

Agenda

Advisory Committee on Model Civil Jury Instructions

November 26, 2018
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

| | | |
|---|-------|------------------------------|
| Welcome and approval of minutes | Tab 1 | Judge Andrew Stone, Chair |
| Subcommittees and subject area timelines | Tab 2 | Judge Andrew Stone |
| Trespass and Nuisance Instructions | Tab 3 | Cameron Hancock |
| Other business | | Judge Andrew Stone |

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m.
unless otherwise stated.

December 10, 2018

2019 Schedule: TBD (we generally meet the 2nd Monday of each month)

Tab 1

DRAFT MINUTES

Standing Committee on Model Civil Jury Instructions

May 14, 2018

4:00 p.m.

Present: Tracy Fowler (Chair Pro Tem), Nancy Sylvester (staff), Professor Marianna Di Paolo, Joel Ferre, Ruth A. Shapiro, Doug Mortensen, Lauren Shurman

Excused: Judge Andrew Stone, Christopher M. Von Maack, Paul Simmons, Peter Summerill, Judge Keith Kelly

Guests: Heather White, Ryan Frazier

1. *Welcome, announcements and approval of minutes.*

Mr. Fowler welcomed the committee to the meeting. He then had new member, Doug Mortensen, introduce himself to the committee. Mr. Fowler asked for a motion on the minutes. On motion of Joel Ferre, seconded by Lauren Shurman, the committee approved the minutes of the April 9 meeting.

2. *Civil Rights Instructions*

CV 1301

The committee discussed the use of the terms “pretending” and “purporting” in CV1301. Nancy Sylvester and Heather White said that the 10th Circuit did not use the term “pretending” the way the 9th Circuit did, but the 10th Circuit did use the term “purporting.” Because the terms seemed like they would be confusing to the average juror, the committee replaced them both with “claiming to act.”

On motion of Ruth Shapiro, seconded by Joel Ferre, the committee approved the revised instruction.

CV 1308 and 1309

To address readability issues, the committee redrafted the following sentence in CV 1309: “Bad intentions will not make a constitutional violation out of an objectively reasonable use of force, and good intentions will not make an unreasonable use of force proper.” The sentence was redrafted as follows: “An officer’s evil intentions will not make a constitutional violation out of a reasonable use of force. Likewise, an officer’s good intentions will not make an unreasonable use of force constitutional.” The language largely tracks *Graham v. Connor*, 490 U.S. 386 (1989).

To address a comment made during the comment period about not including the objectiveness standard, the committee drafted the following note: “This instruction supplies a framework for the concept of ‘objective reasonableness.’ Linguistically,

‘objective’ and ‘subjective’ are difficult terms for the average person to understand, so in order to avoid confusion, the instruction does not use the term ‘objectively reasonable.’”

On motion of Lauren Shurman, seconded by Joel Ferre, the committee approved revised instructions 1308 and 1309, which also contained edits from the April meeting.

3. *Economic Interference*

At Doug Mortensen’s suggestion, the committee discussed with Ryan Frazier whether to include an instruction on interference with a contractual relationship. The committee determined that it did need to include one since the note to CV1401 discussed that the instructions would need to be included in conjunction with others, including the contract instructions and potentially other tort instructions.

Regarding the comment to the instructions by Josh Lee, Mr. Frazier reported that the subcommittee’s view was that the established standard of a trade or profession aspect of improper means had not been fleshed out in Utah and the instruction simply reflected the law as it currently stands. The subcommittee determined that the argument should be made in a case to an appellate court. The committee agreed with the subcommittee’s determination and also discussed that what comprised an “established standard” was a legal question for the judge. The committee determined that the case cited by Mr. Lee, *Walker v. Anderson-Oliver Title Ins. Agency, Inc.*, 2013 UT App 202, ¶¶ 20-21, 309 P.3d 267, 274, could be appropriately added to CV 1404.

The committee also discussed the use of the term “contrary to law” in the same instruction. Suggestions were made to change the phrase to “unlawful” or “against the law.” After reviewing the instruction note, which explained the areas of law “contrary to law” described and also made clear that the practitioners would need to provide examples, the committee determined that “contrary to law” would be sufficiently clear.

On motion of Doug Mortensen, seconded by Joel Ferre, the committee approved revised instruction 1404.

4. *Other business.*

There was no other business to discuss at this time.

5. *Next meeting.*

The next committee meeting is scheduled for Monday, June 11th from 4:00 to 6:00 p.m. Ms. Sylvester said she would discuss canceling the meeting with Judge Stone since it did not appear that there would be another set of instructions ready by that time.

The meeting adjourned at 5:36 p.m.

