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The Florida Bar

2018
Florida Construction Law and Practice
Chapter 17

JURY INSTRUCTIONS IN CONSTRUCTION CASES

Ninth Edition 2018

CONSTRUCTION LAW COMMITTEE OF THE FLORIDA BAR
REAL PROPERTY, PROBATE AND TRUST LAW SECTION

§ 17.1. INTRODUCTION

In 1997, the Construction Law Committee of The Florida Bar Real Property, Probate and Trust Law Section (Committee) began compiling a set of sample jury instructions for the benefit of Committee members. These sample instructions focused on the types of issues that arise in Florida construction law actions.

In 2011, the Committee significantly expanded and updated the sample jury instructions. In 2012 and 2014, the Committee updated and revised these instructions again. Many Committee members worked diligently to revise the instructions and analyze the impact of recent authority. The following committee members contributed to the 2015 update to this chapter: Michael Childers, Christopher Cobb, Matthew Cogburn, Lisa Colon Heron, Michael Meyer, Hardy Roberts, and Paul Ullom. For the 2018 update of this chapter, the section would like to express its appreciation to Brian C. Porter and Jason Quintero.

Practitioners should also consult FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES (Fla. Bar CLE 3d ed. 2010, 2017 Supp.), FLORIDA STANDARD JURY INSTRUCTIONS IN CONTRACT AND BUSINESS CASES (Fla. Bar CLE 2nd ed., 2016 Supp.), and the Florida Supreme Court's website, www.floridasupremecourt.org/ jury_ instructions.shtml. Appendix D to FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES, *How to Write and Use Jury Instructions in Civil Cases*, is a detailed explanation of preparing and using jury instructions.

§ 17.2. FORM

Under *Fla.R.Civ.P.* 1.470(b) and Fed.R.Civ.P. 51(a)(1), requested jury instructions must be "written." The form of requested jury instructions may be governed by standard or case-specific orders, local court rules or custom, or the individual preferences of the trial judge.

The following format is suggested:

IN THE _____ COURT FOR _____ COUNTY, FLORIDA
_____, Plaintiff,
vs.
_____, Defendant.
Case No. _____

REQUESTED JURY INSTRUCTIONS OF [PLAINTIFF] [DEFENDANT], *(NAME OF PARTY)*

[PLAINTIFF] [DEFENDANT], *(name)*, through undersigned counsel and in accordance with Fla.R.Civ.P. 1.470, submits the following jury instructions, numbered 1 through *(number)*, and respectfully requests the court to charge the jury with these instructions.

These instructions have been prepared based on the current issues in this case and before [plaintiff] [defendant] has had an opportunity to examine any proposed instructions that may be submitted by [plaintiff] [defendant]. [[PLAINTIFF] [DEFENDANT] fully anticipates that the evidence actually presented and the rulings made during the trial will have an impact on what the jury is asked to consider. In light of these contingencies, [plaintiff] [defendant] respectfully reserves the right to supplement these requested instructions before the jury is charged.

All jury instructions that are part of the Florida Standard Jury Instructions Forms will be so identified.

The Florida Standard Jury Instructions appearing on the court's website at www.floridasupremecourt.org/ jury_instructions/instructions.shtml shall be used by the trial judges of this state in instructing the jury in civil actions

to the extent that the Standard Jury Instructions are applicable, unless the trial judge determines that an applicable Standard Jury Instruction is erroneous or inadequate. If the trial judge modifies a Standard Jury Instruction or gives such other instruction as the judge determines necessary to accurately and sufficiently instruct the jury, upon timely objection to the instruction, the trial judge shall state on the record or in a separate order the legal basis for varying from the Standard Jury Instruction. Similarly, in all circumstances in which the notes accompanying the Florida Standard Jury Instructions contain a recommendation that a certain type of instruction not be given, the trial judge shall follow the recommendation unless the judge determines that the giving of such an instruction is necessary to accurately and sufficiently instruct the jury, in which event the judge shall give such instruction as the judge deems appropriate and necessary. If the trial judge does not follow such a recommendation of the Florida Standard Jury Instructions, upon timely objection to the instruction, the trial judge shall state on the record or in a separate order the legal basis of the determination that such instruction is necessary. Not later than at the close of the evidence, the parties shall file written requests that the court instruct the jury on the law set forth in such requests. The court shall then require counsel to appear before it to settle the instructions to be given. At such conference, all objections shall be made and ruled upon and the court shall inform counsel of such instructions as it will give. No party may assign as error the giving of any instruction unless that party objects thereto at such time, or the failure to give any instruction unless that party requested the same. The court shall orally instruct the jury before or after the arguments of counsel and may provide appropriate instructions during the trial. If the instructions are given prior to final argument, the presiding judge shall give the jury final procedural instructions after final arguments are concluded and prior to deliberations. The court shall provide each juror with a written set of the instructions for his or her use in deliberations. The court shall file a copy of such instructions.

Fla.R.Civ.P. 1.470(b).

All other jury instructions requested by [plaintiff] [defendant] that are not from the Florida Standard Jury Instructions are supported by citation to appropriate authorities.

I HEREBY CERTIFY that a copy hereof has been furnished by *(method of service)* to *(name and address of opposing counsel)* on *(date)*.

Respectfully submitted,

_____

(name of attorney)

Attorney for Plaintiff

(address and phone number)

(e-mail address(es))

Florida Bar number _____

Each requested instruction should be attached to the form. Each instruction should be typed on a separate page, double-spaced, and numbered sequentially. Although the body of the instruction should *not* contain case or statutory citations, citations to supporting authorities should appear immediately following the text of the requested instruction. If appropriate, supporting legal memoranda and copies of supporting case law or applicable statutes may be attached. The practitioner should take care to maintain consistency among the instructions. See *Buga v. Wiener*, 277 So.2d 296 (Fla. 4th DCA 1973). Each instruction should contain blank spaces for indicating if the request for the instruction has been granted, denied, granted as revised, or withdrawn. The following is an example of a requested jury instruction consistent with the approach outlined above.

JURY INSTRUCTION NUMBER _____

A written contract can be modified by later oral agreement of the parties or subsequent conduct of the parties, even when the written contract states that oral modification is not permitted.

Authorities: King Partitions & Drywall, Inc. v. Donner Enterprises, Inc., 464 So.2d 715 (Fla. 4th DCA 1985); Pan American Engineering Co. v. Poncho's Construction Co., 387 So.2d 1052 (Fla. 5th DCA 1980). But see County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1998) (doctrine of sovereign immunity precluded recovery of cost of extra work performed by county when extra-work claims were for work totally outside terms of contract and firm did not obtain written change order).

Granted _____

Denied _____
Granted as revised _____
Withdrawn _____
Submitted by: ***(name of party)***
Submitted by: (name of party)
For further discussion, see Artigliere & Artigliere, *How to Write and Use Jury Instructions in Civil Cases*, Appendix D to FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES (Fla. Bar CLE 3d ed. 2010, 2017 Supp.).

§ 17.3. CONTRACT, WARRANTY, AND STATUTORY ACTION JURY INSTRUCTIONS

A. In General

1. Contract — Intent And Formation

See Fla. Stand. Jury Instr. Contr. & Bus. 416.3 (Contract Formation — Essential Factual Elements).

