THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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

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

re: Invitation to Comment—CACI 17-01

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 17-01) and appreciates the opportunity to submit these comments.

1. CACI No. 429. Negligent Sexual Transmission of Disease

The case on which this proposed new instruction is based, *John B. v. Superior Court* (2006) 38 Cal.4th 1177, involved a very specific fact pattern. We question the need for a standard instruction involving such specific facts. We believe the proposed instruction as written does not limit liability to the same factual scenario as in *John B.*, which involved a married couple, promises of monogamy, and unprotected sex. We believe the cautionary language in the Directions for Use is insufficient to avoid the potential misuse of this instruction. Moreover, the instruction seems to assume that the defendant had unprotected sex with the plaintiff, when that could be a disputed issue and, in any event, should be expressly stated in the instruction. Also, we would state that the defendant "was negligent" rather than "may be negligent." We find the instruction flawed and would reject this proposed new instruction.

2. CACI No. 470. Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity

Agree.

3. CACI No. 471. Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches

Agree.

4. CACI No. 472. Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors

Agree.

5. CACI No. 473. Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk

a. Unlike the other instructions on exceptions to nonliability, this proposed new instruction states when the defendant is not liable ("[*Name of defendant*] is not liable if [*name of plaintiff*]'s injury arose from a risk inherent in the occupation of [*e.g., firefighter*])," but without stating which party has the burden of proof on that issue. We believe this language is unnecessary and may confuse the jury. The instruction states that the plaintiff must prove certain facts to establish liability, and this seems sufficient. We would delete the sentence quoted above. This will require a fuller explanation of the "inherent risk" in the third alternative element 1, which we would modify as follows:

"[1. That the cause of [*name of plaintiff*]'s injury was not related to the <u>risks</u> inherent ~~risk~~ <u>in [*e.g., firefighting*]</u>;]

b. The Directions for Use of the other instructions on exceptions to nonliability include a paragraph stating, "While duty is question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. . . ." We find this useful and would include the same language in the Directions for Use of this instruction.

6. CACI No. 1009B. Liability to Employees of Independent Contractor for Unsafe Conditions—Retained Control

Agree.

7. CACI No. 1010. Affirmative Defense—Recreation Immunity—Exceptions

Agree.

8. CACI No. 1249. Affirmative Defense—Reliance on Intermediary

We agree with this proposed new instruction, except we would add a fourth factor in element 3(c) based on the California Supreme Court authority quoted in the eighth bullet point in the Sources and Authority, stating: "(4) Whether [*name of intermediary*] had a legal duty to warn end users about the particular risk."

9. CACI No. 1720. Affirmative Defense—Truth

Agree, except we would add "[Citations.]" after the first sentence in the quotation from *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382, in the Sources and Authority.

10. CACI No. 1722. Retraction: News Publication or Broadcast

Agree.

11. VF-1700. Defamation per se (Public Officer/Figure and Limited Public Figure

Agree.

12. VF-1701. Defamation per quod (Public Officer/Figure and Limited Public Figure

Agree.

13. VF-1702. Defamation per se (Private Figure—Matter of Public Concern)

Agree.

14. VF-1703. Defamation per quod (Private Figure—Matter of Public Concern)

Agree.

15. VF-1704. Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Public Concern)

Agree.

16. VF-1705. Defamation per quod (Private Figure—Matter of Private Concern)

Agree.

17. VF-1900. Intentional Misrepresentation

We agree with the revision to the instruction. We believe, however, that in a case in which reasonable reliance is disputed and CACI No. 1908, *Reasonable Reliance*, is given, this verdict form should explicitly require a "material fact." We suggest inserting "[material]" as optional language in question No. 1 immediately before the word "fact" and stating in the Directions for Use to include that optional language if reasonable reliance is disputed and CACI No. 1908 is given.

18. VF-1903. Negligent Misrepresentation

Same comment as directly above.

19. CACI No. 2021. Private Nuisance—Essential Factual Elements

a. The word "substantial" or "substantially," although prevalent in published opinions on nuisance, provides little or no meaningful guidance to the jury as to the degree of interference, or harm, required. Moreover, the word "substantial" in the context of harm seems to have a different meaning from "substantial" as used in "substantial factor." If the jury is not instructed on the meaning of "substantial" with respect to harm, the jury may refer to the definition of "substantial factor" in CACI No. 430, *Causation: Substantial Factor*, which may be misleading as to the meaning of "substantial" in this different context.

The Directions for Use state that this instruction must be given with CACI No. 2022, *Private Nuisance—Balancing Test Factors—Seriousness of Harm and Public Benefit*. *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 163, stated that the balancing test encompasses the requirement that the harm was substantial, and if a jury properly instructed on the balancing test finds the defendant liable the jury necessarily must have found that the harm was substantial. As in *Wilson*, we believe that these two instructions given together adequately cover the substantial harm requirement. The insertion of "substantially" in element 3 of CACI No. 2021 is unnecessary and could confuse the jury, so we would strike the word.

b. In renumbered element 4, we believe that "reasonably have been annoyed or disturbed" conveys the intended meaning more clearly than "have been reasonably annoyed or disturbed." Accordingly, we would modify proposed element 4 as follows:

"Would an ordinary person <u>reasonably</u> have been ~~reasonably~~ annoyed or disturbed by [name of defendant]'s conduct?"

20. VF-2600. Private Nuisance

a. We would strike "substantially" in question No. 3 for the reasons stated above.

b. We would modify question No. 4 as follows for the reason stated above:

"Would an ordinary person <u>reasonably</u> have been ~~reasonably~~ annoyed or disturbed by [name of defendant]'s conduct?"

