Agenda
Advisory Committee on Model Civil Jury Instructions

September 14, 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.

October 13, 2009
November 9, 2009
December 14, 2009
January 11, 2010
February 8, 2010
March 8, 2010
April 12, 2010
May 10, 2010
June 14, 2010
September 13, 2010
October 12, 2010 (Tuesday)
November 8, 2010
December 13, 2010

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
August 10, 2009
4:00 p.m.

Present: John L. Young (chair), Juli Blanch (by phone), Phillip S. Ferguson, L. Rich Humpherys, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and Kent B. Scott (chair of the Construction Contract subcommittee)

Excused: Honorable William W. Barrett, Jr., Tracy H. Fowler, Colin P. King, David E. West

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

a. *CV2223. Extra work due to unusual site conditions unknown to the parties*. At Mr. Young's suggestion, "compensation" in subparagraph (2) was changed to "costs." The committee approved the instruction as modified.

b. *CV2224. Implied contract or unjust enrichment*. Mr. Ferguson asked how this instruction was different from CV2225, Cardinal changes. Messrs. Scott and Young explained that the difference was one of degree and remedy. If there is a cardinal change, the project becomes different in character from what was planned, and the contractor may re-price the entire contract, not merely recover the reasonable cost of extra work. The committee approved the instruction.

c. *CV2225. Cardinal changes*. Mr. Lund questioned whether jurors would understand the term "cardinal." Mr. Simmons suggested that the instruction be revised to follow the format of CV2224 and make it clear what the jury is to decide. Mr. Scott will rewrite CV2225 and add a comment to make it clear that cardinal change and unjust enrichment may be alternative claims in the same case.

Mr. Humpherys joined the meeting.

d. *CV2226. Excusable delay*. At Mr. Young's suggestion, "reasonably" was added before "foreseeable" in subsection (2), and "compensation" was replaced with "costs" in subsection (5). Messrs. Ferguson and Shea asked whether jurors would understand what it means to "assume[] or waive[]" the delay. Mr. Young thought it should be "waived the claim for delay." Mr. Ferguson noted that the instruction requires the contractor to prove a negative. Mr. Young asked whether there should be separate jury instructions depending on who is making the claim--the contractor or the owner--or whether delay is being raised as a claim or a defense. Messrs. Ferguson and Summerill thought

subparagraphs (3) and (4) stated affirmative defenses and not elements of a claim. Mr. Scott agreed to take them out. The instruction was revised to read:

> [Name of contractor] claims that [he] is entitled to extra [time/compensation] to complete the work because of delay. To succeed on this claim, [name of contractor] must prove that the delay:
>
> (1) was beyond [his] control;
>
> (2) was caused by events that were not reasonably foreseeable to [name of contractor]; and
>
> (3) required [name of contractor] to incur more [time/costs] to perform the work.

The committee approved the instruction as revised.

e. *CV2227. Inexcusable delay.* Mr. Shea and Mr. Simmons thought the instruction was simply the negation of the plaintiff's burden to prove excusable delay and could be deleted. Mr. Simmons thought that if the contractor had the burden of proving that the delay was excused and the owner had the burden of proving that the delay was not excused, it could result in confusion, particularly if the jury decided that neither party had met its burden. Mr. Young thought both instructions were necessary. Mr. Humpherys asked whether the instruction to be given (CV2226 or CV2227) depended on which party to the contract was the plaintiff. Mr. Lund noted that there was little difference between the instruction on excusable delay (CV2226) and the instruction on compensable delay (CV2228). The only difference is that, for delay to be compensable, the owner must have caused it. Mr. Ferguson asked whether there could be a case where the contractor was claiming that any delay was excused but was not seeking any damages; if not, then we would not need separate instructions on excusable and compensable delay. Mr. Scott said there could be. Mr. Scott suggested revising the delay instructions and calling them "Owner delay" and "Contractor delay," incorporating CV2228 in CV2226.

