

LITIGATION



March 2, 2020

Via E-mail: civiljuryinstructions@jud.ca.gov.

Mr. Eric Long
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 20-01

Dear Mr. Long:

The Jury Instructions Committee of the California Lawyers Association’s Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 20-01) and appreciates the opportunity to submit these comments.

1. User Guide

Agree.

2. CACI No. 113. Bias

Agree.

3. CACI No. 118. Personal Pronouns

Agree.

4. CACI No. 420. Negligence Per Se: Rebuttal of the Presumption of Negligence— Violation Excused

a. We believe stating “or” after each item in the series is helpful and does not detract from this instruction. It makes it clear to the jury that the list is disjunctive without having to refer back to the introductory sentence or forward to the penultimate item.

b. We believe the term “factors” should be reserved for matters for the jury to consider in making a finding, as stated on page 2 of the User Guide. In the Directions for Use, we would refer to (a) through (e) as items, not factors.

5. CACI No. 440. Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

Agree.

6. CACI No. 1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

We agree with the proposed revisions.

Although not encompassed in the proposed revisions, we note that the term “dangerous condition” appears several times in this instruction. That term is defined by statute. We believe CACI No. 1102, *Definition of “Dangerous Condition,”* should always be given with this instruction and would modify the Directions for Use accordingly:

~~“See also Give this instruction with~~ CACI No. 1102, *Definition of “Dangerous Condition,”* ~~and See also~~ CACI No. 1103, *Notice.*”

7. CACI No. 1102. Definition of “Dangerous Condition” (Gov. Code, § 830(a))

The first sentence of the Directions for Use essentially repeats the first sentence of the instruction and does not seem helpful. We believe a more helpful direction would be to give this instruction with CACI No. 1100. Accordingly, we would delete the first sentence and replace it with the following:

“Give this instruction if CACI No. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*, is given.”

8. VF-1100. Dangerous Condition of Public Property

Agree.

9. VF-1201. Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification

Agree.

10. CACI No. 1305. Battery by Police Officer

a. We agree with the proposed revisions, but we suggest that a CACI instruction be drafted for cases involving use of deadly force because we believe the modifications needed may be extensive.

b. Although not encompassed in the proposed revisions, this instruction states the essential factual elements of the cause of action, so we believe the title should include the words “Essential Factual Elements.”

11. CACI No. 1812. Comprehensive Computer Data and Access Fraud Act—Essential Factual Elements (Pen. Code, § 502)

Agree.

12. CACI No. 1813. Definition of “Access” (Pen. Code, § 502(b)(1))

We suggest the following changes for clarity and consistency with Penal Code section 502, subdivision (b)(1):

“The term ‘access’ means that ~~that~~ ~~[name of defendant]~~ ~~did something~~ to [[gain entry to], [instruct], [cause input to], [cause output from], [cause data processing with], ~~and/or~~ [communicate with]] the logical, arithmetical, or memory function resources of a computer, computer system, or computer network.”

13. CACI No. 1814. Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1))

a. We agree with the proposed new instruction and the Directions for Use.

b. In the Sources and Authority, we would strike the reference to punitive damages and Penal Code section 502, subdivision (e)(4). This instruction is for compensatory damages, and the statutory provision on punitive damages is not authority for the instruction.

14. CACI No. 2511. Adverse Action Made by Decision Maker Without Animus (Cat’s Paw)

a. We would strike “In this case,” at the beginning of the instruction as superfluous and unnecessary.

b. The discriminatory actor in *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95 was a supervisor, and *Reeves* stated the cat’s paw rule in terms of a discriminatory supervisor (*id.* at p. 115). But *Reid v. Google* (2010) 50 Cal.4th 512, 542, later stated the cat’s paw rule in terms of a discriminatory “employee,” stating that there were circumstances in which “discriminatory remarks by a non-decisionmaking employee can influence a decision by a decisionmaker,” and, “ ‘If [the formal decision maker] acted as the conduit of [an employee’s] prejudice—his cat’s paw—the innocence of [the decision maker] would not spare the company from liability.’ ” This language and other discussion in *Reid* and the holding in *McGrory v. Applied Signal Tech.* (2013) 212 Cal.App.4th 1510, 1536, suggest that the discriminatory actor influencing the decisionmaker need not be a supervisor to support liability, even if in many cases the discriminatory actor is a supervisor. We therefore suggest changing “supervisor” in the instruction to encompass persons other than a supervisor:

“ . . . if [*name of decision maker*] followed a recommendation from or relied on facts provided by a supervisor [or other person] who had [discriminatory/retaliatory] intent.”

“1. That [*name of plaintiff*]’s [*specify protected activity or attribute*] was a substantial motivating reason for [*name of supervisor or other person*]’s [*specify acts of supervisor or other person on which decision maker relied*]; and

“2. That [*name of supervisor or other person*]’s [*specify acts on which decision maker relied*] was a substantial motivating reason for [*name of decision maker*]’s decision to [discharge/[*other adverse employment action*]] [*name of plaintiff*].”

