Agenda
Advisory Committee on
Model Civil Jury Instructions

December 10, 2012
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

CV 129. Statement of opinion.		Tim Shea
Design professional instructions	Tab 1	Craig Mariger

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

January 14, 2013
February 11, 2013
March 11, 2013
April 8, 2013
May 13, 2013
September 9, 2013
October 15, 2013 (Tuesday)
November 12, 2013 (Tuesday)
December 9, 2013

Professional Liability: Design Professionals

CV 501. Standard of care for design professionals. Approved

A [design professional] is required to use the same degree of learning, care, and skill ordinarily used by other [design professionals] under like circumstances. This is known as the "standard of care." The law does not require perfect [plans/drawing/services] or satisfactory results but rather requires compliance with the standard of care.

[The standard of care may change over time and may be different in different localities. If the standard of care has changed over time or does vary by locality, the "applicable standard of care" is the standard of care existing at the time of [name of defendant]'s services and in the same or similar locality as where [name of defendant]'s services were performed.]

The failure to follow the standard of care is a form of fault known as "professional malpractice." [Name of defendant] is an [architect] [landscape architect] [engineer] [land surveyor]. To establish professional malpractice of [name of defendant], [name of plaintiff] has the burden of proving three things:

(1) first, what the standard of care is;

(2) second, that [name of defendant] failed to follow this standard of care; and

(3) third, that this failure to follow the standard of care was the cause of [name of plaintiff]'s harm.

In this case, [name of plaintiff] alleges that [name of defendant] failed to follow the standard of care in the following respects:

(1)

(2)

(3)

If you decide that [name of defendant] failed to follow the standard of care in any of these respects, then you must determine whether that failure was a cause of [name of plaintiff]'s harm.

References

SME Industries, Inc. v. Thompson, Ventulett, Stainback and Assoc., Inc., 2001 UT 54, &&25-29, 28 P.3d 669.

Erickson Landscaping Co. v. Wessel, 711 P. 2d 250, 253 (Utah 1985).

Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 178-80, 467 P.2d 610, 614-15 (1970).

Whitman v. W.T. Grant Co., 16 Utah 2d 81, 83, 395 P.2d 918, 920 (1964).

Klein v. Catalano, 437 N.E.2d 514 (Mass. 1982).

Borman's, Inc. v. Lake State Dev. Co., 230 N.W.2d 363 (Mich. Ct. App. 1975).

Committee Notes

Use the bracketed second paragraph only if the standard of care has changed over time or varies by locality.

MUJI 1st

7.30

~~**CV 502. More than one recognized practice.**~~ **Approved**

~~A[n] [architect] [landscape architect] [engineer] [land surveyor] who uses a practice or technique recognized by the [architect] [landscape architect] [engineering] [land surveying] profession does not fail to follow the standard of care if the [architect] [landscape architect] [engineer] [land surveyor] uses his/her best judgment when selecting that practice or technique, even if the practice or technique selected turns out to be the wrong choice or another [architect] [landscape architect] [engineer] [land surveyor] would not have selected that practice or technique in the same situation.~~

~~**MUJI 1st**~~

~~7.31~~

CV 502. Standard of care of a specialist. Approved

A[n] [architect] [landscape architect] [engineer] [land surveyor] who claims to be a specialist in a particular field must have the same knowledge and skill ordinarily possessed by others who are specialists in that field.

References

~~Basic Civil Jury Instructions, District of Utah.~~

MUJI 1st

7.32

CV 503. Evidence of standard of care where expert is required. Approved.

Due to the advanced learning and skill involved in [architecture] [landscape architecture] [engineering] [land surveying], I have determined that you must use only the standard of care established through evidence presented by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard based on your own experience or any other standard of your own.

If you find that an expert witness has relied on a fact that has not been proved, or has been disproved, you may consider that in determining the value of the witness's opinion.

References

Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997).

Wyaclis v. Guardian Title of Utah, 780 P.2d 1989, 726 n. 8 (Utah Ct. App. 1989).

Groen v. Tri-O-Inc., 667 P.2d 598, 603 (Utah 1983).

Dixon v. Stewart, 658 P.2d 591, 597 (Utah 1982).

Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 467 P.2d 610 (1970).

Committee Notes

This instruction should not be given unless the court has previously determined that expert testimony is required to establish the standard of care. It may be the case that lay persons are competent to decide whether the defendant breached the standard of care without relying on expert testimony. In this circumstance, the court may give Instruction CV 129. Statement of opinion.