21. CACI No. 2100. Conversion

a. We agree that the words "intentionally and" are misplaced in the current instruction and should be stricken because the defendant need not have intended to wrongfully interfere. However, as stated in the third bullet point in the Sources and Authority, the act constituting conversion must be done knowingly and intentionally to create liability. We would

add a sentence at the end of element 2 to convey this requirement while distinguishing it from knowingly acting wrongfully:

"[*Name of defendant*] need not have known that this act was wrongful, but must have knowingly done the act."

b. The citations to *Taylor* and *Madatyan* in the fourth and fifth bullet points in the Sources and Authority are the first citations to those cases, so we would make them full citations.

c. We suggest that the Advisory Committee consider adding to the Sources and Authority a quotation from *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124-125, discussing the conversion of intangible property where the property right is not reflected in a document:

"We recognize that the common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel [citation], may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so. [Citation.] The appropriate scope of a conversion action as applied to intangible personal property has been the subject of scholarly and informative discussion. [Citations.] [¶] A net operating loss is a definite amount [citation] that can be recorded in tax and accounting records. The significance of this, in our view, is not that the intangible right is somehow merged or reflected in a document, but that both the property and the owner's rights of possession and exclusive use are sufficiently definite and certain."

22. VF-2100. Conversion

Agree.

23. CACI No. 2547. Disability-Based Associational Discrimination—Essential Factual Elements

a. We suggest adding the appropriate code citation to the title "(Gov. Code, § 12926(o)" consistent with other instructions in this series.

b. The penultimate bracket in the last line of element 4 appears to be misplaced, so we would delete it:

"[*Specify other basis for associational discrimination*];]

c. We can find no authority in the Sources and Authority supporting element 5 in an associational discrimination case. The statement in *Castro-Ramirez v. Dependable Highway*

Express, Inc. (2016) 2 Cal.App.5th 1042, 1038-1039, is dictum. We suggest including element 5 only if authority for the element is provided, and otherwise would delete that element.

24. CACI No. 2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing

Agree. We note that the first the citation under Secondary Sources in the Sources and Authority appears to include a second date that does not belong (March 3, 2008), which should be stricken. We also suggest including a link to the Joint Statement, which may be difficult for users to find: "available at https://www.hud.gov/offices/fheo/library/huddojstatement.pdf.

25. CACI No. 2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit

a. We agree with the instruction.

b. It appears that the reference to element 7 in the second sentence in the final paragraph of the Directions for Use should be to element 8.

c. The last sentence in the Directions for Use suggests that the defendant would have the burden of proof on the issue of whether restoration is reasonable, but cites no case authority. It is unclear whether this statement refers to an element in the instruction and whether the instruction should be modified in some manner if the issue is disputed, and if so how it should be modified. We find the statement unhelpful and would strike this sentence.

d. The Joint Statement cited under Secondary Sources in the Sources and Authority appears to be the same Joint Statement cited in CACI No. 2548 and should have the same date (May, 17, 2004) shown in the document online and a link, as stated above.

26. CACI No. 3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm

Proposed new element 4 seems unnecessary in any case where the defendant knowingly exposed the plaintiff to a substantial risk of serious harm. If the defendant knowingly created the risk through the defendant's conduct or failure to act (as required in elements 2 & 3), it should not be necessary to prove that the defendant failed to take reasonable measures to protect against the risk the defendant knowingly created.

The source of the proposed new language, *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, 1067, quoted in the Sources and Authority, refers to "failing to take reasonable measures to abate [a substantial risk of serious harm]" in the context of a failure to act, as distinguished from affirmative conduct. A defendant who, in the language of proposed new element 4, fails to take reasonable measures to protect against a risk of serious harm creates a risk of serious harm by failure to act, as stated in one of the alternatives of element 2. Thus, proposed new element 4 appears to be duplicative of element 2 where the defendant failed to act, and should be unnecessary. So we would strike proposed new element 4.

27. CACI No. 3052. Use of Fabricated Evidence—Essential Factual Elements

a. We agree with the instruction.

b. This instruction is for use in a section 1983 case, which is a civil case. The first sentence in the third paragraph of the Directions for Use ("Give the last optional paragraph in a criminal case") seems inappropriate. We believe an appropriate statement would be to give the last optional paragraph if the section 1983 claim involves an underlying criminal prosecution or arrest.

c. In the citation in the seventh bullet point in the Sources and Authority, "Fed.3d" should be "F.3d."

28. CACI No. 3509A. Precondemnation Damages—Unreasonable Delay (Klopping Damages)

Agree.

29. CACI No. 3509B. Precondemnation Damages—Public Entity's Authorized Entry to Investigate (Code Civ. Proc., § 1245.060)

Agree.

30. CACI No. 3511A. Permanent Severance Damages

Agree.

31. CACI No. 3511B. Temporary Severance Damages

Agree.

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

We believe the language "reasonably certain" may suggest to lay jurors a greater degree of certainty than the law requires. The word "certain" in particular may suggest a quantum of proof greater than a preponderance of the evidence. We suggest modifying element 1 as follows so the jury will apply the preponderance standard in determining whether the plaintiff will suffer damages:

"That ~~it is reasonably certain that the~~ [*name of plaintiff*]'s injury ~~that [*name of plaintiff*] sustained~~ will cause [him/her] to earn less money in the future than [he/she] otherwise would have earned; and"

33. CACI No. 4012. Concluding Instruction

Agree.

34. VF-Conservatorship—Verdict Form

Agree.

DISCLAIMER

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Very truly yours,

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