Agenda
Advisory Committee on
Model Civil Jury Instructions

June 8, 2009
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

Video Conference: https://www.via3.com/via3/login/login.aspx

Approval of minutes	Tab 1	John Young
Attorney Negligence	Tab 2	Frank Carney Bob Gilchrist
Construction Contracts	Tab 3	Kent Scott John Young

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.

July 13, 2009	Accountant Negligence
August 10, 2009	Eminent Domain
September 14, 2009	Premises Liability
October 13, 2009	Insurance Obligations
November 9, 2009	Probate
December 14, 2009	Professional Liability
January 11, 2010	Employment

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 11, 2008
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Mariana Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons

Excused: John L. Young (chair)

Mr. Shea conducted the meeting in Mr. Young's absence.

1. Mr. Shea noted that he and Mr. Young talked to the Utah Supreme Court in April about getting feedback from judges and attorneys. They also suggested that the court enter an order requiring trial courts to use a MUJI 2d instruction if one applies, unless the trial court decides that the instruction is not an accurate statement of the law.

2. *CV1802. Negligent misrepresentation.* At the last meeting, the instruction was returned to the subcommittee to answer the question of whether the standard of proof is a preponderance of the evidence or clear and convincing evidence. Mr. Shea noted that the subcommittee did not respond. Mr. Carney said that some jurisdictions apply a preponderance standard, and some apply a clear-and-convincing standard and that he had not found any Utah case on point. Mr. Shea will add parentheticals to the case citations in the committee note to indicate which approach each case adopted. Mr. Lund thought that to require a plaintiff to prove by clear and convincing evidence that a defendant "should have known" that a representation was false would be a hybrid standard. The committee revised the elements of the claim to read:

(1) [name of defendant] represented to [name of plaintiff] that an important fact was true;

(2) [name of defendant]'s representation of fact was not true;

(3) [name of defendant] failed to use reasonable care to determine whether the representation was true;

(4) [name of defendant] was in a better position than [name of plaintiff] to know the true facts;

(5) [name of defendant] had a financial interest in the transaction;

(6) [name of plaintiff] relied on the representation, and it was reasonable for him to do so; and

(7) [name of plaintiff] suffered damage as a result of relying on the representation.

The committee approved the instruction and committee note as revised.

Dr. Di Paolo joined the meeting.

3. The committee continued its review of the attorney negligence instructions.

a. *CV402. Elements of claim for attorney's negligence.* Mr. Simmons thought that the second element (that the defendant owed a duty to the plaintiff) should not be included in the instruction because it presented a question of law for the court to decide, not a question of fact for the jury. Mr. Lund suggested combining the first two elements. Mr. Ferguson suggested revising the instruction to read: "You must find that [name of plaintiff] had an attorney-client relationship with [name of defendant]. If you find such a relationship, then [name of defendant] owed [name of plaintiff] a duty to use reasonable care. Then you must also find whether [name of defendant] breached that duty and whether any breach caused any harm to [name of plaintiff]." Mr. Carney noted that the new Restatement of Law Governing Lawyers is well written and clearly sets out the elements of a legal malpractice claim. Mr. Fowler suggested deleting the second element and expanding the fourth. Mr. Shea suggested deleting the second element and revising the remaining two elements to read:

(2) [name of defendant] failed to use the same degree of care, skill, judgment and diligence used by qualified lawyers under similar circumstances; and

(3) [name of defendant]'s failure to use that degree of care was a cause of [name of plaintiff]'s injury, loss or damage.

The committee changed "qualified lawyers" in subparagraph (2) to read "reasonably careful lawyers." Dr. Di Paolo suggested revising the introductory sentence to say that the plaintiff "must prove all of the following" or "must prove three things:" The committee re-approved the instruction as modified.

b. *CV403. Attorney-client relationship.* Mr. Simmons asked whether the attorney's statements must have been made to the plaintiff. Dr. Di Paolo and Mr. Lund thought they did not, that the fact that the statements may have been made to someone else goes to the reasonableness of the plaintiff's belief that he had an attorney-client relationship with the defendant but does not preclude an

attorney-client relationship from arising. At Mr. Simmons's suggestion, the committee note was revised to read, "If the attorney-client relationship is not disputed, rather than give this instruction, the court should instruct the jury that there is an attorney-client relationship." The committee re-approved the instruction and the committee note as modified.

c. *CV404. Duty of care.* Mr. Shea asked whether the instruction was necessary in light of the changes to CV402. Mr. Ferguson thought there was no harm in including the instruction. The committee changed "qualified lawyers" to "reasonably careful lawyers," to match CV404, and deleted the last sentence of the instruction. The committee re-approved the instruction as modified.

d. *CV405. Scope of representation.* Dr. Di Paolo noted that the instruction did not define "scope of representation" and asked what it meant. Mr. Lund noted that an attorney may limit what he will do for a client. Dr. Di Paolo suggested adding an appositive--"that is, what [he] will do in the case." The instruction was revised to read:

> In general, a lawyer has no duty to act beyond the scope of representation. "Scope of representation" means what the lawyer will do for the client. [Name of defendant] may limit the scope of representation if the limitation is reasonable and if [name of plaintiff] gives informed consent.

Dr. Di Paolo asked whether "informed consent" needed to be defined. Mr. Shea noted that it was only defined in the medical malpractice instructions. Mr. Carney noted that the phrase comes from Utah Rule of Professional Conduct 1.2, but the rule does not define the term. Mr. Lund asked whether informed consent required independent legal advice. The committee added a sentence to the committee note to the effect that the court may need to draft an instruction defining "informed consent" because rule 1.2 does not define the term. The committee approved the instruction as modified.

e. *CV406. Standard of care for plaintiff.* Messrs. Shea and Lund noted that the instruction does not define a standard of care but talks about comparative fault. The committee changed the title to read, "Plaintiff's actions." Ms. Blanch suggested that the instruction take the form: "[Name of defendant] claims that [name of plaintiff] was at fault. In determining whether [name of plaintiff] was at fault, you may consider . . . . You may not consider . . . ." Mr. Shea noted that the instruction presupposes instructions on comparative fault and asked whether the general negligence instructions on comparative fault were sufficient. Mr. Carney thought not. He and Mr. Fowler suggested adding a cross-

reference to CV211 ("allocation of fault"), with a notation to insert CV406 into CV211 if comparative fault is at issue. The committee revised the instruction to read:

> [Name of defendant] claims that [name of plaintiff]'s actions were a cause of the harm. In deciding whether [name of plaintiff] was at fault,
> (1) you may not consider [his] actions before hiring [name of defendant]; however,
> (2) you may consider [his] actions after hiring [name of defendant].

The committee approved the instruction as modified.

f. *CV407. Fiduciary relationship*. The committee questioned whether the jury had to find a fiduciary relationship between the attorney and client. The committee thought that a fiduciary duty was a given if there was an attorney-client relationship. The committee questioned the need for the instruction. Mr. Carney quoted from *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283 (Utah 1996), that "legal malpractice" is a generic term for three different causes of action: (1) breach of contract; (2) breach of fiduciary duty; and (3) negligence. Mr. Fowler asked if we needed to add breach of contract instructions to this section. Mr. Ferguson noted that a party may plead a claim for breach of fiduciary duty because it may have a different statute of limitations, may give rise to an award of attorney's fees, and may give rise to punitive damages. Mr. Simmons suggested that the instruction track the format of CV402:

> [Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim, [name of plaintiff] must prove that--
> (1) [he] and [name of defendant] had an attorney-client relationship;
> (2) [name of defendant] breached a duty to [name of plaintiff] by--
> (a) taking advantage of [name of defendant]'s legal knowledge and position;
> (b) failing to have undivided loyalty to [name of plaintiff];
> (c) failing to treat all of [name of plaintiff]'s matters as confidential;
> (d) concealing facts or law from [name of plaintiff]; or

(e) deceiving [name of plaintiff]; and

(3) [name of defendant]'s breach was a cause of [name of plaintiff]'s injury, loss or damage.

