Agenda
Advisory Committee on Model Civil Jury Instructions

February 9, 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

Approval of minutes	Tab 1	John Young
CV 1057. Safety risks.	Tab 2	John Young
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.

March 9, 2009	Negligent Misrepresentation
April 13, 2009	Eminent Domain
May 11, 2009	Premises Liability
June 8, 2009	Insurance Obligations
July 13, 2009	Probate
August 10, 2009	Professional Liability
September 14, 2009	Employment

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
January 12, 2009
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and David E. West. Also present: Kent B. Scott, chair of the construction contract subcommittee

Excused: Phillip S. Ferguson, Colin P. King

1. *Preliminary Instructions.* The committee considered Mr. Humpherys's proposed additions to the general instructions:

a. *CV137. Selection of jury foreperson and deliberation.* The committee approved the instruction.

b. *CV138. Do not speculate or resort to chance.* At Mr. Carney's suggestion, a reference to *Day v. Panos,* 676 P.2d 403 (Utah 1984), was added. At Mr. Simmons's suggestion, the last sentence was revised to read, "You must not agree in advance to average the estimates." The committee approved the instruction as modified.

c. *CV139. Agreement on special verdict.* The committee approved the instruction.

2. *Construction Contract Instructions.*

a. *CV2201A. Committee notes to construction contract instructions.* Mr. Young suggested adding an eighth area: defective construction. Mr. Simmons asked whether it was already covered by "(5) claims," and "(6) defenses." Mr. Humpherys asked why the subcommittee had "determined that it would be best" not to address certain areas--because they are legal issues and not proper subjects for jury instructions? because they do not arise often enough to warrant instructions? or because they are not easily dealt with in jury instructions? Mr. Scott noted that the subcommittee had drafted instructions but had decided against proposing them because they were very fact intensive and the status of the law in Utah was uncertain. For example, there is no Utah law on whether a "paid if paid" clause is enforceable. Mr. West thought such clauses presented legal issues that would not go to the jury in any event. The fourth paragraph was revised to read: "The Advisory Committee decided not to draft pattern instructions on certain areas of law . . . ." Mr. Summerill noted that the third paragraph, which said that mechanic's lien and bond claims are "fact intensive," suggested that they should be covered by jury instructions. At Mr. Scott's suggestion, the committee struck the phrase "fact intensive and" from the

third paragraph. At Mr. Shea's suggestion, the committee struck the last paragraph. Mr. West suggested striking the third and fourth paragraphs as well. He thought there was no need to explain what subjects were not covered in the instructions. Mr. Scott thought it was necessary to explain why some areas were left out because attorneys will want to know where they can find instructions dealing with those areas. At Mr. Young's and Mr. Humpherys's suggestion, CV2201A was deleted. A general comment will be added to the introduction to the effect that if there is no Utah law on a subject, the subject has not been covered in the instructions.

b. *CV2201B. Compliance with public bidding instructions.* Mr. Scott noted that bidding on public contracts is governed by statute. Mr. Humpherys questioned the use of "responsive responsible bidder." Mr. Young noted that it was a statutorily defined term and thought it should be retained. The instruction deals with a claim by the lowest bidder; Mr. Young asked what happens to the bid the contractor accepted. It was thought that the contract was still enforceable, but the public entity would be liable in damages to the bidder whose bid was wrongly rejected. Mr. Young asked what the cause of action would be. Mr. Scott thought it would be akin to a breach of contract claim or a claim for damages for breach of the procurement code. Mr. Humpherys thought the instruction implied a form of strict liability. Mr. Scott noted that the instruction states the general rule for public construction contracts but noted that there are exceptions. The subcommittee decided not to include instructions on the exceptions because they are complicated and the law is not clear. Mr. Humpherys thought there should be a committee note to explain this. Mr. Shea added a committee note that says there are statutory exceptions to the general rule stated in the instruction. Mr. Scott will supply Mr. Shea with citations to the statutory exceptions. The committee revised the first and last paragraphs of the instruction to read:

> [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]. 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 one who:
>
> . . .
>
> If you find that [name of contractor] submitted the lowest responsive responsible bid and that [name of governmental entity]

> accepted a different bid, you must find that [name of governmental entity] is liable to [name of contractor] for damages.

