

# Model Utah Civil Jury Instructions, Second Edition

## Injurious Falsehood

CV1901 Injurious Falsehood—Introductory Notes to Practitioners (not to be read to the jury).....	2
CV1902 Elements of an Injurious Falsehood Claim.....	4
CV1903 Definition: Publication. ....	5
CV1904 Disparaging Statement.....	5
CV1905 Definition: False Statement. ....	7
CV1906 Definition: Opinion. ....	8
CV1907 Definition: Malice. ....	8
CV1908 Economic Damages. ....	10
CV1909 Non-actionable Statements.....	11

**CV1901 Injurious Falsehood—Introductory Notes to Practitioners (not to be read to the jury).**

The tort of injurious falsehood encompasses two related claims known at common law as “slander of title” and “trade libel.” “Slander of title has traditionally addressed statements casting doubt upon the fact or the extent of a plaintiff’s ownership of property, most often real estate.... More recently, slander of title has been expanded to apply to interests other than title and to property other than land.” 2 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 13:1.1 (4th ed. 2016) (hereinafter, “*Sack on Defamation*”). “The tort of disparagement of quality, or ‘trade libel,’ developed from slander of title. It provides compensation for false derogatory statements about the quality, rather than the ownership, of property, most often a product or service being sold.” *Id.* “In both cases it is the plaintiff’s interest in property, real or personal, tangible or intangible, that is protected.” *Id.* Because both claims involve essentially the same elements, the only difference being whether the injurious statements concern ownership or quality of property, they are treated together as a claim for injurious falsehood.

The use of “slander” and “libel” is largely anachronistic. Disparagement of property can be either oral (slander) or written (libel), or even non-verbal—and the same is true of trade libel (sometimes called “business disparagement”). Given the confusion associated with these common law terms, these instructions refer to both types of claims as “injurious falsehood.”

Injurious falsehood shares a vocabulary with the tort of defamation. “However, despite the similarity in the names of the torts, there is a basic distinction between the two. They protect separate and unrelated interests. The tort of slander of title and the related tort of disparagement of property are based on an intentional interference with economic relations. They are not personal torts; unlike slander of the person, they do not protect a person’s reputation.” *Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988); *see also Sack on Defamation* § 13:1.4[B] (“The law of defamation protects the personal reputation of the defamed party; the law of business or commercial disparagement, or injurious falsehood, protects the economic interests of the injured party.”). “[I]njurious falsehood is a far more difficult cause of action than defamation to sustain, because it is an action only for special damages caused by the false statement, and the burden of proving falsity, damages, and ‘malice’ in its many forms is generally higher than in defamation.” *Sack on Defamation* § 13:1.4[A].

Nonetheless, despite the different interests protected by defamation and injurious falsehood, many courts and commentators have recognized that the First Amendment protections incorporated into defamation law should apply with equal force to an injurious falsehood claim, as both torts implicate freedom of speech. As one commentator has put it, “[t]here is no reason to accord lessened protection because the plaintiff’s claim is denominated ‘disparagement,’ ‘trade libel,’ or ‘injurious falsehood’ rather than ‘libel’ or ‘slander’ or because the injury is to economic interests rather than to personal reputation. Since only economic injury and not injury to reputation and psyche is at issue, perhaps the balance should tip even further to the side of free expression.” *Sack on Defamation* § 13:1.8. In Utah, this remains an open question because neither the United States Supreme Court nor the Utah appellate courts have ever addressed

whether the constitutional protections of defamation apply to injurious falsehood. The issue has, however, been addressed by a federal district court in Utah. See *SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1293 (D. Utah 2010) (“Having reviewed the relevant authority, the Court finds that slander of title claims are subject to the First Amendment.”); cf. *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody’s Investor’s Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (applying First Amendment opinion protection to injurious falsehood claim under Colorado law); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249 (D. Mass 1981) (applying First Amendment actual malice standard to product disparagement claim), *rev’d on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff’d*, 466 U.S. 485 (1984); *SIRQ, Inc. v. Layton Cos.*, 2016 UT 30, ¶ 50, 379 P.3d 1237 (“[F]alse light claims that arise from defamatory speech raise the same First Amendment concerns as are implicated by defamation claims.”).

