

# Agenda

## Advisory Committee on Model Civil Jury Instructions

August 10, 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
Construction Contracts	Tab 2	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.

September 14, 2009	Accountant Negligence
October 13, 2009	Eminent Domain
November 9, 2009	Premises Liability
December 14, 2009	Insurance Obligations
January 11, 2010	Probate
February 8, 2010	Professional Liability
March 8, 2010	Employment

# Tab 1

**MINUTES**

Advisory Committee on Model Civil Jury Instructions

June 8, 2009

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and Kent B. Scott (chair of the Construction Contract subcommittee)

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, David E. West

1. *Legal Malpractice Instructions.* Mr. Shea asked what the section should be called--attorney negligence or attorney malpractice. Mr. Simmons suggested "legal malpractice," to make it parallel to the section on medical malpractice and because the section includes theories other than negligence. The committee agreed. The committee then considered the following instructions in this section:

a. *CV402. Elements of claim for attorney's negligence.* The committee had previously approved this instruction. Mr. Shea suggested changing "injury, loss or damage" at the end of the instruction to "harm," to be consistent with other instructions. The committee approved the change.

b. *CV403. Elements of claim for breach of fiduciary duty.* Mr. Ferguson noted that "his" in subparagraph (2)(A) was ambiguous. It was not clear whether it referred to the attorney or the client. Messrs. Young and Simmons suggested adding "to [name of plaintiff]'s detriment" to the end of the subparagraph. Mr. Fowler suggested adding "improper" before "advantage." The committee revised subparagraph (2)(A) to read, "took improper advantage of [his] superior legal knowledge and position." The committee also deleted the last sentence of the committee note as redundant. The committee approved the instruction as revised.

c. *CV407. "Cause" defined.* Mr. Shea noted that he had included the subcommittee's proposal (the first paragraph of CV407) and the instruction on causation from the general negligence instructions (CV209) (the rest of the instruction). Mr. Ferguson thought the subcommittee's proposal was hard to follow. Mr. Simmons noted that CV402, which sets out the elements of the claim, includes "harm," whereas the subcommittee's proposal talks about the loss of a benefit and asked whether the loss of a benefit is the same as "harm." Mr. Young suggested using both. The committee deleted the first two paragraphs of CV407 and added a new introductory paragraph: "[Name of plaintiff] claims that [name of defendant] caused [name of plaintiff] harm by [describe his act or failure to act]."

Ms. Blanch joined the meeting.

The committee approved the instruction as modified.

d. *Damage instructions.* Mr. Shea noted that the legal malpractice instructions do not include instructions on damages. He noted that MUJI 1st included an instruction (7.52) entitled, "Plaintiff Must Prove Damages Resulting from Attorney Negligence," but further noted that the instruction was more of a causation instruction. It said that the plaintiff must prove not only that the defendant attorney was negligent but also that, but for his or her negligence, the plaintiff would have prevailed in the underlying legal action (the so-called "case within a case" requirement). The subcommittee had tried to deal with the concept in its proposed causation instruction ("[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 benefited."). Mr. Fowler asked whether the general instructions on tort damages would apply. Mr. Simmons thought that MUJI 7.52 was necessary. Mr. Young suggested replacing "negligence" with "fault" in the instruction. The committee decided to omit MUJI 7.52 but to add a note to CV407 saying, "In describing the act or failure to act, the instructions should describe the 'case within the case' requirement." Mr. Shea will also add a reference to the damage instructions for tort damages and damages for breach of contract.

e. *Publication.* Mr. Shea asked whether the legal malpractice instructions should be published now or whether he should wait to publish them until the other professional negligence instructions were completed. The committee thought they should be published now.

Mr. Scott joined the meeting.

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

a. *CV2206. Contractor's right to rely on owner-furnished information.* The committee revised subparagraph (4) to read: "The information caused [name of contractor] to incur extra [time/costs]." The instruction was approved as modified.

b. *CV2207, Contractor's duty to inquire or investigate; CV2214, Contractor's damages for defective plans and specifications; and CV2218, Owner's damages for contractor's defective work.* Mr. Scott will re-write CV2207, CV2214, and CV2218, with Mr. Young's input.

