Agenda
Advisory Committee on
Model Civil Jury Instructions

October 13, 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.

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
September 14, 2009
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kent B. Scott (chair of the Construction Contract subcommittee)

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

a. *CV2207. Contractor's duty to inquire about or investigate specific information provided by owner*. Mr. Humpherys questioned whether jurors would understand "representation" and suggested that "statement" be used instead. Dr. Di Paolo asked whether all representations are statements or whether a schematic, for example, could be a representation. The committee revised the instruction to read:

> [Name of contractor] claims that [name of owner] made the following incorrect representations: [describe the representations].
>
> [Name of contractor] claims [he] is entitled to damages caused by relying on incorrect representations.
>
> [Name of owner], however, claims [he] is not liable for [name of contractor]'s damages because [name of contractor] should have investigated or inquired about the representations before submitting a proposal.
>
> In order for [name of contractor] to establish that there was no obligation to investigate or inquire about each representation, [name of contractor] must prove that:
>
> (1) the representations were incorrect;
>
> (2) [he] conducted a reasonable [inspection/inquiry] of the proposed work site and bid documents to confirm their accuracy before submitting a proposal;
>
> (3) [he] should not have reasonably been expected to recognize that the representation was incorrect; and
>
> (4) [name of owner] did not warn [name of contractor] that the representations may not be reliable and may require further investigation or inquiry.

Mr. Shea asked whether "investigate or inquire" were the same thing. Dr. Di Paolo and Mr. Scott said no (both from a linguistic perspective and a legal perspective). Mr. Fowler asked whether it should be "investigate and inquire." Dr. Di Paolo suggested saying "investigate and/or inquire." Mr. Young suggested adding a committee note to explain that a contractor does not have to both

investigate and inquire in every case. At Mr. Shea's suggestion, the instruction was changed to read "to investigate or inquire about each representation." The committee approved the instruction as modified. Mr. Fowler noted that the *Jack B. Parson* case cited as authority for the instruction is listed as a 1996 case in CV2207 and as a 1986 case in CV2206. Mr. Shea will correct the incorrect citation.

b. *CV2216. Duty to provide access to the worksite.* Mr. Young noted that the instruction, which had previously been approved, was revised to cover cases of delay as well as those involving additional cost. At Mr. Young's suggestion, the terms *he* and *his* in subparagraphs (1) through (3) were changed to *[Name of contractor]['s].* The committee approved the instruction as modified.

c. *CV2218. Contractor's liability for defective work.* Messrs. Young and Scott agreed that this instruction can be deleted.

d. *CV2225. Cardinal changes.* The phrase "contemplated by the original contract" in the first paragraph was changed to "described by the original contract." Dr. Di Paolo and Mr. Humpherys asked whether the term *abandoned* in subparagraph (3) needed to be defined or explained. Mr. Ferguson noted that it is defined in CV2134, a commercial contract instruction. Messrs. Scott and Humpherys questioned whether subparagraph (3) was even necessary. Messrs. Humpherys and Ferguson asked how the concept was different from a novation or an accord and satisfaction. Mr. Shea thought that whether the contract could be considered abandoned was a conclusion for the jury to draw. Mr. Humpherys noted that the original contract is not completely abandoned; it still exists; it is just not controlling. The committee revised subparagraph (3) to read, "the parties acted as if the contract no longer applied." The committee approved CV2225 as revised.

e. *CV2226. Excusable delay; contractor's claim for time.* Several committee members found the instruction confusing and asked how the issue would arise. Mr. Young noted that a claim of excusable delay may be either a claim or an affirmative defense but most often arises as a defense to a claim by the owner for liquidated damages. Mr. Scott explained that, depending on the reasons for a delay, the contractor may be entitled to (1) additional time to complete the contract; (2) additional time and money; or (3) no additional time or money. Mr. Nebeker asked whether an award of additional time automatically meant that the contractor was also entitled to additional money. Messrs. Scott and Young said no. The committee revised the instruction to read:

> [Name of contractor] claims that he was entitled to more time to perform the work because of an excusable delay. To succeed on this claim, [name of contractor] must prove that the events causing the delay:
>
> (1) were beyond [name of contractor]'s control;
>
> (2) were not reasonably foreseeable by [name of contractor] at the time the contract was made;
>
> (3) prevented [name of contractor] from meeting the contract deadline.