Because application of the First Amendment to injurious falsehood remains an open question in Utah, the Committee has not drafted these instructions to incorporate the constitutional requirements of defamation law. However, should a party wish to argue for such protections, the modifications to these instructions would not be extensive. This is because, in Utah, the “malice” element of injurious falsehood already requires a plaintiff to prove the defendant published statements with actual knowledge of falsity. See *Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, ¶¶ 35-36, 326 P.3d 656. This is not the rule in all jurisdictions, some of which allow “malice” for injurious falsehood to consist of common law malice, or ill will, at least in private figure cases. See *Sack on Defamation* § 13:1.4[E].

The Utah standard of malice for injurious falsehood, therefore, is already higher than the standard for constitutional “actual malice” set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which must be met in public official and public figure defamation cases, and which can be satisfied *either* by actual knowledge of falsity *or* reckless disregard for the truth. As a result, in Utah there is no need to distinguish between the types of plaintiffs in injurious falsehood cases, nor to include a separate instruction on punitive damages. In addition, there is no need for an instruction on conditional privilege, as conditional privileges are abused and vitiated by actual malice. See *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 28, 221 P.3d 205.

Were the full scope of First Amendment protections from defamation law to apply to injurious falsehood claims, the Committee anticipates only two potentially necessary modifications to these instructions. First, under *Sullivan*, actual malice must be proven by clear and convincing evidence in public official and public figure cases. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Second, although the United States Supreme Court has never explicitly said so, the same heightened standard may apply in public plaintiff cases to the standard for falsity. See CV1605 (Definition: False Statement), Committee Notes. The below instructions do not specify a standard of proof other than preponderance of the evidence, but they could be modified in an appropriate case to be consistent with the constitutional standards of proof for defamation claims.

Finally, although Utah courts have not directly addressed the issue, it is generally acknowledged that “the absolute privileges that apply to defamation actions apply also to injurious falsehood suits.” *Sack on Defamation* § 13:1.5[A]; see also Restatement (Second) of Torts § 635 (1977) (“The circumstances under which there is an absolute privilege to publish an injurious falsehood

are in all respects the same as those under which there is an absolute privilege to publish matter that is personally defamatory”). Examples of absolute privileges include, but are not limited to, the judicial proceedings privilege, *see DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, and the legislative proceedings privilege, *see Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128. In the injurious falsehood context, other courts have found privileged “the filing of a lis pendens, a mechanic’s lien, or a judgment[.]” *Sack on Defamation* § 13:1.5[A] (footnote citations omitted). Whether a statement is privileged, however, is typically a question for the court, not the jury, to decide. *See Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992); *see also* CV1608 (Conditional Privilege). Therefore, as with the MUJI 2d instructions for defamation, *see* CV1608 (Conditional Privilege), Committee Notes, the Committee has not included an instruction on absolute privilege. If, during trial, the jury has heard evidence of statements the court has determined are absolutely privileged, and there is some concern the jury may assume those statements are actionable, the parties may wish to use CV1909 (Non-actionable Statements).

Utah statutes may provide additional remedies for conduct that also constitutes injurious falsehood. Utah Code §§ 38-9-101, et seq., and Utah Code §§ 38-9a-101, et seq., for example, provide remedies for the recording of wrongful liens, which may also be actionable as slander of title. *See, e.g., Rehn v. Christensen*, 2017 UT App 21, 392 P.3d 872 (analyzing statutory and common law claims). These instructions deal only with the common law tort of injurious falsehood and are not intended to be used for any related or overlapping statutory claims.

