Agenda
Advisory Committee on
Model Civil Jury Instructions

May 1, 2008
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Approval of minutes	Tab 1	John Young
Product Liability Instruction 1057	Tab 2	John Young
Medical Malpractice Instructions		Frank Carney
Contract Instructions	Tab 3	Gary Johnson

Committee Web Page: http://www.utcourts.gov/committees/muji/

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

May 12, 2008	Motor Vehicles
June 9, 2008	Premises Liability
August 11, 2008	Employment
September 8, 2008	Insurance Obligations
October 14, 2008	Construction Contracts
November 10, 2008	Intentional Torts / Fraud and Deceit
December 8, 2008	Eminent Domain
January 12, 2008	Probate
February 9, 2008	Professional Liability

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
April 14, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Colin P. King, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill. Also present: Curtis Drake, Elliott Williams

1. *Products Liability Instructions*. The committee considered CV 1056, "The manufacturer is not an insurer," and CV 1057, "Safety risks." Mr. Young noted that the issue is whether these are the kinds of instructions the Utah Supreme Court has said should not be given. He proposed an amendment to CV 117, "Preponderance of the evidence," to say that, if the jury finds that the evidence regarding a fact is evenly balanced or preponderates against the fact, then the jury must find that the fact has not been proved "and the party has therefore failed to meet its burden of proof to establish that fact." **The committee approved this amendment to CV 117.** Mr. Young asked whether this change satisfied the need for CV 1056 and 1057. Mr. Fowler thought that CV 1057 was still needed. It addresses an issue that arose in *Slisze v. Stanley-Bostitch,* 1999 UT 20, which held that a product is not necessarily defective just because a safer model is available. Mr. Fowler did not think that the issue should be left to argument because of the danger that jurors will think that, because a safer alternative is available, the product must be defective. Mr. Carney questioned how CV 1056 and 1057 were different from the instructions disapproved in *Green v. Louder* and *Randle v. Allen*. Mr. Fowler noted that those cases were negligence cases and dealt with matters of common knowledge, whereas products liability is an area of the law not familiar to most jurors. He suggested that the instructions be left in with a committee note saying that the committee did not agree on whether the instructions should be used. Mr. Humpherys thought that CV 1057 was misleading. He read it to say that a product that may present some safety risks is not defective as a matter of law, which he did not think was an accurate statement of the law. Mr. Carney thought that the instructions should tell the jury what the law is and not what it is not. He and Mr. Summerill thought the instructions merely restated the converse of the burden of proof. Mr. Shea thought that the first clause of CV 1057 was such a negative statement of the elements a plaintiff must prove and suggested limiting the instruction to the second clause, which is taken from *Slisze*. Mr. Young concluded that the instruction needed more work and deferred further discussion on it.

2. *Medical Malpractice Instructions*. The committee continued its review of the medical malpractice instructions.

a. *Advisory committee note*. At Mr. Summerill's suggestion, the fourth paragraph (explaining what instructions were omitted because there is no Utah appellate authority for them) was deleted. Mr. Carney asked how specific

instructions must be under *Mikkelsen v. Haslam,* 764 P.2d 1384 (Utah Ct. App. 1988), which said that the mere giving of abstract instructions on negligence without adapting them to the specific duties in the case may be error. Mr. Humpherys and Mr. Drake thought that the specific duties alleged in the case could best be handled by instructions on the parties' contentions. Mr. Humpherys thought that detailed statements of the duties involved (*e.g.,* "The defendant had a duty to tie off the cystic duct.") were not statements of the law but application of the law (*viz.,* that the defendant had a duty to use reasonable care under the circumstances) to the facts of the case and the medicine involved.

Mr. King joined the meeting.

b. *CV 301. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.* Mr. Shea noted that he has deleted all references to "nurses" in CV 301. Nurses are covered in CV 302. Dr. DiPaolo suggested striking the phrase "a form of fault known as." Other committee members pointed out that the phrase was needed so that the jury could relate the medical malpractice instructions to other instructions that are phrased in terms of "fault." Mr. Drake questioned the use of the phrase "a cause." He thought it cut out part of the definition of proximate cause, namely, legal causation, and shortened proximate cause to cause in fact. Messrs. Fowler and Carney pointed out that "cause" is defined in other instructions (including CV 310) to mean what was formerly called "proximate cause."

c. *CV 304. Duty to disclose material medical information.* Dr. DiPaolo thought that the last sentence defining "material" was unnecessary because materiality was built into the definition of duty in this instruction. At her suggestion, the instruction was revised to read:

> [Name of defendant] had a duty to disclose to [name of plaintiff] information concerning [name of plaintiff]'s condition that was unknown to [name of plaintiff], if the information would be important to a reasonable person in making decisions about health care, and if disclosure of the information would not be expected to make [name of plaintiff]'s health worse.

The instruction was approved as revised.

