

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

January 15, 2019

4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Joel Ferre, Tracy H. Fowler, Honorable Keith A. Kelly, Alyson McAllister, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons,. Also present: Ryan Beckstrom of the Trespass and Nuisance subcommittee

Excused: Marianna Di Paolo, Douglas G. Mortensen, Peter W. Summerill

1. *Minutes*. On motion of Mr. Fowler, seconded by Ms. Shapiro, the committee approved the minutes of the November 26, 2018 meeting.

2. *New Committee Member*. Judge Stone and Ms. Sylvester welcomed Ms. McAllister, the newest member of the committee, and committee members took turns introducing themselves.

3. *Trespass and Nuisance Instructions*. The committee continued its review of the proposed trespass and nuisance instructions.

a. *CV1204, Consent*. Mr. Beckstrom noted that he had deleted the last paragraph of the instruction and the last sentence of the comment as redundant.

b. *CV1206, Damages--Nominal Damages*. Mr. Beckstrom noted that he had added to the committee note a cross-reference to the Tort Damages instructions, CV2008-2011. He further noted that CV2004, the instruction on noneconomic damages, appears to be geared towards physical injuries to one's person or property. *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998), notes that noneconomic damages for trespass and nuisance can include annoyance and discomfort. Mr. Beckstrom asked whether there should be a instruction on noneconomic damages specific to trespass and nuisance. At Judge Stone's suggestion, the committee add the following to the comment: "The damages instructions may be adapted to the circumstances of the case. For example, you may want to add discomfort and annoyance to CV2004's list of considerations. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-49 (Utah 1998)." Ms. Shurman noted that the references to "IJI" in the references should be deleted throughout the instructions.

On motion of Ms. McAllister, seconded by Mr. Fowler, the committee approved the trespass instructions as revised.

Judge Kelly joined the meeting.

c. *CV1207, Nuisance--Introductory Instruction.* Mr. Beckstrom noted that the subcommittee had updated the references. He further noted that the committee had done away with the introductory instruction for the trespass instructions and suggested that the committee might want to do the same with this instruction. Ms. Shurman questioned the use of “nontrespassory” in the first sentence and wondered where it came from. Mr. Beckstrom noted that *Whaley v. Park City Municipal Corp.*, 2008 UT App 234, ¶ 20, 190 P.3d 1, used the term, quoting Restatement (Second) of Torts § 821D. Judge Kelly asked whether the same conduct can ever give rise to liability for both trespass and nuisance. Ms. Shurman questioned why the jury would need to know that nuisance is a “nontrespassory” tort. Judge Stone noted that odors have traditionally been dealt with as nuisances but that they involve a physical invasion of the property, albeit by volatilized microscopic particles. Judge Stone also questioned the use of the term “invasion.” Ms. Shapiro thought that the second sentence was too long and should be broken up. Ms. Sylvester questioned whether jurors would understand “property interest.” She suggested starting the instruction, “A person may be liable for nuisance if . . .” Judge Kelly suggested dropping the first paragraph and starting with the second, which states the nature of the case. Ms. Shapiro thought there was a risk of confusion or inconsistency between CV1207 and CV1209 (private nuisance). Ms. Shurman noted, for example, that CV1207 suggests that the injury must be an economic injury, but CV1209 does not. The committee decided that CV1207 was not necessary.

d. *CV1208, Nuisance Per Se.* At Ms. Sylvester’s suggestion, the committee added a comment stating that the instruction is not appropriate in every case.

e. *CV1209, Private Nuisance.* Judge Stone suggested combining the first two sentences. Mr. Beckstrom suggested revising the first sentence to read, “A private nuisance is any activity that substantially and unreasonably interferes with the use and enjoyment by another of that person’s property other than by entering upon it.” Judge Stone suggested using the statutory definition found in Utah Code Ann. § 78B-6-1101(1): “A nuisance is anything which is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” Judge Kelly then raised the question as to whether the statutory cause of action for nuisance abrogates the common law cause of action. The committee did not know the answer. Judge Stone noted that the two had co-existed for some time. He thought that, as to matters covered in detail in the statute, such as second-hand smoke, the statute might provide a plaintiff’s only remedy. But courts haven’t always distinguished between the statutory cause of action and the common-law cause of action and have applied concepts belonging to one when

discussing the other. Mr. Simmons noted that the statute appears to create strict liability, whereas the common law requires some fault, such as intentional and unreasonable conduct or negligence. Mr. Beckstrom noted that the statute appears to make the test a subjective one, that is, whether the complainant felt that his comfortable enjoyment of his property was interfered with, without any requirement that the interference would also have had to offend the sensibilities of a reasonable person. Mr. Beckstrom asked whether the definitions of “unreasonable,” “substantial interference,” and “otherwise actionable” should be part of the instruction or whether each should be a separate instruction. He noted that only “unreasonable” is used in the public nuisance instruction. Ms. McAllister preferred separate instructions. Ms. Shurman thought that the definition of “unreasonable” should be in the disjunctive (the harm outweighs any benefits it produces *or* [not *and*] the activity is not suitable to the location). She thought the issue was a preemption-type analysis: Did the legislature intend for the statute to cover the field of nuisance? The committee asked Mr. Beckstrom to raise these issues with the subcommittee and report back on the relationship between the statute and the common law cause of action.

Ms. Shapiro and Mr. Beckstrom were excused.

4. *Uniformity.* Judge Kelly noted that there are significant differences between the general civil instructions and the general criminal instructions and that he has found some of the criminal instructions (particularly CR201 through CR205) useful in civil cases. Judge Stone said that he would like to see the two sets of instructions conform to each other as much as possible. He suggested that someone prepare a document showing the civil and criminal general instructions side by side so that the committee can compare them easily and decide which ones it prefers. He also noted that there should be clear opening and closing instructions. Judge Kelly suggested that, rather than renumbering the instructions, the committee add an explanatory note suggesting which instructions to use when. Ms. McAllister and Ms. Shurman volunteered to serve on a subcommittee chaired by Judge Kelly to undertake the comparison and make recommendations. They scheduled a conference call for Tuesday, January 22, at 10:30 a.m.

5. *Next meeting.* The next meeting is Monday, February 11, 2019, at 4:00 p.m.

The meeting adjourned at 6:00 p.m.