MINUTES

Advisory Committee on Model Civil Jury Instructions
December 10, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill. Also present: Craig R. Mariger, Chair of the Design Professional subcommittee

Excused: Phillip S. Ferguson, Ryan M. Springer, and David E. West

The committee continued its review of the Professional Liability: Design Professionals instructions:

1. *CV504. Damages.* Mr. Shea verified that the committee had decided to delete CV504 and add links to other damage instructions. The committee noted that most design professional claims will be contract claims, not tort claims. Mr. Shea will add references to the contract damage instructions.

Dr. Di Paolo joined the meeting.

2. *CV505. Damages. Measure of property damages.* Mr. Young compared CV505 with CV2231, the instruction on damages for a contractor's defective work. The latter says that the measure of damages is the cost of repair unless that would result in unreasonable economic waste. CV505 says the measure of damages is (1) the cost of repair (unless unreasonably wasteful) or (2) lost value. Mr. Young thought the two instructions should be the same. Mr. Young will send CV2231 back to John Lund and Kent Scott to consider adding the property's lost value as an alternative in CV2231.

Mr. Young noted that CV2231 uses the phrase "unreasonable economic waste," whereas CV505 uses "unreasonably wasteful." He thought the two instructions should use the same terms. Ms. Blanch thought "unreasonably wasteful" was preferable. Mr. Mariger noted that the term was chosen because it was thought to be plainer English. Mr. Shea will change the language in CV2231 to "unreasonably wasteful." Mr. Summerill asked whether the term was defined. The committee noted that CV2232 provides an explanation. Mr. Mariger thought that CV2232 may have been based on real property cases, whereas Utah law follows the first Restatement of Contracts in design professional cases, in which case CV2232 should not be used. Mr. Young thought that CV2232 was based on a comment to the first Restatement. If that is the case, Messrs. Young and Mariger thought similar language could be included in CV505. Mr. Summerill thought that the jury needed some guidance on determining whether the cost of repair would be unreasonably wasteful. Mr. Mariger noted that it is a matter of looking at the disparity between the cost of repair and the value of the repaired property and deciding whether that disparity is reasonable, which is a question for the jury to determine based on the evidence and their judgment and experience.

At Ms. Blanch's suggestion, the phrase "If repair is not possible or if [name of defendant] proves that the costs of repair would be unreasonably wasteful," was deleted from the second paragraph as repetitive. It was suggested that the phrase "that the costs of repair of the property are sufficiently more than the loss in the value of the property caused by the breach of the standard of care" be deleted from the preceding sentence, but Mr. Mariger thought that language should stay.

At Mr. Young's suggestion, the term "give" was changed to "award," to make the instruction consistent with CV2231.

3. *CV506. Betterment or value added.* Mr. Summerill asked whether betterment was the flip side of economic waste and asked how the issue would be addressed on a special verdict form. Mr. Mariger noted that betterment only applies to a repair measure of damages. Mr. Young thought there would need to be a finding of fact on the special verdict form. Mr. Shea suggested making two instructions–505A for the repair measure of damages, which could also include betterment, and 505B for loss of property value. Mr. Mariger thought it was better to keep the betterment instruction separate, since it will not apply in every case and has not been unambiguously adopted in Utah. Mr. Young asked Mr. Mariger to have his subcommittee draft a comment saying that it is unclear whether the doctrine has been adopted in Utah. Mr. Mariger noted that, although there are no cases expressly adopting the doctrine in Utah, there are no cases rejecting it either, and there are a lot of cases saying that the plaintiff should not be placed in a better position by a breach of contract than he would have been in if the contract had been performed. Mr. Mariger had no doubt that the instruction correctly stated the law in Utah. He said the cases focus not on whether the doctrine exists but whether it applies in a given case, that is, on whether the plaintiff was bettered under the facts of the case. Judge Harris thought that the current committee note was unnecessary. Mr. Shea asked how much of the parenthetical information should be included in the references section.

The committee revised the instruction to read:

> The damages you award to [name of plaintiff] cannot place [him] in a better position than the position that [he] would have been in had [name of defendant] not breached the standard of care.
>
> To prevent [name of plaintiff] from being placed in a better position, you must reduce from the damages any additional amount of money that [name of plaintiff] would have paid in designing and constructing the [facility name] if [name of defendant] had provided services that met the standard of care. You must make this reduction only if [name of defendant] proves that [name of plaintiff] would have completed the [facility name] at the additional cost for construction if the services had met the standard of care. . . .

