

Agenda

Advisory Committee on Model Civil Jury Instructions

March 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 |
| Fraud and Deceit | Tab 2 | George Hailey Tim Shea |
| Attorney Negligence | Tab 3 | Frank Carney Bob Gilchrist |

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.

| | |
|--------------------|------------------------|
| April 13, 2009 | Construction Contracts |
| May 11, 2009 | Eminent Domain |
| June 8, 2009 | Premises Liability |
| July 13, 2009 | Insurance Obligations |
| August 10, 2009 | Probate |
| September 14, 2009 | Professional Liability |
| October 13, 2009 | Employment |

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 9, 2009

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Paul M. Simmons, and David E. West. Also present: Kent B. Scott, chair of the construction contract subcommittee

1. *New Member.* The committee welcomed John R. Lund, who is taking the place of Gary Johnson on the committee.

2. *Construction Contract Instructions.* The committee continued its review of the construction contract instructions.

a. *General instruction.* Mr. Carney thought the section on construction contracts needed a general instruction. Messrs. Scott and Shea noted that the commercial contract instructions contain general instructions on the issues in a breach of contract case and the elements of a breach of contract claim (CV2101 and CV2102). Mr. Carney suggested that a committee note be added to the construction contract section referring users to CV2101 and CV2102 for general instructions.

b. *CV2207. Contractor's right to withdraw bid.* Mr. Shea noted that he had changed "intentional" in subparagraph (2) to "unintentional." Mr. Lund asked whether "mathematical" would be more easily understood than "arithmetical." The committee approved the instruction as modified.

c. *CV2208. Mutual mistake.* Mr. Young thought the instruction belonged in the contract instructions, not the construction contract instructions. Mr. Scott noted that the instruction was similar to the commercial contract instruction (CV2129) but cited construction contract authorities. Some committee members thought the instructions would be more user friendly if both the commercial contract instructions and the construction contract instructions contained an instruction on mutual mistake. Mr. Lund noted, however, that if the instructions used different language, one may think that the law is different depending on the type of contract involved. Mr. Young suggested using the language of CV2129 for CV2208 but keeping the construction contract references. The committee approved his suggestion.

d. *CV2209. Unilateral mistake.* At Mr. Young's suggestion and on motion of Mr. Ferguson, the committee substituted the language of CV2130 for CV2209, but kept the references to construction contract cases.

e. *CV2210. "Material mistake" defined.* Mr. Young noted that the commercial contract instructions cover "material breach" but not "material mistake." The committee debated whether to use the term "material" or "important." Mr. Scott noted that the public bidding statute uses "material." Since the instructions on unilateral and mutual mistake now use the term "important," the committee thought that CV2210 was unnecessary and deleted the instruction, although some committee members questioned whether the instructions should define "important mistake."

Dr. Di Paolo joined the meeting.

f. *CV2211. Promissory estoppel.* The committee noted that CV2211 is similar to CV2114, but there is a difference in subparagraph (3). Mr. Scott reported that he had talked to Bruce Badger, the chair of the commercial contract subcommittee, and Mr. Badger agreed that CV2211 should be used for CV2114. The committee struck "by a preponderance of the evidence" from the first paragraph, in keeping with its practice of not restating the standard of proof in each instruction. At Mr. Ferguson's suggestion, "material" in subparagraph (1) was changed to "important." Mr. Lund questioned whether "induce" in subparagraph (3) was plain English. The committee discussed alternatives, such as "lead to," "cause the party to act or not act," "make," "prompt," "persuade," and "influence." Mr. Simmons suggested rephrasing subparagraph (3) to say that the party making the promise "expected that [name of party] would act or not act based on the promise." Mr. Lund and Dr. Di Paolo thought that shifted the focus of the instruction. The committee rewrote subparagraph (3) to read: "[name of other party] knew or should have expected that [his] promise would lead [name of party] to act or not act." The committee approved the instruction as revised.

