THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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

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

re: Invitation to Comment—CACI 16-02

Dear Mr. Greenlee:

The Jury Instructions Committee of the State Bar of California's Litigation Section has reviewed the proposed revisions to civil jury instructions and verdict forms (CACI 16-02) and appreciates the opportunity to submit these comments.

1. CACI No. 107. Witnesses

a. The word "lied" is strong language that to some jurors may mean something more than or different from "deliberately testified untruthfully." We believe that rather than simplify the instruction, the word "lied" would create ambiguity. Rather than use the word "lie," we would substitute "deliberately did not tell the truth" for "deliberately testified untruthfully" and "did not tell the truth" for "testified untruthfully."

2. CACI No. 303. Breach of Contract—Essential Factual Elements

Agree.

3. CACI No. 706. Basic Speed Law (Veh. Code, § 22350)

a. We agree with the new Directions for Use.

b. In the Sources and Authority, *Maxwell v. Colburn* (1980) 105 Cal.App.3d 180 and *Monreal v. Tobin* (1998) 61 Cal.App.4th 1337 help to illustrate the application of the statute. We would not delete those citations.

4. CACI No. 710. Duties of Care for Pedestrians and Drivers in Crosswalk (Veh. Code, § 21950)

a. We agree with the revisions to the instruction and Directions for Use.

b. We suggest adding the following to the Sources and Authority, which is excerpted from an instruction that *Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71 held "correctly states the law" and "should have been given" (*id.* at p. 81):

" 'The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While, usually, that fact limits his capacity to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he, too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of the possible, serious consequences from any conflict between himself and such forces.' " (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 75-76, 81 [265 P.2d 513].)

We suggest including this excerpt because it provides the California Supreme Court's guidance as to the reasonable care each party should use and may dispel confusion created by a split in authority over *Dawson v. Lalanne* (1937) 22 Cal.App.2d 314. *Dawson* held the trial court erred by refusing to give an instruction that both parties were " 'chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the [motorist] . . . .' " (*Id.* at pp. 314-315.) While most courts have followed *Dawson*, at least one has rejected it. (See *Cucinella*, *supra*, 42 Cal.2d at p. 80 ["Since the *Dawson* decision, *supra*, numerous other cases have approved instructions couched in substantially the same language"]); compare *Arentz v. Blackshere* (1967) 248 Cal. App. 2d 638, 640 [stating it was error to reject a similar instruction because "*Cucinella* forecloses argument that the rejection was not erroneous"] with *Rangel v. Badolato* (1955) 133 Cal. App. 2d 254, 259 [upholding the rejection of a similar instruction and criticizing the instruction as inaccurate].)

c. To provide clarity, we would also shorten the first sentence of the paragraph quoting *Spann v. Ballesty* (1969) 276 Cal.App.2d 754:

"The phrase 'immediate hazard' in Vehicle Code § 21950~~When the pedestrian suddenly leaves his place of safety, the vehicle must be so close as to constitute an immediate hazard. Such wording [in Veh. Code § 21950]~~ 'indicates the statute was intended to apply to those situations where a pedestrian unexpectedly asserts his right-of-way in an intersection at a time when the vehicle is so close that it is virtually impossible to avoid an accident. Typical situations include . . . .' "

5. CACI No. 2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

a. We agree with the revision to the Directions for Use.

b. In the Sources and Authority, we believe the quotation from *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 246 Cal.App.4th 180, 202, quoting *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 should indicate that *Yanowitz* is the source of the quotation. Rather than omit the internal citations, we would include the internal citations to make this clear.

c. There should be two more closing quotation marks (' ") at the end of the quotation from *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1409.

d. We would add the following language to the quotation from *Wallace v. County of Stanislaus* (2016) 245 Cal.App,4th 109, 128, reflecting the *Wallace* court's understanding of how the California Supreme Court in *Harris* resolved the noted ambiguity in the phrase "because of."

"Based on *Harris*, we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject the employer to an adverse employment action."

