MINUTES

Advisory Committee on Model Civil Jury Instructions
November 14, 2016
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester, Christopher M. Von Maack. Also present: Steven Combe from the Emotional Distress subcommittee and Heather White from the Civil Rights subcommittee

Excused: Patricia C. Kuendig, Peter W. Summerill

1. *Minutes.* On motion of Mr. Johnson, seconded by Mr. Ferre, the committee approved the minutes of the October 11, 2016 meeting.

2. *Emotional Distress Instructions.* Ms. Blanch reported that the Emotional Distress subcommittee had met to address the issues raised at the last meeting. She, Mark Dunn, and Mr. Simmons had then discussed the subcommittee's proposals and recommendations. Ms. Blanch circulated with the minutes a memorandum regarding the negligent infliction of emotional distress (NIED) instructions.

a. *CV1505. Negligent Infliction of Emotional Distress–Direct Victim.* Ms. Blanch noted that the subcommittee had recommended giving an instruction on "zone of danger," so CV1505 had been revised to put "zone of danger" back in. The subcommittee had also recommended deleting the last part of the committee note, dealing with so-called thin-skull plaintiffs and the amount of damages recoverable. Mr. Von Maack questioned whether "unmanageable" should be left in the instruction and asked why it was removed. Mr. Simmons said that it came from dicta in *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 975 (Utah 1993) (per Durham, J.), and was not listed as an element in the cases that list the elements of the claim. He thought it was adequately covered by the requirement of "severe emotional distress resulting in illness or bodily harm," that it was not universally true (for example, it wasn't true if the defendant knew or should have known that the plaintiff was extra sensitive), and that it was best left for argument. Dr. Di Paolo added that it would not be obvious to the average juror what "unmanageable" meant. Would the plaintiff have to be bedridden or incapacitated from the emotional distress? The case law does not say. Mr. Von Maack noted that the elements of the claim as stated in CV1505 did not match the elements as stated in *Candelaria v. CB Richard Ellis*, 2014 UT App 1, ¶ 9, 319 P.3d 708, which says: "To establish a claim of negligent infliction of emotional distress, a plaintiff must show that (1) the defendant unintentionally caused emotional distress to the plaintiff; (2) the defendant 'should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person'; (3) the defendant, 'from facts known to him, should have realized that the distress, if it were caused, might

result in illness or bodily harm'; and (4) the emotional distress resulted in illness or bodily harm to the plaintiff." *Candelaria* cited *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 57, 116 P.3d 323, which in turn quoted *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 69 (Utah 1998), quoting Restatement (Second) of Torts § 313 (1965). Judge Harris noted that CV1505 focused on the defendant's conduct and the plaintiff's reaction and said nothing about the defendant's state of mind, which is the focus of the first three elements under *Candelaria*. Mr. Simmons noted that *Candelaria* also does not require that the plaintiff suffer a physical injury or be within the "zone of danger," as CV1505 does. Mr. Von Maack thought the second and third elements of *Candelaria* defined negligence in the context of a NIED claim. Judge Harris thought the second element of *Candelaria* made no sense and asked whether the subcommittee had considered *Candelaria* and *Anderson*. Mr. Combe thought it had not. Ms. Blanch asked Mr. Combe to ask the subcommittee to reconsider CV1505 in light of those cases.

b. *CV1506. Negligent Infliction of Emotional Distress–Bystander.* Ms. Blanch noted that the changes from the last meeting were to change the title to reinstate "Bystander," to substitute "zone of danger" for "actual physical peril," to add the element of witnessing the injury, and to add a reference to *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988), in the committee note. Although a majority of the subcommittee thought the claim should be limited to members of the injured person's immediate family, Ms. Blanch and Mr. Simmons thought that the issue had not been clearly decided under Utah law and that it should be dealt with in the committee note. Mr. Simmons pointed out that the committee note already contained a reference to *Johnson v. Rogers* and that the statement in the proposed addition was not joined by a majority of the court in that case. A majority of the committee agreed that, unless there was a Utah appellate decision squarely deciding the issue, the requirement that the injured person be an immediate family member should not be included in the instruction. Ms. Blanch asked whether "witness" was broad enough to cover all of the senses. Mr. Combe thought it wasn't clear. The committee considered using "sensed" rather than "witnessed" but rejected the idea because it could be construed as applying to a mere feeling or intuition. Ms. Blanch suggested adding a sentence to the committee note regarding the meaning of "witness" (i.e., that it was intended to be construed broadly and not limited to seeing the injury). Dr. Di Paolo suggested saying "witnessed or perceived." Judge Harris agreed, noting that perception is the foundation for a lay witness to testify under Article VI of the Utah Rules of Evidence. The committee decided to say "witnessed" but to add a sentence to the committee note saying that it encompasses "perceived" by any of the senses. Mr. Simmons suggested that the committee revise CV1506 to track the language that the subcommittee comes up with for CV1505, with the addition of the "zone of danger" requirement. The committee deferred further discussion of CV1506.

c. *CV1507. Definition of "Zone of Danger."* Ms. Blanch explained that the subcommittee had recommended including a separate instruction defining "zone of danger." The main issue was whether that definition should include the requirement that the plaintiff fear for his or her own safety. Mr. Combe said he was not aware of any case that says that is a requirement, but the result in *Lawson v. Salt Lake Trappers*, 901 P.2d 1013 (Utah 1995), is hard to explain if it is not a requirement. Dr. Di Paolo thought it should be in the instruction. She asked how one could be considered a bystander if he did not know about the threatened harm.