2. Contract Modification

See Fla. Stand. Jury Instr. Contr. & Bus. 416.13 (Modification).

3. Changes Not In Writing

Even though a written contract contains a provision stating that the contract may not be changed except by an agreement in writing, that provision may be waived by the parties and the waiver may be established by the actions between the parties.
Authorities: Husky Rose, Inc. v. Allstate Insurance Co., 19 So.3d 1085 (Fla. 4th DCA 2009); Pan American Engineering Co. v. Poncho's Construction Co., 387 So.2d 1052 (Fla. 5th DCA 1980); Fletcher v. Laguna Vista Corp., 275 So.2d 579 (Fla. 1st DCA 1973); Shore Drive Apartments, Inc. v. Frank J. Rooney, Inc., 253 So.2d 478 (Fla. 4th DCA 1971); Doral Country Club, Inc. v. Curcie Bros. Inc., 174 So.2d 749 (Fla. 3d DCA 1965); Broderick v. Overhead Door Company of Fort Lauderdale Inc., 117 So.2d 240 (Fla. 2d DCA 1959). But see County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1998) (doctrine of sovereign immunity precluded recovery of cost of extra work performed by county when extra work claims were for work totally outside terms of contract and firm did not obtain written change order); see also Town of Palm Beach v. Ryan Inc. Eastern, 786 So.2d 665 (Fla. 4th DCA 2001) (same). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.18 (Interpretation — Construction By Conduct), and 416.30 (Affirmation Defense — Waiver).

4. Notice Of Claim

The contract between ***(name of party)*** **and** ***(name of party)*** **provides: [**[(quote or paraphrase the contract provisions that require notice of claim)**]**.
The issue for you to decide is whether ***(name of party)*** **gave** ***(name of party)*** **notice of claim as required by the contract. If you find that notice was not given, your verdict should be for** ***(name of party)***.
However, if you determine that ***(name of party)*** **waived or excused compliance by** ***(name of party)*** **with the notice of claim requirement by some affirmative action or that** ***(name of party)*****, by [his] [her] [its] conduct, did not require notice, and you also determine that** ***(name of party)*** **breached the contract, your verdict should be for** ***(name of party)***.
Authorities: Florida Recycling Services, Inc. v. Greater Orlando Auto Auction, Inc., 898 So.2d 129 (Fla. 5th DCA 2005); Pan American Engineering Co. v. Poncho's Construction Co., 387 So.2d 1052 (Fla. 5th DCA 1980). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.30 (Affirmative Defense — Waiver).

5. Full Performance/Substantial Performance

"Full performance" means that the performing party did everything that [he] [[she] [it] was required to do, with nothing left to do under the contract.
"Substantial performance" means performance of a contract that, although not full performance, is so nearly equal to what the parties bargained for that it would be unreasonable or unfair to deny the performing party the full contract price, subject to the other party's right to recover whatever damages may have been caused by the failure to give full performance.

According to the doctrine of substantial performance, a contractor who substantially performs in good faith is entitled to enforce the contract even if performance has been less than complete.
In the context of contracts for construction, the doctrine of substantial performance is applicable only where the contractor has not willfully or materially breached the terms of this contract or has not intentionally failed to comply.
Authorities: Pullam v. Hercules, Inc., 711 So.2d 72 (Fla. 1st DCA 1998); National Constructors, Inc. v. Ellenberg, 681 So.2d 791 (Fla. 3d DCA 1996); J.M. Beeson Co. v. Sartori, 553 So.2d 180 (Fla. 4th DCA 1989); Ocean Ridge Development Corp. v. Quality Plastering, Inc., 247 So.2d 72 (Fla. 4th DCA 1971). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.12 (Substantial Performance).

B. Nondelegable Duties

1. Duty To Perform

When the contracting party makes it his or her duty to perform a task, that party cannot escape breach of contract liability for the damages caused by the wrongdoing of independent contractors hired to do the task.
Authorities: Pope v. Winter Park Healthcare Group Ltd., 939 So.2d 185 (Fla. 5th DCA 2006); Gordon v. Sanders, 692 So.2d 939 (Fla. 3d DCA 1997); City of Coral Gables v. Prats, 502 So.2d 969 (Fla. 3d DCA 1987); Acevedo ex rel. Salmeron v. Lifemark Hospital of Florida, Inc., 2005 WL 1125306 (Fla. 11th Cir. May 5, 2005).

2. Duty Of Care

An [architect] [engineer] who undertakes the obligation to design a building or home has a contractual duty of care to exercise and apply [his] [[her] [its] professional skill, ability, and judgment in a way that is reasonable and without neglect. That duty cannot be delegated away, which means that it cannot be avoided by delegating the responsibility of ensuring that the design follows applicable laws and regulations.
Authorities: Public Health Trust of Dade County, Fla. v. George Hyman Construction Co., 606 So.2d 728 (Fla. 3d DCA 1992); Shepard v. City of Palatka, 414 So.2d 1077 (Fla. 5th DCA 1981); Atlantic National Bank of Jacksonville v. Modular Age, Inc., 363 So.2d 1152 (Fla. 1st DCA 1978). See also Fla. Stand. Jury Instr. Civ. 402.2 (Summary of Claims); compare Fla. Stand. Jury Instr. Civ. 402.5.

C. Implied Duties

1. In General

See Fla. Stand. Jury Instr. Contr. & Bus. 416.24 (Breach of Implied Covenant of Good Faith and Fair Dealing).
Authorities: City of Fort Lauderdale v. Israel, 178 So.3d 444 (Fla. 4th DCA 2015); Town of Palm Beach v. Ryan Inc. Eastern, 786 So.2d 665 (Fla. 4th DCA 2001); Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988); Jacksonville Port Authority v. Parkhill-Goodloe Co., 362 So.2d 1009 (Fla. 1st DCA 1978); Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970); Gulf American Land Corp. v. Wain, 166 So.2d 763 (Fla. 3d DCA 1964)

2. To Furnish Accurate Information

Each party has a duty to furnish accurate information.
You must determine whether a party failed to furnish accurate information by

1. **not providing to another party material facts or information about the project that had an impact on the work; or**
2. **not disclosing material facts that the party knew of, or that were accessible by only that party, that had an impact on the work.**

If you find that a party failed to furnish accurate information and that the failure affected the work, you should award damages in the manner in which I will instruct you.
Authorities: Triple R Paving, Inc. v. Broward County, 774 So.2d 50 (Fla. 4th DCA 2001); Jacksonville Port Authority v. Parkhill-Goodloe Co., 362 So.2d 1009 (Fla. 1st DCA 1978); Town of Longboat Key v. Carl E. Widell & Son, 362 So.2d 719 (Fla. 2d DCA 1978). Compare Fla. Stand. Jury Instr. Contr. & Bus. 416.28 (Affirmative Defense — Fraud).

3. To Act In Good Faith And To Cooperate

In every contract, there is an implied agreement that the parties will perform in good faith and deal fairly with each other.