g. *CV2212. Owner's duty not to interfere with construction.* At Mr. Ferguson's suggestion, "or delays" was deleted from subsection (3), on the grounds that the result of delays is damages. Mr. Young questioned whether "damages" should be "additional costs." Other committee members noted that there may be other damages besides "additional costs," such as consequential and incidental damages, and one can have damages without additional costs. The committee left "damages" in subsection (3) and approved the instruction as otherwise modified.

h. *CV2213. Implied warranty of fitness of plans and specifications.* Mr. Young noted that there is a recent Utah case on point that refers to the implied warranty as one of the "accuracy," not "fitness," of the plans and specifications. He noted that the case allowed the contractor to recover damages for additional costs incurred. Mr. Scott thought that the damages could best be

covered in a separate damage instruction. Mr. Shea questioned the use of “deficiencies” in the instruction. The committee changed “deficiencies” to “defects” and added at the end of the instruction “and may recover damages caused by defects in the plans and specifications.” Mr. Young suggested that the subcommittee revise the instruction to explain the damages that are recoverable for a breach of the implied warranty. Mr. Shea noted that the instruction does not use the term “warranty” and suggested the title be revised to “Defective plans and specifications.” The instruction was approved, subject to the subcommittee adding a section on damages.

i. *CV2214. Duty to provide for suitable working conditions.* The committee deleted “[he] is entitled to” from the first line. At Mr. Young’s suggestion, it added “at the construction site” to the end of the first sentence and the end of subparagraph (1). and struck “by a preponderance of the evidence” from the second sentence. Mr. West questioned whether the owner is responsible for the site; he thought that responsibility belonged to the contractor. Mr. Scott noted that the owner must provide safe working conditions and give the contractor access to the site, but also noted that the subcommittee could not find any Utah authority for the instruction. Mr. Lund thought that responsibility for the site would be a matter of contract. Mr. Young thought that if the contract was silent, the owner had a duty. The committee ultimately decided to withdraw the instruction since there is no Utah law on point.

j. *CV2215. Duty to provide access to the worksite.* Mr. Young thought there was a Utah case on point (the *City of Fillmore* case). Mr. Scott offered to check for Utah authority for the instruction. Mr. West thought that the cases generally involve a general contractor (not an owner) failing to provide access to the worksite. At Mr. Lund’s suggestion, the first sentence was revised to read: “[Name of contractor] claims [he] had additional costs because [name of owner] failed to provide access to the worksite.” Mr. West suggested that a committee note be added to say that the instruction can be modified to cover subcontractor-contractor claims. Mr. Shea suggested that it be covered in a general note for the entire section. Mr. Lund asked whether the duty to provide access included an element of reasonableness. Mr. Young suggested saying “suitable access.” Mr. Scott noted that the cases just refer to “access.” Dr. Di Paolo thought that suitability is subsumed in the term “access.” Mr. Simmons asked whether subparagraph (3) (which says that the owner had responsibility for lack of access) was a question of fact for the jury to decide or a question of law for the court to decide. Subparagraph (3) was deleted and replaced with “(3) [he] had additional costs.” The instruction was approved as modified.

Mr. Fowler was excused.

k. *CV2216. Claim for extra work.* Messrs. Lund and Ferguson questioned the use of “[time/compensation]” in the first line. Mr. Ferguson noted that the jury cannot award “time.” Mr. Scott noted that the intent was that the court and attorneys would adapt the instruction to the facts of the case. Some contracts may provide that there are no damages for delay, for example. The committee substituted “cost” for “compensation.” The phrase “by a preponderance of the evidence” was deleted from the third line. At Mr. Young’s suggestion, subparagraph (3) was changed to “[name of owner] knew or should have known that the work required additional [time/cost].” Dr. Di Paolo asked whether the owner must have known that the work would require additional time or cost at the time he directed the contractor to perform the additional work. Mr. Scott noted that the owner must have known (or should have known) before the work was completed but not necessarily when he ordered the additional work. Mr. Scott suggested that the jury be left to work out the timing issue, based on what is fair under the circumstances of the particular case. The committee approved the instruction as modified.