Judge Stone, who had been in trial, joined the meeting.

Judge Harris suggested that the committee ask the subcommittee why the requirement should be included if it is not in the case law and noted that the law in this area is very unclear. He questioned whether separate instructions for direct victims and bystanders were even necessary if the plaintiff had to fear for his or her own safety in either case. He thought adding the requirement would make everyone a direct victim. Mr. Simmons thought that separate instructions would still be necessary since the emotional distress recoverable in each case was different; in the direct victim case, it is emotional distress for fear for one's own safety, whereas in the bystander case it is emotional distress at witnessing the injury to another. Judge Harris thought that it was too hard to distinguish between the two, but Mr. Simmons thought that was the sort of distinction we ask juries to make all the time. Mr. Von Maack noted that certain language in *Straub v. Fisher & Paykel Health Care,* 1999 UT 102, 990 P.2d 384, suggests that it may be possible to have a bystander claim even if the plaintiff was not within the zone of danger. Ms. Blanch asked Mr. Combe to go back to the subcommittee and ask the members to consider combining CV1505 and CV1506. Judge Stone thought that *Straub* suggested that they could not be combined. He and Judge Harris suggested a committee note pointing out the inconsistencies in the case law.

Mr. Combe was excused, and Ms. White joined the meeting.

3. *Civil Rights Instructions.*

a. *CV1301. Section 1983 Claim–Elements.* Judge Harris suggested defining the first element (that the defendant's conduct was "under color of state law"). The committee struggled with trying to define it. It considered saying, "[Name of defendant] was a state [or other government] employee and was acting or claiming to act within the scope of his authority." Judge Harris asked whether "employee" was too narrow. The committee thought so, since liability can extend to people who are not state agents, such as independent contractors and volunteers, as long as they were acting "under color of state law." Judge Harris

and Ms. White suggested revising it to read, "[Name of defendant] was a state employee acting in his official capacity or exercising his responsibilities under state law." Ms. White noted, however, that acts done beyond the bounds of official authority can be done "under color of state law" if the defendant was pretending to act under state law or had a genuine belief that he was authorized to act by state law. Mr. Von Maack asked whether it was ever a jury question whether the defendant was acting under color of state law; if not, he thought the requirement could be omitted. Ms. White said she had had the issue come up once, and it was resolved by the court. But she also found a Supreme Court case that said the issue was a mixed question of law and fact. *But see Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) (suggesting that whether an action is considered "state action" is a question of law). Ms. Blanch asked Ms. White to have the subcommittee come up with a definition of "under color of state law." At Judge Harris's suggestion, "the Constitution of the United States" in the second element was replaced with "federal law," since section 1983 applies to "the Constitution *and laws*" of the United States (emphasis added). At Judge Harris's suggestion, "proximate" was deleted from the third element of the instruction, and a cross-reference to CV209 defining "cause" was put in a committee note. Ms. Blanch asked whether the committee had been using "injuries and damages." At Mr. Simmons's suggestion, the phrase was replaced with "harm."

b. *CV1302. Section 1983 Claim–Deprivation of Rights.* The committee revised the instruction to read: "The second element of [name of plaintiff]'s claims is that [name of defendant]'s conduct deprived [him/her] of a right protected by federal law. [Name of plaintiff] claims in this case that [he/she] was deprived of [his/her] right to [list the right or rights]. I will explain [this right] [these rights] later in the instructions." The committee debated whether to say the defendant "deprived" plaintiff of the right or "violated" the plaintiff's right and elected to go with "deprived." On motion of Mr. Simmons, seconded by Mr. Johnson, the committee approved the instruction.

c. *CV1303. Warrantless Arrest.* Judge Harris suggested revising the instruction to read, in part:

> [Name of plaintiff] claims that [he/she] was unlawfully arrested by _____ on _____. Under the Fourth Amendment to the U.S. Constitution, an arrest may be made only when (1) a police officer has an arrest warrant, or (2) when a police officer has probable cause. . . .

Ms. Blanch asked the subcommittee to verify that those are the only two ways in which a lawful arrest can take place. The committee deferred further discussion of CV1303 until the next meeting.

4. *Schedule.* Ms. Blanch reviewed the timeline for future subjects. She also noted that Mr. Summerill has a problem with meeting on Mondays and asked if anyone else would prefer to meet on another day. No one else expressed a desire to change the meeting times, so the meetings will continue to take place on the second Monday of every month from 4:00 to 6:00 p.m.

5. *Next meeting.* The next meeting will be Monday, December 12, 2016, at 4:00 p.m.

The meeting concluded at 6:00 p.m.