c. *CV2215. Contractor's liability for defective work.* Mr. Ferguson asked whether the phrase "the contract requirements" in subparagraph (1) needed to be defined. The phrase was changed to "[describe the contract

requirements].” Mr. Ferguson also thought the instruction was ambiguous because it was not clear whether the owner had to prove either (1) or (2) in addition to (3) or whether he had to either prove (1) or else prove (2) and (3). Mr. Young noted that (1) and (2) will often be present in the same case. At Mr. Shea’s suggestion, the committee bracketed subparagraphs (1) and (2) and deleted “OR.” It also added a note saying that the court should instruct only on those elements ((1) or (2)) for which there is evidence. At Mr. Shea’s suggestion, “the same or” was deleted from subparagraph (2). The committee approved the instruction as modified.

d. *CV2216. Duty to provide access to the worksite.* Mr. Scott will try to find a Utah case to cite as authority for the instruction.

e. *CV2219. Additional time or compensation for extra work.* Ms. Blanch and Mr. Simmons questioned whether the jury can award “time.” Mr. Scott and Mr. Young assured them that it can. The committee approved the instruction.

f. *CV2220. “Waiver” defined.* Mr. Young asked whether the definition of “waiver” for construction contract cases was different from the definition of “waiver” generally. Mr. Shea noted that there is no waiver instruction in the commercial contract instructions. Mr. Nebeker asked whether the requirement in subparagraph (2) meant that the party must have read the contract. Mr. Young asked whether knowledge can be imputed. Mr. Ferguson thought so; if someone signs a contract, he is deemed to know what is in the contract. At Mr. Simmons’s suggestion, “release” was replaced with “give [or giving] up” throughout the instruction. Mr. Young questioned whether jurors would understand the concept of implied intent. Ms. Blanch suggested revising the last paragraph to read, “The intent to give up a right may be determined by considering all relevant circumstances.” The committee left the last paragraph as it was. At Mr. Ferguson’s suggestion, the reference to *Jensen v. IHC Hospitals* was deleted, since it is not a construction contract case. The committee approved the instruction as modified.

g. *CV2221. Wavier of change notice.* Mr. Shea asked whether the phrase “by words or conduct” in the second sentence could be deleted. The committee thought not. Mr. Ferguson asked whether “extra work” needed to be defined. The committee thought that it was adequately defined in CV2217 and did not need to be defined again in CV2221. Mr. Simmons thought the instruction was missing an element, namely, that the owner intended to give up the right to insist on written notice. He thought that an owner could understand that extra work needed to be performed and would require a change to the

contract but could still insist that notice of the change be given in writing. Mr. Scott said that the case law makes it clear that there are just the two elements set out in the instruction. Messrs. Young and Scott explained how changes to a construction contract are made in practice and explained the difference between a change notice and a change order. At Mr. Young's suggestion, the title of the instruction was changed to "Owner's waiver of written change notice from the contractor," and a sentence was added to the beginning of the instruction stating, "The contract requires that change notices be made in writing." The committee approved the instruction as modified.

h. *CV2222, Extra work due to site conditions different from contract terms (Type 1 differing site condition), and CV2223, Extra work due to unusual site conditions unknown to the parties. (Type 2 differing site condition).* At Mr. Ferguson's suggestion, "actual" was added before "site conditions" in the first sentence of CV2222, in subparagraph (3) of that instruction, and in the second sentence of CV2223. At Mr. Simmons's suggestion, the phrase "and the different site conditions added to [name of contractor]'s [time/compensation]" was added to the end of CV2223. The committee approved the instructions as modified.

3. *Next meeting.* The next committee meeting will be August 10, 2009. There will be no committee meeting in July 2009.

The meeting concluded at 6:00 p.m.

# Tab 2

## Construction Contracts

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

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

**(2) CV2202. Compliance with public bidding instructions.**

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

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

- (1) submitted a bid that complies with the invitation to bid;
- (2) submitted a bid that satisfies the plans and specifications of the invitation to bid;
- (3) satisfies [name of owner governmental entity]’s requirements for financial strength, capacity to perform, integrity, and/or reliability;
- (4) provides a bid bond or equivalent money as a condition of the construction contract; and
- (5) provides a payment and performance bond as required by law.

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

Committee Note

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

References

- Utah Code Sections 11-39-101(10), 11-39-103 and 11-39-107.  
Cal Wadsworth Const. v. City of St. George, 898 P.2d 1372, 1375 (Utah 1995).  
Rapp v. Salt Lake City, 527 P.2d 651, 654 (Utah 1974).  
Thatcher Chem. Co. v. Salt Lake City Corp., 445 P.2d 769, 771 (Utah 1968).  
Schulte v. Salt Lake City, 10 P.2d 625, 628 (Utah 1932).