Tab 2

| <u>Priority</u> | <u>Subject</u> | <u>Sub-C in place?</u> | <u>Sub-C Members</u> | <u>Projected Starting Month</u> | <u>Projected Finalizing Month</u> | <u>Comments Back?</u> |
|-----------------|--|--------------------------------------|---|---------------------------------|-----------------------------------|---|
| 1 | Injurious Falsehood | Yes | Dryer, Randy; Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David (Chair); Stevens, Greg | December-17 | February-18 | December 2018 Meeting |
| 2 | Trespass and Nuisance | Yes | Hancock, Cameron; Abbott, Nelson (P); Steve Combe (D) | November-18 | February-19 | |
| 3 | Assault/False Arrest | Yes | Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P) | March-19 | June-19 | |
| 4 | Insurance | Yes | Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D) | | | |
| 5 | Unjust Enrichment | No (instructions from David Reymann) | David Reymann | | | |
| 6 | Abuse of Process | No (instructions from David Reymann) | David Reymann | | | |
| 7 | Directors and Officers Liability | Yes | Call, Monica; Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam | | | Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area. |
| 8 | Wills/Probate | No | Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron | | | |
| 9 | Civil Rights: Set 2 | Yes | Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D) | | | |
| 10 | Sales Contracts and Secured Transactions | Yes | Cox, Matt (chair); Boley, Matthew; Maudsley, Ade | | | |
| 11 | Products Liability | No | Tracy Fowler, Nelson Abbott, and Todd Wahlquist | | | Time to update due to significant changes in case law. |

Tab 3

| MUJI 4.8 TRESPASS - INTRODUCTORY INSTRUCTION

| In this action, the plaintiff seeks to recover damages from the defendant for a trespass to the plaintiff's property. A trespass is any ~~injury to, or~~ invasion of, or encroachment upon, another's property by one who has no right to do so.

References:

| *Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc.*, 2006 UT App 387, ¶ 4, 145 P.3d 1177

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| MUJI 4.9 TRESPASS TO REAL PROPERTY

To award the plaintiff damages for trespass against the property involved in this case, you must find that:

1. The plaintiff had [ownership/lawful possession] of the property;
2. The defendant interfered with the plaintiff's exclusive right to possession of the property by entering [or causing an object to enter] the plaintiff's land;
3. The defendant intended to perform the act that resulted in the unlawful invasion of the plaintiff's property; and
4. The defendant had no right to do the act that constituted the unlawful invasion of the plaintiff's property.

References:

| *Purkey v. Roberts*, 2012 UT App 241, ¶ 17, 285 P.3d 1242

John Prince Associates v. Utah State Conference, 615 P.2d 1210 (Utah 1980)

Wood v. Myrup, 681 P.2d 1255 (Utah 1984)

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| MUJI 4.10 TRESPASS TO PERSONAL PROPERTY

To award the plaintiff damages for trespass against the property involved in this case, you must find that:

1. The plaintiff had [ownership/lawful possession] of the property at the time of the alleged trespass;
2. The defendant interfered with the plaintiff's exclusive right to possession of the property, by [specify briefly the acts alleged to constitute wrongful interference with the plaintiff's personal property];
3. The defendant intended to perform the act that amounted to the unlawful interference with the personal property of the plaintiff; and
4. The defendant had no right to do the act that constituted the interference with the personal property of the plaintiff.

References:

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

Peterson v. Petterson, 117 P. 70, 71 (Utah 1911)

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MUJI 4.11 EXPRESS CONSENT

The defendant asserts that the defendant was given express consent by the plaintiff or the plaintiff's agent to [use/enter upon] the plaintiff's property, and that the defendant is thus not liable for trespass.

Consent is an absolute defense to an action for trespass. Therefore, the defendant is not liable for trespass if the defendant can show that the rightful [owner] [possessor] [authorized agent] gave express consent to the defendant's [use of/entry upon] the plaintiff's property, and that the defendant's use did not exceed the consent given by the rightful [owner] [possessor] [authorized agent].

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

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MUJI 4.12 ~~IMPLIED CONSENT~~ - CUSTOM AND USAGE

The defendant asserts that the defendant had the implied consent of the plaintiff or the plaintiff's agent to [use/enter upon] the plaintiff's property, and that the defendant is thus not liable for trespass.

Consent is an absolute defense to an action for trespass. Consent for [use of/entry upon] real property need not be expressly given but may be implied from the circumstances. The implied consent may be derived from custom, usage, or conduct. Therefore, the defendant is not liable for trespass if the defendant can show that:

1. The defendant was a member of a category of persons for whom [use of/entry upon] the property would be considered customary or common;
2. The defendant's [use of/entry upon] the plaintiff's property was within the fair and reasonable bounds of the implied consent to [use/enter upon] the property; and
3. The plaintiff did not indicate, either verbally or by posted signs on the property, that the plaintiff did not consent to the entry.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

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Comment [RB1]: I don't see any cases setting forth a distinction under Utah law between express and implied consent—nor are these elements of implied consent found anywhere. The cases cited under express and implied consent stand for the general proposition that consent is a defense to trespass.

| MUJI 4.13 MEASURE OF DAMAGES - NOMINAL DAMAGES

Even if you find that no actual damage was suffered by the plaintiff as a result of the defendant's trespass, you may still award the plaintiff a trivial amount, called "nominal damages," to compensate the plaintiff for the invasion of the plaintiff's property rights. "Nominal damages" has been defined as a trivial sum such as one cent or one dollar.