Next Meeting. The next meeting is Monday, June 8, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m., to the strains of "Back in the Saddle Again" wafting from Mr. Carney's computer.

Tab 2

Attorney Negligence

(1) CV401. Committee Note on Attorney Negligence Instructions

The Committee intentionally omitted MUJI 1st Instructions 7.45 and 7.46 because there is no Utah case law supporting them.

If the defendant claims not to be liable because the law is uncertain, the court decides as a matter of law whether the law is uncertain. Watkiss & Saperstein v. Williams, 931 P.2d 840 (Utah 1997).

Do we call this attorney "negligence" or "malpractice?"

(2) CV402. Elements of claim for attorney's negligence.

[Name of plaintiff] claims that [name of defendant] negligently performed legal services. To succeed on this claim, [name of plaintiff] must prove three things:

(1) [he] and [name of defendant] had an attorney-client relationship;

(2) [name of defendant] failed to use the same degree of care, skill, judgment and diligence used by reasonably careful attorneys under similar circumstances.; and

(3) [name of defendant]'s failure to use that degree of care was a cause of [name of plaintiff]'s ~~injury, loss or damage~~ harm.

MUJI 1st Reference

7.42

References

Crestwood Cove Apartments Business Trust v. Turner, 2007 UT 48, 164 P.3d 1247.

Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17.

Committee Notes

Approved

(3) CV403. Elements of claim for breach of fiduciary duty.

[Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim, [name of plaintiff] must prove ~~that~~ three things:

(1) [he] and [name of defendant] had an attorney-client relationship;

(2) [name of defendant~~] breached the duty by~~:

[(A) ~~taking~~ took advantage of [his] legal knowledge and position;]

[(B) ~~failing~~ failed to have undivided loyalty to [name of plaintiff];]

[(C) ~~failing~~ failed to treat [name of plaintiff]'s matters as confidential;]

[(D) ~~concealing~~ concealed important facts or law from [name of plaintiff;] or

[(E) ~~deceiving~~ deceived [name of plaintiff].] and

(3) [name of defendant]'s ~~breach was~~ act(s) were a cause of [name of plaintiff]'s ~~injury, loss or damage~~ harm.

MUJI 1st Reference

7.49

References

Kirkpatrick v.Wiley, Rein & Fielding, 909 P2d 1283 (Utah 1996).

Smoot v. Lund, 13 Utah 2d 168, 369 P2d 933 (1962).

Shaw Resources v. Pruitt, Gushee & Bachtell, 2006 UT App 313,142 P.3d 560.

Walter v. Stewart, 2003 UT App 86,67 P.3d 1042.

Committee Notes

This list of fiduciary duties is not exhaustive, and the judge should instruct only on those duties for which there is evidence.

This instruction should be given only in cases that involve claims of breach of fiduciary duty, for example, mishandling client funds, breach of confidentiality, conflict of interest, etc. Include in the instruction only those items for which there is evidence.

(4) CV404. Attorney-client relationship.

An attorney-client relationship can be established by an express contract between the parties, or by an implied contract based upon [name of defendant]'s statements or conduct. An implied attorney-client relationship exists when [name of plaintiff] reasonably believes that [name of defendant] represents [name of plaintiff]'s legal interests. The reasonableness of that belief must be weighed in light of all of the facts.

MUJI 1st Reference

7.43

References

Roderick v. Ricks, 2002 UT 84, 54 P.3d 1119.

Kilpatrick v. Wiley, Rein & Fielding, 2001 UT 107, 37 P.3d 1130.

Utah State Bar Ethics Advisory Opinion No. 05-04, Issued September 8, 2005.

Committee Notes

If the attorney-client relationship is not disputed, rather than give this instruction, the court should instruct the jury that that fact is stipulated.

Approved

(5) CV405. Duty of care.

[Name of defendant] has a duty to use the same degree of care, skill, judgment and diligence used by reasonably careful attorneys under similar circumstances.

MUJI 1st Reference

7.44

References

Watkiss & Saperstein v. Williams, 931 P.2d 840 (Utah 1997).

Williams v. Barber, 765 P.2d 887 (Utah 1988).

Committee Notes

Approved

(6) CV406. Scope of representation.

In general, an attorney has no duty to act beyond the scope of representation. "Scope of representation" means what the attorney will do for the client. [Name of defendant] may limit the scope of representation if the limitation is reasonable, and if [name of plaintiff] gives informed consent.

MUJI 1st Reference

7.47

References

Lundberg v. Backman, 11 Utah 2d 330, 358 P.2d 987 (1961).

Bruer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990).

Rule of Professional Conduct 1.2. Scope of Representation.

Utah State Bar Ethics Advisory Opinion No. 05-04.

Committee Notes

There may be some circumstances in which there is a duty to act beyond an agreed upon limit. The court may need to draft an instruction defining "informed consent" because RPC 1.2 does not.

Approved

(7) CV407. “Cause” defined.

[Name of plaintiff] must prove that if [name of defendant] had done the act [he] failed to do, or not done the act complained about, [name of plaintiff] would have benefitted.

I've instructed you before that the concept of fault includes a wrongful act or failure to act that causes harm.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence;

and

(2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

There may be more than one cause of the same harm.

MUJI 1st Reference

7.50

References

Kilpatrick v. Wiley, Rein & Fielding, 909 P2d 1283 (Utah 1996).

Harline v. Barker, 854 P2d 595 (Ut App. 1992).

Dunn v. McKay, Burton, McMurray & Thurman 584 P2d 894 (Utah 1978).

Young v. Bridwell, 20 Utah 2d 332, 437 P2d 686 (1968).

See Instruction CV209, “Cause” defined.

Committee Notes

(8) CV408. Plaintiff’s fault.

[Name of defendant] claims that [name of plaintiff]’s actions were a cause of the harm. In deciding whether [name of plaintiff] was at fault,

(1) you may not consider [his] actions before hiring [name of defendant];

(2) however, you may consider [his] actions after hiring [name of defendant].

MUJI 1st Reference

7.48

References

Steiner v. Johnson & Higgins, 996 P2d 531 (Utah 2000).

Committee Notes

Approved

(9) CV409. Damages caused by a judicial mistake.

[Name of defendant] claims that any damages [name of plaintiff] may have suffered were caused by mistakes made by a judge. [Name of defendant] is not liable for damages that result from mistakes by a judge.

MUJI 1st Reference

References

Crestwood Cove Apartments Business Trust v. Turner, 2007 UT 48, 164 P.3d 1247.

Committee Notes

Approved

Damages is described as an element of the claim in 402, but there is no instruction on calculating damages. The following is from MUJI 1st, citing only BAJI as its authority. It does not instruct on calculating damages, but has the same concept as the MUJI 1st instruction on proximate cause. (Highlighted text in 407.)