Approved

**(3) CV2203. “Responsive bid” defined.**

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

References

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

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

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

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

Approved

**(4) CV2204. “Responsible bid” defined.**

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

References

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

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

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

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

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

Committee Note

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

Approved

**(5) CV2205. Owner’s duty to inform.**

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

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

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

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

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

References

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

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

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

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

Approved

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

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

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

(2) the information was inaccurate or misleading;

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

(4) the information caused [name of contractor] to perform extra work, which 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 P.2d 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).

Approved

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

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

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

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

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

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

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

- (2) the extent of site access;
- (3) the conditions observable at the time of year;
- (4) the cost of independent site exploration; and
- (5) the specificity and sufficiency of information furnished by the owner.

#### Committee Note

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

#### References

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

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

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

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

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

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

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

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

**Kent will rewrite.**

#### **(8) CV2208. Contractor’s right to withdraw bid.**

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

- (1) the bid contains a substantial clerical or mathematical mistake, as opposed to an error in judgment;
- (2) [name of contractor]’s mistake was unintentional; and
- (3) [name of contractor] communicated the mistake to [name of owner] before the contract was awarded.

#### References

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

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

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

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

ABA Model Instruction 3.03.

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

Corbin on Contracts §609.

Approved

**(9) CV2209. Mutual mistake.**

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

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

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

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

References

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

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

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

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

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2129](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2129)>Instruction CV2129</a>, Mutual mistake.

Approved

**(10) CV2210. Unilateral mistake.**

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

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

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

(2) [his] mistake has such serious consequences that to enforce the contract would be unconscionable;

(3) the matter about which the mistake was made related to an important feature of the contract;

(4) the mistake occurred even though [name of defendant] made a reasonable effort to understand the circumstances about which he was mistaken; and

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

References

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

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

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

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2130](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2130) >Instruction CV2130</a>, Unilateral mistake.

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2127](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2127) >Instruction CV2127</a>, Substantive unconscionability.

Approved

**(11) CV2211. Promissory estoppel.**

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

- (1) [name of other party] was aware of all the important facts;
- (2) [name of other party] promised to [describe promise];
- (3) [name of other party] knew or should have expected that this promise would lead [name of party] to act or not act;
- (4) [name of party] reasonably relied on the promise;
- (5) [name of party]'s action or inaction resulted in damages.

References

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

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

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

Hess v. Johnston, 2007 UT App. 213.

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2114](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2114) >Instruction CV2114</a>, Promissory estoppel.

Approved

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

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

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

(2) the interference was unreasonable under the circumstances;

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

References

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

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

Approved

**(13) CV2213. Defective plans and specifications.**

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

References

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

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

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

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

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

Approved

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

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

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

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

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

References

Restatement (Second) of Contracts § 348

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

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

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

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

Committee Notes

Kent will rewrite.

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

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

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

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

AND

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

References

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

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

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

Committee Note. For items (1) and (2), instruct only on those items for which there is evidence.

Approved

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

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

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

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

(3) [he] had additional costs.

References

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

Add Utah cases.

Approved

**(17) CV2217. Claim for extra work.**

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

- (1) the work was not in the parties' original contract;
- (2) [name of owner], by words or conduct, directed [name of contractor] to perform the work;
- (3) [name of owner] knew or should have known that the work required additional [time/compensation];
- (4) [name of contractor] performed the work; and
- (5) the work added to [name of contractor]'s [time/compensation].

References

Highland Const. Co. v. Union Pacific R. Co., 683 P.2d 1042 (Utah 1984).  
Thorn Const. Co., Inc. v. Utah Dept. of Transp., 598 P.2d 365 (Utah 1979).  
Richards Contracting Co. v. Fullmer Bros., 417 P.2d 755 (Utah 1966).  
Campbell Bldg. Co. v. State Road Commission, 70 P.2d 857 (Utah 1937).  
Hoth v. White, 799 P.2d 213 (Utah App. 1990).  
Brixen & Christopher, Architects v. Elton, 777 P.2d 1039 (Utah App. 1989).  
Approved.

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

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

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

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

References

Restatement (Second) of Contracts § 348  
Bruner & O'Connor on Construction Law §§ 19:57-62  
Leishman v. Kamas Valley Lumber Co., 19 Utah 2d 150, 152, 427 P.2d 747, 749 (Utah 1967)  
Eleopulos v. McFarland and Hullinger, LLC, 2006 UT App 352, ¶ 11, 145 P.3d 1157, 1159 (2006)  
Jacob & Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889 (N.Y. 1921)

Committee Notes

Kent will rewrite.