Mr. Ferguson joined the meeting.

d. *CV 307. Duties of hospitals to patients.* Mr. Simmons asked whether the existence of an employment relationship between a hospital and a

physician would ever be a jury question. The instruction presupposes that the court has already decided whether or not an employment relationship exists. Mr. Carney thought the issue generally did not present a jury question except in cases of apparent authority. Mr. Williams thought the last sentence of the note was ambiguous; he read it as referring to subparagraph (6). The phrase "last paragraph" in the last sentence of the note was changed to "bracketed paragraph." Mr. Carney questioned whether the instruction on hospital duties should more closely track the instructions for other health-care providers rather than spelling out all of the duties a hospital could breach. He will draft a more general instruction on hospitals' duties.

e. *CV 310. "Cause" defined.* Mr. Fowler noted that the instruction should be broader than just the defendant's fault; it should also apply to the fault of the plaintiff and third parties. Mr. Carney considered listing in this instruction all the ways a plaintiff could be at fault but decided against it. He will revise the instruction and present it to the committee at a later meeting.

f. *CV 311. Elements of an informed consent claim;* and *CV 312. Duty to obtain informed consent. "Informed consent" defined.* At Mr. Simmons's suggestion, the order of CV 311 and 312 was reversed.

g. *CV 314. Standard for judging patient's consent.* Mr. Young thought the phrase "you must use the viewpoint" was awkward. At Dr. DiPaolo's suggesting, "use" was replaced with "take." Mr. King thought the instruction was backwards, that it should read, "To determine whether a patient would have consented . . . , you must take the viewpoint of a reasonable person in the plaintiff's position . . . ." Other committee members thought the instruction was fine as written. Dr. DiPaolo noted that the reference to "patient" in the main clause was confusing since the only "patient" all the jurors know is the plaintiff. Mr. Carney noted that the statute refers to the "viewpoint of *the* patient." At Dr. DiPaolo's suggestion, the instruction was revised to read:

> To determine whether a reasonable person would have consented to the care, you must take the viewpoint of a reasonable person in [name of plaintiff]'s position before the care was provided and before any harm occurred.

At Mr. Simmons's suggestion, the first line was revised to say, "would not have consented," to track the language of CV 311. The instruction was approved as amended.

h. *CV 315. Oral consent valid.* Mr. Humpherys asked why "refusal of treatment" was included. Mr. Ferguson noted that the plaintiff's claim may be that the defendant was negligent for *not* treating him. The title of the instruction was changed to "Consent or refusal of treatment." The instruction was revised to read:

> A [consent to/refusal of] treatment is binding even if it is not in writing.

The instruction was approved as modified.

i. *CV 316. Consent is presumed.* Mr. Young suggested moving the phrase "unless proven otherwise" to the end of the instruction. Mr. Humpherys asked why the phrase was needed at all. The committee thought we needed a general instruction on presumptions. Messrs. Humpherys and Ferguson thought the instruction should read, "There is a presumption that, when a person submits to health care, the care was authorized." The effect of the presumption could then be explained in a general instruction on rebuttable presumptions. Dr. DiPaolo thought that one term ("presumption" or "presumed") should be used consistently throughout the instructions and recommended that the committee use "presumption." Mr. Humpherys thought that if the jury is instructed on the presumption, it should also be instructed on how the presumption can be rebutted. Mr. Williams thought that the presumption was a presumption of actual consent, which would be a defense to a claim of battery, and not a presumption of informed consent, so the committee note should be struck. Others, however, thought that the statute is not clear as to whether the presumption also covers informed consent. Mr. Carney struck the committee note. Mr. Summerill noted that the committee was getting bogged down in debates about the law and recommended that the instruction be sent back to the subcommittee for further review.

j. *CV 317. Patient's negligence in failing to follow instructions*. and *CV 318. Patient's negligence in giving medical history*. Mr. Carney asked whether an instruction on comparative fault should include a laundry list of all the ways that a patient may be comparatively negligent (as with the draft instruction on hospital negligence, CV 307), or be stated more generally, in a single paragraph. Mr. Humpherys thought that depended on whether the laundry list of duties are really legal duties or applications of the general legal duty (the duty to use reasonable care for one's own health and safety) to the evidence and the facts of the case. Mr. Humpherys also questioned whether expert testimony is required to establish that a patient breached his or her legal duty. Mr. Williams thought not, that what patients are required to do is within

the knowledge of the average juror, whereas what health-care providers are required to do is not. Mr. Young suggested using a general instruction with a contention instruction, for example: "[Name of patient] had a duty to use reasonable care to take care of himself. In this case, [name of defendant] claims that [name of plaintiff] failed to use reasonable care in the following ways: . . ." Mr. Williams noted that, merely because someone makes a claim does not mean that the other side actually had a duty. Mr. Humpherys thought that, in instructing the jury on the duties of health-care providers and patients, we should be consistent and only state as duties those duties defined by statute or case law. CV 317 and 318 were sent back to the subcommittee to reconsider, in light of the committee's discussion.

k. *CV 319. Patient's fault: preexisting conditions.* Messrs. King and Summerill noted that the instruction was an application of the principle that a defendant takes the plaintiff as he finds him. Mr. Johnson questioned whether that principle had been modified by a later decision, *Ortiz v. Geneva Rock Products, Inc.,* 939 P.2d 1213 (Utah Ct. App. 1997). Others thought, however, that *Ortiz* allowed a plaintiff's preexisting condition to be considered only on the issue of causation, not comparative fault. The committee approved the language of CV 319, but, at Mr. Young's suggestion, the subcommittee will revise the committee note.