4. *CV507. Creation of a warranty*. Dr. Di Paolo thought the instruction should define warranty before telling the jury what it has to decide (namely, whether there was a warranty and whether it was breached). Mr. Mariger could not think of a warranty "made by the actions of" the defendant in this context. He noted that a warranty claim differs from a negligence claim but that, under *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Associates, Inc.,* 2001 UT 54, 28 P.3d 669, there is no implied warranty other than that the work complies with the standard of care. Specifically, there is no implied warranty of fitness for a particular purpose in design professional cases. Dr. Di Paolo was not clear on the distinction and asked whether we even need to instruct on an implied warranty claim. Mr. Mariger thought so, since implied warranty claims are very common. Mr. Young noted that AIA contracts disclaim any implied warranties. But Mr. Mariger thought that the implied warranty recognized in *SME* cannot be disclaimed. The committee decided to move the second sentence of the instruction to the end of the instruction and to delete the words "operation of" from the phrase "by operation of law" in the definition of implied warranty. It also decided to add the *SME* and *Groen v. Tri-O-Inc.* cases to the references and delete the reference to BAJI.

5. *CV508. Breach of warranty essential elements*. The committee revised the instruction to read:

> [Name of plaintiff] must prove the following elements to prove breach of warranty:
>
> (1) [Name of defendant] made a warranty that [describe the warranty];
>
> (2) [Name of defendant] reasonably expected that [name of plaintiff] would rely on the warranty, and [name of plaintiff] in fact reasonably relied on the warranty;
>
> (3) The [work/services] of [name of defendant] [was/were] not as promised;
>
> (4) [Name of plaintiff] was injured and incurred damages as a consequence of the breach of warranty by [name of defendant]; and
>
> (5) It was reasonably foreseeable at the time the warranty was made that [name of plaintiff] would be harmed if the [work/services] [was/were] not done as promised in the warranty.

> [To establish breach of an express warranty, [name of plaintiff] does not also have to prove that [name of defendant] was negligent.]

Mr. Shea asked whether the fourth element could be stated "[Name of defendant]'s breach of warranty was a cause of [or "caused"] [name of plaintiff]'s harm." Mr. Mariger noted that in warranty and contract actions, the breach must be "the cause" of the plaintiff's harm; the plaintiff can only recover for the harm caused by the breach of warranty (or contract). The committee questioned whether comparative fault would apply in a breach of implied warranty case under *SME,* since the implied warranty in effect applies a negligence standard.

The committee bracketed the last paragraph at Judge Harris's suggestion because the sentence only applies to express warranty claims; under *SME,* the plaintiff does have to prove that the defendant was negligent for breach of an implied warranty in a design professional case. Dr. Di Paolo and Judge Stone expressed concerns with the last paragraph. Messrs. Young and Mariger suggested alternative instructions, for breach of express warranty and breach of implied warranty. Judge Stone thought the instruction could be adapted based on how the warranty claim was defined. He also suggested using "breached the standard of care" for "negligent." The committee decided to add a comment saying to give the bracketed paragraph only where the claim is not one for breach of the standard of care, that is, where it is a claim for breach of express warranty. The instruction was approved as revised.

6. *CV509. Implied warranties. Accuracy and fitness for purpose.* Judge Stone questioned the use of "impliedly warrant or guarantee" and suggested substituting "promised" in its place. Dr. Di Paolo suggested "does not imply a warranty or guarantee." Mr. Mariger suggested "makes an implied warranty to the contracting party," noting that there are no implied warranties to third parties in design professional cases. The committee revised the instruction to read:

> The [name of defendant] made an implied warranty to [name of plaintiff] that the services would not fall below the standard of care, but [he] did not make an implied warranty to [name of plaintiff] that [his] services would be performed without error or defects or that [his] services would be suitable for the purpose intended by [name of plaintiff]. The [architect] [engineer] [land surveyor] does warrant that [his] services will not fall below the ordinary skill and care exercised by others engaged in the same profession in the same locality.

Ms. Blanch was excused.

Mr. Mariger suggested adding a committee note to the effect that the instruction does not apply if the plaintiff was not the contracting party. Mr. Mariger and Judge

Stone also thought the note should say that the instruction should be used in conjunction with CV501, "Standard of care for design professionals." The reference to MUJI 7.39 should be changed.

7. *CV510. Implied warranties. Compliance with building code.* Mr. Mariger noted that there is no law in Utah to support this instruction. He said that the AIA contract does not expressly waive an implied warranty of compliance with building codes. The *Allen Steel* case said that the implied warranty had to be expressly disclaimed, but the opinion was withdrawn because the case settled. Mr. Mariger offered to bring a copy of the opinion to the next meeting and added that some jurisdictions hold otherwise. Mr. Carney asked if there was a difference between a warranty and a guaranty. Mr. Mariger did not think so. Judge Harris asked when the issue became a jury question. Mr. Mariger thought it was not clear what is and is not a jury question. Mr. Young thought that it would be up to the jury to decide whether the defendant complied with the building code. Mr. Summerill suggested letting the attorneys argue the issue rather than instruct on it. Mr. Mariger did not think that a jury instruction was necessary but said that it was very important to the plaintiffs' bar. The matter was deferred till the next meeting.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting, scheduled for January 14, 2013, was canceled. The next meeting will be Monday, February 11, 2013, at 4:00 p.m.