MUJI 7.52 PLAINTIFF MUST PROVE DAMAGES RESULTING FROM ATTORNEY NEGLIGENCE

In order to recover damages from an attorney for negligence in the handling of a lawsuit, the plaintiff must not only establish that the attorney was negligent but also must establish that, but for such negligence, the prior lawsuit [would have resulted in a collectible judgment in the plaintiff's favor] [would have been successfully defended].

References:

BAJI No. 6.37.5 (1986). Reprinted with permission; copyright © 1986 West Publishing Company

Tab 3

Construction Contracts

Table of Contents

(1) CV2201. Committee Notes on Construction Contract Instructions.

These instructions name the owner and the contractor as the parties. They should be amended appropriately if the parties are the contractor and the subcontractor.

(2) CV2202. Compliance with public bidding instructions.

[Name of contractor] claims that [name of governmental entity] was required by law to award [him] the construction contract. [Name of governmental entity] claims that [describe claim].

[Name of governmental entity] is not required to accept any bid. However, if [name of governmental entity] did accept a bid, it was required to accept the lowest "responsive responsible" bid. The contractor who submitted the lowest responsive responsible bid is the one who:

(1) submitted a bid that complies with the invitation to bid;

(2) submitted a bid that satisfies the plans and specifications of the invitation to bid;

(3) satisfies [name of owner governmental entity]'s requirements for financial strength, capacity to perform, integrity, and/or reliability;

(4) provides a bid bond or equivalent money as a condition of the construction contract; and

(5) provides a payment and performance bond as required by law.

If you find that [name of contractor] submitted the lowest responsive responsible bid and that [name of governmental entity] accepted a different bid, then [name of governmental entity] is liable to [name of contractor] for damages.

Committee Note

There are statutory exceptions to the general rule expressed in this instruction. Need cite

References

Utah Code Sections 11-39-101(10), 11-39-103 and 11-39-107.

Cal Wadsworth Const. v. City of St. George, 898 P.2d 1372, 1375 (Utah 1995).

Rapp v. Salt Lake City, 527 P.2d 651, 654 (Utah 1974).

Thatcher Chem. Co. v. Salt Lake City Corp., 445 P.2d 769, 771 (Utah 1968).

Schulte v. Salt Lake City, 10 P.2d 625, 628 (Utah 1932).

Approved

(3) CV2203. "Responsive bid" defined.

A bid is "responsive" if it provides all information and documentation required by the invitation to bid.

References

Utah Code Sections 63G-6-103(25) and 63G-6-401(7)(a).

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

Taylor Bus Service, Inc. v. San Diego Bd. of Education, 195 Cal.App.3d 1331 (Cal. Ct. App. 1987).

Konica Business Machines U.S.A., Inc. v. Regents of Univ. of California, 206 Cal.App.3d 449 (Cal. Ct. App. 1988).

Approved

(4) CV2204. "Responsible bid" defined.

A "responsible bid" is a bid made by a party who has the capability, integrity and reliability to fully perform the contract requirements in good faith.

References

Utah Code Sections 63G-6-103(24) and 63G-6-401(7).

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

Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974).

Taylor Bus Service, Inc. v. San Diego Bd. of Education, 195 Cal.App.3d 1331 (Cal. Ct. App. 1987).

City of Inglewood-L.A. County Civic Ctr. Auth. v. Superior Court, 500 P.2d 601 (Cal. 1972).

Committee Note

"Good faith" is used in the statutory definition of "responsible bid", but is itself not a defined term.

Approved

(5) CV2205. Owner's duty to inform.

[Name of contractor] claims that [name of owner] had a duty to disclose the following information before the bid was submitted: [describe information.] You must decide whether, [name of contractor] has proved that:

(1) [name of owner] did not disclose the above-described information to [name of contractor];

(2) the undisclosed information was important to [name of contractor]'s ability to perform the contract; and

(3) [name of owner] had knowledge about the undisclosed information that was not available to [name of contractor].

If you find that [name of contractor] has proved all of these facts, then [name of owner] is liable to [name of contractor] for damages.

References

Bruner & O'Connor on Construction Law § 3:25 (2002).

Guarantee State Bank v. Farm Service Agency, 68 Fed.Appx 134, 137 (10th Cir. 2003).

J.F. Shea Co., Inc. v. U.S., 4 Cl. Ct. 46, 53 (1983).

Welch v. State of California, 139 Cal.App.3d 549, 188 Cal.Rptr. 726 (1983).

Approved

(6) CV2206. Contractor's right to rely on owner-furnished information.

[Name of contractor] claims that [he] should recover the costs of extra work caused by inaccurate or misleading information provided by [name of owner]. [Describe information.] To succeed on this claim, [name of contractor] must prove that:

(1) [name of owner] provided the information to [name of contractor];

(2) the information was inaccurate or misleading;

(3) [name of contractor] reasonably relied on the information; and

(4) the work added to [name of contractor]'s [time/costs].

References

United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L.Ed. 166 (1918).

Jack B. Parson Const. Co. v. State By and Through Dept of Transp., 725 P2d 614 (Utah 1986).

Thorn Const. Co. v. Utah Dept. of Transp., 598 P.2d 365, 368 (Utah 1979).

Hensel Phelps Const. Co., 413 F.2d 704 (10th Cir. 1969).

Wunderlich Contracting Co. v. U.S., 240 F.2d 201, 205 (10th Cir. 1957).

Railroad Waterproofing Corp. v. U.S., 137 F.Supp. 713, 715 (Ct. Cl. 1956).

(7) CV2207. Contractor's duty to inquire or investigate.

[Name of owner] claims that [he] is not liable for damages because [name of contractor] knew or should have known of [describe facts] that created a duty to reasonably [inquire about/investigate] the accuracy and completeness of the information provided by [name of owner].

To succeed on this claim [name of owner] must prove that the facts described above were either:

(1) a material mistake or omission in the information furnished by [name of owner], or

(2) a material conflict in the information furnished by [name of owner].

In deciding whether the [name of contractor] knew or should have known of [describe facts], you may consider:

(1) the time allotted by the owner for the investigation;

(2) the extent of site access;

(3) the conditions observable at the time of year;

(4) the cost of independent site exploration; and

(5) the specificity and sufficiency of information furnished by the owner.

Committee Note

According to prevailing case authority, the contractor is held to an "actual knowledge" or "should have known" standard.

References

Blount Brothers Construction Company v. United States, 171 Ct.Cl. 478, 346 F.2d 962 (1965)

White v. Edsall Construction Company, Inc., 296 F.3d 1081 (2002)

Frontier Foundations, Inc., 818 P.2d 1040, 1041 (Utah App. 1991).

Guarantee State Bank v. Farm Service Agency, 68 Fed.Appx. 134, 137 (10th Cir. 2003).

Rapid Demolition Co., Inc. v. New York, 49 A.D.3d 844 (N.Y.A.D. 2008).

Servidone Constr. Corp. v. United States, 19 Cl.Ct. 346, 373 (1990)

4 Bruner & O'Connor Construction Law § 14:55 (2008).

S. Stein, Construction Law ¶ 5B.01[3][a]

Kent will rewrite.

(8) CV2208.Contractor's right to withdraw bid.

[Name of contractor] claims that [he] had the right to withdraw the bid even though the [statute/invitation to bid] states that a bid may not be revoked. To succeed on this claim, [name of contractor] must prove that:

(1) the bid contains a substantial clerical or mathematical mistake, as opposed to an error in judgment;

(2) [name of contractor]'s mistake was unintentional; and

(3) [name of contractor] communicated the mistake to [name of owner] before the contract was awarded.