l. *CV 320. Use of alternative treatment methods.* Mr. Humpherys questioned use of the phrase "it may not be negligence" and suggested substituting "fault," "medical malpractice," or "below the standard of care" for "negligence" to make the instruction consistent with other instructions. Mr. Drake thought the instruction should say "is not" negligence rather than "may not be" and asked why the language of MUJI 6.29 was changed. Mr. Williams agreed. He thought that if the jury finds that the treatment was appropriate in the case and was approved by a respectable portion of the medical community, then the treatment was not negligent as a matter of law. Mr. Humpherys asked how the instruction related to the doctrine of negligence per se. Messrs. Johnson and Drake said that it did not; negligence per se is based on a violation of a statute. Mr. Summerill thought that the instruction should not say that use of an accepted alternative treatment is not negligence because the treatment may be accepted for reasons other than its safety or efficacy, such as to cut costs. He and Mr. Carney pointed out that, just because a particular treatment is "approved by a respectable portion of the medical community," does not mean it is not negligent; advances in medicine may make treatments that were "approved" at one time no longer acceptable. Messrs. Young and King noted that the instruction does not define "approved by a respectable portion of the medical community." It does not answer such questions as, Approved by whom? or By

what percentage of the community? Mr. King thought the instruction would make the standard of care depend on whether a particular treatment is used by a threshold percentage of providers. He thought the standard should be whether a treatment meets the minimum standard of care and not whether it is used by a certain percentage of providers. Dr. DiPaolo thought that the instruction did not tell jurors what they have to decide. Mr. Carney noted that there is no Utah law to support the instruction. The only Utah case cited, *Butler v. Naylor,* 1999 UT 85, 987 P.2d 41, said that it was harmless error to give the instruction, which, Mr. Summerill thought, meant that it was error to give it. Mr. Humpherys thought that the committee should not include the instruction if there was no Utah law to support it. That would not preclude attorneys requesting such an instruction in a given case. Mr. Humpherys also asked about the burden of proof. The instruction seems to put the burden of proof on the defendant to prove he used an "approved" method of treatment. Mr. Humpherys questioned why the burden should not be on the plaintiff to prove that the defendant's choice of treatment was not "approved." Mr. Johnson noted that the instruction sets out an affirmative defense, on which the defendant bears the burden of proof. The plaintiff already has the burden of proving that the defendant's conduct fell below the applicable standard of care. Messrs. Humpherys and Summerill thought the matter should be left for argument and should not be covered by a jury instruction; they thought the instruction went too far without any Utah authority to support it. The instruction was sent back to the subcommittee to see if there is Utah law to support it.

3. *Next Meeting*. The next regularly scheduled meeting is Monday, May 12, 2008, at 4:00 p.m. However, because the committee is behind the schedule that it set for itself in January 2008, Mr. Young called a special meeting for Thursday, May 1, 2008, at 4:00 p.m. to finish its consideration of the medical malpractice instructions and to approve the commercial contract instructions.

The meeting concluded at 6:00 p.m.

Tab 2

CV 1057. Safety risks.

A [product] is not defective or unreasonably dangerous merely because it presents some safety risks that cause it to be dangerous for its intended use, nor is it defective or unreasonably dangerous merely because it could have been made safer or because a safer model of the [product] is available.

References

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 10.

Fed. Jury Prac. and Instr., § 122.10 (5th Ed. 2000) (modified).

MUJI 1st References

Committee Notes

Staff Notes

This seems very similar to 1056.

Status

Tab 3

Contract Instructions

Table of Contents

CV2101. Issues in a breach of contract case.

[Name of plaintiff] claims that [he] had a contract with [name of defendant] for [list purpose or description of the contract]. [Name of plaintiff] also claims that [name of defendant] breached the contract by not performing [his] obligations and that [name of plaintiff] has been damaged as a result. [Name of plaintiff] wants [name of defendant] to pay [him] money to compensate [him] for the damages [he] claims to have suffered.

[Name of defendant] denies [name of plaintiff]'s claims and in [his] defense claims that [list affirmative defenses].

MUJI 1st Instruction

CV2102. Elements for breach of contract.

In order to recover damages, [name of plaintiff] must prove each of these four things:

(1) whether there was a contract between [name of plaintiff] and [name of defendant];

(2) whether [name of plaintiff] did what the contract required [him] to do, or whether [he] was excused from performing [his] contract obligations;

(3) whether [name of defendant] breached the contract by not performing [his] obligations; and

(4) whether [name of plaintiff] was damaged because [name of defendant] breached the contract.

References

Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 14.

MUJI 1st Instruction

[Definition and instruction on "implied" or "express" is needed.]

CV2103. Creation of a contract.

You must decide whether [name of plaintiff] and [name of defendant] had a contract. A contract is an agreement between two or more parties. It can be either verbal or written, or a mixture of both.

To create a contract, each party must promise to do something for the other party in exchange for something of value. "Value" doesn't necessarily have to be money. It can be a promise to do some act in exchange for the other party's act or promise.

What the parties have promised to do for each other has to be spelled out, either expressly or impliedly, well enough that they can tell what it is they have each promised to do for the other.

References

Glacier Land Co., L.L.C. v. Claudia Klawe & Associates, L.L.C., 2006 UT App 516.

Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985).

MUJI 1st Instruction

CV2104. Offer.

To create a contract, the parties have to agree on the terms of the contract. Whether they have agreed on the terms of the contract depends on whether [party's name] made an offer that was accepted by [other party's name].

A party makes an offer when [he] invites the other party to accept [his] terms in such a way that the party accepting the offer realizes that if [he] accepts the terms, both parties will become obligated to each other. The terms of the offer have to be clear and definite.

All of the important terms of the offer have to be accepted unconditionally. If the accepting party accepts some terms of the offer, but not others, or proposes different or additional terms, this becomes a counteroffer which then must be accepted unconditionally by the other party before a contract is formed.

Nunley v. Westgates Casing Services, Inc., 1999 UT 100(citing Engineering Assoc. v. Irving Place Assoc., 622 P.2d 784, 787 (Utah 1980)).

References

DCM Investment Corp. v. Pinecrest Investment Co., 2001 UT 91, ¶ 12.

Cal Wadsworth Construction v. City of St. George, 898 P.2d 1372 (Utah 1995).

Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1192 (Utah Ct. App. 1993).

MUJI 1st Instruction

CV2105. Acceptance.