Mr. Scott will revise CV2226-28 in light of the committee's discussion.

f. *CV2229. Concurrent delay.* At the suggestion of Messrs. Young and Scott, the first sentence was deleted. Messrs. Lund and Humpherys asked whether concurrent delay was a form of contributory negligence. Mr. Scott

explained that there is a difference between concurrent delay and contributory negligence. The former is not a complete defense. In construction law, the court looks at each day of delay, and a party can only recover delay damages for those days for which it bore no responsibility for the delay. The committee approved the instruction as modified.

g. *CV2230. Acceleration.* Mr. Humpherys asked whether profit should be included in the damages. Mr. Young explained that profit was included in "costs." The committee revised the instruction to read:

> [Name of contractor] claims that he is entitled to recover extra costs incurred because [[name of owner] required him to perform the work in less time than required by the contract] [[name of owner] increased the scope of work and did not increase the contract time].
>
> 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] [ordered [name of contractor] to complete the work in less time than required by the contract] [increased the scope of the work, but did not grant [name of contractor] an extension of time]; and
>
> (3) [name of contractor] incurred extra costs.

The committee approved the instruction as modified.

h. *CV2231. Damages for delay.* Mr. Scott thought the instruction should be called "No damages for delay," since it deals with no-damages-for-delay provisions of the contract. The committee revised the instruction to read:

> [Name of contractor] claims damages for delays. The contract provides that [name of contractor] is entitled to extra time to complete the work but is not entitled to recover damages caused by the delay. However, there are circumstances in which [name of contractor] may recover damages for delay regardless of the contract.

> To succeed on this claim, [name of contractor] must prove [that [name of owner/owner's agent] caused the delay by direct interference, active interference, or willful interference with [name of contractor]'s work.] [that the parties did not contemplate the delay at the time they entered into the contract and the delay was excessive and unreasonable.]

Mr. Shea asked what the difference was between direct interference and active interference. Mr. Lund thought that the revised instruction, which changed the phrase "so excessive and unreasonable that it falls outside of the contract," changed the substance of the instruction and lessened the contractor's burden. Mr. Young, however, thought that "falls outside of the contract" was problematic. Mr. Simmons asked whether the standard was objective or subjective: What if the parties did not actually contemplate the delay, but the delay was reasonably foreseeable at the time of contracting? The committee approved the instruction as revised.

i. *CV2232. Right to suspend work for non-payment.* Mr. Simmons suggested adding as the first element: "(1) [name of owner] failed to make one or more payments required by the contract." Mr. Scott suggested deleting the next element (that the failure to make the payments was a material or important breach of the contract), but the committee thought it should stay in. The first sentence was revised to read, "[Name of contractor] claims [he] suspended the work because of nonpayment," and new subparagraph (1) was added. The committee approved the instruction as revised.

j. *CV2233. Right to suspend work for interference.* Mr. Lund suggested making the instruction parallel to CV2232. The committee revised the instruction to read:

> [Name of contractor] claims that [he] suspended the work because of interference by [name of owner]. To succeed on this claim, [name of contractor] must prove that--
>
> (1) [name of owner] [events within [name of owner]'s control] unreasonably interfered with [name of contractor]'s performance of [his] work, and
>
> (2) the interference was for an unreasonable period of time.

Mr. Simmons asked how the issue of suspension of work arises--is it a claim for damages, or an affirmative defense to a claim? Mr. Scott indicated that it can be

either a claim or a defense. If it is a claim, it should be followed by the appropriate damage instruction (CV2246).

Mr. Scott will draft a committee note to that effect.

k. *CV2234. Bad faith termination for convenience.* Mr. Ferguson questioned the use of the phrase "malicious or wrongful intent." Must the intent be both "malicious" and "wrongful"? What does "malicious" mean in this context? What is "wrongful" intent? At Mr. Scott's suggestion, the instruction was withdrawn. The committee agreed to use the general contract instruction on good faith and fair dealing instead.

l. *CV2235. Termination for cause.* At Mr. Ferguson's suggestion, subparagraph (1) was revised to read, "he gave timely and adequate notice of the alleged breach to [name of other party]." With regard to subparagraph (3), Mr. Humpherys asked, What if the terminating party had been in breach of the contract but had cured the breach before the termination? Messrs. Ferguson, Young, and Simmons thought the last paragraph, which said, "you must strictly apply the termination provisions of the contract against [name of terminating party]," was a legal determination for the court to make and not properly part of the jury instruction. Mr. Summerill asked about subcommittee member Melissa Orien's suggestion that the instruction be deleted because there is no Utah law on point. The committee deferred further discussion of the instruction to allow time to review the Utah case cited in the references (*Keller v. Deseret Mortuary Co.,* 455 P.2d 197 (Utah 1969)).