Instruction CV 136, Conflicting testimony of experts, might be given in conjunction with this instruction, but if the court has determined that expert testimony is required to establish the standard of care, <a

href=http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=1#129>Instruction CV 129, Statement of opinion, should not be given.

This instruction will require modification if experts in disciplines other than the defendant's are found competent to testify to the applicable standard of care. See Wessel v. Erickson Landscaping Company, 711 P.2d 250 (Utah 1985).

If expert testimony is required to establish the element of causation, this instruction may be modified to address that issue at well. See Bowman v. Kalm, 2008 UT 9, 179 P.3d 754.

MUJI 1st

7.33

~~CV 504B. Evidence of standard of care where expert is not required.~~ Approved

~~You must decide whether [name of defendant] complied with the standard of care. I have determined that you do not need to rely on the evidence presented in this trial by [architects] [landscape architects] [engineers] [land surveyors] called as expert witnesses, who testified about the skill and care ordinarily used by other [architects] [landscape architects] [engineers] [land surveyors] under like circumstances. You may choose to rely on the expert testimony, but are not required to do so. You may give each opinion the weight that you believe it deserves.~~

~~Whether or not you choose to rely on the expert testimony, you may rely on your own knowledge and experience to determine whether [name of defendant] complied with the standard of care.~~

~~This instruction should not be given. For purposes of consistency, there should simply be a reference to the general 'experts' instruction.~~

~~References~~

~~Bowman v. Kalm, 2008 UT 9, 179 P.3d 754.~~

~~Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980).~~

~~Committee Notes~~

~~This instruction should not be given if lay persons are not competent to decide whether the defendant breached the standard of care without relying on expert testimony. See MUJI 2d 504A. This instruction assumes the plaintiff is not legally required to present expert testimony in order to reach the jury, but that expert testimony is nevertheless presented.~~

CV 504. Damages.

~~You must determine the amount of damages to give to [name of plaintiff], but only if you decide (1) that [name of defendant]'s professional services were not performed using the standard of care of [architects] [landscape architects] [engineers] [land~~

~~surveyors], and (2) that [name of plaintiff] has been injured by [name of defendant]'s failure to provide professional services meeting the standard of care. If [name of defendant]'s professional services were not performed using the standard of care of [architects] [landscape architects] [engineers] [land surveyors], we call this a "breach of the standard of care."~~

~~If you decide both that [name of defendant] breached the standard of care and [name of plaintiff] was injured by [name of defendant]'s breach of the standard of care, then you must give to [name of plaintiff] as damages the amount of money that will reasonably compensate [name of plaintiff] for the injury caused to [name of plaintiff] by the breach of the standard of care.~~

Committee Notes

Assuming that the elements of negligence have been proved, the plaintiff is entitled to standard tort damages. Rather than restate those instructions here, the court should use the following instructions, appropriately modified as circumstances of the case require:

- Instruction CV 2001. Introduction to tort damages. Economic and noneconomic damages introduced.
- Instruction CV 2002. Proof of damages.
- Instruction CV 2003. Economic damages defined.
- Instruction CV 2004. Noneconomic damages defined.

CV505. Damages. Measure of property damages.

If [name of plaintiff]'s property has been damaged by [name of defendant]'s breach of the standard of care, the amount of money that will reasonably compensate [name of plaintiff] for the injury will be either (1) a "repair measure of damages" or (2) a "loss in property value measure of damages."

Repair Measure of Damages: If repair of the property is possible and repair of the property would not be unreasonably wasteful, you must give [name of plaintiff] the reasonable costs to repair the property to the condition it would have been in if [name of defendant] had not breached the standard of care. This is called the "repair measure of damages."

Loss in Property Value Measure of Damages: If repair to the property is not possible or if [name of defendant] proves that the costs of repair of the property are sufficiently more than the loss in the value of the property caused by the breach of the standard of care that it would be unreasonably wasteful to repair the property, then you cannot give [name of plaintiff] a repair measure of damages. If repair is not possible or if [name of defendant] proves that the costs of repair would be unreasonably wasteful, you must give [name of plaintiff] damages equal to the difference between the value that the property would have had if [name of defendant] had not breached the standard of care and the value of the property received by [name of plaintiff] following [name of defendant]'s breach of the standard of care. This is called the "loss in property value measure of damages."