References

Union Tank Car Co. v. Wheat Bros., 387 P.2d 1000 (Utah 1964).

Sulzer v. Bingham Pumps, Inc. v. Lockheed Missiles & Space Co., 947 F.2d 1362 (9th Cir. 1991).

First Baptist Church v. Barber Contracting Co., 377 S.E.2d 717 (Ga. Ct. App. 1989).

M.J. McGough Co. v. Jane Lamb Memorial Hosp., 302 F.Supp. 482 (S.D.Iowa 1969).

ABA Model Instruction 3.03.

Restatement (Second) of Contracts § 153 (illustration 1).

Corbin on Contracts §609.

Approved

(9) CV2209. Mutual mistake.

[Name of owner] claims that the contract is not enforceable because both parties were mistaken about [describe mutually mistaken important fact].

For [name of name of owner] to succeed on this claim, you must find that [he] proved the following by clear and convincing evidence:

(1) that at the time the contract was entered into both [name of owner] and [name of contractor] were mistaken about these facts, and

(2) that these facts were a basic assumption or an important fact upon which they based their bargain.

References

Deep Creek Ranch, LLC v. Utah State Armory Bd., 2008 UT 3, ¶¶17-18, 178 P.3d 886.

Arnell v. Salt Lake County Bd. of Adjustment, 2005 UT App 165, ¶¶ 41-42.

Mostrong v. Jackson, 866 P.2d 573, 579-80 (Utah Ct. App. 1993).

Mooney v. BR & Associates, 746 P.2d 1174, 1178 (Utah Ct. App. 1987).

See Instruction CV2129, Mutual mistake.

Approved

(10) CV2210. Unilateral mistake.

[Name of contractor] claims the contract is not enforceable because [he] was mistaken about [insert description of unilateral mistake of fact].

For [name of contractor] to succeed on this claim, you must find that [he] has proved each of the following by clear and convincing evidence:

(1) [name of contractor] was mistaken about [insert description of mistake];

(2) [his] mistake has such serious consequences that to enforce the contract 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 about which he was mistaken; and

(5) [name of owner] can be put back in the same position [he] was in before the contract, losing only the benefit of the bargain.

References

John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205 (Utah 1987).

Mostrong v. Jackson, 866 P.2d 573 (Utah Ct. App. 1993).

Grahn v. Gregory, 800 P.2d 320 (Utah Ct. App. 1990).

See Instruction CV2130, Unilateral mistake.

See href=http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2127>Instruction CV2127, Substantive unconscionability.

Approved

(11) CV2211. Promissory estoppel.

[Name of party] claims that [name of other party] must perform as promised even though there was no contract between them. To succeed on this claim, [name of party] must prove that:

(1) [name of other party] was aware of all the important facts;

(2) [name of other party] promised to [describe promise];

(3) [name of other party] knew or should have expected that this promise would lead [name of party] to act or not act;

(4) [name of party] reasonably relied on the promise;

(5) [name of party]'s action or inaction resulted in damages.

References

Youngsblood v. Auto-Owners Ins. Co., 2007 UT 28.

Tolboe Const. Co. v. Staker Paving & Const. Co., 682 P.2d 843 (Utah 1984).

Union Tank Car Co. v. Wheat Bros., 387 P.2d 1000 (Utah 1964).

Hess v. Johnston, 2007 UT App. 213.

See Instruction CV2114, Promissory estoppel.

Approved

(12) CV2212. Owners duty not to interfere with construction.

[Name of contractor] claims [name of owner] interfered with [name of contractor]'s work. To succeed on this claim, [name of contractor] must prove that:

(1) [name of owner] interfered with [name of contractor]'s ability to perform the contract;

(2) the interference was unreasonable under the circumstances;

(3) the interference caused [name of contractor] damages.

References

Lester N. Johnson v. City of Spokane, 588 P.2d 1214 (WA App. 1985).

Steven G.M. Stein, Construction Law, 5.03[2][c][ii].

Approved

(13) CV2213. Defective plans and specifications.

If [name of contractor] proves that [he] acted reasonably in following [describe the specific plans and specifications] provided by [name of owner], then [name of contractor] can recover from [name of owner] the costs caused by reasonable reliance on the plans and specifications.

References

United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L.Ed. 166 (1918).

SME Industries, Inc. v Thompson, Ventulett, Stainback and Associates, Inc., 2001 UT 54, 28 P.3d 669 (Utah 2001).

R.C. Tolman Constr. Co. v. Myton Water Ass'n, 563 P.2d 780 (Utah 1977).

Jack B. Parsons Constr. Co. v. State, 725 P.2d 614 (Utah 1986).

Thorn Construction Co. v. Utah Dep't of Transportation, 598 P.2d 365 (Utah 1979).

Approved

(14) CV2214. ~~Owner's damages for contractor's defective work.~~Contractor's damages for defective plans and specifications.

If you find [name of contractor] performed defective work, [name of owner] is entitled to:

(1) the cost to correct the defective work, unless

(2) the cost to correct the defective work unreasonably exceeds the project's decrease in value.

If the cost to correct the defective work unreasonably exceeds the project's decrease in value, [name of owner] is entitled to the project's decrease in value.

References

Restatement (Second) of Contracts § 348

Bruner & O'Connor on Construction Law §§ 19:57-62

Leishman v. Kamas Valley Lumber Co., 19 Utah 2d 150, 152, 427 P.2d 747, 749 (Utah 1967)

Eleopulos v. McFarland and Hullinger, LLC, 2006 UT App 352, ¶ 11, 145 P.3d 1157, 1159 (2006)

Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889 (N.Y. 1921)

Committee Notes

Kent will rewrite.

(15) CV2215. Contractor's liability for defective work.

[Name of owner] claims that [name of contractor] performed defective work. To succeed on this claim, [name of owner] must prove that:

(1) [name of contractor]'s work did not meet the contract requirements;

OR

(2) [name of contractor] did not perform the work with the degree of care ordinarily used by contractors doing the same or similar work;

AND

(3) [name of contractor]'s work caused [name of owner]'s damages.

References

Trujillo v. Utah Dep't. of Transp., 1999 UT App 227, ¶ 38, 986 P.2d 752, 763 (Utah Ct. App. 1999).

Benson v. Ames, 604 P.2d 927, 929 (Utah 1979)

Bruner & O'Connor on Construction Law §§ 9:67

(16) CV2216. Duty to provide access to the worksite.

[Name of contractor] claims [he] had additional costs because [name of owner] failed to provide access to the worksite. To succeed on this claim, [name of contractor] must prove that:

(1) [he] was prepared to work on [dates];

(2) [his] failure to perform the work was exclusively because [name of owner] failed to [describe lack of access]; and

(3) [he] had additional costs.

References

Steven G.M. Stein, Construction Law, 5.03[2][c][ii].

Add Utah cases.

Approved

(17) CV2217. Claim for extra work.

[Name of contractor] claims additional [time/compensation] for work that [name of owner] required but that was not part of the original contract. To succeed on this claim, [name of contractor] must prove that:

(1) the work was not in the parties' original contract;

(2) [name of owner], by words or conduct, directed [name of contractor] to perform the work;

(3) [name of owner] knew or should have known that the work required additional [time/compensation];

(4) [name of contractor] performed the work; and

(5) the work added to [name of contractor]'s [time/compensation].