The committee approved the instruction as modified.

c. *CV2202. "Responsive bid" defined.* Mr. West asked whether the instruction was covered by CV2201B(2). Mr. Scott said the subcommittee tried to combine CV2202 through 2204 but thought they were too long and complex to be easily combined. Mr. Shea noted that the instructions could be written without using technical terms, but the committee thought the technical terms were necessary because they are so common in the industry. The committee approved the instruction.

d. *CV2203. "Responsible bid" defined.* The committee struck the last sentence of the instruction. Mr. Humpherys asked what the phrase "integrity and reliability that will support its good faith performance" meant. Mr. Summerill pulled the statute and noted that it requires "integrity and reliability." Mr. Fowler asked whether "good faith" needs to be defined. Mr. Scott thought the definition should be in the commercial contract instructions, not the construction contract instructions. Mr. Young suggested adding a committee note cross-referencing the commercial contract instruction. Mr. Humpherys suggested that the note simply say that good faith is not defined in the statute. The instruction was revised to read:

> 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.

e. *CV2204. Owner's duty to inform.* Mr. Humpherys noted that in the fraud jury instructions the committee had used "important" instead of "material." Others suggested that "material" simply be deleted from the first sentence. In keeping with its practice of not repeating the standard of proof in instructions (unless the standard is something other than a preponderance of the evidence), the committee deleted the phrase "by a preponderance of the evidence" in the first paragraph. Mr. Humpherys asked whether the instruction should use the term "breached the contract." He thought "breach" may not be commonly understood by jurors. Mr. Simmons thought it should be used because the verdict form will ask them to decide whether the defendant breached the contract. The committee revised the instruction to eliminate the phrase. The revised instruction reads:

> [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 plaintiff] 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.

The committee approved the instruction as modified.

f. *CV2205. Contractor's duty to investigate.* Ms. Blanch suggested that the instruction be stated in the active voice. Ms. Blanch was excused (for reasons totally unrelated to her comment). Mr. Humpherys asked what the consequence was if a contractor failed to investigate. Mr. Scott said that a failure to investigate relieves the owner from liability. Mr. Humpherys noted that the instruction will be awkward if there is a lot of information to describe. He also asked whether there is still a duty to investigate if the contractor has inquired and received reassuring answers to his inquiries. Mr. Young noted that the duty goes beyond just re-reading the contract. Mr. Humpherys asked whether the standard was subjective ("knew") or objective ("should have known"). Mr. Young proposed revising the instruction to read:

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

> accuracy and completeness of the information provided by the owner.
>
> If you find that [name of contractor] knew or should have known of these facts, then [name of contractor] had notice of all information that a reasonable [inquiry/investigation] would have revealed.

Mr. West was excused. Mr. Young suggested that a committee note be added to say that, depending on the circumstances, a contractor may have only a duty to inquire or also a duty to investigate. An inquiry may uncover facts that would require a reasonable contractor to do more investigating. At Mr. Summerill's suggestion, Mr. Scott will run the proposed changes and committee note by the subcommittee and will check the authority for the instruction. Mr. Humpherys was excused. Mr. Young asked Mr. Scott to ask the subcommittee (1) whether the contractor's duty is only to inquire, (2) under what circumstances it also has a duty to investigate, and (3) when does the contractor have a right to rely on what the owner says. Mr. Scott thought that perhaps there should be separate instructions on the duty to inquire and the duty to investigate.

3. The next meeting will be Monday, February 9, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

CV 1057. Safety risks.

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

References

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

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

MUJI 1st References

Committee Notes

In Slisze v. Stanley-Bostitch, the Utah Supreme Court held that a product manufacturer does not have a duty to make a non-defective product safer or to warn a user that a safer alternative exists. 1999 UT 20, ¶¶ 9-15. Committee members who favored this instruction maintain that under Slisze, a plaintiff cannot establish that a product is defective or unreasonably dangerous merely by offering evidence that a safer alternative exists. A manufacturer is not an insurer of a product's safety, nor must a manufacturer provide only the very safest of products. See, e.g., Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). Under Utah law, a product may not be considered to have a defect or to be in a defective condition unless at the time it was sold there was a defect or defective condition in the product that made it unreasonably dangerous to the user or consumer. Utah Code Ann. § 78B-6-703(1). Committee members who favored this instruction thought that it makes clear that there is no duty for manufacturers to provide products that are perfectly safe, consistent with the holding in Slisze.