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

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

References

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

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

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

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

Approved

**(20) CV2220. "Waiver" defined.**

"Waiver" means intentionally giving up a known right. To decide whether a party has waived a contract right, you must determine that all of the following have been proved:

- (1) a party has a contract right;
- (2) the party knew of the right; and
- (3) the party intended to give up that right.

The intent to give up 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).

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

Approved

**(21) CV2221. Owner's waiver of written change notice from contractor.**

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

- (1) understood that the work performed by [name of contractor] was extra work; and
- (2) agreed or acknowledged that this extra work would require a change to the contract [time/compensation].

References

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

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

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

Approved

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

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

- (1) the contract documents describe certain site conditions;
- (2) [name of contractor] reasonably relied on the description;
- (3) [the actual site conditions were different from those described; and
- (4) the different site conditions added to [name of contractor]'s [time/compensation].

References

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

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

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

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

Approved

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

[Name of contractor] claims additional [time/compensation] for extra work caused by site conditions that were unknown to the parties. To succeed on this claim, [name of contractor] must prove that:

- (1) there were important differences between the actual site conditions and those usually encountered; and
- (2) the different site conditions added to [name of contractor]'s [time/compensation].

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)

Approved

**(24) CV2224. Implied contract or unjust enrichment.**

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

- (1) [name of owner] requested [name of contractor] to perform extra work; and
- (2) [name of contractor] expected additional [time/compensation] for the extra work;
- (3) [name of owner] knew or should have known that [name of contractor] expected additional [time/compensation];
- (4) [name of contractor] performed the extra work that benefited [name of owner]; and
- (5) it would be unjust for [name of owner] to benefit from the extra work without providing [name of contractor] additional [time/compensation].

References

- Uhrhahn Const. & Design, Inc. v. Hopkins, 179 P.3d 808 (Utah App. 2008).  
Gary Porter Const. v. Fox Const., Inc., 101 P3d 371 (Utah App. 2004).  
ProMax Development Corp. v. Mattson, 943 P3d 247 (Utah App. 1997).  
Davies v. Olson, 746 P2d 264 (Utah App. 1987).

**(25) CV2225. Cardinal changes.**

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

References

- Highland Const. Co. v. Union Pacific R. Co., 683 P. 2d 1042 (Utah 1984).  
Allen-Howe Specialties Corp. v. U. S. Const., Inc., 611 P.2d 705 (Utah 1980).  
Wilson v. Salt Lake City, 174 P. 847 (Utah 1918).  
Wunderlich Contracting Co. v. U.S. ex re Reischel & Cottrell, 240 F.2d 201 (C.A.10 Dist. Utah 1957).  
Salt Lake City v. Smith, 104 F. 457 (C.A.8 Dist. Utah 1900).

**(26) CV2226. Excusable delay.**

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

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

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

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

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

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

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

#### References

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

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

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

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

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

CJS Contracts § 391.

CJS Contracts § 580.

#### (27) CV2227. Inexcusable delay.

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

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

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

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

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

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

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

#### References

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

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

**(28) CV2228. Compensable delay.**

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

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

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

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

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

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

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

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

References

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

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

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

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

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

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

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

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

CJS Contracts § 580.

**(29) CV2229. Concurrent delay.**

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

References

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

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

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

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

**(30) CV2230. Acceleration.**

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

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

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

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

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

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

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

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

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

References

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

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

CJS Contracts § 391.

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

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

work but is not entitled to recover damages caused by the delay. However, in limited circumstances, Utah law permits damages for delay, despite the contract.

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

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

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

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

#### References

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

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

Acree, James, Construction Litigation Handbook. § 7.8.

#### Committee Note

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

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

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

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

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

#### References

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

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

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

#### References

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

**(34) CV2234. Bad faith termination for convenience.**

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

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

[(2) entered into the contract without intending to honor its terms;]

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

References

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

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

ABA Model Jury Instructions: Construction Litigation § 6.16.

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

12 ALR Fed.2d 551.

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

Committee Note

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

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

**(35) CV2235. Termination for cause.**

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

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

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

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

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

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

References

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

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

ABA Model Jury Instructions: Construction Litigation § 6.18.

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

**(36) CV2236. Mitigation of damages.**

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

References

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

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

Restatement (Second) of Contracts § 350.

