

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 14, 2021

4:00 p.m.

Present: Ruth A. Shapiro (chair), Judge Keith A. Kelly, Judge Kent Holmberg, Nancy J. Sylvester (staff), Marianna Di Paolo, Douglas G. Mortensen, Randy Andrus, Samantha Slark, Lauren A. Shurman, and Alyson McAllister.

Also present: Tracy Fowler, Paul Simmons

Excused: Adam D. Wentz (recording secretary) Ricky Shelton, and Joel Ferre

1. *Welcome.*

Ruth Shapiro welcomed everyone to the meeting.

2. *Approval of Minutes.*

Ms. Shapiro asked for a motion on the May meeting minutes. A minor amendment was made to the minutes in the last paragraph. With that change, the minutes were unanimously approved.

3. *Timeline.*

The committee discussed the timeline and decided to continue discussing product liability.

4. *Implicit Bias Instructions.*

The subcommittee has met and Kimberly Papillon, who is an expert in this area, attended. She said other states are looking at this issue and some are opting to update their jury videos rather than doing a jury instruction. No language has been drafted yet. Lauren Shurman noted that the *Chauvin* instruction will need to be amended since that was a criminal, not civil, case. Nancy Sylvester will connect Marianna DiPaolo, Lauren Shurman, Judge Chon, and Jon Puente about updating the jury trial video with a section on implicit bias.

5. *Discussion of Product Liability Instructions.*

CV1055. Learned intermediary. The committee amended Instruction CV1055 and informally approved it as follows with Lauren Shurman moving and Samantha Slark seconding:

CV1055 Learned intermediary. Informally approved 6/14/21.

A [designer] [manufacturer] of [prescription drugs] [medical devices] has a duty to warn only the [prescribing] [implanting] medical provider, not the patient, of the risks associated with the [drug] [medical device]. If you find that the

[designer] [manufacturer] gave appropriate warnings to the medical provider, you must find that the [designer] [manufacturer] fulfilled its duty to warn.

References

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922 (Utah 2003).

Tingey v. Radionics, 193 Fed. Appx. 747, 757 n.4 (10th Cir. 2006).

Committee Notes

[This instruction applies principally to prescription drugs and medical devices but it may be possible to broaden it to other areas. So far, Utah case law has only addressed this doctrine in the context of prescription drugs.]

The learned intermediary rule does not preclude a negligence claim against a pharmacist for dispensing drug that has been withdrawn from the market. See *Downing v Hyland Pharmacy*, 2008 UT 65.

CV1056. Product liability—No duty to make a safe product safer. Following extensive discussion and comparison with CV1002, Lauren Shurman moved to strike CV1056 and to ask the subcommittee to place something in the comments to CV1002 to address *Slisze v. Stanley-Bostitch*, 1999 UT 20, ¶ 10, 979 P.2d 317, 320. Ms. McAllister seconded and the motion carried.

CV1002--Pending input from subcommittee (see CV1056 above).

CV 1057: Pending input from subcommittee. [Evidence Rule407](#) was updated after *Misener*. Should CV1057 be updated to track that?

Rule 407. Subsequent Remedial Measures.

When measures are taken that would have made an earlier event that caused injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

CV1058: Pending input from subcommittee. The committee expressed concern about the preciseness of the language "most," "substantial percentage," and "severity." The committee sent this instruction back to the subcommittee to decide whether it's the current state of the law.

6. Adjournment and farewell.

The meeting concluded at 6:05 PM and committee members wished Nancy Sylvester a fond farewell.