A party accepts an offer when [he] agrees unconditionally to all of the terms. Unless an offer specifies that the terms need to be accepted in a certain manner, acceptance can be shown by something in writing, or by words, or by the conduct of the party who accepts the offer.

In order to decide whether the offer was accepted in this case, ask yourself whether [party's name] communicated [his] acceptance of the offer so that an objective, reasonable person would understand that a contract had been made.

References

Cal Wadsworth Construction v. City of St. George, 898 P.2d 1372 (Utah 1995).

Engineering Assoc. v. Irving Place Assoc., 622 P.2d 784, 787 (Utah 1980). Nunley v. Westgates Casing Servs., Inc., 1999 UT 100, ¶ 27.

MUJI 1st Instruction

CV2106. Withdrawal of offer.

An offer can be withdrawn at any time before it is accepted, but not afterwards.

Jones v. New York Life Insurance Co., 15 Utah 522, 50 P. 620 (1897).

MUJI 1st Instruction

CV2107. Consideration.

To create a contract, each party must promise to do something for the other party in exchange for something of value. It can be a promise to do some act in exchange for the other party's act. "Value" doesn't necessarily have to be money, but it can be.

If you find that either party did not agree to give something of value in exchange for the other party's promise to perform [his] obligations under the contract, then there is no contract.

References

Resources Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028 (Utah 1985).

Latimer v. Holladay, 103 Utah 152, 134 P.2d 183 (1943).

Restatement (Second) of Contracts § 71 (1979).

MUJI 1st Instruction

CV2108. Duty to perform.

[Name of plaintiff] and [name of defendant] agree that their contract required both parties to perform their contract obligations at the same time. Consequently, [name of defendant] had to do what [he] promised to do only if [name of plaintiff] either did or was ready to do what [he] promised to do.

References

Collard v. Nagle Construction, Inc., 2002 UT App 306, ¶ 19.

Century 21 All Western Real Estate and Inv., Inc. v. Webb, 645 P.2d 52, 55-56 (Utah 1982).

Restatement (Second) of Contracts § 238.

MUJI 1st Instruction

CV2109. Time of performance.

Even though the contract does not specify a time by which [name of defendant] had to do what [he] promised to do, [name of defendant] had to do what [he] promised to do within a reasonable time.

You must decide what a reasonable time was by considering the nature of the agreement, the relationship between the parties, the circumstances surrounding [name of defendant]'s performance of [his] duties, and anything else that a reasonable person would think is relevant to determining when [name of plaintiff] would have expected [name of defendant] to have performed [his] contract obligations.

References

Coulter & Smith, Ltd. v. Russell, 966 P.2d 852 (Utah 1998).

Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

MUJI 1st Instruction

CV2110. Discharge by performance.

[Name of plaintiff] is entitled to recover damages from [name of defendant] if [name of plaintiff] did everything [he] had promised to do under the contract and [name of defendant] failed to do what [he] had promised to do under the contract.

Advisory Committee Note: This instruction should be used only in the absence of any defenses.

References

Restatement (Second) of Contracts § 235.

Smith v. Grand Canyon Expeditions Co., 2003 UT 57, ¶ 27.

MUJI 1st Instruction

CV2111. Substantial performance.

[Name of plaintiff] claims that even though [he] did not do everything exactly as the contract required, [he] should still recover damages from [name of defendant] because [name of defendant] breached the contract. [Name of plaintiff]'s failure to do everything exactly as promised under the contract does not prevent [him] from recovering damages unless

(1) [he] acted in bad faith or

(2) what [he] failed to do was important to fulfilling the purpose of the contract. In order to decide whether the things [name of plaintiff] failed to do were important to fulfilling the purpose of the contract, you will need to decide whether [name of plaintiff]'s failure was minor and could be fixed without difficulty.

Advisory Committee Note: The term "bad faith" is defined separately in Instruction CV21##.

References

Reliance Ins. Co. v. Utah Dep't of Transp., 858 P.2d 1363, 1370 (Utah 1993).

MUJI 1st Instruction

CV2112. Occurrence or failure of condition precedent.

[Name of plaintiff] and [name of defendant] agree that their contract did not require [party's name] to [describe the obligation] unless [describe the condition] occurred. You must decide whether this condition occurred. If it did, then [party's name] had to [describe the obligation]. If the condition did not occur, then [party's name] did not have to perform [his] contract obligations.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340.

MUJI 1st Instruction

CV2113. Disputed condition precedent.

[Party's name] claims that according to the contract, [he] did not have to [describe the obligation] unless [describe the condition] occurred first. You must decide whether, according to the contract, this condition had to occur before [party's name] was required to perform [his] contract obligations.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340.

McBride-Williams v. Huard, 2004 UT 21, ¶ 13.

MUJI 1st Instruction

CV2114. Performance excused by material breach.

[Name of plaintiff] claims that [he] was excused from performing [his] contract obligations because [name of defendant] failed to perform an important part of what [he] had promised to do. Specifically, [name of plaintiff] claims that [name of defendant] failed to [describe the claimed breach].

To decide whether [name of defendant]'s obligation was an important part of the contract, you should ask yourselves whether a reasonable person would have entered into the contract if a promise to [describe the obligation] had not been included.

If you decide that [name of defendant] did not perform an obligation that was an important part of the contract, then you should find that [name of plaintiff] was excused from performing [his] contact obligations. If, on the other hand, you decide that the obligation [name of defendant] failed to perform was not an important part of the contract, then [name of plaintiff] was not excused from performing [his] contract obligations.

References

Bonneville Distributing Co. v. Green River Development, 2007 UT App 175, ¶ 32.

Jackson v. Rich, 499 P.2d 279, 280 (Utah 1972).