We also note that the beginning of the quotation from *Wallace* is missing an opening quotation mark, and there is an extra closing quotation mark after the words "because of."

6. CACI No. 2506. Limitation on Remedies—After-Acquired Evidence

a. The Directions for Use appropriately state that the doctrine of after-acquired evidence is not a complete defense to liability. Still, we believe the term "equitable defense" may create some confusion because an equitable defense ordinarily is a complete defense. We suggest using the term "equitable doctrine" in lieu of "equitable defense" wherever those words appear in the second paragraph. We also suggest the following revisions for greater clarity:

"There is some uncertainty as to whether or not it is an equitable ~~defense~~ doctrine. (Compare *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1173 [104 Cal.Rptr.2d 95] [~~"~~doctrine is the basis for an *equitable defense* related to the traditional defense of ~~"~~'unclean hands,'" italics added] with *Salas*, *supra*, 59 Cal.4th at p. 428 [omitting "equitable"].) If it is an equitable ~~defense~~ doctrine, then the judge is the proper fact finder. Accordingly, the fact finding ~~in the~~ elements of ~~the~~ this instruction would be only advisory to the court, or the elements could be found ~~be~~ by the court itself as the trier of fact. (See *Thompson*, *supra*, 86 Cal.App.4th at p. 1173; see also *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337] [jury's factual findings are purely advisory because, on equitable cause of action, the judge is the proper fact finder].)"

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

a. We agree with the revisions to the instruction and the Directions for Use.

b. We agree with the revisions to the Sources and Authority with the exception of the final bullet point on "animus," which we believe is not on point and therefore would omit.

8. CACI No. 3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

a. We agree with the revisions to the instruction.

b. Civil Code section 51 states the characteristics that are protected under section 51.5, so we would add section 51 to the Sources and Authority.

9. CACI No. 3063. Acts of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

a. We agree with the revisions to the instruction.

b. Civil Code section 51 states the characteristics that are protected under section 51.7, so we would add section 51 to the Sources and Authority.

10. CACI No. 3064. Threats of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

a. We agree with the revisions to the instruction.

b. Civil Code section 51 states the characteristics that are protected under section 51.7, so we would add section 51 to the Sources and Authority.

11. CACI No. 3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

a. *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 160, stated that to be liable for neglect under Welfare and Institutions Code section 15610.57 a defendant must have "a caretaking or custodial relationship that arises where an elder or dependent adult depends on another for the provision of all or some of his or her fundamental needs." *Winn* also stated, "the Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient." (*Winn*, at p. 152.) We believe the word "substantial" adds nothing helpful to the instruction and may cause misunderstanding or confusion, so we would delete the word "substantial," as in the language on page 160 of the opinion.

b. Accordingly, we would also delete "substantial" in the penultimate paragraph of the Directions for Use.

c. The Sources and Authority include the quote from *Winn* at page 152 with the word "substantial," but not the quote on page 160 without that word. We agree that only one of the two quotes is needed. We would choose the language on page 160 of the opinion (quoted above) without the word "substantial."

12. CACI No. 3511. Permanent Severance Damages

Agree.

13. CACI No. 3706. Special Employment—Lending Employer Denies Responsibility for Worker's Acts

a. The last sentence in the proposed new first paragraph includes a superfluous definition of a term, "special employer," that is never used either in the language read to the jury or the bracketed language guiding the court and counsel. We would omit this definition.

b. The term "borrowed employee" is more descriptive than "special employee" and would be more understandable to jurors. We would modify the last sentence in the proposed new first paragraph of the instruction as follows:

"In this situation, the ~~borrowing employer is known as a 'special employer' and the~~ employee is referred to as a "~~special~~ borrowed employee."

c. Accordingly, we would substitute "borrowed employee" for "special employee" in the second, third, and fourth paragraphs of the instruction.

d. In the Directions for Use, we would delete the third and fourth sentences in the first paragraph as unnecessary. In the second paragraph, first sentence, we would substitute "borrowed employee" for "special employee." In the third paragraph, first sentence, we would substitute "borrowing employer" for "special employer."