2. *Remaining Construction Contract Instructions*. Mr. Young said that the subcommittee would meet next week to finalize the construction contract instructions. They will e-mail their suggested changes to the committee members. Committee members should review their work and provide any substantive or stylistic feedback before the next committee meeting, so that the committee can review and approve the remaining instructions as quickly as possible.

3. *Next Meeting*. The next committee meeting will be Monday, September 14, 2009. The committee is scheduled to review the Accountant Negligence instructions then.

The meeting concluded at 6:00 p.m.

Tab 2

Construction Contracts

Table of Contents

(1) CV2201. Committee Notes.

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. The user may also want to consult the instructions for Commercial Contracts.

(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. Utah Code Section 11-39-104.

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 (10th Cir. 2003).

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

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

Approved

(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 P2d 614 (Utah 1986).

Thorn Const. Co. v. Utah Dept. of Transp., 598 P.2d 365, 368 (Utah 1979).

Hensel Phelps Const. Co., 413 F.2d 704 (10th Cir. 1969).

Wunderlich Contracting Co. v. U.S., 240 F.2d 201, 205 (10th Cir. 1957).

Railroad Waterproofing Corp. v. U.S., 137 F.Supp. 713, 715 (Ct. Cl. 1956).

Approved

(7) CV2207. Contractor's duty to inquire about or investigate specific information provided by owner.

[Name of contractor] claims [he] is entitled to damages caused by relying on incorrect representations provided by [name of owner] in the bid documents. [Name of owner], however, claims [he] is not liable for [name of contractor]'s damages caused by the incorrect representations because [name of contractor] should have investigated or inquired about the representations before submitting a bid. In order for [name of contractor] to establish that there was no obligation to investigate or inquire about the representations, [name of contractor] must prove that:

(1) the representations were incorrect;

(2) [he] conducted a reasonable inspection of the proposed work site and bid documents to confirm their accuracy before submitting a bid; and

(3) [he] did not or should not have been expected to recognize the incorrect representation; and

(4) [name of owner] did not provide a specific disclaimer warning to [name of contractor] that the representations were not reliable and required further investigation by [name of contractor].

Committee Note

Prevailing case law holds that general disclaimers do not operate to require a contractor to investigate the truthfulness of specific affirmative representations; instead, specific disclaimers are required.

References: Jack B. Parson Constr. Co. v. State, 725 P.2d 614 (Utah 1996).

Frontier Foundations, Inc., 818 P.2d 1040, 1041 (Utah App. 1991)Thorn Constr. Co. v. Dept. of Transp., 598 P.2d 365 (Utah 1979).

(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 Instruction CV2129, 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 Instruction CV2130, Unilateral mistake.

See href=http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2127 >Instruction CV2127, 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 Instruction CV2114, 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

Fuhriman v. Jarrell, 445 P.2d 136, 21 Utah 2d 298 (1968).

Stangl v. Todd 554 P.2d 1316 (Utah 1976).

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

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

John Young 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

John will rewrite.

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

[Name of contractor] claims [he] had additional costs and/or was delayed 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 and/or was delayed.

References

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

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

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

Bruner & O'Connor on Construction Law, § 15:51.

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 c~~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

John 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/cost].

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).

Approved

(25) CV2225. Cardinal changes.

[Name of contractor] claims that [he] should be paid in excess of the contract amount because of a cardinal change(s). A cardinal change is a change that substantially alters the type of work contemplated by the original contract. To succeed on this claim, [name of contractor] must prove that:

(1) the change(s) were substantially different from the work described in the original contract;

(2) the change(s), were not anticipated under the contract; and

(3) the contract, for all intents and purposes, could be considered abandoned.

Committee Note

Because a cardinal change scenario involves abandonment of the contract, contractual remedies are generally inadequate; therefore, the proper remedy for recovery is equitable and would fall under the doctrine of unjust enrichment.

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).

Bruner & O'Connor on Construction Law, § 4:13-16.

(26) CV2226. Excusable delay; contractor's claim for time.

An excusable delay awards a contractor additional time, but not additional compensation, as a result of being delayed. In order to succeed on this claim, [name of contractor] must prove that the delay:

(1) was caused by events beyond the control of [name of contractor] and [name of owner];

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

(3) required [name of contractor] to incur more time to perform the work; and

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

References

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

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

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

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; denying contractor's claim for additional time or money.