References:

Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988)

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| MUJI 4.14 NUISANCE - INTRODUCTORY INSTRUCTION

Nuisance law protects property interests from nontrespassory invasions. A person who intentionally or negligently invades the property interest ~~(describe interest)~~ of another, or who uses that person's own property in a manner that is unreasonable, inappropriate, abnormal, or dangerous considering the character of the surrounding property, may be liable for creating a nuisance. The person may be liable for the nuisance if that person's use of the property disturbs the use or enjoyment, or causes an invasion, of the property of another that renders its ordinary use or occupation physically disagreeable. Such liability is also dependent on the nature and relative importance of the interests interfered with or invaded.

The plaintiff in this case claims that the defendant, through the use of the defendant's property, has created a nuisance that has interfered with the [health/comfort/safety/property rights] of the plaintiff. The plaintiff claims that the plaintiff has suffered economic injury as a result of this nuisance, and seeks to recover damages from the defendant for that injury.

References:

Utah Code Ann. § 76-10-801 ~~(1992)~~

Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985)

Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)

Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978)

Turnbaugh v. Anderson, 793 P.2d 939 (Utah ~~Ct.~~ App. 1990)

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| MUJI 4.15 NUISANCE PER SE

The court has determined, and instructs you as a matter of law, that the defendant's conduct constitutes a nuisance.

References:

Erickson v. Sorensen, 877 P.2d 144, 149 (Utah App. 1994)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
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MUJI 4.16 PRIVATE NUISANCE

A private nuisance is any activity that interferes with the use and enjoyment by another of that person's property. A private nuisance is generally defined as a substantial and unreasonable nontrespassory interference with the private use and enjoyment of another's land. The activity may infringe either on the right of one person or on the rights of a specific number of people.

The plaintiff claims that the defendant has interfered with the plaintiff's use and enjoyment of the plaintiff's property by [specify nature of alleged nuisance]. The defendant is liable to the plaintiff for creating or maintaining a private nuisance if you find that:

1. The plaintiff owned or possessed an actual property interest in the real property that is the subject of this action;

2. ~~The defendant's activity substantially interfered~~ Defendant caused or was responsible for a substantial interference with the plaintiff's use and enjoyment of the plaintiff's property;

3. ~~The defendant's interference with the plaintiff's use and enjoyment of the land resulted in substantial annoyance, discomfort, or harm, which is measured by what would be offensive to a person who has ordinary health and ordinary and reasonable sensitivities; and~~

4. The defendant's use of the property was either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable.

Defendant's use of its property may be "unreasonable" under ~~the circumstances, in that the~~ where the harm caused by the defendant's activity outweighs any benefits it produces, and the activity is not suitable to the location.

A "substantial interference" with the plaintiff's use and enjoyment of the land is typically one that results in substantial annoyance, discomfort, or harm, which is measured by what would be offensive to a reasonable person—or one who has ordinary health and ordinary and reasonable sensitivities.

An unintentional use that is "otherwise actionable" is generally one that negligent or reckless, or that results in abnormally dangerous conditions or activities in an inappropriate place.

Comment [RB2]: The *Whaley* case sets forth the most updated elements of both private and public nuisance, which I have incorporated into both instructions.

Comment [RB3]: Not sure if these should be their own definitional instructions or included here under the elements for the benefit of the jury in interpreting the elements.

References:

Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Stanford v. Univ. of Utah, 488 P.2d 741 (Utah 1971)
Johnson v. Mount Ogden Enterprises, Inc., 460 P.2d 333 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)
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MUJI 4.17 PUBLIC NUISANCE

A defendant is liable for creating a public nuisance where:

~~1. is The alleged nuisance consists of unlawfully doing any act or omitting to perform any duty, which act or omission;~~

~~2. The defendant's conduct was unreasonable;~~

~~3. The act or omission either~~

~~a. Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;~~

~~b. Offends public decency;~~

~~c. 2- Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway; or~~

~~d. 3- In any way renders three or more persons insecure in life or the use of property;~~

~~4. Plaintiff has suffered damages different from those of society at large.~~

An act which affects three or more persons in any of the ways specified in this instruction is still a nuisance regardless of the extent of annoyance and regardless of whether the damage inflicted on individuals is unequal.

References:

Utah Code Ann. § 76-10-803 (~~1992~~)

Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1

Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d (Utah 1976)

Monroe City v. Arnold, 452 P.2d 321 (Utah 1969)

Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)

Erickson v. Sorensen, 877 P.2d 144, 148 (Utah App. 1994)

MUJI DAMAGES FOR NUISANCE

Once you have determined that defendant is liable for creating a nuisance, you may consider evidence of the degree of a defendant's interference in the use and enjoyment of the plaintiff's land and the reasonableness of the interference in the context of wider community interests to determine the amount of damages recoverable once liability is established.

References:

Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)