3. *Procedure.* Noting that the “perfect is the enemy of the good,” Mr. Carney suggested a procedure for approving the instructions more quickly. He suggested that each set of instructions be approved by a smaller group than the whole committee. Mr. Young suggested that two groups of 3 or 4 members approve each set of instructions. The committee approved Messrs. Young, Scott, and Lund as the group to approve the construction contract instructions. Mr. Carney volunteered to take Mr. Johnson’s place on the professional liability instruction subcommittee. Mr. Carney noted that, because the jury instruction revisions are ongoing, if there are mistakes in the instructions, they can be fixed later. Mr. Carney noted that we need feedback on the jury instructions to identify problem areas and tell where they need to be revised or fine-tuned. Dr. Di Paolo suggested that the court require all jury instructions actually given at trial to be posted somewhere. Mr. Shea noted that the committee’s webpage can also be used as a blog page.

4. *Next Meeting.* The next meeting will be Monday, March 9, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

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

Fraud and Deceit

| | |
|---|---|
| (1) CV1801. Elements of fraud. | 1 |
| (2) CV1802. Reckless false statement. | 2 |
| (3) CV 1803 Negligent misrepresentation. | 2 |
| (4) CV1804. Recovery for misrepresentation of fact. | 3 |
| (5) CV1805. Promises and statements of future performance. | 3 |
| (6) CV1806. Important statement of fact. | 4 |
| (7) CV1807. Intent to induce reliance. | 4 |
| (8) CV1808. Reasonable reliance. | 4 |
| (9) CV1809. Reliance on statement of opinion. | 5 |
| (10) CV1810. Concealment or fraudulent non-disclosure. | 6 |
| (11) CV1811. Compensatory damages. | 6 |
| (12) CV18##. Intent. | 8 |
| (13) CV18##. Duty to speak the whole truth. | 8 |
| (14) CV1899A. Special verdict form. | 8 |
| (15) CV1899B. Special verdict form. | 9 |

(1) CV1801. Elements of fraud.

[Name of plaintiff] claims that [name of defendant] defrauded [him] by making a false [oral/written], statement of fact that caused [him] harm. To succeed in this claim, [name of plaintiff] must prove each of the following by clear and convincing evidence:

- (1) [name of defendant] made a false statement about an important fact; and
- (2) either [name of defendant] made the statement knowing it was false, or [he] made the statement recklessly and without regard for its truth; and
- (3) [name of defendant] intended that [name of plaintiff] would rely on the statement; and
- (4) [name of plaintiff] reasonably relied on the statement; and
- (5) [name of plaintiff] suffered damages as a result of relying on the statement.

I will provide you with more information about each of these in the following instructions.

References

Yazd v. Woodside Homes Corp., 143 P.3d 283 (Utah 2006).

Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35 (Utah 2003).

Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060 (Utah 1996).

Taylor v. Gasor, Inc., 607 P.2d 293 (Utah 1990).

Dilworth v. Lauritzen, 18 Utah 2d 386, 424 P.2d 136 (1967).

Child v. Hayward, 16 Utah 2d 351, 400 P.2d 758 (1965).

See http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=1#118 Instruction CV118, Clear and convincing evidence.

MUJI 1st Instruction

17.1; 17.9

Committee Notes

This instruction and the instructions which follow use the term “important” rather than “material.” The Committee made this change because jurors are more likely to understand the former term, and because Utah case law defines materiality in terms of importance. See, e.g., Yazd v. Woodside Homes Corp., 143 P.3d 283 ¶ 34 (Utah 2006) (“To be material, the information must be ‘important.’”).

Although some of the instructions in this section may be useful in negligent misrepresentation cases, they do not purport to comprise a complete set of instructions for such cases.

Approved

(2) CV1802. Reckless false statement.

A false statement is made recklessly if [name of defendant] knew that [he] did not have sufficient knowledge to make the statement.

References:

Kuhre v. Goodfellow, 2003 UT APP 1, 69 P.3d 286.

Prince v. Bear River Mut. Ins. Co., 2002 UT 68, 56 P.3d 524.

Rawson v. Conover, 2001 UT 24, 20 P.3d 876 (“To have made a false representation recklessly, defendants would have to know that they had insufficient knowledge upon which to base the representation made.”)