15. CACI No. 2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

16. CACI No. 2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

17. CACI No. 2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

We believe the language “either with our without reasonable accommodation for [*his/her/nonbinary pronoun*] [*e.g. condition*]” in element 4 should be made optional (i.e. bracketed) because in cases where reasonable accommodation is not at issue this language may confuse the jury.

18. CACI No. 2545. Disability Discrimination—Affirmative Defense—Undue Hardship

Agree.

19. CACI No. 2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(l))

Under Government Code section 12940, subdivision (l)(1), it is the employer’s burden to show that it has explored reasonable accommodations, rather than the plaintiff’s burden to show the opposite. Accordingly, we would delete element 6.

20. CACI No. 2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(l)(1), 12926(u))

a. Government Code section 12940, subdivision (l)(1) specifies two reasonable accommodations that the employer must consider: (1) excusing the person from the duties that conflict with the person’s religious belief or observance and (2) permitting those duties to be performed at by another person at another time. We believe the instruction should state that the defendant must prove that the defendant considered both (1) and (2), and should not state that it is sufficient if the defendant considered (1), (2), or (3):

“To succeed on this defense, [*name of defendant*] must prove that [*he/she/nonbinary pronoun/it*] considered reasonable alternative options for accommodating the [*religious belief/religious observance*], including (1) excusing [*name of plaintiff*] from duties that conflict with [*his/her/nonbinary pronoun*] religious belief/religious observance]; or (2) permitting those duties to be performed at another time or by another person; ~~or (3) [*specify other reasonable accommodation*].”~~

b. We would delete the language, “If there is evidence of another reasonable alternative accommodation, include it as a third means of accommodating the plaintiff.” in the Directions for Use for the same reasons.

21. VF 2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

22. VF 2506B. Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

23. VF 2506C. Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

24. VF 2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

25. VF 2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

26. VF 2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

Agree.

27. VF-2508. Disability Discrimination—Disparate Treatment

Agree.

28. CACI 2705. Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant’s Employee (Lab. Code, § 2750.3)

a. We question whether there is a right to jury trial in actions under the Unemployment Insurance Code. If not, we suggest deleting “Unemployment Insurance Code” from the title, instruction, and Directions for Use.

b. This instruction pertains only to issues relating to independent contractor status and not to any other “dispute as to whether the defendant was the plaintiff’s employer.” Those disputes can arise in other contexts, such as joint employers. We suggest modifying the Directions for Use to clarify this point and to note the statutory presumption of employment status:

“This instruction may be needed if there is a dispute as to whether the defendant claims that the plaintiff is an independent contractor and not the defendant’s employee. Under was the plaintiff’s employer for purposes of a claim covered by the Labor Code, the Unemployment Insurance Code, or a and the California wage orders, any person providing services or labor for remuneration is presumptively an employee. . . .”

c. Because Labor Code section 2750.3 lists numerous exceptions and potential exceptions to the “ABC” test, we believe the Directions for Use should note that the instruction may not always be appropriate when the independent contractor issue is raised. We suggest adding the following as a second paragraph:

“This instruction may not be appropriate in cases where the defendant claims independent contractor status based on one of the exceptions listed in Labor Code section 2750.3, subdivisions

(b) through (h).”

c. Although not encompassed in the proposed revisions, we would modify the following language in the Directions for Use for greater clarity:

~~“The rule on employment status has been that if there are disputed facts, it’s for the jury to decide whether one is an employee or an independent contractor. The trial court’s determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences (S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 349 [256 Cal.Rptr. 543, 769 P.2d 399] (Borello); Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal.App.4th 1, 16-17 [64 Cal.Rptr.3d 327] (Estrada).) The question is one of law only if the evidence is undisputed. (Borello, at p. 341.)” (Espejo v. The Copley Press (2017) 13 Cal.App.5th 329, 342-343 [221 Cal.Rptr.3d 1].) However, on disputed facts, the court may decide that the relationship is employment as a matter of law. (Dynamex, supra, 4 Cal.5th at p. 963.)”~~

29. CACI No. 3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

a. Although not encompassed in the proposed revisions, we believe the language preceding factors (a) through (d) should be written in terms of what the plaintiff has to prove (i.e. excessive force) consistent with the burden of proof stated at the beginning of the instruction and element 2, rather than explain the issue from the perspective of the defendant’s position (i.e. when force is not excessive):

“Force is ~~not~~ excessive if it is not reasonably necessary under the circumstances.”

b. In the Sources and Authority, the third and fourth bullet points on page 101 discuss summary judgment, not trial. Those cases provide no authority for this instruction, so we would delete them.

30. CACI No. 3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

Agree.

31. CACI No. 3053. Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements (42 U.S.C. § 1983)

Agree.

32. VF-3012. Unreasonable Search or Seizure—Search or Seizure Without a Warrant (42 U.S.C. § 1983)

Agree.