References

Highland Const. Co. v. Union Pacific R. Co., 683 P.2d 1042 (Utah 1984).

Thorn Const. Co., Inc. v. Utah Dept. of Transp., 598 P.2d 365 (Utah 1979).

Richards Contracting Co. v. Fullmer Bros., 417 P.2d 755 (Utah 1966).

Campbell Bldg. Co. v. State Road Commission, 70 P.2d 857 (Utah 1937).

Hoth v. White, 799 P.2d 213 (Utah App. 1990).

Brixen & Christopher, Architects v. Elton, 777 P.2d 1039 (Utah App. 1989).

Approved.

(18) CV2218. ~~Owner's damages for c~~Contractor's liability for defective work.

If you find [name of contractor] performed defective work, [name of owner] is entitled to:

(1) the cost to correct the defective work, unless

(2) the cost to correct the defective work unreasonably exceeds the project's decrease in value.

If the cost to correct the defective work unreasonably exceeds the project's decrease in value, [name of owner] is entitled to the project's decrease in value.

References

Restatement (Second) of Contracts § 348

Bruner & O'Connor on Construction Law §§ 19:57-62

Leishman v. Kamas Valley Lumber Co., 19 Utah 2d 150, 152, 427 P.2d 747, 749 (Utah 1967)

Eleopulos v. McFarland and Hullinger, LLC, 2006 UT App 352, ¶ 11, 145 P.3d 1157, 1159 (2006)

Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889 (N.Y. 1921)

Committee Notes

Kent will rewrite.

(19) CV2219. Additional time or compensation for extra work.

In determining the amount of additional [time/compensation] to be awarded for extra work, [name of contractor] is entitled to the amount agreed to or, if there was no agreement, to a reasonable amount.

References

Allen-Howe Specialties Corp. v. U. S. Const., Inc., 611 P.2d 705 (Utah 1980).

Campbell Bldg. Co. v. State Road Commission, 70 P.2d 857 (Utah 1937).

Wilson v. Salt Lake City, 52 Utah 506, 174 P. 847 (Utah 1918).

Salt Lake City v. Smith, 104 F. 457 (C.A.8 Dist. Utah 1900)

(20) CV2220. "Waiver" defined.

A "waiver" is the intentional release of a known right. To decide whether a party has waived a contract right, you must determine that all of the following have been proved:

(1) a party has a contract right;

(2) the party knew of the right; and

(3) the party intended to release that right.

The intent to release a right may be express or implied and may be determined by considering all relevant circumstances.

References

United Park City Mines Co. v. Stichting Mayflower Mountain Fonds, 140 P.3d 1200 (Utah 2006).

Jensen v. IHC Hospitals, Inc., 82 P.3d 1076, (Utah 2003).

Soter's Inc. v. Deseret Federal Sav. & Loan Ass'n, 857 P.2d 935 (Utah 1993).

(21) CV2221. Waiver of change notice.

[Name of contractor] claims that [name of owner] waived the right to require written notice of contract changes. To succeed on this claim, [name of contractor] must prove that [name of owner], by words or by conduct:

(1) understood that the work performed by [name of contractor] was extra; and

(2) agreed or acknowledged that the extra work would require a change to the contract [time/compensation].

References

Darrell J. Didericksen & Sons, Inc. v. Magna Water and Sewer Imp. Dist., 613 P.2d 116 (Utah 1980).

Campbell Bldg. Co. v. State Road Commission, 70 P.2d 857 (Utah 1937).

Uhrhahn Const. & Design, Inc. v. Hopkins, 179 P.3d 808 (Utah App. 2008).

(22) CV2222. Extra work due to site conditions different from contract terms (Type 1 differing site condition).

[Name of contractor] claims additional [time/compensation] for extra work caused by site conditions different from those described in the contract documents. To succeed on this claim, [name of contractor] must prove that:

(1) the contract documents describe certain site conditions;

(2) [name of contractor] reasonably relied on the description;

(3) [the site conditions were different from those described; and

(4) the different site conditions added to [name of contractor]'s [time/compensation].

References

Jack B. Parson Const. Co. v. State By and Through Dept. of Transp., 725 P.2d 614 (Utah 1986).

Thorn Const. Co., Inc. v. Utah Dept. of Transp., 598 P.2d 365 (Utah 1979).

L. A. Young Sons Construction Co. v. County of Tooele, 575 P.2d 1034 (Utah 1978).

Frontier Foundations, Inc. v. Layton Const. Co., Inc., 818 P.2d 1040 (Utah App. 1991).

(23) CV2223. Extra work due to unusual site conditions unknown to the parties. (Type 2 differing site condition).

[Name of contractor] claims additional [time/compensation] for extra work caused by site conditions that were unknown to the parties. To succeed on this claim, [name of contractor] must prove that there were important differences between the site conditions and those usually encountered.

References

Youngdale & Sons Const. Co., Inc. v. U.S., 27 Fed. Cl. 516 (1993)

Servidone Const. Corp. v. U.S., 19 Cl. Ct. 346 (1990)

Bruner and O'Connor On Construction Law § 14:53 (2002)

(24) CV2224. Implied contract or unjust enrichment.

[Name of contractor] claims additional [time/compensation] for extra work even though the contract does not provide for it. To succeed on this claim, [name of contractor] must prove that:

(1) [name of owner] requested [name of contractor] to perform extra work; and

(2) [name of contractor] expected additional [time/compensation] for the extra work;

(3) [name of owner] knew or should have known that [name of contractor] expected additional [time/compensation];

(4) [name of contractor] performed the extra work that benefited [name of owner]; and

(5) it would be unjust for [name of owner] to benefit from the extra work without providing [name of contractor] additional [time/compensation].

References

Uhrhahn Const. & Design, Inc. v. Hopkins, 179 P.3d 808 (Utah App. 2008).

Gary Porter Const. v. Fox Const., Inc., 101 P3d 371 (Utah App. 2004).

ProMax Development Corp. v. Mattson, 943 P3d 247 (Utah App. 1997).

Davies v. Olson, 746 P2d 264 (Utah App. 1987).

(25) CV2225. Cardinal changes.

[Name of contractor] claims that [he] should be paid the reasonable value of the work [he] performed instead of the contract price because [name of owner] made changes that were so excessive or unreasonable that the general character and purpose of the original contract was changed. In making your determination, you may consider the nature and total effect of all the changes.

References

Highland Const. Co. v. Union Pacific R. Co., 683 P. 2d 1042 (Utah 1984).

Allen-Howe Specialties Corp. v. U. S. Const., Inc., 611 P.2d 705 (Utah 1980).

Wilson v. Salt Lake City, 174 P. 847 (Utah 1918).

Wunderlich Contracting Co. v. U.S. ex re Reischel & Cottrell, 240 F.2d 201 (C.A.10 Dist. Utah 1957).

Salt Lake City v. Smith, 104 F. 457 (C.A.8 Dist. Utah 1900).

(26) CV2226. Excusable delay.