If you find by the greater weight of the evidence that one party has actively interfered with or hindered the performance of work, or made performance of the work more expensive or difficult, that party has breached the implied duty of good faith and you should award damages in the manner in which I will instruct you.
Authorities: Walker v. Chancey, 96 Fla. 82, 117 So. 705 (1928); Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc., 966 So.2d 1 (Fla. 2d DCA 2007); Triple R Paving, Inc. v. Broward County, 774 So.2d 50 (Fla. 4th DCA 2001); Newberry Square Development Corp. v. Southern Landmark, Inc., 578 So.2d 750 (Fla. 1st DCA 1991); Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988); Casale v. Carrigan & Boland, Inc., 288 So.2d 299 (Fla. 4th DCA 1974).

4. To Provide Access To Site

***(Name of party)* has an implied duty to furnish *(name of party)* access to the project site for performance of work**.
You must determine whether *(name of party)* breached this duty by causing or permitting unreasonable obstructions or hindrances that required *(name of party)* to perform the work in a disorderly and inefficient manner.
If you find that *(name of party)* has breached this duty, your verdict must be for *(name of party)* and you must award damages in the manner in which I will instruct you.
However, if you find that a breach of this duty did not occur, your verdict must be for *(name of party)* and you may not award any damages to *(name of party)* on this claim.
Authorities: Guerini Stone Co. v. P.J. Carlin Construction Co., 248 U.S. 334, 39 S.Ct. 102, 63 L.Ed. 275 (1919); Concrete Specialties v. H. C. Smith Construction Co., 423 F.2d 670 (10th Cir. 1970); Great Lakes Construction Co. v. Republic Creosoting Co., 139 F.2d 456 (8th Cir. 1943). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.24 (Breach of Implied Covenant of Good Faith and Fair Dealing).

D. Breach Of Contract

1. In General

See Fla. Stand. Jury Instr. Contr. & Bus. 416.4 (Breach of Contract — Essential Factual Elements).
Authorities: Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962); Walker v. Chancey, 96 Fla. 82, 117 So. 705 (1928); Town of Palm Beach v. Ryan Inc. Eastern, 786 So.2d 665 (Fla. 4th DCA 2001); Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988); Lamitu Corp. v. Stottler Stagg & Associates, Inc., 505 So.2d 626 (Fla. 3d DCA 1987).

2. Damages

See Fla. Stand. Jury Instr. Contr. & Bus. 504.1 (Introduction to Contract Damages) and 504.2 (Breach of Contract Damages).
Authorities: St. Regis Paper Co. v. Watson, 428 So.2d 243 (Fla. 1983); Indian River Colony Club, Inc. v. Schopke Construction & Engineering, Inc., 592 So.2d 1185 (Fla. 5th DCA 1992); Born v. Goldstein, 450 So.2d 262 (Fla. 5th DCA 1984); A.M.R. Enterprises, Inc. v. United Postal Savings Ass'n, 567 F.2d 1277 (5th Cir. 1978).

3. Material Breach

Generally, the parties to a contract must perform all of the material requirements of the contract, and the failure to perform a material requirement of the contract is a breach of contract.
The breach of a material requirement of the contract is one that goes to the essence of the contract. In other words, a material breach is the type of breach that would discharge the non-breaching party from further performance of the contract. However, if the breach is not material, there is no right to terminate the contract or fail to perform under the terms of the contract. A party's failure to perform some minor part of his contractual duty is not a material breach.
Whether a material breach has occurred depends on the importance or seriousness of the breach and the probability of the injured party obtaining substantial performance. It is not necessary that (name of party) fully and completely perform every item specified in the plans and specifications, which are a part of the contract.
In deciding whether a party breached its contract, you must determine from the greater weight of the evidence if the party failed to substantially perform under the contract at the time the other party terminated the work.

Authorities: Covelli Family, L.P. v. ABG5, L.L.C., 977 So.2d 749 (Fla. 4th DCA 2008); Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988); Beefy Trail, Inc. v. Beefy King International, Inc., 267 So.2d 853 (Fla. 4th DCA 1972); Ocean Ridge Development Corp. v. Quality Plastering, Inc., 247 So.2d 72 (Fla. 4th DCA 1971). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.4 (Breach of Contract) and 416.12 (Substantial Performance).

4. Anticipatory Breach

See Fla. Stand. Jury Instr. Cont. & Bus. 416.23 (Anticipatory Breach).
Authorities: Aberdeen Golf & Country Club v. Bliss Construction, Inc., 932 So.2d 235 (Fla. 4th DCA 2005); Porkolab v. Smithbay Homes, Inc., 640 So.2d 195 (Fla. 3d DCA 1994); Twenty-Four Collection, Inc. v. M. Weinbaum Construction, Inc., 427 So.2d 1110 (Fla. 3d DCA 1983); Mori v. Matsushita Electric Corp. of America, 380 So.2d 461 (Fla. 3d DCA 1980).

5. Wrongful Termination

You must determine whether *(name of party)* breached the contract by terminating *(name of party)*'s performance without cause.
The failure to perform a material or vital duty under the contract is cause for termination. The failure to perform a minor contractual duty that is not material or vital to the contract is not cause for termination.
Authorities: Indian River Colony Club, Inc. v. Schopke Construction & Engineering, Inc., 592 So.2d 1185 (Fla. 5th DCA 1992); City of Miami Beach v. Carner, 579 So.2d 248 (Fla. 3d DCA 1991); Beefy Trail, Inc. v. Beefy King International, Inc., 267 So.2d 853 (Fla. 4th DCA 1972).

E. Payment

1. Timeliness

The contract provided that payments were to be made when the architect certified the contractor's application for payment. Once the architect certified that the contractor was entitled to payment of $ _____, *(name of party)* was obliged to pay that amount within the time prescribed by the contract.
If you find that *(name of party)* failed to make payment for the full amount certified and that *(name of party)* gave proper notice of its intention to stop work if the progress payment was not made, your verdict must be that *(name of party)* breached the contract, and you must consider *(name of party)*'s damages.
Authorities: Scott v. Rolling Hills Place Inc., 688 So.2d 937 (Fla. 5th DCA 1997).

2. Failure To Make Payment — Material Breach

A material breach of the contract is a failure to perform that has a significant impact on the project. Failure to make payment is a material breach of the contract. The effect of a material breach is to excuse the performance of the other party.
If you find that *(name of party)* unjustifiably failed to make a payment owed to *(name of party)*, then *(name of party)* has breached the contract, *(name of party)* may stop its work, and you must consider *(name of party)*'s damages.
Authorities: Mizner Land Corp. v. Abbott, 128 Fla. 489, 175 So. 507 (1937); Chatlos v. Morse Auto Rentals, Inc., 183 So.2d 854 (Fla. 3d DCA 1966). See also: Fla. Stand. Jury Instr. Contr. & Bus. 416.39 (Account Stated), 416.4 (Breach of Contract — Essential Factual Elements), and 504.2 (Breach of Contract Damages).

3. Excused Performance For Nonpayment — Contractor

If *(name of party)* withheld payment, in whole or in part, through no fault of *(name of party), (name of party)* may stop work after giving the required notice in the contract, until payment of the amount owing has been received.
The time for performance under the contract may be extended accordingly and the amount due under the contract may be increased by the amount *(name of party)* has been damaged as a result of [(insert reasons, such as the reasonable costs of shutdown, delay, and start-up)**].**
Authority: North American Van Lines v. Collyer, 616 So.2d 177 (Fla. 5th DCA 1993). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.36 (Affirmative Defense — Ratification), 416.38 (Open Account), 416.23 (Anticipatory Breach), 416.13 (Modification).