Subparagraph (4) (that the contractor did not waive or assume the delay) was deleted, on the grounds that it was an affirmative defense to the claim. The title of the instruction was changed to "Excusable delay not caused by contractor." The committee approved the instruction as revised.

f. *CV2228. Compensable delay; contractor's claim for time and money*. The committee revised the instruction to read:

> [Name of contractor] claims [he] was entitled to additional time and money to perform the work. To succeed on this claim, [name of contractor] must prove that the events causing the delay:
>
> (1) were caused by [name of owner] and not [name of contractor];
>
> (2) were within [name of owner]'s control;
>
> (3) were reasonably foreseeable by [name of owner];
>
> (4) required [name of contractor] to incur additional expenses and take additional time in performing the work.

Former subparagraph (4) (regarding assumption or waiver of the delay) was deleted. Mr. Scott noted that there can be three types of delay: (1) excusable delay, where neither the contractor nor the owner is at fault, in which case the contractor is entitled to additional time; (2) compensable delay, where the owner is at fault but the contractor is not, in which case the contractor is entitled to additional time and money; and (3) inexcusable delay, where the contractor is at fault, in which case the contractor is not entitled to either additional time or additional money. Mr. Humpherys noted that CV2226 imposes less requirements to obtain additional time than CV2228 does and asked which would apply if the contractor just wanted additional money and not additional time. He suggested that CV2228 should deal only with additional money, not additional time, which is covered by CV2226. Dr. Di Paolo, however, thought that they were not mutually exclusive. The contractor, for example, may be entitled to more money under CV2228, but any damage award could be offset by liquidated

damages if the contractor were not also given more time to complete the contract. The committee changed the title of the instruction to "Compensable delay caused by owner." The committee approved the instruction as modified.

e. *CV2227. Inexcusable delay; denying contractor's claim for additional time or money*. At Mr. Scott's suggestion, CV2227 was moved to follow CV2228 on compensable delay. Messrs. Humpherys and West asked whose burden it was to show inexcusable delay, and whether inexcusable delay is just the absence of an excusable or compensable delay. Mr. Humpherys noted that, under CV2228, the burden of proof is on the contractor to prove compensable delay, but under CV2227 the burden of proof is on the owner to prove inexcusable delay and noted the inconsistency. Mr. Scott noted that inexcusable delay may be a direct claim by the owner or an affirmative defense to a contractor's claim for compensable delay. He noted that, in the usual case, the contractor sues the owner for nonpayment, and the owner defends by saying that he didn't pay the contractor because the contractor delayed the project, costing the owner money. In that case, Mr. Shea suggested, the owner only has to show that the contractor has not met his burden of proving an excusable or compensable delay. The committee agreed to delete CV2227.

Mr. Scott will draft a new instruction for an owner's claim for damages caused by a contractor's delay.

g. *CV2234. Termination for cause*. Mr. Young noted that there is no Utah case law on the issue of termination for cause and suggested deleting the instruction. Mr. Carney thought the instruction should be included, with a committee note saying there are no Utah cases on point, but that the instruction represents the majority view from other jurisdictions. Mr. Young thought that the committee was not instructing on matters unless there was Utah law on point. Others pointed out that some of the instructions are rewrites of MUJI 1st instructions, and MUJI 1st did not have Utah authority for every instruction. Mr. Scott noted that CV2234 should not be controversial, that the concept is almost universally recognized. Dr. Di Paolo asked whether "breached the contract" needed to be defined. Mr. Shea noted that CV2101 and CV2102 talk about breaching a contract "by not performing [one's] obligations" under the contract. Others thought that jurors would understand the term. Dr. Di Paolo also thought "cure the breach" in subparagraph (2) would be unclear to jurors. The committee changed subparagraph (2) to read: "(2) gave [name of other party] reasonable time to correct the breach [as required by the contract]." The last phrase was bracketed to show that it is optional, since some contracts may not explicitly deal with time to correct a breach. The committee approved the instruction as modified.

h. *CV2215. Damages for contractor's defective work.* Mr. Young distributed a memorandum and drafts of CV2215 and CV2214 ("Contractor's liability for defective work") that he had drafted. Mr. Young noted that the measure of damages for defective work is generally the reasonable cost of repair but that sometimes repairs are not economically practicable. This concept is subsumed in the phrase "unreasonable economic waste," which is well established in the case law but not well defined and would be confusing to jurors.

Mr. Young will revise CV2215 to add a definition of "unreasonable economic waste," based on the Restatement.