[Name of contractor] claims that [he] is entitled to ~~an extension of the contract~~ extra [time/compensation] to complete the work ~~as a result of a~~ because of delay that was beyond [his] control. To succeed on this claim, [name of contractor] must prove that the delay:

(1) ~~the delay~~ was beyond [his] control;

(2) ~~the delay~~ was caused by events that were not foreseeable by either ~~the [name of contractor] or the [name of owner]~~ party at the time the contract was made;

(3) ~~the delay~~ is not the responsibility of either ~~[name of contractor] or [name of owner]~~ party;

(4) ~~the delay~~ was not assumed or waived ~~or assumed~~ by [name of contractor]; and

(5) ~~the delay~~ required [name of contractor] to ~~incur~~ take more [time/compensation] ~~in performing~~ to perform the ~~contract~~ work.

It sounds like “assumed or waived” is a term of art. Jurors likely will not understand its implications without a definition.

References

Higgins v. City of Fillmore, 639 P.2d 192, 193 (Utah 1981).

Steenberg Construction Co. v. Prepakt Concrete Co., 381 F.2d 768 (10th Cir. 1967).

Rapp v. Mountain States Telephone and Telegraph Company, 606 P.2d 1189 (Utah 1980).

S. Stein, Construction Law § 6.09 (1999).

Bruner & O’Connor on Construction Law, § 15:42 (2002).

CJS Contracts § 391.

CJS Contracts § 580.

(27) CV2227. Inexcusable delay.

[Name of owner] claims that [name of contractor] is not entitled to ~~an extension of the contract~~ extra time or ~~additional~~ compensation ~~to complete the work as a result of a~~ because the delay ~~that~~ was the responsibility of [name of contractor]. To succeed on this claim, [name of owner] must prove that the delay was:

~~In order for [name of owner] to be entitled to a determination that [name of contractor] is not entitled to an extension of the contract time or additional compensation [name of owner] must prove that:~~

(1) ~~the delay was~~ caused by [name of contractor] and not [name of owner];

(2) ~~the delay was~~ not beyond [name of contractor]'s control;

(3) ~~the delay was~~ reasonably foreseeable by the [name of contractor]; and

(4) ~~the delay was~~ not assumed or waived by [name of owner].

This instruction is nothing but the negation of what plaintiff has to prove. It should be deleted.

References

Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 747 (Utah 1939).

Bruner & O'Connor on Construction Law, § 15:30 (2002).

(28) CV2228. Compensable delay.

[Name of contractor] claims that [he] is entitled to extra [time/compensation] ~~to perform the contract work~~ because [name of owner] [describe events ~~attributed to the claim]~~ that adversely impacted ~~[name of~~ contractor~~]~~'s ~~performance of the~~ work]. To succeed on this claim, [name of contractor] must prove that the delay:

~~In order for [name of contractor] to recover extra compensation and extra time to perform the contract work, [name of contractor] must prove the following by a preponderance of the evidence:~~

(1) was caused by [name of owner] and not [name of contractor];

(2) was ~~not beyond~~ within [name of owner]'s control;

(3) was reasonably foreseeable by [name of owner];

(4) was not assumed or waived by [name of contractor]; and

(5) required [name of contractor] to ~~incur more costs and time in performing~~ take more [time/compensation] to perform the work.

This instruction also seems like it should be integrated into 2225. Question: In paragraph (3), is foreseeability measured at the time of the contract as in 2225? It also adds "reasonable," which is not in its 2225 counterpart.

References

Burgess Construction Company v. M. Morrin & Son Company, Inc., 526 F.2d 108, 114 (10th Cir. 1975).

Higgins v. City of Fillmore, 639 P.2d 192, 193 (Utah 1981).

Steenberg Construction Co. v. Prepakt Concrete Co., 381 F.2d 768 (10th Cir. 1967).

Rapp v. Mountain States Telephone and Telegraph Company, 606 P.2d 1189 (Utah 1980).

Allen-Howe Specialties Corporation v. U.S. Construction, Inc., 611 P.2d 705, 709 (Utah 1980).

Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Hartford Accident & Indemnity Co., 95 P.2d 736, 747 (Utah 1939).

S. Stein, Construction Law § 6.11 (1999).

Bruner & O'Connor on Construction Law, § 15:50 (2002).

CJS Contracts § 580.

(29) CV2229. Concurrent delay.

In this case, you have heard evidence that both [name of contractor] and [name of owner] contributed to the ~~construction~~ delay~~(s)~~. If you find that both parties contributed to the delay~~(s)~~, then neither party is entitled to recover damages as a result of the delay.

References

Higgins v. City of Fillmore, 639 P.2d 192, 194 n.2 (Utah 1981).

S. Stein, Construction Law § 6.10[3] (1999).

Bruner & O'Connor on Construction Law, § 15:67 (2002).

Is the first sentence commenting upon the evidence? Is not the last sentence simply the negation of paragraph (3) in 2225? This seems more like concurrent fault than concurrent delay.

(30) CV2230. Acceleration.

[Name of contractor] claims that he is entitled to damages for extra costs incurred because [name of owner] required [him] to perform the work ~~within a time period which was less than the performance~~ in less time than required ~~under~~ by the contract ~~[or the owner increased the scope of work and did not increase the contract time]~~. This bracketed option sounds a lot like "extra work," rather than acceleration. We have several other instructions on extra work. If there are additional concepts here, they should be integrated into those instructions and deleted here.

~~In order for [name of contractor] to recover damages for acceleration,~~To succeed on this claim [name of contractor] must prove that:

(1) [name of contractor] is not at fault for any delay related to the claim;

(2) [name of owner] ~~either:~~

~~(a)~~ ordered [name of contractor] to complete the work in less time than required by the contract; ~~OR~~

~~(b) increased the scope of the work, but did not to grant [name of contractor] an extension of time.~~

(3) [name of contractor] incurred extra costs ~~that were the result of either:~~

~~(a) [name of owner]'s direction to [name of contractor]~~ to complete the work in less time than required by the contract~~; OR~~.

~~(b) [name of owner]'s directing [name of contractor] to increase the scope of the work, and refusing to grant [name of contractor]an extension of time.~~

References

Procon Corp. v. Utah Dep't of Trans., 876 P.2d 890, 894 (Utah Ct. App. 1994).

Bruner & O'Connor on Construction Law, § 15:89 (2002).

CJS Contracts § 391.

(31) CV2231. ~~No d~~Damages for delay.

~~The contract provides that if [name of owner/owner's agent] delays [name of contractor], [name of contractor] is entitled to extra time to complete the work but is not entitled to recover damages caused by the delay. However,~~ [~~n~~Name of contractor] claims damages for delays caused by [name of owner/owner's agent]~~'s unreasonable interference with [name of contractor]'s opportunity to proceed with work in the manner provided by the contract~~. The contract provides that if [name of owner/owner's agent] delays [name of contractor], [name of contractor] is entitled to extra time to complete the work but is not entitled to recover damages caused by the delay. However, in limited circumstances, Utah law permits damages for delay, despite the contract.

To succeed on this claim, [name of contractor] must prove ~~either:~~

[(1) that the parties did not contemplate the delay at the time they entered into the contract and the delay was so excessive and unreasonable that it falls outside of the contract.]~~; or~~

[(2) that [name of owner/owner's agent] caused the delay by direct, active, or willful interference with [name of contractor]'s work.]

~~If you find neither of the above, you must find that [name of contractor] cannot recover damages for delay and is entitled only to extra time for the delay. If you find either of the above, you must also award [name of contractor] damages caused by the delay.~~

References

Allen-Howe Specialties Corp. v. U.S. Const., Inc., 611 P.2d 705 (Utah 1980).

W. Eng'rs, Inc. v. State By and Through Rd. Comm'n, 437 P.2d 216 (Utah 1968).

Acret, James, Construction Litigation Handbook. § 7.8.