MUJI 1st Instruction

Approved

(3) CV 1803 Negligent misrepresentation.

[Name of plaintiff] claims [he] was harmed when [name of defendant] negligently misrepresented an important fact. To succeed in this claim [name of plaintiff] must prove by clear and convincing evidence that:

(1) [name of defendant] owed a duty to [name of plaintiff];

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

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

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

(5) that it is reasonable to assume that [name of plaintiff] would trust that the fact was true;

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

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

References:

West v. Inter-Financial, Inc., 139 P.3d 1059, Court of Appeals (Utah 2006).

Smith v. Frandsen, 94 P.3d 919, (Utah Sup. Ct. 2004).

Price v Orem Investment Company v. Rollins, Brown & Gunnel, Inc., 713 P.2d 55 (Utah Sup. Ct. 1986).

Jardine v. Brunswick Corporation, 423 P.2d 659 (Utah Sup. Ct. 1967).

Is it OK to include a negligence instruction in the midst of the fraud instructions? Do we need an instruction on when defendant owes a duty to plaintiff?

(4) CV1804. Recovery for misrepresentation of fact.

You must decide whether the defendant's statement was a representation of fact as opposed to an opinion. Generally, a plaintiff may recover for fraud only if the defendant's statements were misrepresentations of facts.

References:

Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982).

MUJI 1st Instruction

17.3; 17.4

Committee Notes

Approved

(5) CV1805. Promises and statements of future performance.

A promise about a future act is a false statement of fact if [name of plaintiff] proves that [name of defendant]:

(1) never intended to keep the promise; and

(2) made the promise for the purpose of deceiving [name of plaintiff].

References:

Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982)

Hull v. Flanders, 83 Utah 158, 27 P.2d 56 (1933)

MUJI 1st Instruction

Approved

(6) CV1806. Important statement of fact.

A statement of fact is important if knowing that it is false would influence a reasonable person's judgment, or [his] decision to act or not to act.

References:

Yazd v. Woodside Homes Corp., 2006 UT 47, 143 P.3d 283

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

MUJI 1st Instruction

Approved

(7) CV1807. Intent to induce reliance.

You must decide whether [name of defendant] intended [name of plaintiff] to rely on a false statement, even though [name of defendant] did not make it directly to [name of plaintiff].

[Name of defendant] intended [name of plaintiff] to rely on the false statement if

[[Name of defendant] made the statement to a group of people that included [name of plaintiff]].

[[Name of defendant] made the statement to another person, with the intent or the belief that it would be communicated to [name of plaintiff]].

References:

Ellis v. Hale, 373 P.2d 382 (1962)

MUJI 1st Instruction

Approved

(8) CV1808. Reasonable reliance.

In deciding whether [name of plaintiff]'s reliance on the false statement was reasonable, you must take into account all relevant circumstances, such as [his] age, mental capacity, knowledge, experience, and [his] relationship to [name of defendant].

References

Mikkelson v. Quail Valley Realty, 641 P.2d 124 (Utah 1982)

Berkeley Bank for Coops. v. Meibos, 607 P.2d 1369 (Utah 1980)

MUJI 1st Instruction

17.8

Approved

(9) CV1809. Reliance on statement of opinion.

[Name of plaintiff] claims that [his] reliance on [name of defendant]'s statement was reasonable, even though the statement was an opinion. To succeed in this claim, [name of plaintiff] must prove by clear and convincing evidence that:

(1) the opinion was that of a person [name of plaintiff] reasonably believed was disinterested; and

(2) the fact that the person holds the opinion was important to [name of plaintiff].

OR

(1) [name of plaintiff] did not know about the matter about which [name of defendant] stated the opinion; and

(2) [name of defendant] stated the opinion in a way that implied the matter to be true, rather than just as an expression of belief.

OR

[(1) [name of defendant] claimed to have special knowledge about the matter that [name of plaintiff] did not have;] or

[(2) [name of defendant] and [name of plaintiff] had a relationship of trust;] or

[(3) [name of defendant] secured [name of plaintiff]'s confidence;] or

[(4) [name of defendant] has a special reason to expect that [name of plaintiff] would rely on [name of defendant]'s opinion.]