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### **CV1902 Elements of an Injurious Falsehood Claim.**

[Name of plaintiff] claims that [name of defendant] injured [him/her] by publishing one or more statements known as “injurious falsehoods.” To succeed on this claim, [name of plaintiff] must prove the following elements:

- (1) [name of defendant] published statement(s) that disparaged
  - (a) the quality of [name of plaintiff’s] [property, goods, or services]; or
  - (b) [name of plaintiff’s] property rights in [land, personal property, or intangible property];
- (2) the statements were false;
- (3) the statements were made with malice; and
- (4) the statements caused specific monetary loss to [name of plaintiff].

Some of these words have special meanings, and they will be explained in the following instructions.

### **References**

*Rehn v. Christensen*, 2017 UT App 21, 392 P.3d 872  
*Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, 326 P.3d 656  
*Neff v. Neff*, 2011 UT 6, 247 P.3d 380  
*First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253 (Utah 1989)  
*Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566 (Utah 1988)  
*Jack B. Parson Cos. v. Nield*, 751 P.2d 1131 (Utah 1988)  
*Direct Import Buyers Assoc. v. KSL, Inc.*, 572 P.2d 692 (Utah 1977)

Restatement (Second) of Torts §§ 623A, 624, 626 (1977)

### **MUJI 1st Instruction**

19.17, 19.18

#### **Committee Notes**

The first element in this instruction is intended to encompass both slander of title and trade libel claims, and is worded generally regarding the specific target of the injurious statements. It could be modified to be more specific if the parties and court so choose.

This instruction is not intended to address statutory causes of action for wrongful liens. See Utah Code sections 38-9-101 to 38-9-305 and 38-9a-101 to 38-9a-205 (2017).

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#### **CV1903 Definition: Publication.**

[Name of plaintiff] must prove [name of defendant] “published” the alleged injurious falsehoods. Publication means [name of defendant] communicated the statements to a person other than [name of plaintiff]. Publication can be oral, written, or non-verbal if a person’s non-verbal conduct or actions specifically communicate the injurious falsehoods. “Written” statements include statements that are communicated electronically or digitally.

#### **References**

*Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, 326 P.3d 656

*First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253 (Utah 1989)

*Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566 (Utah 1988)

Restatement (Second) of Torts §§ 623A cmt. e, 630 (1977)

### **MUJI 1st Instruction**

19.19

#### **Committee Notes**

Utah cases do not address whether publication of an injurious falsehood must be intentional, or at least negligent, to create liability. The Restatement requires at least negligence. *See* Restatement (Second) of Torts § 630 (1977). In some ways, however, this concept is subsumed within the malice requirement, as a non-negligent, unintentional publication would rarely be published with the requisite degree of malice.

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#### **CV1904 Disparaging Statement.**

I have already determined that the following statement(s) is/are capable of having a disparaging meaning: [insert statements].

You must determine whether the person to whom the statement(s) [was/were] published actually understood the statement(s) in [its/their] disparaging sense. You must also determine whether that person understood the statement(s) as referring to [name of plaintiff’s] [interests]. “Published” has a special meaning and is defined in the previous instruction.

A statement is disparaging when it

- (a) calls into question in a negative way the quality of [name of plaintiff's] property, goods, or services; or
- (b) casts doubt on [name of plaintiff's] property rights. Property rights can mean an interest in land, personal property, or other types of property.

Some statements may convey more than one meaning. For example, a statement may have one meaning that is disparaging and another meaning that is not. To support an injurious falsehood claim, [name of plaintiff] must prove, for any particular statement, that someone to whom the statement was published actually understood it in its disparaging sense and understood it as referring to [name of plaintiff's] [interests]. If no one actually understood a particular statement in its disparaging sense and as referring to [name of plaintiff's] [interests], then that statement cannot be used to support an injurious falsehood claim.