~~For example, consider the case of a designer of an office building who was proven to have breached the standard of care by designing the building with non-reflective glass panels that caused the building owner to pay more per year in air conditioning costs than if the design had included reflective glass panels. Assume the evidence proved that the material costs and installation costs of the reflective glass panels and the non-reflective glass panels are the same and that the cost to repair the building to replace all non-reflective glass panels with reflective glass panels is $200,000. Also assume the evidence proved the value of the building delivered to the building owner with non-reflective glass panels was $4,000,000, but the value of the building would have been $4,100,000 if reflective glass panels had been included in the design and installed. In this case you would consider whether the cost to repair ($200,000) was sufficiently greater than the loss in value of the property ($100,000) that it would be unreasonably wasteful to repair the building. If you decided that it would be unreasonably wasteful to repair the building, you would give the building owner $100,000, the loss in property value measure of damages. If you decided that it would not be unreasonably wasteful to repair the building, you would give the building owner $200,000, the cost of repair measure of damages.~~

References

F.C. Stangl, III v. Todd, 554 P.2d 1316, 1320 (Utah 1976).

Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298, 302-03, 445 P.2d 136, 139 (Utah 1968).

Restatement (First) of Contracts § 346(1) (1932).

CV 506. Betterment or value added.

The damages you give to [name of plaintiff] cannot place [him] in a better position than the position that [he] would have been in had [name of defendant] not breached the standard of care.

You must reduce from the damages you give to [name of plaintiff] any additional amount of money that [name of plaintiff] would have paid in designing and constructing

the [facility name] if [name of defendant] had provided services meeting the standard of care. You must make this reduction only if [name of defendant] proves that [name of plaintiff] would have completed the [facility name] if [name of defendant] had provided services meeting the standard of care. ~~For example, consider the case of a designer of a mountain ski cabin that was proven to have breached the standard of care by designing the cabin without the number of roof supports necessary to safely carry the weight of the snow. Assume it was proven that the cost to repair the cabin is $30,000 and that it would have cost the cabin owner $10,000 more to construct the cabin with the design containing the additional roof supports required by the standard of care. In this case, you must reduce from the $30,000 repair measure of damages the $10,000 the cabin owner would have paid if the design had met the standard of care, but only if the designer proves that the cabin owner would have constructed the cabin if the designer had provided a design meeting the standard of care.~~

For the same reasons, you must reduce from the damages you give to [name of plaintiff] using a cost of repair measure of damages the costs of any repairs that better or add value to the [facility name] beyond the value it would have had if [name of defendant] had not breached the standard of care. ~~For example, consider a designer of a retaining wall that collapses after five years of its intended 20-year life because of a design that is proven to have breached the standard of care. Assume it is proven that the cost to replace the retaining wall with a 20-year design life retaining wall is $50,000, and that this cost includes $10,000 to construct a landscape planter on top of the retaining wall that was not included in the retaining wall that collapsed. In this case, the $10,000 to construct the added landscape planter and an amount for the added value the retaining wall owner will receive because the replacement retaining wall will last an additional 20 years (not an additional 15 years as would the collapsed retaining wall had it been designed meeting the standard of care), must be reduced from the repair measure of damages given to the retaining wall owner.~~

References

Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund, Ltd., 552 So. 2d 228, 232-33 (Fla. App. 1989).

St. Joseph Hosp. v. Corbetta Constr. Co., 21 Ill. App. 3d 925, 936-941,316 N.E. 2d 51, 59-62 (1974).

Henry J. Robb, Inc. v. Urdahl, 78 A. 2d 387, 388-89 (D.C. App. 1951).

Reiman Construction Co. v. Jerry Hiller Co., 709 P.2d 1271, 1277 (Wyo. 1985).

Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317, 1319-20 (Utah 1976) (mentions the word 'betterment,' but unclear from the case whether that doctrine is adopted as law).

Ogden Livestock Shows, Inc. v. Rice, 108 Utah 228, 233-34, 159 P.2d 130, 132-33 (Utah 1945). Held that admission of testimony regarding cost of new bridge vs. value of old bridge not error. Did not expressly adopt 'betterment' as a doctrine. Instead,

recognized that ""There is no universal test for determining the value of property injured or destroyed" Ogden Livestock Shows v. Rice, 108 Utah 228, 233, 159 P.2d 130, 132 (1945). In the absence of some compelling argument that Utah has singled out 'betterment' as the factor to be used, it seems inappropriate to focus a jury on this issue to the exclusion of all other factors. This may be an instruction that the lawyers themselves seek to use through motion, but is not an instruction so clearly grounded in Utah law as to require its formal adoption by this committee.[MSOffice1]

Committee Notes

The value added or betterment defense recognized in St. Joseph Hosp. v. Corbetta Constr. Co., 21 Ill. App. 3d 925, 316 N.E. 2d 51 (1974) has been held inapplicable in the absence of proof that the owner would have gone forward with the project using a design that met the standard of care. L.L. Lewis Const., LLC v. Adrian, 142 S.W. 3d 255, 264 (Mo. App. 2004); Skidmore, Owings & Merrill v. Intrawest I, LP, 87 Wash. App. 1054, 1997 WL 563159 (Wash. App., 1997).

