

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 13, 2009

4:00 – 6:00 p.m.

Present: Juli Blanch, Marianna Di Paolo, Phillip Ferguson, Rich Humpherys, John Lund, Stephen Nebeker, Timothy Shea, Kent Scott, Peter Summerill, John Young

Excused: Judge William Barrett, Frank Carney, Tracy Fowler, Colin King, Paul Simmons

Mr. Young called the meeting to order.

Mr. Young reported that he and Mr. Shea had met with the Board of District Court Judges to encourage feedback about the model instructions. Board members stated that they were using the new instructions and thought that they were well done. The Board members also stated that, even if there is no Utah law on a matter, that it would be helpful for the committee to draft an instruction based on the law of other states, providing a majority and minority view when appropriate. Other committee members stated that the new instructions seem to be gaining acceptance. Mr. Young thought that Chief Justice Durham's letter to the district court judges had been very helpful.

Mr. Shea reported that, based on his research and the earlier draft provided by Mr. Young, he recommends breaking up the instructions for liability and damages for defective work to cover three concepts: contractor's liability; owner's damages; and avoiding unreasonable economic waste. He reported that the law on the first two is reasonable clear, but that the law on the last is not.

CV2214. Contractor's liability for defective work. The committee decided to omit (2) in light of the recent Davencourt decision. The committee added "did not comply with industry standards" to the bracketed language in (1). The committee approved the instruction.

CV2215. Damages for contractor's defective work. The committee added noncompliance with "industry standards" to the bracketed language. The committee approved the instruction.

CV2216. Avoiding unreasonable economic waste. Mr. Shea reported that Utah law is clear that the contractor bears the burden of proving that the cost to repair or replace defective construction involves unreasonable economic waste. Some states place the burden of disproving that on the owner. Mr. Shea reported that the Stangl case, which establishes the principle, quotes Corbin for the principle that the contractor must prove "affirmatively and convincingly," that the cost to repair or replace involves economic waste. Whether that means the standard or proof is clear and convincing evidence is unstated.

It is also unclear what constitutes unreasonable economic waste, other than it has to be extreme. The committee thought that the concept of the cost to repair or replace

being way out of proportion to the value of the project should be added. The committee decided to add “clearly” out of proportion to (1). The committee approved the instruction.

CV2228. Owner’s claim for damages for delay caused by contractor. Mr. Scott explained that there is no Utah law on damages for delay other than liquidated damages. The committee decided that this instruction should more closely parallel contractor’s claim for damages caused by owner, which is the counterpart to this instruction. The committee edited 2227 to fit the context of the owner’s damages and approved the instruction.

CV2235. Mitigation of damages. The committee decided to copy the commercial contract instruction on mitigation, but to use “without unreasonable risk or burden” rather than “undue” and to separate humiliation since there seems to be no concept that a reasonable amount of humiliation might be acceptable.

CV2236. Impossibility. The committee approved the instruction as drafted.

CV2237. Excessive and unreasonable cost. The committee decided to omit this instruction because it restates the concepts in the “cardinal change” instruction.

CV2238. Frustration of purpose. The committee decided to copy the commercial contract instruction on frustration of purpose. There is no Utah law in the construction context.

CV2239. Estoppel. The committee decided to omit this instruction.

CV2240. Accord and satisfaction. The committee decided to copy the commercial contract instruction on accord and satisfaction.

CV2241. Damages for termination for convenience. Mr. Scott will draft a new instruction.

The meeting was adjourned.