Restatement (Second) of Contracts §243 (1979).

MUJI 1st Instruction

CV2115. Performance not excused by other party's non-performance.

One party to a contract cannot by a willful act or omission make it difficult or impossible for the other party to perform and then be excused from performing because the other party did not perform.

If you decide that [name of plaintiff] was willing and able to perform [his] contract obligations, but that [he] could not perform because of something that [name of defendant] purposely did or failed to do, then [name of plaintiff] was excused from performing [his] obligations under the contract.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340, ¶ 15.

Saunders v. Sharp, 840 P.2d 796, 805-806 (Utah Ct. App. 1992).

Cahoon v. Cahoon, 641 P.2d 140, 144 (Utah 1982).

MUJI 1st Instruction

CV2116. Promissory estoppel.

[Name of plaintiff] claims that [name of defendant] made a promise to him that [describe the promise], and that as a result of that promise [name of plaintiff] [describe the action or inaction].

You must decide whether:

(1) [name of defendant] made a promise to [name of plaintiff];

(2) the promise reasonably caused [name of plaintiff] to [describe the action or inaction taken]; and

(3) only (?) by enforcing the promise can injustice be avoided.

To decide whether the promise reasonably caused [name of plaintiff] to [describe the action or inaction taken], decide whether a reasonable person would have expected [name of plaintiff] to do what [he] did based on the promise [name of defendant] made.

If you decide that [name of plaintiff] has proved these three things, then you may enforce the promise.

References

Restatement (Second) of Contracts § 90.

MUJI 1st Instruction

CV2117. Breach of the contract.

[Name of plaintiff] claims that [name of defendant] breached their contract. A party to a contract breaches the contract if [he] fails to do what [he] promised to do in the contract.

References

Restatement (Second) of Contracts § 235.

MUJI 1st Instruction

CV2118. Material breach.

If [name of defendant] failed to do what [he] promised to do in the contract, and that promise was important to fulfilling the purpose of the contract, then [name of defendant] materially breached the contract. If you decide that [name of defendant] materially breached the contract, then [name of plaintiff] was excused from doing what [he] had promised to do under the contract. However, if you decide that what [name of defendant] failed to do was not important to fulfilling the purpose of the contract, then [name of plaintiff] was not excused from doing what [he] promised to do in the contract. In order to decide whether the things [name of defendant] failed to do were important to fulfilling the purpose of the contract, you will need to decide whether [name of defendant]'s failure was minor and could be fixed without difficulty.

References

Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 22.

Polyglycoat Corp. v. Holcomb, 591 P.2d 449, 451 (Utah 1979).

Black's Law Dictionary (8th ed. 2004) (defining breach of contract).

MUJI 1st Instruction

CV2119. Total breach.

A total breach occurred if [name of plaintiff] did not receive any of the benefits [he] was due under the contract.

References

Restatement of Contracts § 236.

MUJI 1st Instruction

CV2120. Partial breach.

If [name of defendant] did some but not all of the things [he] promised to do under the contract, then [name of plaintiff] may recover damages related only to what [name of defendant] failed to do under the contract.

References

Restatement of Contracts § 236.

MUJI 1st Instruction

CV2121. Anticipatory breach.

When a party is supposed to perform [his] contract obligations at some time in the future, it is a material breach of the contract if [he] shows unequivocally that [he] does not intend to perform [his] contract obligations when the time arrives.

When this happens, the other party has three options:

(1) [he] can treat the entire contract as broken;

(2) [he] can treat the contract as still binding and wait until the time arrives for its performance; or

(3) [he] can cancel the contract.

["shows without a doubt" – alternative phrasing]

References

Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992).

Kasco Services Corp. v. Benson, 831 P. 2d 86, 88 (Utah 1992).

Restatement (Second) of Contracts § 253.

MUJI 1st Instruction

Advisory Committee Note

The doctrine of anticipatory breach is not applicable to unilateral contracts. Greghuhn v. Mutual of Omaha Ins. Co., 461 P.2d 285 (Utah 1969).

CV2122. Implied covenant of good faith and fair dealing.

All contracts contain an unwritten or implied promise that the parties will deal with each other fairly and in good faith. This means that [name of plaintiff] and [name of defendant] have promised not to intentionally do anything to injure each other's right to receive the benefits of the contract. A violation of this implied or unwritten promise is a breach of the contract.

There are some limits, however, to this implied promise to deal fairly and in good faith. First, the duty to act in good faith does not establish new, independent rights or duties to which [name of plaintiff] and [name of defendant] did not agree. Second, the duty to act in good faith does not create rights and duties inconsistent with the actual terms of the contract. Third, the duty to act in good faith does not require either party to decide to use a right they have under the contract that will be harmful to themselves simply for the purpose of benefiting the other party. Finally, you may not use the duty to act in good faith to achieve an outcome in harmony with your sense of justice but inconsistent with the actual terms of the contract.

You must decide whether or not [name of defendant] breached the duty to act in good faith.

To make that decision, you must ask yourselves if [name of plaintiff] has proved both of the following:

(1) that [name of defendant] breached the implied promise to deal with [name of plaintiff] fairly and in good faith; and,

(2) that [name of plaintiff] was damaged as a result.

References

Mark Technologies Corp. v. Utah Resources International, Inc., 2006 UT App 418, ¶ 7, citing St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991).

Oakwood Village, LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45.

MUJI 1st Instruction

CV2123. Accord and satisfaction.

[Name of defendant] claims that [he] did not have to perform [his] contract obligations because [he] and [name of plaintiff] had a disagreement about the contract that they resolved by entering into a new contract that replaced the first contract. [Name of defendant] claims that the new contract required [describe the new obligation(s)] and that [he] has fully performed these obligations.