Committee Note

The judge should instruct the jury only on those elements, (1) or (2), for which there is evidence.

(32) CV2232. Right to suspend work for non-payment.

[Name of contractor] claims [he] suspended the work because [name of owner] failed to make required progress payments. To succeed on this claim, [name of contractor] must prove that:

(1) [name of owner]'s failure to make the payments was ~~a material~~ an important breach of the contract; and

(2) [name of owner] had no reasonable excuse to withhold the payments.

References

Darrell J. Didericksen & Sons v. Magna Water & Sewer Improv. Dist., 613 P.2d 1116, 1119 (Utah 1980).

(33) CV2233. Right to suspend work for interference.

[Name of contractor] claims that [he] suspended the work because [name of owner], or events within [his] control, unreasonably interfered with [name of contractor]'s performance of the work~~, which entitled [name of contractor] to suspend the work and seek recovery of damages~~. ~~If~~ To succeed on this claim, [name of contractor] must prove~~s~~ that [name of owner] or events within [his] control interfered with [name of contractor]'s performance of [his] work for an unreasonable period of time~~, you must find that [name of contractor] had the right to suspend work~~.

References

Bruner & O'Connor Construction Law §§ 15:83-84.

(34) CV2234. Bad faith termination for convenience.

The contract allows [name of owner] to terminate the contract for any reason at any time. However, [name of contractor] claims that [name of owner] acted in bad faith ~~i~~in terminating the contract ~~for convenience, [name of owner] cannot act in bad faith~~. ~~If~~ To succeed on this claim, [name of contractor] must prove~~s~~ that [name of owner]

[(1) acted with malicious or wrongful intent towards [name of contractor] by terminating the contract.] or

[(2) entered into the contract without intending to honor its terms~~,~~.]

~~then you must find that [name of owner] acted in bad faith.~~

References

Flynn v. W.P. Harlin Constr. Co., 509 P.2d 356, 358 (Utah 1978).

Lantec, Inc. v. Novell, Inc., 2001 WL 1916256 (D. Utah 2001).

ABA Model Jury Instructions: Construction Litigation § 6.16.

Bruner & O'Connor Construction Law §§ 5:272.

12 ALR Fed.2d 551.

64 Am.Jur. 2d Public Works and Contracts § 164.

Committee Note

The judge should instruct the jury only on those elements, (1) or (2), for which there is evidence.

I recommend eliminating the term "for convenience" unless it is absolutely necessary. It is not defined and the instruction seems understandable without it. I think it will confuse the jury.

(35) CV2235. Termination for cause.

[Name of terminating party] claims [he] had the right to terminate the contract because ~~of an alleged breach of the contract by~~ [name of other party] breached the contract. To succeed on this claim, [~~N~~name of terminating party] must prove that [he]:

(1) gave timely and adequate notice to [name of other party];

(2) gave [name of other party] reasonable time to cure the breach as required by the contract;

(3) ~~was not in material default of the contract~~ had not breached the contract in any important way at the time of termination; and

(4) [name of other party] had not already substantially performed the contract].

In determining whether [name of terminating party] has met these requirements, you must strictly apply the termination provisions of the contract against [name of terminating party].

References

Keller v. Deseret Mortuary Co., 455 P.2d 197 (Utah 1969).

S. Stein, Construction Law § 4.13 at 4-75, 4-97-98.

ABA Model Jury Instructions: Construction Litigation § 6.18.

From Melissa: Suggest deleting this instruction since there is no Utah law.

(36) CV2236. Mitigation of damages.

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

References

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

Angelos v. First Interstate Bank of Utah, 671 P.2d 772 (Utah 1983).

Restatement (Second) of Contracts § 350.

See Instruction CV2139, Mitigation and avoidance.

From Commercial Contracts:

CV2139 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.

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

[Name of plaintiff] had no obligation to mitigate [his] damages by taking action which [name of defendant] refused to take. If [name of defendant] had the primary responsibility to perform [list the act] and had the same opportunity to perform [the act] and the same knowledge of the consequences as [name of plaintiff], [name of defendant] cannot succeed in a claim that [name of plaintiff] failed to perform [the act].

(37) CV2237. Impossibility

~~In this case, [n~~[he] is excused from performing the contract because [insert description of circumstances] made the main purpose of the contract ~~was~~ impossible~~ to perform and that he is excused from performing work because [insert description of circumstances]~~.

To succeed on this claim, [~~N~~name of contractor] ~~is excused from performing the contract work if [name of contractor]~~ must prove~~s~~ that:

(1) the main purpose of the contract is no longer possible;

(2) [name of contractor] did not create the events that made the ~~performance of the contract~~ main purpose impossible;

(3) the ~~cause of the impossibility~~ events that made the main purpose impossible are beyond [name of contractor]'s control; and

(4) the events ~~causing the impossibility~~ that made the main purpose impossible were not foreseeable by either ~~the [name of contractor] or the [name of owner]~~ party at the time the contract was made.

References

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

Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301, 305-06 (Utah 1975).

Western Properties v. Southern Utah Aviation, Inc., 776 P.2d 656, 658-59 (Utah Ct. App. 1989).

See Instruction CV2125, Impossibility/Impracticability.

From Commercial Contracts:

CV2125 Impossibility/Impracticability.

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

"Highly 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:

To prevail on this claim defendant must show:

[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 [name of the defendant] has proved 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 highly impracticable, then [name of defendant]'s obligations under the contract are excused.

(38) CV2238. ~~Impracticability~~ Excessive and unreasonable cost.

~~In this case,~~ [~~n~~Name of contractor] claims that [he] is excused from performing the contract because [insert description of circumstances] made the main purpose of the contract ~~was impracticable to perform, and that he is excused from performing work because [insert description of circumstances]~~ achievable only at an excessive and unreasonable cost.

To succeed on this claim, [~~N~~name of contractor] ~~is excused from performing the contract work if he~~ must prove~~s~~ that:

(1) the main purpose of the contract could ~~only~~ be achieved only at an excessive and unreasonable cost;

(2) [name of contractor] did not create the events that made the ~~performance of the contract impracticable~~ main purpose achievable only at an excessive and unreasonable cost;

(3) the ~~cause of the impracticability~~ events that made the main purpose achievable only at an excessive and unreasonable cost are beyond [name of contractor]'s control; and

(4) the events ~~causing the impracticability~~ that made the main purpose achievable only excessive and unreasonable costs were not foreseeable by either ~~the [name of contractor] or the [name of owner]~~ party at the time the contract was made.

References

Commercial Union Associates v. Clayton, 863 P.2d 29, 38 (Utah App. 1993).

Western Properties v. Southern Utah Aviation, Inc., 776 P.2d 656, 658-59 (Utah Ct. App. 1989).

See Instruction CV2125, Impossibility/Impracticability.

(39) CV2239. ~~Frustration of purpose~~ Destruction of main purpose.

~~In this case,~~ [~~n~~Name of contractor] claims that [he] is excused from performing the contract ~~work~~ because [insert description of circumstances] destroyed the main purpose of the contract ~~was frustrated due to [insert description of circumstances]~~.