### **References**

*Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566 (Utah 1988)  
Restatement (Second) of Torts §§ 629, 652 (1977)  
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535  
*O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214  
*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)  
*Allred v. Cook*, 590 P.2d 318 (Utah 1979)  
*Mast v. Overson*, 971 P.2d 928 (Utah Ct. App. 1998)  
*Hogan v. Winder*, 762 F.3d 1096 (10th Cir. 2014)  
Restatement (Second) of Torts §§ 559, 614 (1977)

### **MUJI 1st Instruction**

19.20

### **Committee Notes**

The element of “disparaging” has not been extensively addressed by Utah courts in the injurious falsehood context, including the question of the court’s role in determining whether a statement is capable of conveying a disparaging meaning. The element is analogous, however, to the element of defamatory meaning for defamation claims, which has been addressed by Utah courts, and with respect to which the court’s role is clearly defined. References are therefore included to defamation authority for this instruction. *See also* CV1607 (Definition: Defamatory); Restatement (Second) of Torts § 652 (1977) (“In an action for injurious falsehood, the court determines ... whether the statement is capable of disparaging or other injurious meaning; ... the jury determines whether ... the statement complained of was understood by the recipient as disparaging or otherwise injurious” and “the statement was understood to be published of and concerning the plaintiff’s interest”).

The definition of “disparaging” as “casting doubt” on the plaintiff’s interests comes from the Restatement. *See* Restatement (Second) of Torts §§ 629 (1977). Because the phrase “casting doubt” may not be as inclusive of the types of statements that would constitute business disparagement, the instruction also uses the phrase, “calls into question in a negative way.”

As with CV1902 (Elements of an Injurious Falsehood Claim), the third paragraph of this instruction could be narrowed and stated more specifically depending on the types of statements at issue in a particular case. The bracketed word [interests] could be used as a general descriptor, or the parties and court could decide to be more specific about the interests at issue in a particular case, *i.e.*, the plaintiff's title in land, ownership of intangible property, quality of services, etc.

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**CV1905 Definition: False Statement.**

The allegedly injurious statement must state or imply facts which can be proved to be false, and [name of plaintiff] must show the statement to be false.

“False” means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, the statement must be materially false. A statement is “materially false” if it is false in a way that matters; that is, if it has more than minor or irrelevant inaccuracies.

A true statement cannot be the basis of an injurious falsehood claim, no matter how annoying, embarrassing, damaging, or insulting it may be. To be considered “true” in an injurious falsehood case, a statement need not be completely accurate. The statement need only be substantially true, which means the gist of the statement is true.

You should determine the truth or falsity of the statement according to the facts as they existed at the time [name of defendant] published the statement.

**References**

*Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, 326 P.3d 656  
*First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253 (Utah 1989)  
*Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566 (Utah 1988)  
*Air Wis. Airlines Corp. v. Hoeper*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 852 (2014)  
*Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)  
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535  
*Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956  
*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325  
*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)  
*Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991)  
*Auto West, Inc. v. Baggs*, 678 P.2d 286 (Utah 1984)  
Restatement (Second) of Torts § 634 (1977)

**MUJI 1st Instruction**

19.22

**Committee Notes**

The issue of falsity has not been extensively discussed in the injurious falsehood context, but it is essentially the same as the requirement of falsity for defamation claims. References are therefore included to defamation authority for this instruction. *See also* CV1605 (Definition: False Statement).

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**CV1906 Definition: Opinion.**

A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot be used to support an injurious falsehood claim. A statement of an opinion can be the basis of an injurious falsehood claim only when the statement implies [a fact/facts] that [name of plaintiff] shows [is/are] both false and disparaging. I have determined that the following statement(s) [is/are] statements of opinion: [insert specific statement(s).]

You must determine whether any particular statement of opinion implies one or more facts that are both false and disparaging.