2. *Remaining Construction Contract Instructions.* Mr. Scott encouraged the committee to provide any feedback on the outstanding instructions before the next meeting so that he can present the committee with concise, simplified instructions at the next meeting.

3. *Next Meeting.* The next committee meeting will be Monday, October 13, 2009.

The meeting concluded at 6:05 p.m.

Tab 2

Construction Contracts

(1) CV2214. Contractor's liability for defective work.

[Name of owner] claims that [he] was damaged by [name of contractor]'s [defective/incomplete] work. To succeed on this claim, [name of owner] must prove that:

(1) [Name of contractor] did not comply with the [contract requirements, the plans and specifications, or the requirements of the building code];

(2) [Name of contractor] did not use the degree of care ordinarily used by contractors doing similar work; and

(3) [name of contractor]'s [defective/incomplete] work was a cause of [name of owner]'s damages.

Question: Are (1) and (2) in the alternative? Or do you need to prove both in addition to (3)?

Committee Note

References

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

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

Rex T. Fuhriman, Inc. v. Jarrell, 445 P.2d 136 (Utah 1968).

Trujillo v. Utah Dept. of Transp., 986 P.2d 752 (Utah Ct. App. 1999).

(2) CV2215. Damages for contractor's defective work.

If you find that [name of owner] was damaged by [name of contractor]'s [defective/incomplete] work, [name of owner] is entitled to recover as damages the reasonable cost to [repair/complete] the construction according to the [contract requirements, the plans and specifications, or the requirements of the building code].

Committee Note

References

Winsness v. M.J. Conoco Distributors, Inc., 593 P.2d 1303 (Utah 1979).

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

Rex T. Fuhriman, Inc. v. Jarrell, 445 P.2d 136 (Utah 1968).

Restatement, (Second) of Contracts, Section 348(2)(b)

(3) CV2216. Avoiding unreasonable economic waste.

[Name of contractor] claims that it is impossible to [repair/complete] the construction according to the [contract requirements, the plans and specifications, or the requirements of the building code] without unreasonable economic waste. To succeed on this claim, [name of contractor] must prove that the cost to [repair/complete] the construction:

(1) is out of proportion to the value of the finished project; or

(2) would require the destruction or substantial reconstruction of useable property.

If you find that [name of contractor] has proved this claim, then you must award as damages to [name of owner], not the reasonable cost to [repair/complete] the construction, but rather the difference between the market price that the property would have had without the defects and the market price of the property with the defects.

References

F.C. Stangl, III v. Todd, 554 P.2d 1316,1320, citing 5 Corbin on Contracts, §1089 (Utah 1976).

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

Restatement (Second) of Contracts, §348, comment (c).

Ludington, John P., Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract. 41 A.L.R.4th 131, ¶(2)(f).

Committee Note

Comment (c) of the Restatement indicates that diminution in price is the correct measure of damages if the "the injured party does not prove the actual loss in value...." But in Stangl, the Supreme Court puts the burden of showing economic waste on the breaching party: "The contract breaker should pay the cost of construction and completion in accordance with his contract, unless he proves, affirmatively and convincingly, such construction and completion would involve unreasonable economic waste." F.C. Stangl, III v. Todd, 554 P.2d 1316,1320, citing 5 Corbin on Contracts, §1089 (Utah 1976). Jurisdictions differ on who has the burden of proof. See Ludington, 41 A.L.R.4th 131, ¶(9).

Although the Stangl case uses the phrase "proves, affirmatively and convincingly," requiring clear and convincing evidence of unreasonable economic waste seems not to be supported by the Restatement, but the court may need to decide the matter.

What is the standard for determining unreasonable economic waste and how unreasonable the economic waste has to be before diminution in price becomes the correct measure of damages is not revealed in Stangl or the Restatement. The two alternatives suggested in this instruction are summaries of the analysis in Ludington, 41 A.L.R.4th 131, ¶(2)(f). The ALR article suggests that unreasonableness may depend on the circumstances of the case, such as: whether the repairs which can be made without seriously disturbing the structure; whether the correction is of a structural defect rather than an esthetic defect; whether the structure is safe and useable even with the defects.

(4) CV2228. Owner's claim for damages for delay caused by contractor.

Kent will write.

(5) 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.

(6) 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.

(7) 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.

(8) CV2238. Frustration of purpose

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

See Instruction CV2126, Frustration of purpose.

(9) 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).

(10) 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.

(11) 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.

(12) 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).

(13) 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)