MINUTES

Advisory Committee on Model Civil Jury Instructions
April 11, 2017
4:00 p.m.

Present: Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Heather S. White from the Civil Rights subcommittee

Excused: Juli Blanch (chair), Marianna Di Paolo, Patricia C. Kuendig, Ruth A. Shapiro

Judge Harris conducted the meeting in Ms. Blanch's absence.

1. *Minutes.* On motion of Mr. Ferre, seconded by Judge Stone, the committee approved the minutes of the March 13, 2017 meeting.

2. *Negligent Infliction of Emotional Distress (NIED) Instructions.* Judge Harris revisited the NIED instructions in light of comments on the courts' website and comments from Judge Barry Lawrence. He proposed revised instructions. Phil Ferguson had commented on the website that the current instruction works well for bystander cases but not for direct victim cases, such as *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993), and *Harnicher v. University of Utah Medical Center*, 962 P.2d 67 (Utah 1998). Judge Harris thought that we should have separate instructions for direct victims and bystanders. He noted that one can have a direct victim claim without a physical injury separate from that caused by the emotional distress, but a bystander claim requires a physical injury to someone. He said that the committee could send the instructions back to the subcommittee or deal with them itself, either today or at the next meeting. In the interest of time, the committee members chose to deal with the instructions themselves at the next meeting. Mr. Simmons suggested that the first element in each of the new instructions, which Judge Harris had numbered CV1504.5 (direct victim) and CV1505 (bystander), be "[name of defendant] unintentionally caused [name of plaintiff] emotional distress," consistent with section 313 of the Restatement (Second) of Torts. Instead, at Judge Harris's suggestion, the committee took "unintentionally" out of the first element and put it before "caused" in the third element of each instruction, since the conduct could be intentional; what the defendant did not intend was to cause emotional distress. Judge Harris also thought that the committee needed to make it clear that the last sentence of CV1503 ("It is possible to have severe and extreme emotional distress without observable behavioral or physical symptoms.") only applies to claims for intentional infliction of emotional distress (IIED), not NIED claims. CV1503 was meant to define "severe or extreme emotional distress" as used in CV1501 (the IIED instruction), but, as Mr. Von Maack noted, the NIED instructions also refer to "severe emotional distress." Mr. Simmons suggested bracketing the sentence and adding a committee note that says it is only to be used in IIED cases. Judge Harris added that the note should also say that

it is an open question whether it applies in NIED cases. He noted that the Utah Supreme Court has stopped short of defining "illness or bodily harm" as used in the NIED instructions. For example, it is unclear whether a diagnosed mental illness is sufficient or required for NIED cases where the emotional distress did not cause a physical illness. Judge Stone noted that *Samms v. Eccles,* 11 Utah 2d 289, 358 P.2d 344 (1961), cited as support for CV1503, was abrogated in *Johnson v. Rogers,* 763 P.2d 771 (Utah 1988), to the extent it refused to recognized a claim for NIED. The committee deferred further discussion of the NIED instructions until the next meeting.

Ms. White jointed the meeting.

3. *Civil Rights Instructions.* The committee continued its review of the Civil Rights instructions.

a. *CV1303. Warrantless arrest.* The committee deleted "Fourth Amendment to the United States" in the first line and changed the other references to "Fourth Amendment" to read "Constitution." On motion of Mr. Fowler, seconded by Mr. Von Maack, the committee approved the instruction as revised.

b. *CV1307. Reasonable suspicion.* Judge Stone questioned whether the jury needed to be instructed on "reasonable *articulable* suspicion." That is, he did not think the phrase "and can identify" was necessary. Mr. White noted that it is not a subjective standard; the officer's subjective motivation is irrelevant. Moreover, the officer does not have to be right. It is enough if there are facts that would lead a reasonable officer to conclude that a crime had been committed. The committee revised the first sentence to read: "Reasonable suspicion means that the officer was aware of specific facts that would lead a reasonable officer to conclude that the person in question committed a crime." On motion of Mr. Simmons, seconded by Judge Stone, the committee approved CV1307 as revised.

c. *CV1310, Search of residence, and CV1313, [Entry/Search] of a residence.* The committee asked what the difference was between CV1310 and CV1313. Ms. White explained that an entry and a search are different, and the right to be free from an unreasonable entry is distinct from the right to be free from an unreasonable search. But the standard is the same. The committee revised CV1310 to replace "search" and "searched" with "[entry/search]" and "[entered/searched]" respectively. Mr. Simmons thought that CV1310 was meant to state the elements of a claim for an unreasonable entry or search, and CV1313 was meant to explain when an entry or search was unreasonable. Mr. Von Maack suggested revising the title to CV1313 to "Reasonable [entry/search]." But, he noted, CV1310 states as an element that the entry or search was *un*reasonable and

thought that jurors might be confused if the instruction did not define "unreasonable" entries and searches. Judge Stone questioned the use of "residence" in CV1310. He noted that the case could involve any interest in property, such as a storage unit, a guest's interest in a motel room, a leased room in a home, or even a virtual file or a cloud account. The committee replaced "residence" with "property" in CV1310 and revised the committee note to say, "These instructions refer to 'property' in brackets, but it may be clearer to refer to the specific type of property involved in the case, such as a home, business, vehicle, backpack, computer file, etc."

The committee turned to CV1313. Mr. Von Maack suggested starting the instruction by saying, "To show that a [search/entry] was unreasonable, [name of plaintiff] must show that--". Judge Harris suggested starting the instruction by saying, "There are three ways to constitutionally [enter/search] property," and concluding by saying, "If none of these are present, the search is unreasonable." The committee discussed whether to use "constitutionally" or "lawfully." The committee thought "lawfully" was better, but, as Mr. Von Maack pointed out, the instructions should be consistent and had been using "constitutionally." He suggested that the committee use one term consistently throughout. The committee revised CV1313 to read:

> An officer may lawfully [enter/search] [property] under three situations:
>
> 1. The officer has a warrant.
>
> 2. The officer has obtained valid consent.
>
> 3. The officer has probable cause, and exigent circumstances exist.
>
> A search that does not fall into one of these three situations is unreasonable.

The committee debated whether to say that the officer needed a "valid" warrant, which would probably require additional instructions on how to determine whether a warrant was "valid," but decided not to but to leave it to the attorneys to argue whether the warrant was valid or not. Mr. Von Maack suggested renaming the instruction "Lawful [entry/search] defined." The committee deleted the committee note to CV1313. The committee then discussed the burden of proof. CV1310 states the general rule that the plaintiff has the burden of proving by a preponderance of the evidence that the search was unreasonable, which would mean that the plaintiff has the burden of proving that the search

was not pursuant to a warrant, consent, or probable cause and exigent circumstances, but the current version of CV1313 suggests that if the officer did not have a valid warrant, the burden of proof shifts to the officer to prove that he had consent or that probable cause and exigent circumstances existed, suggesting that the latter are affirmative defenses. Mr. Von Maack suggested splitting CV1313 into two instructions, one if there is a warrant, and one if there is not. The latter would say that if there was no warrant, the search was presumptively unreasonable, and the burden shifts to the defendant to show consent or probable cause and exigent circumstances. The committee decided it did not know the law well enough to resolve the issue and asked Ms. White to come back with an answer about the burden of proof next time.

4. *Next meeting.* The next meeting is Monday, May 8, 2017, at 4:00 p.m.

The meeting concluded at 6:00 p.m.