4. Improper Withholding Of Certification — Duty To Pay

If you determine by the greater weight of the evidence that the architect would not certify payment and withheld [his] [her] [its] certificate, in whole or in part, because of the architect's misapprehension, gross mistake, or arbitrary action, the law does not permit *(name of party)* to take advantage of the architect's errors to avoid [his] [her] [its] obligations to pay what actually is owed to *(name of party)*.
Authority: Duval County v. Charleston Engineering & Contracting Co., 101 Fla. 341, 134 So. 509 (1931).

5. Withholding Payment Justified

An owner may withhold all or partial payment otherwise owed to the contractor to reasonably protect [himself] [herself] [itself] from known construction defects such as

[(insert defects; for example, defective work that is not fixed, third-party claims filed, or reasonable evidence indicating probable filing of those claims)].

Authorities: Marshall Construction, Ltd. v. Coastal Sheet Metal & Roofing, Inc., 569 So.2d 845 (Fla. 1st DCA 1990); Coquina, Ltd. v. Nicholson Cabinet Co., 509 So.2d 1344 (Fla. 1st DCA 1987).

6. Progress Payments

a. Waiver Of Timely Payment Requirement

The requirement that each progress payment be made on a timely basis may be waived by the contractor if the contractor accepts late payments; that is, payments made after the contractual due date. If the contractor accepts late payments, the owner's duty to make timely payments under the contract is waived by the contractor.
If you find that *(name of party)* accepted late payments, then you must also find that *(name of party)* recognized the continued existence of the contract and thereby waived any right *(name of party)* may have had to complain that *(name of party)* breached the contract by failing to make timely payment.
Authorities: Baker v. Rice, 37 So.2d 837 (Fla. 1948); Blue Paper, Inc., v. Provost, 914 So.2d 1048 (Fla. 4th DCA 2005); Dad's Properties, Inc. v. Lucas, 545 So.2d 926 (Fla. 2d DCA 1989); 11 FLA.JUR.2d Contracts §§ 280-284. See also Fla. Stand. Jury Instr. Contr. & Bus. 416.18 (Interpretation — Acceptance); 416.6 (Contract Implied In Fact); and 416.30 (Affirmative Defense — Waiver); and 416.21 (Existence of Conditions Precedent Disputed).

b. Reinstatement Of Timely Payment Requirement

The requirement of timely payment, once waived, may be reinstated by *(name of party)* when

1. *(name of party)* reasonably notifies *(name of party)* that timely payments in accordance with the contract will be required in the future;

2. *(name of party)* does not materially change [his] [her] [its] position in reliance on *(name of party)* having accepted late payment(s) in the past.

Authorities: RESTATEMENT (SECOND) OF CONTRACTS § 84 and Comment f; CALAMARI AND PERILLO ON CONTRACTS § 11.5.C.3 (Thomson/West 6th ed. 2009). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.33 (Affirmative Defense — Equitable Estoppel); 416.30 (Affirmative Defense — Waiver); and 416.21 (Existence of Conditions Precedent Disputed).

7. Joint Payee Check

As a matter of law, if *(name of party)* issued a check that was

1. intended to be a payment for labor, services, or materials provided to the project;

2. made payable jointly to *(name of party)* and (name(s) of other payee(s)); and

3. endorsed by *(name of party)*, the full amount of the check is to be deducted from the sums due *(name of party)*.

Authorities: Southeastern Municipal Supply Co. v. Seaboard Surety Co., 552 So.2d 259 (Fla. 4th DCA 1989); Tropical Supply Co. v. Verchio, 402 So.2d 1284 (Fla. 4th DCA 1981).

8. Conditional Payment Bond

If *(claimant)*'s written contract with *(contractor)* expressly states that the *(contractor)*'s obligation to pay *(claimant)* is conditioned upon and limited to the payments made by the owner to *(contractor)*, then the duty of *(surety)* to pay

(claimant) is co-existent with that of *(contractor)*, and *(surety)*'s obligation to pay will be limited to payments actually made by the owner to *(contractor)*, if certain conditions are met. These conditions are:

1. The bond is listed in the notice of commencement for the project as a conditional payment bond and the bond is recorded together with the notice of commencement for the project prior to commencement of the project;
2. The words "conditional payment bond" are contained in the title of the bond at the top of the front page; and
3. The bond contains on the front page, in at least 10-point type, the statement: THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUBSUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.

If you find that *(claimant)*'s contract with *(contractor)* contained such a provision, and all of the above conditions have been met, then *(surety)*'s obligation to pay *(contractor)*, if any, is limited to amounts that have been paid by the owner to *(contractor)* on account of the labor, services, and materials supplied by *(contractor)* in connection with its contract with *(contractor)*.

Authority: F.S. 713.245; Everett Painting Co., Inc. v. Padula & Wadsworth Construction Inc., 856 So.2d 1059 (Fla. 4th DCA 2003). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.21 (Existence of Conditions Precedent Disputed) and 416.22 (Occurrence of Agreed Condition Precedent).

F. Extras And Change Orders

1. In General

a. Extras

When parties enter into an agreement or contract for construction work for a definite sum and, during the progress of the construction work, changes are requested, the law implies an obligation to pay the reasonable costs for the requested changes in addition to the sum agreed to by the parties in the original contract.

Authorities: DeLotto v. Fennell, 56 So.2d 518 (Fla. 1952); Davis v. Dept. of Health & Rehabilitative Services, 461 So.2d 210 (Fla. 1st DCA 1984); Southern Bell Telephone & Telegraph Co. v. Acme Electrical Contractors, Inc., 418 So.2d 1187 (Fla. 4th DCA 1982). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.5 (Oral or Written Contract Terms); 416.18 (Interpretation — Construction by Conduct); and 416.13 (Modification).

b. Change Orders

When an owner requests a contractor to perform extra work or work outside the scope of the contract, an owner must provide a written change order or written order signed by the owner before the contractor is required to perform the extra or additional work.

Authorities: County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1998). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.5 (Oral or Written Contract Terms); and 416.13 (Modification).

2. Acceptance Of Change Order As Full Compensation

You must decide whether, when *(name of party)* signed [(insert change order number)], *(name of party)* was agreeing to accept the particular change order as full compensation not only for the work specifically described in the change order, but also for all of the effects of that change order on any other work, including the time allowed to complete the project, and whether *(name of party)* waived all rights to additional compensation.

If you determine that *(name of party)* made an agreement to accept the change order and its effects as full compensation, your verdict should be for *(name of party)* on this issue.

Authority: J. Allen, Inc. v. Castle Floor Covering, Inc., 543 So.2d 249 (Fla. 2d DCA 1989).

3. Claim For Breach

a. Extras

If you find that the evidence shows

1. that the actions of *(name of party)* required *(name of party)* to provide labor, services, equipment, or materials that were not part of the contract; and

2. that *(name of party)* failed to pay *(name of party)* for the extra work, you must award *(name of party)* a further amount equal to the value of the additional labor, services, equipment, or materials.

