

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 13, 2017

4:00 p.m.

Present: Juli Blanch (Chair), Nancy Sylvester (staff), Professor Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Ruth A. Shapiro, Paul Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Christopher M. Von Maack.

Excused: Patricia Keundig

Guests: Ryan Frazier

1. *Welcome, announcements and approval of minutes.* Ms. Blanch welcomed the committee to the meeting. She announced that Professor Di Paolo had received an award at the Bar's Fall Forum regarding her work on the committee. Judge Stone amended the October minutes to reflect that Ms. Blanch had discussed the preamble, not him. On motion of Tracy Fowler, seconded by Judge Stone, the committee approved the minutes of the October 2, 2017 meeting.

Ms. Blanch asked Mr. Von Maack to look at the *Leigh Furniture* case in preparation for discussing CV 1403 to see if there was a discussion about purpose of interfering/intentional interference. Mr. Furniture said the case discusses purpose of injuring with respect to breach of contract.

Ms. Sylvester then spoke about Ms. Blanch's service to the committee and Ms. Blanch thanked the committee for its work.

2. *Economic Interference Instructions*

Instruction CV 1403. "Intentionally Interfered" Defined.

Ms. Blanch said she had a question about whether the committee should include a knowing element with respect to the person having acted with the purpose of interfering. She thought if the person acted with purpose, it must be knowing. The committee observed that the subcommittee got the instruction language from the *Leigh Furniture* case. The committee looked to the *Mumford* and *Eldridge* cases to determine if there was more it should add to clarify the instruction. Ultimately, the committee left the instruction intact.

Judge Stone moved to approve instruction 1403 and Ruth Shapiro seconded the motion. The motion passed unanimously. The approved instruction reads as follows:

CV 1403. “INTENTIONALLY INTERFERED” DEFINED.

You must next determine whether [name of defendant] intentionally interfered with [name of plaintiff]’s [existing] or [potential] economic relationship. For [name of defendant] to have intentionally interfered with an existing or potential economic relationship of [name of plaintiff], [name of defendant] must have

- 1) acted for the purpose of interfering with that relationship or
- 2) acted knowing that the interference was substantially certain to occur as a result of [his/her/its] actions.

References:

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

Mumford v. ITT Commercial Fin. Corp., 858 P.2d 1041, 1044 (Utah Ct. App. 1993)

Restatement (Second) of Torts § 8A (the word “intent” denotes that the actor desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it)

MUJI 1st Instruction

19.3

Instruction CV 1404. Definition of “Improper Means.”

The committee moved the following from the instruction to the committee note: “Improper means may include such things as acts of violence, threats or other intimidation, bribery, false statements, defamation, a wrongful lien, bringing a lawsuit without any basis, taking money or property to which one was not entitled, or violating a court order.” The committee also requested follow up feedback from the subcommittee on paragraph 2 of the note. Some of the committee members felt that the case law read differently that the way it was written. If the committee was right, the last sentence of the instruction would be impacted: “A deliberate breach of contract, even when used to secure economic advantage, is not, by itself, an ‘improper means’; nor is an intent to inflict injury, by itself, an ‘improper means.’” The committee also asked the subcommittee to explore whether nominal damages are appropriate in these claims and whether a new instruction to that effect should be drafted.

The instruction was left as follows, pending changes from the subcommittee:

CV1404 DEFINITION OF “IMPROPER MEANS.”

The second element of [name of plaintiff]’s claim is that [name of defendant] interfered with [name of plaintiff]’s existing or potential economic relations by improper means. “Improper means” is defined as action that was contrary to law or violated an established standard of a trade or profession.

References:

Eldridge v. Johndrow, 2015 UT 21, 345 P.3d 553

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989)

MUJI 1st Instructions

19.5 & 19.6

Subcommittee Note

Improper means may include such things as acts of violence, threats or other intimidation, bribery, false statements, defamation, a wrongful lien, bringing a lawsuit without any basis, taking money or property to which one was not entitled, or violating a court order.

The court and parties should tailor examples of improper means to the facts of the case. If there is some question as to whether the defendant violated a statute or rule or committed a separate tort as part of his improper means, the court may have to give separate instructions on the elements of the statute or tort.

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 309 (Utah 1982), suggested that an intentional breach of contract with the intent to inflict injury may constitute improper means. The subcommittee did not think this part of *Leigh* survived the Utah Supreme Court's abandonment of the "improper purpose" prong of *Leigh* in *Eldridge v. Johndrow*, 2015 UT 21. Arguably, the same considerations that caused the court to abandon the "improper purpose" prong would also counsel against finding liability for tortious interference for even a malicious breach of contract. The court in *Eldridge*, however, did not specifically address the issue but recognized that a defendant's motivation may still be relevant to a tortious interference claim, including "relevant to the improper means prong of the *Leigh Furniture* test." *Id.* ¶ 67. The subcommittee thought that the court was probably referring to improper means that require intent as an element of the tort or crime and not to lawful actions that were taken with a bad motive. To hold otherwise would in effect reinstate the abandoned "improper purpose" alternative.