To succeed in this claim, [~~N~~name of contractor] ~~is excused from performing the contract work if he~~ must prove~~s~~ that:

(1) the main purpose of the contract was totally or nearly totally destroyed;

(2) [name of contractor] did not create the events that destroyed the main purpose of the contract;

(3) the ~~cause of the~~ events that destroyed the main purpose of the contract are beyond [name of contractor]'s control; and

(4) the events ~~causing the impracticability~~ that destroyed the main purpose of the contract were not foreseeable by either ~~the [name of contractor] or the [name of owner]~~ party at the time the contract was made.

References

Diston v. EnviroPak Medical Products, Inc., 893 P.2d 1071, 1077 (Utah Ct. App. 1995).

Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301, 305-06 (Utah 1975).

See Instruction CV2126, Frustration of purpose.

From Commercial Contracts

CV2126 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.

(40) CV2240. Extraordinary events.

[Name of contractor] claims that [his] [damages/failure to perform] was caused by an extraordinary event ~~that was so extraordinary that prudent parties would not have anticipated its occurrence~~. To succeed in this claim, [name of contractor] must prove that:

(1) [his] [damages/failure to perform], was caused solely by ~~such~~ an event so extraordinary ~~event~~ that careful parties would not have expected it; and

(2) human action did not contribute to the damage.

(41) CV2241. Implied waiver of breach.

[Name of contractor] claims that [name of owner] waived [his] right~~s~~ to recover damages for [describe]. To succeed on this claim, [name of contractor] must prove that [name of owner]:

(1) ~~[name of owner]~~ knew or should have known of the defective [work/materials] supplied by [name of contractor];

(2) ~~[name of owner]~~ did not object to the [work/materials]; and

(3) ~~[name of owner]~~ accepted or paid for the [work/materials].

~~[Name of owner]'s act of o~~Occupying the project is not sufficient to waive [name of owner]'s ~~claim~~ right to recover damages.

References

See Ryan v. Curlew Irrigation & Reservoir Co., 36 Utah 382 (1909).

From Melissa: The case cited for this authority appears to say just the opposite of what the text of the instruction says. There is not another good case on the issue. Consider deleting because of absence of law in Utah.

(42) CV2242. Estoppel.

[Name of owner] claims that it would be unfair to enforce the contract because of [name of contractor]'s previous [describe statement/admission/act/failure to act]. To succeed on this defense, [name of owner] must prove that:

(1) [name of contractor] [describe statement/admission/act/failure to act];

(2) [name of owner] reasonably relied on [name of contractor]'s [statement/admission/act/failure to act];

(3) it would be unfair to enforce the contract against [name of owner] because of [name of contractor]'s [statement/admission/act/failure to act].

Triple I Supply, Inc. v. Sunset Rail, Inc., 652 P.2d 1298 (Utah 1982).

Koch v. Penny, 534 P.2d 903 (Utah 1965).

See Instruction CV2114, Promissory estoppel.

Committee Notes

~~(1) Use the bracketed words that are appropriate to the evidence in the case.~~

~~(2) The subject matter of this instruction is a matter of affirmative defense on which the party asserting it has the burdens of pleading and proof. Utah R. Civ. Pro. 8(c).~~

~~(3)~~ This instruction is applicable to the situation where it is claimed that the plaintiff, by words or conduct, induced the defendant to take, or refrain from taking, a course of action and thereby caused the defendant to breach the contract. See CECO Corp. v. Concrete Specialists, Inc., 772 P.2d 967 (Utah 1989).

(43) CV2243. Accord and satisfaction.

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

To succeed on this claim, [name of owner] must prove that:

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

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

If you decide that [name of owner] has proved both of these things, then [name of owner] is released from performing [describe 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 (Utah 1968).

Restatement (Second) of Contracts § 281(1981).

See Instruction CV2120, Accord and satisfaction.

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(44) CV2244. Industry standards. Customs and usage.

[Name of owner] claims [insert] Even if there is no express contractual agreement about workmanship, the law implies a promise by [name of contractor] that [he] will perform in a good and workmanlike manner.

"Good and workmanlike" means that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work. [REALLY? CHECK LAW]

[Name of owner] must prove that [name of contractor]'s work failed to meet the standard and that this failure was a cause of harm suffered by [name of owner].

From Tim: "good usage and accepted trade practices" and "resulting in a merchantable structure" are not defined. And there seem to be 3 definitions of "reasonably good and workmanlike."

From Melissa: This instruction articulates a rule that is not recognized by Utah law. Consider deleting.

(45) CV2245. Defenses generally.

If you find that [name of contractor] has proved all the elements of any claim, then [name of owner] is liable for damages unless you find that [name of owner] has proved all the elements of any defenses.

References

ABA Model Jury Instructions: Construction Litigation, § 9.02 (American Bar Association 2001).

Move to general instructions. 100 series.

(46) CV2246. Damages for suspension of work.

If you find that [name of contractor] had the right to suspend work, then [he] is entitled to recover:

(1) the percentage of the costs to maintain a home office during the suspension that are reasonably attributed to this project; and

(2) the fixed, periodic costs of maintaining an office and/or equipment at the construction site; and

(3) other reasonable expenses.

References

Acret, James, Construction Litigation Handbook. § 7.16.

(47) CV2247. Damages for termination for convenience.

The contract allows [name of owner] to terminate the contract for any reason at any time. If you find that [name of owner] ~~proves that [he]~~ acted properly in terminating the contract, then [name of contractor] is entitled to recover the following damages:

(1) the cost of preparations made before the termination;

(2) the value of work completed;

(3) a reasonable profit on the work performed;

(4) the cost to de-mobilize from the job site; and

(5) the cost to prepare a termination settlement proposal.

References

Flynn v. W.P. Harlin Constr. Co., 509 P.2d 356, 358 (Utah 1978).

Bruner & O'Connor Construction Law §§ 5:272.

12 ALR Fed.2d 551.

64 Am.Jur. 2d Public Works and Contracts § 164.

Committee Notes

If the contract expressly excludes any item of damages, do not include it when instructing the jury. If the contract provides for additional damages, include these additional categories when instructing the jury.

From Melissa: There is no authority in Utah for proper damages absent a contractual provision. Consider deleting this instruction because it is a contract specific analysis as indicated in *Encon Utah LLC v. FAK, LLC*, 2009 UT 7.

(48) CV2248. Damages for owner's breach that prevents contractor's performance.

If you find that [name of owner] breached the contract and that the breach prevented [name of contractor] from completing performance, then [name of contractor] is entitled to recover the amount that [he] would have received for finishing the project, less what would have been the reasonable expense to complete performance.

References

Flynn v. Schocker Constr, Co., 459 P.2d 433 (Utah 1969).

Flynn v. W.P. Harlin Constr. Co., 509 P.2d 356 (Utah 1973).

(49) CV2249. Liquidated damages.

[Name of owner] seeks to recover the ~~liquidated~~ damages specified in the contract. You must enforce the ~~liquidated~~ damages clause in the contract if you find that, at the time the parties entered into the contract:

(1) the amount of damages was a reasonable ~~forecast~~ estimate of the damages [name of owner] would suffer as a result of a delay, and

(2) the damages arising from the delay were difficult to accurately estimate.

References

Reliance Ins. Co. v. Utah Dep't of Transportation, 858 P.2d 1363, 1366-67 (Utah 1993)

Woodhaven Apartments v. Washington, 942 P.2d 918, 921 (Utah 1997)

Allen v. Kingdon, 723 P. 2d 394, 397 (Utah 1986)

Soffe v. Ridd, 659 P.2d 1082, 1084 (Utah 1983)

Restatement of Contracts § 339 (1932)