See

[http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2139](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2139) <a href="http://www.utcourts.gov/resources/muji/inc\_list.asp?action=showRule&id=21#2139">Instruction CV2139</a>, Mitigation and avoidance.

From Commercial Contracts:

CV2139 Mitigation and avoidance.

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

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

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

**(37) CV2237. Impossibility**

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

To succeed on this claim, [Name of contractor] is excused from performing the contract work if [name of contractor] must proves that:

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

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

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

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

#### References

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

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

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

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2125](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2125)>Instruction CV2125</a>, Impossibility/Impracticability.

#### From Commercial Contracts:

#### CV2125 Impossibility/Impracticability.

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

“Highly impracticable” means that performance under the contract can be done only at an excessive and unreasonable cost.

A “supervening event” is an event that creates a major change in the expected circumstances.

[Name of defendant] makes this assertion based on the following circumstances:

To prevail on this claim defendant must show:

[Insert description of circumstances, such as death of essential participant, destruction of essential property, unforeseen change of law, act of God, etc.]

If you decide that [name of the defendant] has proved these circumstances just described are a supervening event, unforeseen at the time the contract was entered into and occurred through no fault of [name of defendant] and that the circumstances rendered [name of defendant]'s performance of the contract impossible or highly impracticable, then [name of defendant]'s obligations under the contract are excused.

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

In this case, [Name of contractor] claims that [he] is excused from performing the contract because [insert description of circumstances] made the main purpose of the

~~contract was impracticable to perform, and that he is excused from performing work because [insert description of circumstances] achievable only at an excessive and unreasonable cost.~~

~~To succeed on this claim, [Name of contractor] is excused from performing the contract work if he must~~ proves that:

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

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

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

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

#### References

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

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

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2125](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2125) Inst ruction CV2125, Impossibility/Impracticability.

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

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

~~To succeed in this claim, [Name of contractor] is excused from performing the contract work if he must~~ proves that:

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

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

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

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

#### References

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

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

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2126](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2126) Inst ruction CV2126, Frustration of purpose.

**From Commercial Contracts**

**CV2126 Frustration of purpose.**

[Name of defendant] claims that [his] performance under the contract is excused because of the following circumstances:

[Insert description of circumstances which frustrated that purpose.]

To determine if defendant is excused from performance under the contract, you must decide:

- (1) the original purpose of the contract contemplated by the parties;
- (2) whether the circumstances just described are a supervening event, unforeseen at the time the contract was entered into;
- (3) whether the circumstances occurred through no fault of [name of defendant]; and
- (4) whether the new circumstances have made the purpose of the contract useless.

**(40) CV2240. Extraordinary events.**

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

- (1) [his] [damages/failure to perform], was caused solely by ~~such~~ an event so extraordinary ~~event that careful parties would not have expected it~~; and
- (2) human action did not contribute to the damage.

**(41) CV2241. Implied waiver of breach.**

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

- (1) ~~[name of owner]~~ knew or should have known of the defective [work/materials] supplied by [name of contractor];
- (2) ~~[name of owner]~~ did not object to the [work/materials]; and
- (3) ~~[name of owner]~~ accepted or paid for the [work/materials].

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

References

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

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

**(42) CV2242. Estoppel.**

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

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

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

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

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

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

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2114](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2114)>Instruction CV2114</a>, Promissory estoppel.

Committee Notes

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

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

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

**(43) CV2243. Accord and satisfaction.**

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

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

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

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

If you decide that [name of owner] has proved both of these things, then [name of owner] is released from performing [describe obligations] under the original contract.

References

Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977).

Stratton v. West States Constr., 440 P.2d 117 (Utah 1968).

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

See [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=21#2120](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2120) <a href="http://www.utcourts.gov/resources/muji/inc\_list.asp?action=showRule&id=21#2120">Instruction CV2120</a>, Accord and satisfaction.

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

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

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

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

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

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

**(45) CV2245. Defenses generally.**

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

References

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

**Move to general instructions. 100 series.**

**(46) CV2246. Damages for suspension of work.**

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

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

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

(3) other reasonable expenses.

References

Acet, James, Construction Litigation Handbook. § 7.16.

**(47) CV2247. Damages for termination for convenience.**

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

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

(2) the value of work completed;

(3) a reasonable profit on the work performed;

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

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

References

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

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

12 ALR Fed.2d 551.

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

Committee Notes

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

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

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

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

References

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

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

**(49) CV2249. Liquidated damages.**

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

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

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

References

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

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

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

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

Restatement of Contracts § 339 (1932)