Authorities: Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989); Moring v. Levy, 452 So.2d 1069 (Fla. 3d DCA 1984); Southern Bell Telephone & Telegraph Co. v. Acme Electrical Contractors, Inc., 418 So.2d 1187 (Fla. 4th DCA 1982); In re Construction Contractors of Ocala, Inc., 196 B.R. 188 (Bankr. M.D. Fla. 1996).

b. Change Orders

The contract provides

[(quote or paraphrase the contract provision that requires written change orders)**]**.

If you determine that the extra work was not authorized by a written change order, your verdict should be for *(name of party)*.

However, if you determine that *(name of party)* waived or excused the requirement for a written change order for the extra work, your verdict should be for *(name of party)*.

Authorities: Professional Insurance Corp. v. Cahill, 90 So.2d 916 (Fla. 1956); Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc., 145 So.3d 989 (Fla. 4th DCA 2014); King Partitions & Drywall, Inc. v. Donner Enterprises, Inc., 464 So.2d 715 (Fla. 4th DCA 1985); Pan American Engineering Co. v. Poncho's Construction Co., 387 So.2d 1052 (Fla. 5th DCA 1980).

4. Site Preparation Exception

If a general contractor, having the obligation to prepare a construction site for a subcontractor's work, fails to adequately prepare the site, the general contractor is liable to the subcontractor for the cost of additional work that the subcontractor must perform because of the inadequately prepared site.

Furthermore, the additional work is not considered an extra to the contract and is not required to be in writing.

Authority: James A. Cummings, Inc. v. Young, 589 So.2d 950 (Fla. 3d 1992); Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989).

G. Implied Warranties

1. Common Law

a. Fitness And Merchantability

The builder of a new home gives the buyer an implied warranty that the home will be fit and merchantable. "Fit" means that the new home is livable, and ""merchantable" means that the new home has been constructed with good workmanship.

The builder also warrants to the buyer that the home was built in substantial compliance with the plans and specifications that were approved by the proper governmental authority and that the home was built in compliance with the applicable building codes.

Authorities: Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So.3d 1258 (Fla. 2013) (implied warranties of fitness and merchantability include infrastructure, drainage systems, retention ponds, and underground pipes, which directly impact and provide essential services to habitability of homes); Conklin v. Hurley, 428 So.2d 654 (Fla. 1983); Gable v. Silver, 258 So.2d 11 (Fla. 4th DCA 1972), 50 A.L.R. 3d 1062, aff'd 264 So.2d 418. But see Haskell Co. v. Lane Co., 612 So.2d 669 (Fla. 1st DCA 1993) (vendor of commercial building not liable to purchaser's tenants under doctrine of caveat emptor for failure to disclose defect in roof, absent showing of material misrepresentation or fraudulent concealment).

b. Habitability — Objective Standard

To be habitable or livable, a home must be reasonably fit for the ordinary purpose that was intended. If the home is not fit, a breach has occurred.

In determining whether a home is habitable, the test is whether it meets ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality.

Authorities: Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So.3d 1258 (Fla. 2013); Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So.2d 1244 (Fla. 1993), receded from on other grounds 110 So.3d 399; Sierra v. Allied Stores Corp., 538 So.2d 943 (Fla. 3d DCA 1989); Putnam v. Roudebush, 352 So.2d 908 (Fla. 2d DCA 1977).

2. Violation Of Statutory Condominium Warranties

a. Claim Against Contractor/Subcontractor

i. In General

The next issue for your consideration on the claims of *(name of party)* against *(name of party)* is *(name of party)*'s claim that *(name of party)* violated certain warranties of fitness.

Under Florida Law, a [contractor] [subcontractor] [supplier] involved in the construction of a condominium, here *(name of party)*, gives the developer and the purchaser of each unit an implied warranty of fitness as to the work performed or materials supplied by [him] [her] [it].

That the warranty is "implied," means that it exists by operation of law, and regardless of any intention of the [contractor] [subcontractor] [[supplier] to create the warranty.

A warranty of "fitness" means that the item that was the subject of the warranty conforms with generally acceptable standards of workmanship and performance of similar work and materials meeting the requirements specified in the contractor's or subcontractor's contract.

The test for a breach of this warranty is whether the premises met ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality. If the unit meets these standards, then this warranty has not been breached. If the unit does not meet these standards, then the warranty has been breached.

The specific warranty of fitness given by the [contractor] [subcontractor], [[supplier] *(name of party)*, is as follows:

- **For a period of 3 years from the date of completion for construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement, and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit; and**
- **For a period of one year after completion of all construction, a warranty as to all other improvements and materials**.

For the purpose of this warranty, the term "completion of a building or improvement" means [the issuance of a certificate of occupancy, whether temporary or otherwise, that allows for the occupancy or use of the entire building or improvement, or an equivalent authorization issued by the governmental body having jurisdiction] [or if no certificate of occupancy was issued, substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications. "Substantial completion" means completion of the building or improvement so that it can be occupied or used for its intended purposes].

For the purpose of this warranty a "supplier" is one who is engaged, directly or indirectly, in the business of making a product available to consumers.

ii. Defenses

I. Remote Purchasers

The implied warranty of fitness extends only to initial purchasers of the units.

II. Routine Maintenance

This warranty is conditioned upon routine maintenance being performed [unless the maintenance is an obligation of the developer or a developer-controlled association]. If routine maintenance of a warranted item is not performed, the warranty as to that item is released.

III. Right Of Association To Bring Claim

The implied warranty extends to the unit owners individually, but the right to bring a claim for breach of the implied warranty may be exercised collectively, as to matters of common interest, through the condominium association.
Authorities: F.S. 718.203, 672.314, 672.315; Fla.R.Civ.P. 1.221; Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911 (Fla. 1995); Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n, Inc., 658 So.2d 922 (Fla. 1995); Port Marina Condominium Ass'n Inc., v. Roof Services, Inc., 119 So.3d 1288 (Fla. 4th DCA 2013); Stroshein v. Harbour Hall Inlet Club II Condominium Ass'n, Inc., 418 So.2d 473 (Fla. 4th DCA 1982); Parliament Towers Condominium v. Parliament House Realty, Inc., 377 So.2d 976 (Fla. 4th DCA 1979), disapproved on other grounds 620 So.2d 1244; Putnam v. Roudebush, 352 So.2d 908 (Fla. 2d DCA 1977); David v. B&J Holding Corp., 349 So.2d 676 (Fla. 3d DCA 1977).
COMMENT: No instruction defining "common interest" is suggested because those issues would typically be resolved as a matter of law before trial.

b. Claim Against Developer

i. In General

The next issue for your consideration on the claims of *(name of party)* against *(name of party)* is *(name of party)*'s claim that *(name of party)* violated certain warranties of fitness and merchantability.
Under Florida Law, a developer of a condominium, here *(name of party)*, gives the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended for the unit.
That the warranty is "implied" means that it exists by operation of law, and regardless of any intention of the developer to create the warranty.
The test for a breach of these warranties is whether the premises met ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality. If the unit meets these standards, then the warranties have not been breached. If the unit does not meet these standards, then the warranties have been breached.
The specific warranties of fitness and merchantability given by the developer are as follows:

- **As to each unit, a warranty for three years commencing with the completion of the building containing the unit**.
- **As to the personal property that is transferred with, or appurtenant to, each unit, a warranty which is for the same period as that provided by the manufacturer of the personal property, commencing with the date of closing of the purchase or the date of possession of the unit, whichever is earlier**.
- **As to other improvements for the use of unit owners, a 3-year warranty commencing with the date of completion of the improvements**.
- **As to all other personal property for the use of unit owners, a warranty that shall be the same as that provided by the manufacturer of the personal property**.
- **As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, except mechanical units serving only one unit, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for three years thereafter or one year after owners, other than the developer, obtain control of the association, whichever occurs last, but in no event more than five years**.
- **As to all other property that is conveyed with a unit, a warranty to the initial purchaser of each unit for a period of one year from the date of closing of the purchase or the date of possession, whichever occurs first**.