**References**

*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535  
*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)  
*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)  
*Direct Import Buyers Assoc. v. KSL, Inc.*, 572 P.2d 692 (Utah 1977)  
Utah Const. art. 1, §§ 1, 15  
Restatement (Second) of Torts §§ 566 cmt. c, 626 cmt. c, 634 (1977)

**MUJI 1st Instruction**

19.22

**Committee Notes**

The issue of protected opinion has not been extensively discussed in the injurious falsehood context, but it is similar to the issue that arises in the defamation context. References are therefore included to defamation authority for this instruction. In *West v. Thomson Newspapers*, 872 P.2d 999, 1015-19 (Utah 1994), the Utah Supreme Court held that the Utah Constitution protects statements of pure opinion. The Committee discerns no reason the same protection would not apply in the injurious falsehood context. *Cf. Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (applying First Amendment opinion protection to injurious falsehood claim). This instruction also assumes that, as in the defamation context, whether a statement constitutes pure opinion is a question for the court to decide. *See West*, 872 P.2d at 1018. *See also CV1606 (Opinion)*.

This instruction should be used in the event the court determines as a matter of law that one or more statements are opinion, but the statement(s) may nonetheless be actionable because they reasonably imply verifiable facts capable of sustaining a disparaging meaning. The question for the jury is whether those facts were, in fact, implied, and whether the disparaging meaning was, in fact, conveyed.

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**CV1907 Definition: Malice.**

You must determine whether [name of plaintiff] has proved that the statements at issue were published with "malice." Malice in this context does not mean simply ill will or spite, as the

word is commonly understood. Rather, to show that [name of defendant] published the injurious statements with malice, [name of plaintiff] must prove:

- (1) [name of defendant] actually knew the injurious statements were false when [he/she/it] published them; and
- (2) [name of defendant] either:
  - (a) intended to injure [name of plaintiff] by publishing the statements; or
  - (b) reasonably should have expected that the statements would injure [name of plaintiff].

## References

*Rehn v. Christensen*, 2017 UT App 21, 392 P.3d 872  
*Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, 326 P.3d 656  
*Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205  
*First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253 (Utah 1989)  
*Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566 (Utah 1988)  
*Direct Import Buyers Assoc. v. KSL, Inc.*, 572 P.2d 692 (Utah 1977)  
*Howarth v. Ostergaard*, 515 P.2d 442 (Utah 1973)  
Restatement (Second) of Torts §§ 623A (1977)

## MUJI 1st Instruction

19.23

## Committee Notes

The meaning of “malice” in the injurious falsehood context has not always been clear in Utah. Some older cases suggest that malice requires actual knowledge of falsity, while others appear to endorse mere intent to injure or ill will, traditionally known as common law malice. *Compare Direct Import Buyers Assoc. v. KSL, Inc.*, 572 P.2d 692, 696 (Utah 1977) (requiring “actual malice” for disparagement of quality claim) *with First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1257 (Utah 1989) (appearing to allow a showing of malice from proof “that the wrong was done with an intent to injure, vex, or annoy”); *see also Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 n.1 (Utah 1988) (“We forgo defining the term ‘malice’ in this opinion. We note, however, that the concept is not altogether clear under Utah law.” (collecting cases)). This confusion may have stemmed from some courts’ reliance on cases discussing conditional privilege in the defamation context, in which both actual malice and common law malice can constitute abuse of the privilege. In *Dillon v. Southern Management Corporation Retirement Trust*, 2014 UT 14, ¶¶ 34-40, 326 P.3d 656, the Utah Supreme Court resolved this confusion, “clarify[ing] that to show malice in a claim for slander of title, the plaintiff must prove that the defendant had actual knowledge that the statements at issue were false.” *Id.* ¶ 35. This is a subjective, not objective, inquiry. *Id.* The court explained that the “intent to injure” and reasonable foreseeability requirements are alternative ways of showing malice, but that actual knowledge of falsity is required regardless. *Id.* ¶ 36. The latter method of proof (reasonable foreseeability) is sometimes referred to as “implied malice.” *Id.* ¶ 38; *see also Rehn v. Christensen*, 2017 UT App 21, ¶ 62, 392 P.3d 872. This holding conformed Utah law to the Restatement position. *See* Restatement (Second) of Torts § 623A (1977). *Dillon* was a slander of title case, but the Committee discerns no reason the same definition of malice would not apply equally to disparagement of quality claims.