References:

Baird v. Eflow Inv. Co., 289 P.2d112 (Utah 1930).

See Restatement of Torts (Second) Sections 538A, 539, 542 and 543.

Committee Notes

Under the general rule, plaintiff's reliance on an opinion is not reasonable and the fourth element stated in Instruction 1801 is not met. Restatement of Torts (Second) Sections 538A. However, plaintiff's reliance on an opinion may be reasonable under three special scenarios.

First, plaintiff's reliance may be reasonable if plaintiff believes the person stating the opinion is disinterested and the fact that the person holds the opinion is important. This scenario is expressed in the first set of elements (1) and (2). Restatement of Torts (Second) Section 543.

Second, plaintiff's reliance may be reasonable if plaintiff does not know of the facts and defendant expresses the opinion to imply that defendant knows facts that are not incompatible with the opinion or that are sufficient to justify the opinion. This scenario is expressed in the second set of elements (1) and (2). Restatement of Torts (Second) Section 539.

Third, plaintiff's reliance may be reasonable if defendant claims expertise that plaintiff does not have or there is a relationship of trust between the parties. This

scenario is expressed in the third set of elements (1) though (4). Restatement of Torts (Second) Section 542. Note that under this scenario only one of the four elements is necessary.

The judge should instruct the jury only on the scenario for which there is evidence and if the third scenario is included, only on those bracketed elements for which there is evidence. If there is evidence to support more than one of the bracketed elements, they should be connected by the disjunctive “or.”

(10) CV1810. Concealment or fraudulent non-disclosure.

I have determined that [name of plaintiff] was in a [type of relationship] that gave [name of defendant] a duty to disclose an important fact to [name of plaintiff]. You must decide whether [name of defendant] failed to disclose an important fact. To establish that [name of defendant] failed to disclose an important fact, [name of plaintiff] must prove all of the following:

(1) that [name of defendant] knew [describe the important fact] and failed to disclose it to [name of plaintiff];

(2) that [name of plaintiff] did not know [describe the important fact]; and

(3) that [name of defendant]’s failure to disclose [describe the important fact] was a substantial factor in causing [name of plaintiff]’s damages.

References

Yazd v. Woodside, 143 P.3d 283 (Utah 2006)

Moore v. Smith, 158 P.3d 561 (Utah App. 2007)

MUJI 1st Instruction

17.10

Committee Note

This instruction should be given only if the Court has determined that a special relationship imposing the higher duty is established as a matter of law. Moore v. Smith, 158 P.3d 561 (Utah App. 2007).

Approved

(11) CV1811. Compensatory damages.

If you decide that [name of defendant] defrauded [name of plaintiff], then you must also decide how much money is needed to fairly compensate [name of plaintiff] for any damages caused by the fraud.

~~[ALTERNATIVE A]~~

~~In deciding how much money [name of plaintiff] is entitled to as damages, you should determine the difference between the value of the property that [name of plaintiff] [bought/sold] and the value the same property would have had if [name of defendant]’s statements about it had been true~~

~~[ALTERNATIVE B]~~

~~In deciding how much money [name of plaintiff] is entitled to as damages, you should determine the total amount [name of plaintiff] was damaged as a consequence of [his] reliance on [name of defendant]'s statements.~~

You may award damages for the harm [name of plaintiff] experienced because of [name of defendant]'s fraud as long as you determine that the damages were reasonably foreseeable, and that [name of plaintiff] has proven these damages with reasonable certainty. [Name of plaintiff] claims the following damages:

[(1) the difference between the value of the property that [name of plaintiff] bought/sold] and the value the same property would have had if [name of defendant]'s statements about it had been true.]

[(2) loss of good will;]

[(3) expenditures in mitigation of damages;]

[(4) lost earnings;]

~~[(5) prejudgment interest;]~~

[(5) loss of interest on loans required to finance [describe the loss]]

[(6) lost profits;]

[(7) emotional distress;]

[(8) describe other items claimed.]