33. VF-3501. Fair Market Value Plus Severance Damages

a. We support the proposed revisions in concept but believe the verdict form should incorporate the different timing scenarios rather than require modification:

“3. What [would have been/will be] the fair market value of the remaining property ~~have been~~ on [date of valuation] if the [name of public entity]’s proposed project [were/is] completed as planned?”

b. We would delete the proposed new language in the second paragraph of the Directions for Use for the same reasons.

34. CACI No. 3704. Exercise of “Employee” Status Disputed

a. We agree with this proposed new instruction.

b. We would modify the Directions for Use to state that if the plaintiff seeks a penalty the instruction should be modified to require an intentional or reckless violation or willful misconduct.

35. CACI No. 3903C. Past and Future Lost Earnings (Economic Damages)

Agree.

36. CACI No. 3903D. Lost Earning Capacity (Economic Damages)

Agree.

37. CACI No. 3904A. Present Cash Value

Agree.

38. CACI 3906. Lost Earnings and Lost Earning Capacity—Jurors Not to Consider Race, Ethnicity or Gender (Economic Damages)

Agree.

39. CACI No. 4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements

We would modify the Directions for Use for greater clarity and to make it clear that CACI No. 430 should be given with this instruction:

“Give CACI No. 430, *Causation: Substantial Factor*, with this instruction.”

“The existence of a fiduciary relationship. . . .”

~~—————“Substantial factor causation is the causation standard for an intentional breach of fiduciary duty. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1095 [41 Cal.Rptr.2d 768].) Do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, in a case involving an attorney’s intentional or fraudulent breach of duty. If the attorney’s breach of duty is negligent, however rather than intentional or fraudulent, the ‘but for’ (“would have happened anyway”) causation standard applicable to legal malpractice (see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046]) applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473].) If so, the optional last sentence of CACI No. 430, *Causation: Substantial Factor*, should be given: “Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.”~~

“The causation standard for an attorney’s intentional breach of fiduciary duty differs from that for a negligent breach. If the plaintiff alleges an attorney’s intentional breach of duty, do not include the optional last sentence of CACI No. 430, *Causation: Substantial Factor* on ‘but for’ causation. The ‘but for’ causation standard does not apply to an intentional breach of fiduciary duty. If the plaintiff alleges an attorney’s negligent breach of duty, the ‘but for’ (‘would have happened anyway’) causation standard applies. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1093–1094 [236 Cal.Rptr.3d 473]; see *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) If the plaintiff alleges a negligent breach of duty, give the optional last sentence of CACI No. 430: ‘Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.’ ”

“If the plaintiff alleges both negligent breach and intentional or fraudulent breach, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim.

“If the harm allegedly caused by the defendant’s conduct involves the outcome of a legal claim, the jury should be instructed with CACI No. 601, *Damages for Negligent Handling of Legal Matter*, for the but for standard. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 928, 933–937 [125 Cal.Rptr.3d 210] [discussing circumstances when a client need not show that they objectively would have obtained a better result in the underlying case in the absence of the attorney’s breach (the trial-within-a-trial method)].)”

~~—————“If both negligent breach and intentional or fraudulent breach are to be presented to the jury in the alternative, the jury must be instructed on both causation standards and it should be made clear which causation standard applies to which claim.”~~

40. CACI Nos. 4300, 4301, 4303-4309 & 4325

Agree.

41. CACI No. 4575. Right to Repair Act—Affirmative Defense—Failure to Follow Recommendations or to Maintain (Civ. Code, § 945.5(c))

Agree.

42. CACI No. 4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

a. We agree with the proposed revisions to the instruction.

b. We agree with the proposed revisions to the Directions for Use, but would add a reference to CACI No. 2705 after the first paragraph so as to ensure that the jury is instructed on the presumption of employment status if the defendant claims that the plaintiff was an independent contractor:

“If the plaintiff’s employment status is at issue because the defendant claims the plaintiff was an independent contractor, give CACI No. 2705, *Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant’s Employee (Lab. Code, §2750.3)*.”

43. VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6)

Agree.

44. CACI No. 4920. Wrongful Foreclosure—Essential Factual Elements

a. Element 1 refers to a foreclosure sale of the plaintiff’s “home,” but the foreclosed property need not be the plaintiff’s home. We would change “home” to “real property.”

b. Two cases include element 4 as an element of the tort with little discussion, while several other cases listing the essential elements do not include element 4. We believe element 4 should be made optional. We believe the Directions for Use should note the discrepancy in the cases and state that the trial court should decide whether to give element 4.

c. The final sentence in the instruction reiterates two of the six (or five) elements, stating that the plaintiff must prove those two elements. But the plaintiff must prove all six (or five) elements. We believe that emphasizing two of the six (or five) elements would not be helpful and would be confusing to the jury.

d. We would change “see CACI No. 4921” to “give CACI No. 4921” for clarity and consistency with other instructions stating “give” when the intention is that the instruction be given.

45. CACI No. 4921. Wrongful Foreclosure—Tender Excused

We agree with this proposed new instruction, but we would add to the Sources and Authority *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113, setting forth exceptions to the tender requirement.

Sincerely,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
California Lawyers Association's
Litigation Section