Dr. Di Paolo's suggestion, "over the same route" was replaced with "to the same destination." The committee approved the instruction as revised.

e. *CV2809. Scope of employment; intentional act.* Dr. Di Paolo questioned whether subsection (2) ("occurred during [his] work hours") was

necessary. The committee thought that it was for intentional torts. Mr. Humpherys questioned whether subsection (3) (“occurred within the boundaries of employment”) was appropriate and raised the question of the “boundaries of employment” for a delivery person, someone sent on an errand for the employer, or a salesman, whose territory could include, for example, the entire western United States. Mr. Carney checked the Restatement and Am. Jur. 2d for the legal standard. Based on those authorities, the committee replaced subsections (2) and (3) with a new (2): “occurred substantially within the authorized time and space limits of [his] employment.” The committee also rewrote subsection (4) (now subsection (3)) to read: “was at least partly motivated to serve [name of employer]’s interest.” Mr. Carney thought the last paragraph would provoke controversy. Mr. Shea suggested changing the phrase “served a personal interest” to “served only a personal interest.” Dr. Di Paolo suggested deleting the paragraph altogether. The committee revised the last paragraph to read: “However, if [name of employee]’s conduct was unprovoked, highly unusual, and outrageous, then [name of employee]’s conduct was not within the scope of employment.” Dr. Di Paolo asked whether all three modifiers (“unprovoked,” “highly unusual,” and “outrageous”) were required. The committee thought that the instruction should follow the case law, which appears to require all three. The committee approved the instruction as revised.

f. *CV2810. Joint venture defined.* Mr. Carney noted that the distinction between a partnership and joint venture is slight. A joint venture is usually created for a single project. Joint ventures were included in the old partnership act, but the new act takes joint ventures out of the definition of partnership. Mr. Carney thought that the liability principles were still the same for both. Mr. Humpherys questioned whether the jury would understand the phrases “community of interest” and “joint proprietary interest.” Dr. Di Paolo thought that “performing” was an odd choice of verb in the phrase “performing a common purpose.” Judge Barrett suggested substituting “goal” for “purpose.” Mr. Young questioned whether subsection (3) was necessary and noted that in construction contracts, a third party usually owns the subject matter (the real property and improvements). Ms. Blanch asked whether there was a distinction between “shared” and “mutual.” Some committee members thought that “mutual” implied an equal sharing, whereas “shared” implied that the parties’ interest may not be equal. Mr. Simmons thought that “mutual” implied that either joint venturer can exercise the right of control, whereas “shared” implies that it must be exercised jointly. Messrs. Ferguson and Young concurred. The committee was not sure what the law was on mutual or shared control. At the suggestion of Messrs. Shea and Humpherys, the instruction was revised to read:

A joint venture is a relationship voluntarily agreed to by two or more people in which the parties combine their property, money, skill, labor or knowledge and share--

- (1) an interest in a common goal;
- (2) an ownership interest in [describe the subject matter];
- (3) a right to control;
- (4) the profits; and
- (5) any losses, unless there is an agreement to the contrary.

The committee approved the instruction as modified.

Ms. Blanch was excused.

g. *CV2811. Liability of [partnership/joint venture] for acts of [partner/joint venture].* Mr. Humpherys asked whether “authority” in subsection (2) needed to be modified. He suggested putting “express or implied” in front of it. At Mr. Ferguson’s suggestion, the committee revised subsection (2) to read, “[name of partner/joint venturer] acted under the [actual/apparent] authority of the [partnership/joint venture],” since “actual” encompasses both express and implied authority. Those present approved the instruction as revised, subject to one more vote for approval.

h. *Old CV2812. Liability of partnership for misapplication of property or money.* Mr. Shea noted that the subcommittee had deleted old CV2812 because it could not envision a case where it would be needed. Those present approved of the deletion.

i. *New CV2812. Liability of parents or legal guardians for property damage caused by a minor.* The committee questioned the need to list specific modes of transportation in subparagraph (2). Mr. Carney noted that the cause of action was statutory, and the instruction tracks the statute. The statute specifically names “railway car[s]” and “caboose[s],” for example, but not motorcycles. Therefore, the committee did not think that it could simply say “vehicle.” Mr. Ferguson suggested adding a committee note to highlight the problem. Mr. Simmons suggested also noting in the committee note that the parents’ liability is limited to \$2,000. He did not think, however, that the statutory limit needed to be included in the instruction; it would be up to the court to apply the limit if the jury awarded more than \$2,000. The committee approved the instruction, subject to obtaining one more vote for approval.

j. *CV2814. Liability of one signing minor's application for a learner permit or provisional license.* Mr. Young suggested making this instruction CV2812B and the preceding instruction CV2812A. He also questioned whether the instruction should include the statutory amounts for liability insurance. He thought that was a legal question for the court to determine. The committee questioned whether the instruction was needed at all. Mr. Carney reported that he had asked the plaintiffs' bar if anyone had used the prior instruction (MUJI 25.21). No one reported having used it at trial, although some people said that they had relied on it for settlement demands. Mr. Ferguson thought that whether the defendant signed a minor's application may be a fact question for the jury to decide, but the committee agreed that the instruction was not necessary.

k. *CV2813. Liability of an owner who gives a minor permission to drive his vehicle.* The committee agreed that this instruction presents a question for the jury (namely, whether the defendant "knowingly permitted" or "furnished" a vehicle for a minor's use. Mr. Humpherys asked what the difference was between subsections (1) and (2). Under subsection (2), the defendant does not have to be the owner of the vehicle. Mr. Carney suggested adding "or" between the two subsections. Dr. Di Paolo noted that a second distinction is that, under (2), the vehicle need not be driving on a "highway" and questioned whether the instruction should define "highway." Mr. Humpherys asked whether the statute would apply if, as a result of the minor's operation of a vehicle on a highway, an injury occurred off the highway. The committee thought that the statute would still apply, as long as the negligence related to driving the vehicle on the highway. At Mr. Ferguson's suggestion, the title was changed from "Liability of an owner . . ." to "Liability of a person . . .," since, under subsection (2), the person need not be the owner. The committee deferred further discussion of the vicarious liability instructions.

2. *CV1005. Industry standard.* Mr. Simmons had asked that the committee revisit CV1005, which, he said, was not supported by either Utah law or the authorities cited for it. The committee asked him to bring the matter to the attention of Mr. Fowler, the chair of the products liability subcommittee, so that the subcommittee can consider the issue first.

3. *Insurance Instructions.* Mr. Humpherys noted that the Utah Supreme Court recently heard oral argument on the question of when the "fairly debatable" defense in insurance bad faith actions presents a jury question. The committee will begin consideration of the insurance instructions at the May 2012 meeting.

4. *Next Meeting.* The next meeting will be Monday, April 9, 2012, at 4:00 p.m.

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The meeting concluded at 6:00 p.m.