[Name of owner] claims that [name of contractor] is not entitled to extra time or money because the delay was the responsibility of [name of contractor]. To succeed on this claim, [name of owner] must prove the delay was:

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

(2) within [name of contractor]'s control; and

(3) reasonably foreseeable by the [name of contractor].

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; contractor's claim for time and money.

A compensable delay awards a contractor additional time and money as a result of being delayed. To succeed on this claim, [name of contractor] must prove the delay:

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

(2) was 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 additional expenses and take additional time in performing the work.

References

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

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).

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

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

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.

If you find that both parties contributed to the delay, 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).

Approved

(30) CV2230. Acceleration.

[Name of contractor] claims that [he] is entitled to recover extra costs incurred because [name of owner] [required [him] to perform the work in less time than required by the contract] [the owner increased the scope of work and did not increase the contract time].

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]:

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

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

(3) [name of contractor] incurred extra costs.

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.

Committee Note

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

Approved

(31) CV2231. Damages for delay.

[Name of contractor] claims damages for delays. The contract provides that [name of contractor] is entitled to extra time to complete the work but is not entitled to recover damages caused by the delay. However, there are circumstances in which [name of contractor] may recover damages for delay regardless of the contract.

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

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

[(2) the delay was not reasonably foreseeable at the time the parties entered into the contract and the delay was excessive and unreasonable.]

References

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

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

Acret, James, Construction Litigation Handbook. § 7.8.

Committee Note

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

Approved

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

[Name of contractor] claims [he] suspended the work because of non-payment. To succeed on this claim, [name of contractor] must prove that:

(1) [name of owner] failed to make required progress payment(s);

(2) [name of owner]'s failure to make the payment(s) was an important breach of the contract; and

(3) [name of owner] had no reasonable excuse to withhold the payment(s).

References

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

Committee Note

Instruction can be used as a cause of action or an affirmative defense.

Approved

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

[Name of contractor] claims that [he] suspended the work because of interference by[name of owner]. To succeed on this claim, [name of contractor] must prove that:

(1) [name of owner] or [events within [name of owner's] control] unreasonably interfered with [name of contractor]'s performance of [his] work; and

(2) the interference was for an unreasonable period of time.

References

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

Committee Note

Instruction can be used as a cause of action or an affirmative defense.

Approved

(34) CV2234. Termination for cause.

[Name of terminating party] claims [he] had the right to terminate the contract because [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 of the claimed breach to [name of other party];

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

(3) 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].

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.

(35) CV2235. Mitigation of damages.

[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].

References

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

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

Restatement (Second) of Contracts § 350.

See Instruction CV2139, Mitigation and avoidance.

(36) CV2236. Impossibility

[Name of contractor] claims that [he] is excused from performing the contract because [insert description of circumstances] made the main purpose of the contract impossible to perform. To succeed on this claim, [name of contractor] must prove that:

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

(2) [name of contractor] did not create the events that made the main purpose impossible, and they were beyond [his] control; and

(3) the events that made the main purpose impossible were not foreseeable by either 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 Instruction CV2125, Impossibility/Impracticability.

(37) CV2237. Excessive and unreasonable cost.

[Name of contractor] claims that [he] is excused from performing the contract because [insert description of events] made the cost to perform the main purpose of the contract excessive and unreasonable. To succeed on this claim, [name of contractor] must prove that:

(1) the cost to perform the main purpose of the contract was excessive and unreasonable;

(2) [name of contractor] did not create the events, and they were beyond [his] control; and

(3) the events were not foreseeable by either 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 Instruction CV2125, Impossibility/Impracticability.

(38) CV2238. Frustration of purpose

No instruction; placeholder only.

References

Currently there is no Utah law on frustration of purpose in a construction context.

See Instruction CV2126, Frustration of purpose.

(39) CV2239. 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].

References

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

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

Committee Notes

This defense can be used by the contractor against claims by the owner. This instruction is applicable if plaintiff, by words or conduct, induced 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).

(40) CV2240. Accord and satisfaction.

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

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

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

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

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

References

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

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

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

See Instruction CV2120, Accord and satisfaction.

(41) CV2241. 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] 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.

(42) CV2242. 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).

(43) CV2243. Liquidated damages.

[Name of owner] seeks to recover the damages for delay specified in the contract. You must enforce the 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 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)