Other committee members, however, thought that this instruction is unnecessary and improper. They believe that jury instructions should state what the law is, not what the law is not. The plaintiff must prove that a product is defective and unreasonably dangerous. This instruction states that a product may not be defective or unreasonably dangerous just because it could have been made safer or because a safer model is available. On the other hand, a jury may find that a product that could have been made safer *is* defective or unreasonably dangerous. The test is not whether the product could have been made safer but whether it was dangerous to an extent beyond what would be contemplated by the ordinary and prudent consumer or user of the product in that community. *See* Utah Code Section 78B-6-702. The jury is already instructed on the proper test; "unreasonably dangerous" is defined in CV 1006. These committee members believe this instruction does not help the jury decide whether a product is defective or unreasonably dangerous, but is just argumentative. Moreover, they believe that *Slisze* was a negligence case. They believe that Slisze did not address when a product is not defective or unreasonably dangerous and therefore do not think that Slisze supports the instruction.

These committee members also thought that the instruction is similar to an instruction that the mere fact of an accident does not necessarily mean that anyone was negligent, which the Utah Supreme Court has held is improper. *See Green v. Louder,*

2001 UT 62, ¶¶ 15-18, 29 P.3d 638. As the court noted in *Green,* if there is no evidence from which a jury could conclude that an element of the plaintiff's claim has been met, the court should direct a verdict for the defendant. If there is such evidence, the jury should be allowed to decide the issue based on proper instructions on the elements of the claim and the burden of proof, not on negative instructions about what does not constitute an element of the claim.

Tab 3

Construction Contracts

Table of Contents

(1) CV2201. 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 ~~bid of the~~ lowest "responsive responsible" bid~~der~~. The contractor who submitted the lowest responsive responsible bid~~der~~ is the ~~lowest bidder~~ 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] ~~was~~ submitted the lowest responsive responsible bid~~der~~ and that [name of governmental entity] accepted a different bid, ~~you must find that~~ [name of governmental entity] ~~was required to accept [name of contractor]'s bid~~ is liable to [name of contractor] for damages.

Committee Note

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

(2) CV2202. "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

(3) CV2203. "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~~all respects and that has the integrity and reliability that will support its good faith performance. In other words, a responsible bidder is one who can perform the contract as required~~.

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

(4) CV2204. 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

(5) CV2205. 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 by a preponderance of the evidence 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).

(6) CV2206. 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].

Committee Note

According to prevailing case authority, the contractor is held to an "actual knowledge" or "should have known" standard. The contractor's duty to inquire and investigate is judged in relation to (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.

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]

(7) CV2207.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 arithmetical 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 contact 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.

(8) CV2208. Mutual mistake.

[Name of owner] claims that the contract is not enforceable because neither party understood that [describe mistake].

To succeed on this claim, [name of owner] must prove by clear and convincing evidence that:

(1) at the time the contract was entered into neither party understood that [describe mistake], and

(2) the mistake was a material mistake.

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.

(9) CV2209. Unilateral mistake.

[Name of contactor] claims that the contract should not be enforced because [he] did not understand that [describe mistake]. To succeed on this claim, [name of contractor] must prove by a preponderance of the evidence that:

(1) [name of contractor] did not understand that [describe mistake];

(2) the mistake was a material mistake;

(3) the mistake occurred even though [name of contactor] made reasonable efforts to avoid the mistake; and

(4) [name of contractor]'s mistake would have serious consequences that make enforcing the contact unconscionable;

(5) [name of owner] won't be damaged by canceling the contract, other than losing 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.

(10) CV2210. "Material mistake" defined.

A mistake is "material" if it concerns a fact that exists or is assumed to exist at the time the parties enter into the contract and is important to fulfilling the purpose of the contract.

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.

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

ABA Model Instruction 3.02.

(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 by a preponderance of the evidence that:

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

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

(3) [name of other party] knew or should ~~reasonably~~ have expected that [his] promise would induce action or inaction by [name of party];

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

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

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.

(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 or delays.

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].

(13) CV2213. Implied warranty of fitness of 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] is not liable for damages caused by deficiencies in the plans and specifications.

References

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

Melissa is going to provide added legal references.

(14) CV2214. Duty to provide for suitable working conditions.

[Name of contractor] claims [he] is entitled to [describe damages] from [name of owner] for [describe work/materials] because [name of owner] did not provide suitable working conditions. To succeed on this claim, [name of contractor] must prove by a preponderance of the evidence that:

(1) [name of owner] did not provide suitable working conditions;

(2) suitable working conditions were necessary for [name of contractor] to complete [his] work; and

(3) [name of contractor] incurred additional costs because of the unsuitable working conditions.

References

Steven G.M. Stein, Construction Law, 5B.02[4][e].

(15) CV2215. Duty to provide access to the worksite.

[Name of contractor] claims [he] is entitled to additional compensation from [name of owner] for [describe work/materials] 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) [name of owner] had responsibility for [describe lack of access].