You must decide whether:

(1) [name of plaintiff] and [name of defendant] had a dispute about the original contract that they resolved by entering into a new contract; and

(2) whether [name of defendant] fully performed or is performing [his] obligations under the new contract.

If you decide that [name of defendant] has proved both of these things, then [name of defendant] is released from performing [his] obligations under the original contract.

References

Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977).

Stratton v. West States Constr., 440 P.2d 117 (1968).

Restatement (Second) of Contracts § 281.

MUJI 1st Instruction

CV2124. Novation.

[Name of defendant] claims, because of a new contract that substitutes [name of new party] who will perform in [his] place, that [he] did not need to perform [his] contract obligations under the old contract. [Name of defendant] bears the burden of proving all of following:

(1) There was a contract between [name of plaintiff] and [name of defendant].

(2) There is a new contract, agreed to by all of the parties, that replaces the old contract and substitutes the performance of a new party in place of [name of defendant].

(3) [Name of plaintiff] must intend for the new contract to release [name of defendant] of [his] obligations under the old contract and to accept the new party as a substitute for [name of defendant].

References

First American Commerce Co. v. Washington Mut. Sav. Bank., 743 P.2d 1193, 1195 (Utah 1987).

Horman v. Gordon, 740 P. 2d 1346, 1352 (Utah Ct. App. 1987).

Kennedy v. Griffith, 95 P. 2d 752 (1939).

MUJI 1st Instruction

CV2125. Duress.

[Name of defendant] claims that [he] is not bound by the contract because [he] was forced to enter into the contract. To succeed, [name of defendant] must prove that [he] did not intend to enter into the contract, and:

Either [Instruct only on the elements for which there is some evidence.]

(1) [he] was physically forced to enter into the contract; or

(2) [he] was influenced to enter into the contract by an improper threat by [name of plaintiff] that left [him] no reasonable alternative but to agree; or

(3) [he] was influenced to enter into the contract by physical force or an improper threat by someone who is not a party to the contract that left [him] no reasonable alternative but to agree. If the person making the threat is not the [name of plaintiff] or [his] agent, this will not excuse [name of defendant] if [name of plaintiff] in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

If you decide that [name of defendant] has proved that [he] entered into the contract as a result of duress, then no enforceable contract was created.

References

Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).

Restatement (Second) of Contracts §§ 174-176.

MUJI 1st Instruction

CV2126. Improper threat. [back to subcommittee]

A threat is "improper" if [use only those relevant to the case] what is threatened is:

(1) a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property;

(2) a criminal prosecution;

(3) the use of civil process and the threat is made in bad faith, or

(4) a breach of the duty of good faith and fair dealing under a contract with the recipient.

A threat is also improper if [use only those relevant to the case] the resulting exchange is not on fair terms, and:

(1) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(2) the effectiveness of the threat in influencing the agreement is significantly increased by prior unfair dealing by the party making the threat, or

(3) what is threatened is otherwise a use of power for illegitimate ends.

References

Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).

Restatement (Second) of Contracts §§ 174-176.

MUJI 1st Instruction

CV2127. Fraudulent inducement.

[Name of defendant] claims that no contract was created because [he] was induced to enter into the contract by fraud. To succeed on this claim, [name of defendant] must prove all of the following.

(1) [Name of plaintiff] represented that [insert alleged fraudulent statement].

(2) [Name of plaintiff] either knew that the representation was false or made the representation recklessly without sufficient knowledge upon which to base the representation.

(3) [Name of plaintiff] made the representation to induce [name of defendant] to agree to the contract.

(4) [Name of defendant] reasonably relied on this representation without knowledge of its falsity.

(5) [Name of defendant] entered into the contract.

(6) [Name of defendant] would not have entered into the contract if [he] had known that the representation was not true.

References

Armed Forces Ins. Exch. V. Harrison, 70 P.3d 35, 40 (Utah 2003).

MUJI 1st Instruction

CV2128. Impossibility/Impracticability.

[Name of defendant] claims that [his] performance under the contract was made impossible or highly impracticable by an unforeseen supervening event.

"Impracticable" means that performance under the contract can be done only at an excessive and unreasonable cost.

A "supervening event" is an event that creates a major change in the expected circumstances.

[Name of defendant] makes this assertion based on the following circumstances:

[Insert description of circumstances, such as death of essential participant, destruction of essential property, unforeseen change of law, act of God, etc.]

If you decide that these circumstances just described are a supervening event, unforeseen at the time the contract was entered into and occurred through no fault of [name of defendant] and that the circumstances rendered [name of defendant]'s performance of the contract impossible or impracticable, then [name of defendant]'s obligations under the contract are excused.

References

Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 861 (Utah 1978).

Commercial Union Associates v. Clayton, 863 P.2d 29 (Utah Ct. App. 1993).

MUJI 1st Instruction

CV2129. Frustration of purpose.

[Name of defendant] claims that [his] performance under the contract is excused because of the following circumstances:

[Insert description of circumstances which frustrated that purpose.]

To determine if defendant is excused from performance under the contract, you must decide:

(1) the original purpose of the contract contemplated by the parties;

(2) whether the circumstances just described are a supervening event, unforeseen at the time the contract was entered into;

(3) whether the circumstances occurred through no fault of [name of defendant]; and

(4) whether the new circumstances have made the purpose of the contract useless.

References

Castagno v. Church, 552 P.2d 1282 (Utah 1976).

Diston v. EnviroPak Medical Products, Inc., 893 P.2d 1071 (Utah Ct. App. 1995).