For the purpose of these warranties, the term "completion of a building or improvement" means [the issuance of a certificate of occupancy, whether temporary or otherwise, that allows for occupancy or use of the entire building or improvement, or an equivalent authorization issued by the governmental body having jurisdiction] [or if no certificate of occupancy was issued, substantial completion of construction, finishing and equipping of the building or improvement according to the plans and specifications. "Substantial completion" means completion of the building or improvement so that it can be occupied or used for its intended purposes].
Authorities: F.S. 718.203; see also Fla. Stand. Jury Instr. Contr. & Bus. 416.7 (Contract Implied In Law).

ii. Defenses

I. Remote Purchasers

The implied warranties of fitness and merchantability extend only to initial purchasers of the units.

II. Routine Maintenance

These implied warranties are conditioned upon routine maintenance being performed [unless the maintenance is an obligation of the developer or a developercontrolled association]. If routine maintenance of a warranted item is not performed, the implied warranty as to that item is released.

III. Right Of Association To Bring Claim

The implied warranties extend to the unit owners individually, but the right to bring a claim for breach of the implied warranties may be exercised collectively, as to matters of common interest, through the condominium association.
Authorities: F.S. 718.203; Fla.R.Civ.P. 1.221; Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n, Inc., 658 So.2d 922 (Fla. 1994); Stroshein v. Harbour Hall Inlet Club II Condominium Ass'n, Inc., 418 So.2d 473 (Fla. 4th DCA 1982); Parliament Towers Condominium v. Parliament House Realty, Inc., 377 So.2d 976 (Fla. 4th DCA 1979), disapproved on other grounds 620 So.2d 1244; Putnam v. Roudebush, 352 So.2d 908 (Fla. 2d DCA 1977); David v. B&J Holding Corp., 349 So.2d 676 (Fla. 3d DCA 1977). See also Porto Venezia Condominium Ass'n, Inc. v. WB Fort Lauderdale, LLC, 926 F.Supp.2d 1330 (S.D. Fla. 2013) (holding that for the purpose of this warranty a lender who has taken title to collateral is a considered a developer).
COMMENT: No instruction defining "common interest" is suggested, because those issues would typically be resolved as a matter of law before trial.

3. Plans And Specifications

a. Owner To General Contractor

The plans and specifications were furnished by *(name of party)*, the owner, to *(name of party)*, the contractor.
Florida law permits the contractor to assume that the plans and specifications are adequate for the owner's purposes when the plans and specifications are furnished to the contractor by the owner. In other words, the owner, in delivering the plans and specifications to the contractor, impliedly warrants that the plans and specifications are sufficient for the owner's purposes.
Thus, if you find from all of the evidence that *(name of party)*, in good faith, attempted to build in accordance with the plans and specifications provided by *(name of party)*, but was unable to do so because of defects in those plans and specifications, you will find that *(name of party)* is not at fault or in breach of [his] [her] [its] obligation to *(name of party)*.
Authorities: United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); Miami-Dade Water & Sewer Authority v. Inman, Inc., 402 So.2d 1277 (Fla. 3d DCA 1981).

b. Contractor To Subcontractor

***(name of party)* was a subcontractor to *(name of party)*, the general contractor**.
A general contractor who furnishes plans and specifications to a subcontractor impliedly warrants them to be fit for their intended use and bears the risk of loss for damages caused by the defects in the plans and specifications.
Authorities: Bradford Builders, Inc. v. Sears, Roebuck & Co., 270 F.2d 649 (5th Cir. 1959); Havens Steel Co. v. Randolph Engineering Co., 613 F.Supp. 514 (W.D. Mo. 1985), aff'd 813 F.2d 186; Miller v. Guy H. James Construction Co., 653 P.2d 221 (Okla. Ct.App. 1982).

c. Claim For Breach

i. In General

You must determine whether *(name of party)* breached the contract by providing plans and specifications to *(name of party)* that were not full, complete, and accurate, and whether *(name of party)*, by relying on the plans and specifications, was misled by incomplete or inaccurate information.

If you find that a breach occurred, your verdict must be for *(name of party)*, and you must award damages in the manner in which I will instruct you.
However, if you find that a breach did not occur, you must find for *(name of party)*
and you may not award any damages to *(name of party)* on this claim.
Authorities: Shore Drive Apartments, Inc. v. Frank J. Rooney, Inc., 253 So.2d 478 (Fla. 4th DCA 1971). See Bradford Builders, Inc. v. Sears, Roebuck & Co., 270 F.2d 649 (5th Cir. 1959).

ii. *Spearin* Doctrine

A contractor who has attempted to comply with an owner's plans and specifications that are proved to be defective, and who has incurred additional costs because of relying on those plans and specifications, has a claim for damages.
However, for *(name of party)* to recover damages, all of the following must be proved:

1. **_(name of party)_ has attempted to fully comply with the plans and specifications.**
2. **The plans and specifications were defective.**
3. **The defective plans and specifications were, in fact, the cause of the problem.**

You are instructed further that, before *(name of party)* may recover, *(name of party)* must prove by the greater weight of the evidence that [he] [she] [it] strictly complied with (name of party)'s plans and specifications.
If you find that *(name of party)* failed to fully comply with *(name of party)*' s plans and specifications and, instead, deviated from the plans and specifications in performing [his] [her] [its] work, then recovery cannot be permitted for (name of party).
Finally, your verdict must be, from all of the evidence, that *(name of party)* has proved that [his] [her] [its] increased costs or other damages were a direct result of the defective plans and specifications of *(name of party)*.
Authorities: United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); Phillips & Jordan, Inc. v. State, Dept. of Transportation, 602 So.2d 1310 (Fla. 1st DCA 1992).

H. Differing Site Conditions

1. In General

Conditions are considered unexpected if they differ materially from either

1. **those conditions shown in the plans and specifications; or**
2. **those conditions ordinarily encountered in the kind of work provided in the contract, even though they are not in conflict with contractual documents.**

Authorities: Hendry Corp. v. Metropolitan Dade County, 648 So.2d 140 (Fla. 3d DCA 1995); Town of Longboat Key v. Carl E. Widell & Son, 362 So.2d 719 (Fla. 2d DCA 1978).