References

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

(16) CV2216. 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 by a preponderance of the evidence 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 contractor] informed [name of owner] that the work would require additional [time/compensation];

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

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

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).

(17) CV2217. Notice of changes.

The contract requires [name of contractor] to notify [name of owner] of any changes in the work that affect the contract schedule or price. [Describe notice requirement in contract.] To recover for contract changes, [name of contractor] must prove by a preponderance of the evidence that:

(1) [name of contractor] notified [name of owner] of [describe changes];

(2) [name of contractor] performed the changes in the work; and

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

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).

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

Procon Corp. v. Utah Dept. of Transp., 876 P.2d 890 (Utah App. 1994).

(18) CV2218. Additional time or compensation for extra work.

If extra work was performed, you must award [name of contractor] the additional [time/compensation] that the parties agreed to. If you determine the parties did not

agree on an amount of additional [time/compensation] for extra work performed, you must award [name of contractor] a reasonable amount of [time/compensation].

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)

(19) CV2219. "Waiver" defined.

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

(1) a party has a contract [right, benefit, advantage];

(2) the party knew of the [right, benefit, advantage]; and

(3) the party intended to release that [right, benefit, advantage].

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).

(20) CV2220. Waiver of change notice.

[Name of contractor] claims that [name of owner] waived the right to require [name of contractor] to notify [name of owner] in writing of changes to the contract. To succeed on this claim, [name of contractor] must prove by a preponderance of the evidence 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/costs].

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).

(21) CV2221. 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 by a preponderance of the evidence that:

(1) the contract documents described certain site conditions;

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

(3) [name of contractor] encountered site conditions different from those described; and

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

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).

(22) CV2222. 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 the site conditions differ materially from 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)

(23) CV2223. 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 by a preponderance of the evidence 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).

(24) CV2224. 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).

(25) CV2225. Excusable delay.

[Name of contractor] claims that [he] is entitled to an extension of the contract time to complete the work as a result of a delay that is beyond [name of contractor]'s control.

In order for [name of contractor] to be entitled to an extension of time [name of contractor] must prove by a preponderance of the evidence that:

(1) The delay was beyond [name of contractor]'s control.

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

(3) The delay is not the responsibility of either [name of contractor] or [name of owner].

(4) The delay was not assumed waived or assumed by [name of contractor].

(5) The delay required [name of contractor] to incur more time in performing the contract work.

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.

(26) CV2226. Inexcusable delay.

[Name of owner] claims that [name of contractor] is not entitled to an extension of the contract time or additional compensation to complete the work as a result of a delay that was the responsibility of [name of contractor].

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 by a preponderance of the evidence 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].

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

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).

(27) CV2227. Compensable delay.

[Name of contractor] claims that he is entitled to extra compensation and extra time 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.

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) The delay was caused by [name of owner] and not [name of contractor].

(2) The delay was not beyond [name of owner]'s control.

(3) The delay was reasonably foreseeable by the [name of owner].

(4) The delay was not assumed or waived by [name of contractor].

(5) The delay required [name of contractor] to incur more costs and time in performing the work.

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.

(28) CV2228. 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).

(29) CV2229. Acceleration.

[Name of contractor] claims that he is entitled to damages for extra costs incurred because [name of owner] required [name of contractor] to perform the work within a time period which was less than the performance time required under the contract [or the owner increased the scope of work and did not increase the contract time].

In order for [name of contractor] to recover damages for acceleration, [name of contractor] must prove by a preponderance of the evidence that:

(1) [name of contractor] is not at fault for any delay related to his 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.

(30) CV2230. No 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, [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.

To succeed on this claim, [name of contractor] must prove by a preponderance of the evidence 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.

(31) CV2231. 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 by a preponderance of the evidence that:

(1) [name of owner]'s failure to make the payments was a material 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).

(32) CV2232. Right to suspend work for interference.

~~[Name of contractor] claims that [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 [name of contractor] proves by a preponderance of the evidence 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~~ then [name of contractor] had the right to suspend work.

References

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

(33) CV2233. Bad faith termination for convenience.

In terminating the contract for convenience, [name of owner] cannot act in bad faith. If [name of contractor] proves 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.

(34) CV2234. 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]. [Name of terminating party] must prove by a preponderance of the evidence 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 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

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

ABA Model Jury Instructions: Construction Litigation § 6.18.

(35) CV2235. 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.

MUJI 1st Instruction

(36) CV2236. Impossibility

In this case, [name of contractor] claims that the contract was impossible to perform and that he is excused from performing work because [insert description of circumstances].