MUJI 1st Instruction

Staff note: The last paragraph contains a lot of stuff, some of it not contained in the introductory paragraph. Consider redrafting it as:

CV2130. Unconscionability.

In order to decide whether one or more terms of the contract are unconscionable, you will need to decide whether there was "substantive unconscionability" and/or "procedural unconscionability."

Substantive unconscionability focuses on the terms of the agreement and requires you to examine the relative unfairness of the contractual obligations. Even if a contract is unreasonable or more advantageous to one party, the contract is not necessarily unconscionable. Rather, for the contract to be substantively unconscionable, the terms must be so one-sided as to oppress or surprise an innocent party, or there must be an overall imbalance in the obligations and rights imposed by the contract, such as excessive price or other terms which you decide are inconsistent with accepted customs of commercial practice.

Procedural unconscionability focuses on the creation of the contract and the circumstances of the parties. Procedural unconscionability causes oppression and unfair surprise and you should examine all of the circumstances. For example, to decide whether there was procedural unconscionability, consider the following:

(1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement;

(2) whether there was a lack of opportunity for meaningful negotiation;

(3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position;

(4) whether the terms of the agreement were explained to the weaker party;

(5) whether the [aggrieved party] had a meaningful choice or instead felt compelled to accept the terms of the agreement; and/or

(6) whether the [stronger party] employed deceptive practices to hide key contractual provisions.

References

The Cantamar, L.L.C. v. Champagne, 2006 UT App 321, ¶¶ 31-36.

Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998).

Sosa v. Paulos, 924 P. 2d 357 (Utah 1996).

Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1190 (Utah Ct. App. 1993).

Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

MUJI 1st Instruction

Advisory Committee Note

Case law suggests that "While a determination of substantive unconscionability may by itself lead to our concluding the contract was unconscionable, procedural unconscionability alone 'rarely render[s] a contract unconscionable.'" Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998)).

CV2131. Mutual mistake.

[Name of defendant] claims that there was no contract because both parties were mistaken about [insert description of mistake]. To succeed on the claim that there is no contract, [name of defendant] must prove all of the following:

(1) Both parties, at the time the contract was entered into, were mistaken about [insert description of mistake].

(2) This mistake was a basic assumption or vital fact upon which they based their bargain.

(3) [Name of defendant] would not have agreed to enter into this contract if [he] had known about the mistake.

References

England v. Horbach, 944 P.2d 340 (Utah 1997).

Despain v. Despain, 855 P.2d 254 (Utah Ct. App. 1993).

Restatement (Second) of Contracts §§ 151, 152 (1979).

MUJI 1st Instruction

CV2132. Unilateral mistake.

[Name of defendant] claims that there was no contract because [he] was mistaken about [insert description of mistake]. To succeed on the claim that there is no contract, [name of defendant] must prove all of the following:

(1) [Name of defendant] was mistaken about [insert description of mistake].

(2) [Name of defendant]'s mistake must have such serious consequences that to enforce the contract as made would be unconscionable.

(3) The matter about which the mistake was made related to an important feature of the contract.

(4) The mistake occurred even though [name of defendant] made a reasonable effort to understand the circumstances described in paragraph (1) above.

(5) It is possible to put [name of plaintiff] back in the position [he] was in prior to the contract, losing only the benefit of the bargain.

References

Guardian State Bank v. Stangl, 778 P.2d 1, 4-5 (Utah 1989).

Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983).

Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

MUJI 1st Instruction

CV2133. Third-party beneficiary.

[Name of plaintiff] claims that [he] is a third party beneficiary of a contract between [list parties to the contract].

Parties to a contract can create rights under the contract in favor of another who is not named as a party to the contract. Such a person is called an "intended third party beneficiary." The third party can enforce [his] rights under the contract just as if [he] had been named as a party to the contract.

Someone who receives benefits under a contract, without the parties to the contract intending to create rights for that person under the contract, is an "incidental beneficiary" under the contract. An incidental beneficiary has no rights under the contract.

[Name of plaintiff] must be an "intended beneficiary" of the contract, and the intention of the parties to "benefit" the third party must be clear from the terms of the contract. A third-party who is only "incidentally benefited" has no rights under the contract.

References

Wasatch Bank v. Surety Ins. Co., 703 P.2d 298 (Utah 1985).

Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314 (Utah 1982).

Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497 (Utah 1980).

MUJI 1st Instruction

CV2134. Assignment.

An assignment transfers a party's rights under the contract to another.

If [Assignor's name] assigned [his] rights under the contract to [Assignee's name], then [Assignee's name] had the right to demand that [name of other party] do what [he] had promised to do under the contract. An assignment does not relieve the assignor of his obligation to perform his duties under the contract when the assignee agrees to perform those duties and the party gives his consent.

References

Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

First American Commerce Co. v. Washington Mut. Sav. Bank, 743 P. 2d 1193, 1194 (Utah 1987).

Restatement (Second) of Contracts §§ 317, 324, 336.

MUJI 1st Instruction

CV2135. Delegation.

A delegation transfers a party's duties under a contract to another.

[Delegator's name] was permitted to delegate [his] duties under the contract to [delegatee's name] unless [name of other party] had a substantial interest in having [delegator's name] personally fulfill the duties. However, even if [delegator's name] delegates [his] duties to [delegatee's name], [delegator's name] is still responsible for guaranteeing that [delegatee's name] performs those duties.

References

Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

First American Commerce Co. v. Washington Mutual Sav. Bank, 743 P.2d 1193, 1194 (Utah 1987).

Restatement (Second) of Contracts § 318.

MUJI 1st Instruction

CV2136. Modification.