2. Inspection Requirement

A provision in the contract that *(name of party)* is required to make [his] [[her] [its] own investigation of the project site does not invalidate the changed conditions clause, nor does that provision require bidders to discover hidden subsurface conditions on their own.
Authorities: Jacksonville Port Authority v. Parkhill-Goodloe Co., 362 So.2d 1009 (Fla. 1st DCA 1978); Town of Longboat Key v. Carl E. Widell & Son, 362 So.2d 719 (Fla. 2d DCA 1978); Bradford Builders, Inc. v. Sears, Roebuck & Co., 270 F.2d 649 (5th Cir. 1959).

3. Contractual Requirement

For a changed conditions clause to apply, it is not necessary for the contract to specifically identify the subsurface conditions, but those conditions must be expressed in such a way that would lead a reasonable contractor to conclude that [he] [she] [it] would not meet the type of subsurface conditions [he] [she] [it] actually met.
Authority: Foster Construction C.A. & Williams Brothers Co. v. United States, 435 F.2d 873 (Ct.Cl. 1970).

4. Complete Plans And Specifications

In determining whether the conditions differed from those contemplated by the contract, you must decide whether the plans and specifications made available to *(name of party)* and *(name of party)* were full, complete, and accurate.

Authorities: Havens Steel Co. v. Randolph Engineering Co., 613 F.Supp. 514 (W.D. Mo. 1985), aff'd 813 F.2d 186; Farnsworth & Chambers Co. v. United States, 346 F.2d 577 (Ct.Cl. 1965); Miller v. Guy H. James Construction Co., 653 P.2d 221 (Okla. Ct.App. 1982).

5. Subsoil Conditions

If you find that *(name of party)* represented to *(name of party)* that the subsoil condition was composed only of sand, you then must determine

1. whether *(name of party)* actually knew of the subsoil condition when *(name of party)* submitted [his] [her] [its] bid;

2. that the subsoil condition actually was made of rock; and

3. whether the existence of the subsoil rock was only a minor inaccuracy or discrepancy in *(name of party)*'s plans and specifications.

If you find that

1. *(name of party)* represented to *(name of party)* that the subsoil condition was composed solely of sand; and

2. *(name of party)* was not aware of the existence of rock; and

3. the existence of rock was not a minor inaccuracy or discrepancy, you should find that *(name of party)* is entitled to recover the extra costs [he] [[she] [it] incurred in performing [his] [her] [its] contract as a result of the rock.

Authorities: Christie v. United States, 237 U.S. 234, 35 S.Ct. 565, 59 L.Ed. 933 (1915); Hollerbach v. United States, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898 (1914); Morrison-Knudsen Co. v. United States, 397 F.2d 826 (Ct.Cl. 1968).

I. Violation Of The Building Code

If you find that *(name of party)* knew or should have known that it committed a violation of the Florida Building Code and if you find that the violation caused damage to *(name of party)*, you shall find in favor of *(name of party)*.

If you find that *(name of party)* did not know or should not have known that it committed a violation of the Florida Building Code and if you find that the violation caused damage to *(name of party)*, you must find in favor of *(name of party)* unless

1. *(name of party)* obtained the required building permits;

2. any local government or public agency with authority to enforce the Florida Building Code approved the plans;

3. the construction project passed all required inspections under the code, and;

4. there was no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections.

Authorities: F.S. 553.84; Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Cos., 110 So.3d 399 (Fla. 2013); Sierra v. Allied Stores Corp., 538 So.2d 943 (Fla. 3d DCA 1989); Welcome v. Arvida Community Sales, Inc., 2004 WL 2340249 (Fla. Cir.Ct. 2004), aff'd 903 So.2d 942 (2001 amendment to F.S. 553.84 applies only to claims arising after enactment of amendment).

As to listing specific building code violations, see Williams v. State Dept. of Transportation, 579 So.2d 226 (Fla. 1st DCA 1991), disapproved on other grounds 641 So.2d 40; Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n, Inc., 573 So.2d 889 (Fla. 2d DCA 1991); (both holding that experts should not give opinions interpreting the building codes, and that such interpretation is for the court).

As to a contractor's obligation to be knowledgeable about building codes, see F.S. 553.841.

§ 17.4. CONTRACT DEFENSES JURY INSTRUCTIONS

A. Greater Weight (Preponderance) Of The Evidence And Burden Of Proof

If the greater weight of the evidence does not support the claim of *(name of party)*, then your verdict should be for *(name of party)*.

If, however, the greater weight of the evidence does support the claim of *(name of party)*, then you shall consider the defenses raised by *(name of party)*.

On the First Defense, the issues for your determination are:

[*(list issues to be determined)*].

On the Second Defense, the issues for your determination are:

[*(list issues to be determined)*].

On the Third Defense, the issues for your determination are:

Authority: Fla. Stand. Jury Instructions Civ. 401.21, 401.22a-f, 402.13, 402.14.

B. Mitigation Of Damages/Doctrine Of Avoidable Consequences

A party that is damaged by the breach of a contract must take all reasonable means to protect [himself] [herself] [itself] and to mitigate or diminish [[his] [her] [its] damages. In considering this defense you should determine which actions, if any, *(name of party)* took to reduce the amount of damages [[he] [she] [it] is claiming in this case.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(name of party)* in the full amount of [his] [her] [its] damages].

Authority: F.S. 713.15; Thomas v. Western World Insurance Co., 343 So.2d 1298 (Fla. 2d DCA 1977); Associated Housing Corp. v. Keller Building Products of Jacksonville, Inc. 335 So.2d 362 (Fla. 1st DCA 1976).

C. Owner Setoff

"Setoff" is the right of a party in a contract dispute to use any claims [[he] [she] [it] has against the other party as full or partial satisfaction of the amounts owed.

If you find that *(name of party)* rendered substantial performance under the contract, *(name of party)* must pay the full contract price less payments previously made, subject to a setoff for

1. any amounts paid to a third party to complete the contract against the amount due *(name of party)*; and

2. any damages sustained by *(name of party)* as a result of defects in *(name of party)*'s performance, measured by the reasonable cost of construction and completion in accordance with the contract, if completion in accordance with the contract is possible and does not involve unreasonable economic waste.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, the plaintiff's claim should be reduced by the amount you determine and your verdict on this defense should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [[her] [its] damages].

Authorities: Grossman Holdings Ltd. v. Hourihan, 414 So.2d 1037 (Fla. 1982); Lindon v. Dalton Hotel Corp., 49 So.3d 299 (Fla. 5th DCA 2010); Felgenhauer v. Bonds, 891 So.2d 1043 (Fla. 2d DCA 2004); Centex-Rooney Construction Co. v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1998); Russo v. Heil Construction, Inc., 549 So.2d 676 (Fla. 5th DCA 1989); Marshall v. Karl F. Schultz, Inc., 438 So.2d 533 (Fla. 2d DCA 1983); In re Raber Industries, Inc., 8 B.R. 631 (Bankr. M.D. Fla. 1981); Bryan & Sons Corp. v. Klefstad, 237 So.2d 236 (Fla. 4th DCA 1970); 20 AM.JUR.2d Counterclaim, Recoupment, and Setoff § 2.

D. Unlicensed Contracting

As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor are unenforceable in law or equity by the unlicensed contractor.