[Name of contractor] is excused from performing the contract work if [name of contractor] proves by a preponderance of the evidence 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 impossible.

(3) The cause of the impossibility are beyond [name of contractor]'s control.

(4) The events causing the impossibility were not foreseeable by either the [name of contractor] or the [name of owner] 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.

(37) CV2237. Impracticability

In this case, [name of contractor] claims that the contract was impracticable to perform, and that he is excused from performing work because [insert description of circumstances].

[Name of contractor] is excused from performing the contract work if he proves by a preponderance of the evidence that:

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

(2) [name of contractor] did not create the events that made the performance of the contract impracticable.

(3) The cause of the impracticability are beyond [name of contractor]'s control.

(4) The events causing the impracticability were not foreseeable by either the [name of contractor] or the [name of owner] 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.

(38) CV2238. Frustration of purpose

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

[Name of contractor] is excused from performing the contract work if he proves by a preponderance of the evidence 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 are beyond [name of contractor]'s control.

(4) The events causing the impracticability were not foreseeable by either the [name of contractor] or the [name of owner] 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.

(39) CV2239. Extraordinary events.

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

(1) [his] [damages/failure to perform], was caused solely by such an extraordinary event; and

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

(40) CV2240. Implied waiver of breach.

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

(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.

References

See Ryan v. Curlew Irrigation & Reservoir Co., 36 Utah 382 (1909). (A superintendent may accept the work pursuant?.)

(41) CV2241. Estoppel.

[Name of owner] claims that it would be unfair to enforce the contract because of [name of contractor]'s previous [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].

References

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).

(42) CV2242. 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.

MUJI 1st Instruction

26.44

(43) CV2243. 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].

NOTE: "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."

Melissa will re-work.

(44) CV2244. 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.

(45) CV2245. Damages for suspension of work.

If you find that [name of contractor] had the right to suspend work, the [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.

(46) CV2246. Damages for termination for convenience.

The contract allows [name of owner] to terminate the contract for any reason at any time. If [name of owner] proves by a preponderance of the evidence 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

Termination instructions. Melissa will confirm citations.

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.

(47) CV2247. Damages for bad faith termination for convenience.

If you find that [name of owner] acted in bad faith in terminating the contract for convenience, then you must decide what damages [name of contractor] can recover~~terminating the contract for convenience in bad faith~~. The proper calculation of damages is:

(1) the contract price less the reasonable cost to complete the work;

(2) plus the profit [name of contractor] would have made had [he] been allowed to complete the work.

[Name of contractor] must prove the costs [he] would have necessarily incurred to complete the contract. [Name of contractor] must also prove that the profit [he] would have earned was reasonably foreseeable and within the contemplation of the parties at the time of entering onto the contract.

NOTE: Is the highlighted text correct? It seems that it would be in contractor's interest to minimize the remaining costs.

Committee Note

Melissa will draft comment.

References

Flynn v. W.P. Harlin Const. Co., 29 Utah 2d 327, 509 P.2d 356 (1973).

Flynn v. Schocker Const. Co., 23 Utah 2d 140, 459 P.2d 433 (1969).

Keller v. Deseret Mortuary Co., 23 Utah 2d 1, 455 P.2d 197 (1969).

Matthew Bender, 3-11 Construction Law P 11.02(2)(a)(ii) (2007).

(48) CV2248. 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 of the damages the 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)

(49) CV2249. Contractor's liability for defective work.

[Name of owner] claims that [name of contractor] breached the contract by performing defective work and that [name of owner] is therefore entitled to damages. To succeed on this claim, [name of owner] must prove that:

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

(2) [name of contractor] failed to perform its work with the degree of care ordinarily exercised by other contractors doing the same or similar work; and

(3) [name of owner] was damaged.

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

(50) CV2250. Contractor's defense to claims for defective work.

[Name of owner] claims that [name of contractor] breached the contract by performing defective work and that [name of owner] is entitled to damages. If you find that [name of owner] provided [name of contractor] with defective plans and [name of contractor] followed the plans, [name of contractor] will not be liable for the defects unless the plans were so obviously defective that no reasonable contractor would have followed them.

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)

Andrus v. State, 541 P.2d 1117, (Utah 1975)

(51) CV2251. Owner's damages for contractor's defective work.

If you find [name of contractor] breached the contract and is liable to [name of owner] for defective work, [name of owner] is entitled to:

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

(2) The cost of correcting the defective work would be unreasonably wasteful in which case the Owner would be entitled to damages equal to the amount of 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

*Unreasonable waste occurs where the costs of correction unreasonably exceeds the project's decrease in value.