References

~~Alternative A~~

Dugan v. Jones, 615 P.2d 1239 (Utah 1980)

Lamb v. Bangart, 525 P.2d 602 (Utah 1974)

Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967)

Alternative B

Restatement (Second) of Torts, § 549

Campbell v. State Farm Mutual Automobile Ins. Co., 65 P.3d 1134 (2001)

Ong International (U.S.A.) Inc., v. 11th Avenue Corp., 850 P.2d 447 (1993)

Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991)

MUJI 1st Instruction

17.11

Committee Notes

This instruction expands MUJI 17.11 to address a broader range of fraud cases. ~~Alternative A~~ This instruction states the traditional measure of damages in fraud cases involving the purchase or sale of property, as recognized in Dugan v. Jones, 615 P.2d 1239 (Utah 1980) (real estate), Lamb v. Bangart, 525 P.2d 602 (Utah 1974) (livestock), Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967) (distributorship) and others.

~~Alternative B is intended for cases where~~The instruction also includes loss is suffered in reliance on a fraudulent misrepresentation, ~~but even if~~ there is not ~~necessarily~~ any purchase or sale between the plaintiff and defendant. This situation is presented in a variety of cases: e.g., where the plaintiff is fraudulently induced to extend money or credit, or where the plaintiff is fraudulently induced to purchase or use an article which is inappropriate for the intended use. See Restatement (Second) of Torts § 549, and comments thereto.

(12) CV18##. Intent.

Intent ordinarily ~~may can~~ not be proved directly because there is no way of ~~fathoming or scrutinizing knowing~~ the operations of [a corporation] ~~or~~ [the human mind]. You may infer intent from the surrounding circumstances and find that [name of defendant] intended the natural and probable consequences of acts done knowingly. You may consider any statement made or acts done by [name of defendant]; and all other facts and circumstances that may ~~indicate show~~ intent. ~~You may draw the inference and find that the person intends the natural and probable consequences of acts knowingly done.~~

References

Deseret Federal Savings and Loan Assn v. United States Fidelity & Guaranty Co., 714 P.2d 1143, 1146 (Utah 1986).

Hoffman v. Life Insurance Company of No. America, 669 P.2d 410, 420 (Utah 1983).

(13) CV18##. Duty to speak the whole truth.

~~In general, once a person undertakes to speak, that person assumes~~ If [name of defendant] made a statement of fact, then [he] had a duty to tell the whole truth, ~~and~~ to make a full and fair disclosure ~~as to of~~ the matters about which ~~the person assumes to speak [he] spoke, and to prevent a partial statement from being misleading or giving a false impression.~~ Under the law, a duty to disclose may exist where one voluntarily undertakes to speak but fails to prevent [his] words from being misleading.

~~Likewise, when a party makes a partial disclosure, the party then has a duty to tell the whole truth. A party is under a duty to disclose to prevent a partial statement of facts from being misleading or conveying a false impression.~~

References

Fraud and Deceit, AmJur 2d, Section 209.

(14) CV1899A. Special verdict form.

Please answer the following questions based on the instructions the court has given you.

(a) Do you find that [name of plaintiff] proved the following by clear and convincing evidence?

(1) Did [name of defendant] make a false statement about an important fact?

Yes _____ No _____

(2) Did [name of defendant] make the statement knowing it was false or recklessly and without regard for its truth?

Yes_____ No_____

(3) Did [name of defendant] intend that [name of plaintiff] would rely on the statement?

Yes_____ No_____

(4) Did [name of plaintiff] reasonably rely on the statement?

Yes_____ No_____

(5) Did [name of plaintiff] suffer damages as a result of relying on the statement?

Yes_____ No_____

(b) If you answer “no” to any of these questions, then skip questions (c) and (d).

(c) If you answer “yes” to questions (1) – (5), what if any damage do you award [name of plaintiff]?

Economic Damage \$_____

Non-Economic Damage \$_____

(d) If you answered “yes” to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of [name of defendant] were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]’s rights?

Yes_____ No_____

Date

Jury Foreperson

(15) CV1899B. Special verdict form.

Please answer the following questions based on the instructions the court has given you.