MUJI 1

7.41

CV 507. Creation of a warranty.

[Name of plaintiff] claims that [name of defendant] is responsible for damages for breach of warranty. You must decide whether [name of defendant] made a warranty of [his] [work/service] to [name of plaintiff]. A warranty is an assurance or promise of a certain fact or condition regarding [name of defendant]'s [work/service]. A warranty that is expressed in written or oral words is an express warranty. A warranty that is made by the actions of [name of defendant] or by operation of law is known as an implied warranty.

~~To establish breach of warranty, [name of plaintiff] does not also have to prove that the [name of defendant] was negligent.~~

MUJI 1st

7.35; 7.37

References

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CV508. Breach of warranty essential elements.

[Name of plaintiff] must prove the following elements to prove breach of warranty:

(1) [name of defendant] made a warranty of the work [name of defendant] performed for [name of plaintiff]; and

(2) [name of defendant] reasonably expected that [name of plaintiff] would rely on

the warranty; and

(3) The work of [name of defendant] was not as { name of defendant] warranted; and

(4) [name of plaintiff] was injured and incurred damages as a consequence of the breach of warranty by [name of defendant]; and

It was reasonably foreseeable at the time that [name of defendant] warranted the work that [name of plaintiff] would incur the injuries and damages suffered by [name of plaintiff] if the work was not as warranted by [name of defendant].

To establish breach of warranty, [name of plaintiff] does not also have to prove that the [name of defendant] was negligent.

MUJI 1st

7.36.

References

Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982).

~~Basic Civil Jury Instructions, District of Utah.~~

~~CV509. Creation of a warranty.~~ Approved

~~You must decide whether [name of defendant] made a warranty of the work of [name of defendant] to [name of plaintiff]. A warranty is an assurance or promise of a certain fact or condition regarding the work of [name of defendant].~~

~~A warranty that is expressed in written or oral words is an express warranty. A warranty that is made by the actions of [name of defendant] or by operation of law is known as an implied warranty.~~

~~MUJI 1st~~

~~7.37.~~

~~References~~

~~See MUJI § 26 passim.~~

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CV 509. Implied warranties. Accuracy and fitness for purpose.

A[n] [architect] [engineer] [land surveyor] does not impliedly warrant or guarantee that the professional services rendered will be performed accurately, that is, without errors or defects, or that the professional services will be fit or suitable for the intended purpose or for the needs of the party employing the [architect] [engineer] [land

surveyor]. However the [architect] [engineer] [land surveyor] does warrant that his performance of services will not fall below the ordinary skill and care exercised by others engaged in the same profession in the same locality.

Committee Notes

This instruction may require modification if used in conjunction with MUJI 7.39.

References

Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 467 P.2d 610 (1970).

Mississippi Meadows, Inc. v. Hodson, 299 N.E.2d 359 (Ill. App. Ct. 1973).

Klein v. Catalano, 437 N.E.2d 514 (Mass. 1982).

Borman's, Inc. v. Lalm State Dev. Co., 230 N.W.2d 363 (Mich. Ct. App. 1975).

John Cruet, Jr. v. Robert Carroll, 2001 Conn. Super. Lexis 3336.

SME Industries v. Thompson, 28 P.3d 669 (Utah 2001).

CV 510. Implied warranties. Compliance with building code.

A[n] [architect] [engineer] [land surveyor] engaged to prepare plans and specifications for the construction of a building or other structure, in the absence of an expressed disclaimer, impliedly warrants and guarantees that the plans and specifications conform to the applicable building codes. This implied warranty of compliance with applicable building codes may be eliminated by express language which, in common understanding, calls attention to the elimination of the warranty and makes it clear that there is no implied warranty of compliance with applicable building codes. If you find that the defendant eliminated the implied warranty of compliance with applicable building codes, a failure of the defendant's plans or specifications to conform to the applicable building codes is not a breach of implied warranty.

References

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