Notably, the *Dillon* court did not hold that malice for injurious falsehood can be shown by proof of the defendant's reckless disregard for the truth. The malice standard for injurious falsehood in Utah, therefore, appears to be higher than the actual malice standard mandated by the First Amendment in defamation law, which incorporates the reckless disregard concept. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205. *Cf.* CV1608 (Conditional Privilege).

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### **CV1908 Economic Damages.**

[Name of plaintiff] must prove that the alleged injurious statements directly caused [him/her/it] economic damages. Economic damages are specific monetary losses.

In this case, [name of plaintiff] alleges economic damages of [list the specific monetary losses].

[A reduction in estimated value of property that [name of plaintiff] continues to own does not constitute a specific monetary loss.]

### **References**

*Rehn v. Christensen*, 2017 UT App 21, 392 P.3d 872

*Neff v. Neff*, 2011 UT 6, 247 P.3d 380

*Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361 (Utah 1997)

*First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253 (Utah 1989)

*Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566 (Utah 1988)

*Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 505 F. Supp. 2d 1178 (D. Utah 2007)

*Watkins v. Gen. Refractories Co.*, 805 F. Supp. 911 (D. Utah 1992)

Restatement (Second) of Torts § 633 (1977)

### **MUJI 1st Instruction**

No analogue

### **Committee Notes**

This instruction uses the term “economic damages” to capture the concept of special damages. Examples of such loss include, but are not limited to, lost sales of products, sale of an interest in land at a reduced price, or legal expenses reasonably necessary to remove a cloud on a title in property. This concept is similar (though not identical) to the concept of special damages in the defamation context. *See* CV1615 (Damages – Economic Damages). Among the differences, the Utah Supreme Court has held that attorneys' fees directly and necessarily incurred in clearing a cloud on title resulting from disparagement of property can constitute special damages for injurious falsehood. *See Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 569 (Utah 1988); *Neff v. Neff*, 2011 UT 6, ¶ 80, 247 P.3d 380; *see also Rehn v. Christensen*, 2017 UT App 21, ¶ 69, 392 P.3d 872. Utah courts have not addressed whether the same rule applies to a disparagement of quality claim.

To constitute special damages, the loss must be liquidated. The last sentence of this instruction is intended to convey that requirement and can be used if appropriate to a particular case. *See Neff*, 2011 UT 6, ¶ 81 (“[W]here a party's claim for harm to the value of his property has been based on appraisal value instead of sale of the land at a reduced price, we have denied recovery

because the damages had not yet been realized.”); *Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361, 364 (Utah 1997) (“Proof of special damages usually involves demonstrating a sale at a reduced price or at greater expense to the seller. It is not sufficient to show that the land’s value has dropped on the market, as this is general damage, not a realized or liquidated loss.”).

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### **CV1909 Non-actionable Statements.**

During trial, you may have heard evidence of certain statements made by [name of defendant] that I have determined are not injurious falsehoods. Specifically, you may have heard evidence of the following statements [insert specific non-actionable statements].

Even though you heard evidence of them, you are instructed that those statements are not injurious falsehoods, but you may consider them for other purposes.

### **References**

*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535

*O’Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214

### **MUJI 1st Instruction**

No analogue

### **Committee Notes**

This instruction recognizes that even where the court makes a determination that certain statements are non-actionable as a matter of law, such as when they are privileged or pure opinion, those statements may still be presented to jury for some other purpose or may have been presented prior to the court’s legal determination. For that reason, and to effectuate the court’s gatekeeping function, this instruction is designed to cure any prejudicial implication that non-actionable but otherwise admitted statements can support an injurious falsehood claim.