(1) Do you find by clear and convincing evidence that [name of defendant] committed fraud on [name of plaintiff]?

Yes_____ No_____

(2) If you answered “yes” to question (1), do you find by clear and convincing evidence that such conduct was a cause of damage to [name of plaintiff]?

Yes_____ No_____

(3) If you answered “yes” to question number (2), what if any damage do you award [name of plaintiff]?

Economic Damage \$_____

Non-Economic Damage \$_____

(4) If you answered "yes" to questions (1) and (2), do you find by clear and convincing evidence that the actions of [name of defendant] were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]'s rights?

Yes_____ No_____

Date

Jury Foreperson

Tab 3

Attorney Negligence

| | |
|---|---|
| (1) CV401(A). Committee Note on Attorney Negligence Instructions..... | 1 |
| (2) CV401(B). Elements of claim for attorney’s negligence..... | 1 |
| (3) CV402. Attorney-client relationship. | 2 |
| (4) CV403. Duty of care. | 2 |
| (5) CV404. Duty of care of specialist..... | 2 |
| (6) CV405. Uncertain laws or judicial mistakes..... | 3 |
| (7) CV406. Scope of representation..... | 3 |
| (8) CV407. Standard of care for plaintiff..... | 3 |
| (9) CV408. Fiduciary relationship..... | 4 |
| (10) CV409. “Cause” defined. | 4 |

(1) CV401(A). Committee Note on Attorney Negligence Instructions

The Committee intentionally omitted MUJI 1st Instruction 7.46 because there is no Utah law supporting it.

(2) CV401(B). 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 that:

- (1) [he] and [name of defendant] had an attorney-client relationship;
- (2) because of that relationship [name of defendant] owed a duty to [name of plaintiff];
- (3) [name of defendant] negligently breached that duty; and
- (4) [name of defendant]’s negligence was a cause of [name of plaintiff] injury, loss or damage.

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

(3) CV402. Attorney-client relationship.

An attorney-client relationship can be established by an express contract between the parties, or by an implied contract based upon their 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.

(4) CV403. Duty of care.

[Name of defendant] has a duty to use the same degree of care, skill, judgment and diligence used by qualified lawyers 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

(5) CV404. Duty of care of specialist.

If [name of defendant] holds [himself] out as a specialist, [he] has a duty to use the same degree of care, skill, judgment and diligence used by qualified specialists in the same field under similar circumstances.

MUJI 1st Reference

7.45

References

Rule of Professional Conduct 7.4(d) - Communication of Fields of Practice.

Committee Notes

(6) CV405. Uncertain laws or judicial mistakes.

[Name of defendant] is not negligent for errors about laws that are uncertain, unsettled or debatable, or laws 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.

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

Committee Notes

(7) CV406. Scope of representation.

[Name of defendant] may limit the scope of representation if the limitation is reasonable under the circumstances and if [name of plaintiff] gives informed consent. In general, [name of defendant] has no duty to act beyond the scope of representation.

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.

(8) CV407. Standard of care for plaintiff.

[Name of plaintiff]'s actions that caused [him] to hire [name of defendant] cannot be considered when you decide who was at fault.

[Name of plaintiff]'s negligent actions after hiring [name of defendant] can be considered when you decide who was at fault.

MUJI 1st Reference

7.48

References

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

Committee Notes

(9) CV408. Fiduciary relationship.

[Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim [name of plaintiff] must prove that [he] and [name of defendant] have a fiduciary relationship that requires [name of defendant] to:

- [(1) not take advantage of [his] legal knowledge and position;]
- [(2) have undivided loyalty to [name of plaintiff];]
- [(3) treat all of [name of plaintiff]'s matters as confidential;]
- [(4) not conceal any facts or law from [name of plaintiff]; and]
- [(5) not deceive [name of plaintiff] in any way.]

A breach of a fiduciary duty is a breach of the standard of care.

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).

Committee Notes

This list of fiduciary duties is not exhaustive. 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.

(10) CV409. "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 http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=2#209>Instruction CV209, "Cause" defined.

Committee Notes

Damages is describes as an element of the claim in 401(A), 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 409.)

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:

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