[Name of party] claims that [he] and [name of other party] changed their contract. The parties to an oral or written contract may agree later to change it. To change a contract, both parties must agree on the new terms. If a contract has been changed, then any old terms that conflict with the new terms cannot be enforced.

R.T. Nielson Co. v. Merrill Cook, 2002 UT 11, ¶ 13 n.4.

Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 373 (Utah 1996).

Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 90 (Utah 1988).

Restatement (Second) of Contracts § 149.

MUJI 1st Instruction

CV2137. Abandonment.

[Name of plaintiff (party?)] claims that [he] and [name of defendant (other party)] abandoned their contract. One way a contract can be abandoned is if the parties agree to abandon their contract. Another way the contract can be abandoned, is if the parties act as if the contract no longer exists. If a contract has been abandoned, then the parties have no further obligation to do what they promised to do.

References

Parduhn v. Bennett, 2002 UT 93, ¶ 11.

Restatement of Contracts § 283 Agreement of Rescission.

MUJI 1st Instruction

CV2138. Nominal damages.

A party who has been damaged by a breach of the contract by the other party to the contract has a right to recover the damages caused by the breach of the contract.

However, if [name of plaintiff] has not proved any actual or substantial damages caused by the breach, or if [name of plaintiff] has not proved the amount of damages, then you may award as damages a small or nominal sum such as One Dollar.

References

Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 18.

Turtle Management v. Haggis Management, 645 P.2d 667, 670 (Utah 1982).

Snyderville Transp. Co. v. Christiansen, 609 P.2d 939, 941-942 (Utah 1980).

Restatement (Second) of Contracts § 346.

MUJI 1st Instruction

CV2139. Damages related to expected benefits.

If a party is damaged by a breach of a contract, then [he] has a right to recover general damages caused by [name of defendant]'s breach based on the benefits [he] expected to receive from the contract. General damages are those that follow naturally and are normally related to the loss of the expected benefits. General damages are measured as follows:

(1) the loss of the benefits from the contract caused by the breach; minus,

(2) any cost or other loss that [name of plaintiff] has avoided by not having to perform.

References

Black v. Allstate Ins. Co., 2004 UT 66, ¶28.

Ford v. Am. Express Fin. Advisors, Inc., 2004 UT 70, ¶ 39.

Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 19.

Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, ¶¶ 21-22.

Restatement (Second) of Contracts § 347.

MUJI 1st Instruction

Advisory Committee Note

This instruction is intended to be read in conjunction with the instruction on consequential damages where appropriate.

CV2140. Consequential damages.

If a party recovers damages for the benefits [he] expected to receive from the contract, then that party is also entitled to recover "consequential" damages caused by [name of defendant]'s breach.

Consequential damages are those losses or injuries reasonably within the contemplation of the parties, that is, they could have considered them or reasonably foreseen them, at the time the contract was made.

In order to decide whether a loss or an injury was foreseeable at the time the contract was made, you should examine the nature and language of the contract and the reasonable expectations of the parties. A loss may be foreseeable because it follows from the breach

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that [name of defendant] had reason to know.

References

Mahan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17.

Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28.

Berube v. Fashion Centre, 771 P.2d 1033, 1050 (Utah 1989).

Gardiner v. York, 2006 UT App 496, ¶ 14.

Restatement (Second) of Contracts § 351.

MUJI 1st Instruction

CV2141. Reliance damages.

Instead of damages based on the benefits [name of plaintiff] expected to receive from the contract, [name of plaintiff] has a right to recover the reasonable expenditures that [name of plaintiff] would have sustained if [name of defendant] had performed the contract as agreed. It is up to [name of defendant] to prove with reasonable certainty the loss [name of plaintiff] would have sustained.

References

Ranch Homes v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979).

Skanchy v. Calcados Ortope SA, 952 P.2d 1071, 1078 (Utah 1998).

Restatement (Second) of Contracts § 349.

MUJI 1st Instruction

CV2142. Damages. Foreseeability.

[Name of plaintiff] may not recover damages for any loss that [name of defendant] did not have reason to foresee and did not anticipate as a probable result of the breach when the contract was made.

It is not enough that [name of defendant] knew of a possible harm. [Name of defendant] must have had reason to foresee the loss claimed by [name of plaintiff] as a probable result of the breach of the contract. A loss may be foreseeable as a probable result of a breach because it follows from the breach

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that [name of defendant] had reason to know.

References

Ranch Homes v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979) .

Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 365 (Utah Ct. App. 1998).

Restatement (Second) of Contracts § 351.

MUJI 1st Instruction

CV2143. Mitigation and avoidance.

[Name of plaintiff] had a duty to mitigate, that is, to minimize or avoid, the damages caused by the breach. [Name of plaintiff] may not recover damages that [he] could have avoided without undue risk, burden or humiliation. Likewise, [name of plaintiff] may not recover the damages for losses that were caused by or made worse by [his] own action or inaction.

However, [name of plaintiff] has a right to recover damages if [he] has made a reasonable but unsuccessful effort to avoid loss.

References

Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 31.

Restatement (Second) of Contracts § 350.

MUJI 1st Instruction

CV2144. Damages. Reasonable certainty.

Damages are only recoverable for loss in an amount that the evidence proves with reasonable certainty, although the actual amount of damages need not be proved with precision. Any alleged damages which are only remote, possible or a matter of guess work are not recoverable.

References

Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986). Winsness v. M.J. Conoco Distributors, Inc., Utah, 593 P.2d 1303, 1305 (1979).

Graham v. Street, 2 Utah 2d 144, 149, 270 P.2d 456, 459 (Utah 1954).

Schwartz v. Adair, 2007 UT App 75.

Restatement (Second) of Contracts § 352.

MUJI 1st Instruction