14. CACI No. 3707. Special Employment—Joint Responsibility

a. We would substitute "borrowed employee" for "special employee" in the instruction for the reasons stated in our comments to CACI No. 3706.

15. CACI No. 3935. Prejudgment Interest (Civ. Code. § 3288)

a. The term "entry" in the language "the date of entry of your verdict" may be unfamiliar to some jurors. We would change this to "the date you sign your verdict."

b. We would modify the second paragraph of the instruction as follows for greater simplicity and clarity:

"You will decide ~~W~~whether [*name of plaintiff*] ~~should~~ receives an award of prejudgment interest on all, some, or none of any past economic damages that you may award ~~is within your discretion~~. If you award these damages to [*name of plaintiff*], you will be asked to decide on ~~address~~ prejudgment interest in the special verdict form."

c. We find the first two sentences in the second paragraph of the Directions for Use unhelpful. The first sentence refers to uncertainty regarding the role of the jury in awarding prejudgment interest under Civil Code section 3288 without explaining the nature of the uncertainty. The second paragraph refers to the gatekeeper function of the court in deciding whether the statute applies, but it is unclear how the court's role in this regard differs from the court's role in deciding whether to give any other instruction. We would delete these two sentences, and retain the third sentence.

d. We also find most of the third paragraph in the Directions for Use unhelpful. It is not clear what is meant by "determining the number to be multiplied by the interest rate," so we would strike the first sentence. The second sentence refers to the reason for prohibiting prejudgment interest on noneconomic damages. The stated reason is potentially confusing because on the one hand, Civil Code section 3288 authorizes prejudgment interest on *unliquidated* tort claims (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 102; *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814), but on the other hand, prejudgment interest is not allowed on noneconomic damages because such damages "are inherently nonpecuniary, unliquidated and not readily subject to precise calculation." (*Greater Westchester*, at p. 103.)

The jury cannot award prejudgment interest on noneconomic damages. The instruction is limited to economic damages. In our view, the Directions for Use should state the rule and the appropriate use of the instruction without attempting to provide further explanation. We would strike the third paragraph of the Directions for Use and replace it with the following:

"Prejudgment interest cannot be awarded on noneconomic damages. (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 103.) This instruction allows prejudgment interest only on past economic damages."

e. The first bullet point in the Sources and Authority cites Civil Code section 3287, subdivision (a), which authorizes prejudgment interest if damages are certain or capable of being made certain. But this instruction is based on section 3288, which separately authorizes prejudgment interest without relying on section 3287. We would delete the first bullet point.

f. Some of the internal quotation marks in the seventh and eighth bullet points in the Sources and Authority should be corrected, and the ninth bullet point is missing a closing quotation mark.

16. Verdict Form Prejudgment Interest Sentence—Example

Agree.

17. CACI No. 4100. "Fiduciary Duty" Explained

Agree.

18. VF-4400. Misappropriation of Trade Secrets

a. We would simplify the proposed new language in the Directions for Use as follows:

"In cases involving more than one trade secret, the jury must answer all of the questions in the verdict form separately for each trade secret at issue ~~identified by the plaintiff on which findings must be made~~."

19. CACI No. 5003. Witnesses

a. As in CACI No. 107, *Witnesses*, we believe the word "lied" is strong language that to some jurors may mean something more than or different from "deliberately testified untruthfully." In our view, rather than simplify the instruction, the word "lied" would create ambiguity. Rather than use the word "lie," we would substitute "deliberately did not tell the truth" for "deliberately testified untruthfully" and "did not tell the truth" for "testified untruthfully."

20. Additional Suggestion for Future Consideration

In instructions with several elements stated in the conjunctive (e.g., [*name of plaintiff*] must prove all of the following") or disjunctive, we suggest adding "and" or "or," as appropriate, after each element, rather than only after the penultimate element. This would make it perfectly clear to the jury and make it easier to follow.

DISCLAIMER

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Very truly yours,

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