Instruction 1405. Defenses: Privilege.

The committee discussed the *Eldridge v. Johndrow*, 345 P.3d 553, case and its interplay with the *Leigh Furniture* case. In *Eldridge*, the Supreme Court held that 1) there was no evidence that defendant interfered with plaintiffs' economic relations through an improper means, as required to support a tortious interference claim, and 2) in the absence of any improper means, an improper purpose is not grounds for tortious interference liability, overruling *Pratt v. Prodata*, 885 P.2d 786, and *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293. So although *Eldridge* said improper purpose cannot by itself support a claim for tortious interference, *Leigh Furniture* is still good law for the privilege defense instruction.

Ruth Shapiro moved to approve instruction CV1405 and Joel Ferre seconded the motion. The committee approved the instruction as follows:

CV1405. DEFENSES: PRIVILEGE.

[Name of defendant] claims that [his/her/its] actions in interfering with [name of plaintiff]’s economic relations were privileged [Name of defendant] claims that [his/her/its] conduct was privileged under the [describe the privilege]. [Name of defendant] must prove the following: [Describe the elements of the privilege.] To the extent you find [name of defendant]’s actions were subject to a privilege, you cannot find those actions to be an “improper means.”

References:

Mumford v. ITT Commercial Financial Corp., 858 P.2d 1041 (Utah Ct. App. 1993)
Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

MUJI 1st Instructions

None

Subcommittee Note

Privilege has been recognized by the Utah Supreme Court and the Utah Court of Appeals as an affirmative defense to an intentional interference with prospective economic relations claim. It does not become an issue unless “the acts charged would be tortious on the part of an unprivileged defendant.” *Mumford v. ITT Commercial Financial Corp.*, 858 P.2d 1041, 1043-44 (Utah Ct. App. 1993) (quoting *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982)).

The Utah Court of Appeals has explained that “[e]ven a recognized privilege may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege.” *Mumford*, 858 P.2d at 1043-44 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 (Or. 1978) (en banc)). Therefore, a privilege is not an absolute defense. If the plaintiff claims that a recognized privilege should not apply because the reason for recognizing the privilege does not apply under the facts of the case, the court may also need to instruct the jury on the reason for the privilege and the parties’ arguments for why it should or should not apply under the circumstances.

If a privilege instruction is given to the jury, an instruction defining and describing the applicable privilege should be given to the jury so that it can properly assess whether the privilege applies. For example, an individual may be able to raise a privilege for statements that would otherwise be defamatory if the statements were made in the course of or incident to juridical or quasi-judicial proceedings. Because of the number and variety of possible privileges, the subcommittee did not think it practicable to provide instructions on each possible privilege. Where a privilege is claimed, the court should instruct the jury as to the nature of the privilege claimed and what the jury must find to conclude that it bars the plaintiff’s claim.

Instruction 1406. Damages.

The committee discussed Instruction 1406’s interplay with the tort damage instructions the committee has already drafted. The committee modified the subcommittee note to better refer to those instructions.

Paul Simmons moved to approve instruction CV1406 and Joel Ferre seconded the motion. The committee approved the instruction as follows:

CV1406. DAMAGES.

If you find that [name of the defendant] intentionally interfered with [name of plaintiff]'s economic relations, then you should award [name of the plaintiff] damages that will reasonably compensate for any harm [name of the plaintiff] has suffered because of the interference with economic relations.

References:

TruGreen Cos. v. Mower Bros., Inc., 2008 UT 81, 199 P.3d 929

Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989)

Restatement (Second) of Torts § 774A (1979)

MUJI 1st Instructions

19.15 & 19.16

Committee Note

Practitioners should also use the tort damages instructions at CV2001, et. seq., that are applicable. Damages could include lost monetary or other benefits or expectations under a contract, any actual harm to plaintiff's reputation, lost profits, or emotional distress caused by defendant's interference.

Instruction 1407. Damages: Lost Profits.

The committee reviewed CV 1407 and made no changes, but discussed whether a nominal damages instruction would be appropriate. The committee requested that the subcommittee answer that question at the next meeting.

Tracy Fowler moved to approve instruction CV1407 and Ruth Shapiro seconded the motion. The committee approved the instruction as follows:

CV1407. DAMAGES: LOST PROFITS.

To award damages for lost profits, you must have a reasonable basis for calculating them. Although past profits cannot be taken as an exact measure of future or anticipated profits, you may consider the past profits and losses of the plaintiff's business in determining lost future profits. You may also consider any increase or decrease in business that might have been reasonably expected if there had been no interference.

References:

TruGreen Cos. v. Mower Bros., Inc., 2008 UT 81, 199 P.3d 929

MUJI 1st Instructions

19.15 & 19.16

3. *Other business.* There was no other business to discuss at this time.

4. *Next meeting.* The next committee meeting will be held on Monday, December 11th from 4:00 to 6:00 p.m.

The meeting adjourned at 5:49 p.m.