

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.