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* was required to have or maintain a license for the work required under the contract. A contractor's status as licensed or unlicensed shall be considered only on the date the parties made their agreement for the work. If the contract does not have a date, then you should consider the first day the contractor provided labor, services, and/or materials as the contract date.

If you determine by the greater weight of the evidence that *(name of party)* was required to have or maintain a license but did not have one, then your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages.]

Authorities: F.S. 489.128; F.S. 768.0425; Earth Trades, Inc. v. T & G Corp., 108 So.3d 580 (Fla. 2013); Central Florida Lumber Unlimited, Inc. v. Qaqish, 12 So.3d 766 (Fla. 2d DCA 2009); Boatwright Construction, LLC v. Tarr, 958 So.2d 1071 (Fla. 5th DCA 2007); Scott & Son Engineering, Inc. v. Tarafa Construction, Inc., 907 So.2d 553 (Fla. 4th DCA 2005); RTM General Contractors, Inc. v. G/W Riverwalk, LLC, 893 So.2d 583 (Fla. 2d DCA 2005).

E. Accord And Satisfaction

As a defense for *(name of party)*, the issue for your consideration is whether the parties have entered into an accord and satisfaction of their prior agreement. To find that an accord and satisfaction of the prior agreement has occurred, your verdict must be based on all of the following elements by the greater weight of the evidence:

1. The parties mutually intended to effect a settlement of an existing dispute by entering into a superseding agreement.

2. There exists actual performance in accordance with the new agreement.

3. Compliance with the new agreement discharges the prior obligation.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Martinez v. South Bayshore Tower, L.L.L.P., 979 So.2d 1023 (Fla. 3d DCA 2008); Wolowitz v. Thoroughbred Motors, Inc., 765 So.2d 920 (Fla. 2d DCA 2000); Pogge v. Dept. of Revenue, 703 So.2d 523 (Fla. 1st DCA 1997); Chassan Professional Wallcovering, Inc. v. Victor Frankel, Inc., 608 So.2d 91 (Fla. 4th DCA 1992); Republic Funding Corp. of Florida v. Juarez, 563 So.2d 145 (Fla. 5th DCA 1990); Rudick v. Rudick, 403 So.2d 1091 (Fla. 3d DCA 1981); see also Fla.R.Civ.P. Form 1.967.

F. Novation

As a defense for *(name of party)*, the issue for your consideration is whether the parties have entered into a novation of their prior agreement. To find that a novation of the prior agreement has occurred, your verdict must be based on all of the following elements by the greater weight of the evidence:

1. The parties had a previously valid contract.

2. The parties made an agreement to make a new contract.

3. The parties intended to extinguish the original contract.

4. The new contract is valid.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: De Las Cuevas v. National Enterprises, Inc., 927 So.2d 41 (Fla. 3d DCA 2006); Thompson v. Jared Kane Co., 872 So.2d 356 (Fla. 2d DCA 2004); Holiday Square Owners Ass'n v. Tsetsenis, 820 So.2d 450 (Fla. 5th DCA 2002); Elmore v. Florida Power & Light Co., 760 So.2d 968 (Fla. 4th DCA 2000); Miami National Bank v. Forecast Construction Corp., 366 So.2d 1202 (Fla. 3d DCA 1979); Taines v. Capital City First National Bank, 344 So.2d 273 (Fla. 1st DCA 1977).

G. Lack Of Capacity

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* had the capacity to enter into the contract. To form a contract, it is necessary that both parties have a meeting of the minds. If one of the parties does not have the capacity to contract, then there can be no meeting of the minds. For example, those who are infants, mentally ill, under guardianship, or intoxicated do not have the legal capacity to contract. However, each case of lack of capacity must be determined on its own facts. In this case *(name of party)* claims that [he] [she] [it] did not have the capacity to contract because:

[(describe circumstance surrounding lack of capacity)**]**.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Wechsler v. Novak, 26 So.2d 884 (Fla. 1946); Novotny v. Estate of Dantone, 848 So.2d 398 (Fla. 4th DCA 2003); 17A AM.JUR.2d Contracts § 28; RESTATEMENT (SECOND) CONTRACTS § 12.

H. Illegality

If enforcement of a contract is contrary to the public policy of this state, violates a statute, or violates the constitution, the contract need not be enforced. In other words, if a contract contains a clause that is illegal, you should not enforce the illegal terms, because a contract cannot give validity to an otherwise illegal act. There is no remedy for that which is illegal. Where a contract contains both legal and illegal terms, the illegal terms can be refused without nullifying the contract as a whole, and you should consider the valid portions of the contract.

As a defense for *(name of party)*, the issue for your consideration is whether the contract between the parties required *(name of party)* to perform an illegal act or contained an illegal clause. The [provision in the contract] [action] that *(name of party)* claims is illegal is:

[(insert illegal provision or required illegal act)**]**.

If you determine by the greater weight of the evidence that the contract [[required *(name of party)* to perform an illegal act] [contained an illegal clause], then your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Title Trust Co. of Florida v. Parker, 468 So.2d 520 (Fla. 1st DCA 1985); McIntyre v. Norman, 429 So.2d 1296 (Fla. 3d DCA 1983); Armco Drainage & Metal Products, Inc. v. County of Pinellas, 137 So.2d 234 (Fla. 2d DCA 1962).

I. Equitable Estoppel

See Fla. Stand. Jury Instr. Contr. & Bus. 416.33 (Affirmative Defense — Equitable Estoppel).

Authorities: Major League Baseball v. Morsani, 790 So.2d 1071 (Fla. 2001); Winans v. Weber, 979 So.2d 269 (Fla. 2d DCA 2007); Goodwin v. Blu Murray Insurance Agency, Inc., 939 So.2d 1098 (Fla. 5th DCA 2006); Parker v. Estate of Bealer, 890 So.2d 508 (Fla. 4th DCA 2005); Rayborn v. Dept. of Management, 803 So.2d 747 (Fla. 3d DCA 2002); Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc., 744 So.2d 482 (Fla. 1st DCA 1999); Lennar Homes, Inc. v. Gabb Construction Services, Inc., 654 So.2d 649 (Fla. 3d DCA 1995).

J. Waiver

1. In General

See Fla. Stand. Jury Instr. Contr. & Bus. 416.33 (Affirmative Defense — Waiver).

Authorities: Major League Baseball v. Morsani, 790 So.2d 1071 (Fla. 2001); Jonas v. City of West Palm Beach, 76 Fla. 66, 79 So. 438 (1918); Husky Rose, Inc. v. Allstate Insurance Co., 19 So.3d 1085 (Fla. 4th DCA 2009); Winans v. Weber, 979 So.2d 269 (Fla. 2d DCA 2007); Cullum v. Packo, 947 So.2d 533 (Fla. 1st DCA 2006); Woodlands Civic Ass'n, Inc. v. David W. Darrow, D.C., P.A., 765 So.2d 874 (Fla. 5th DCA 2000); Torres v. K-Site 500 Associates, 632 So.2d 110 (Fla. 3d DCA 1994); Capital Bank v. Needle, 596 So.2d 1134 (Fla. 4th DCA 1992).

2. Defined

Waiver is the voluntary giving up of a known right, and may be directed or implied from the actions of the parties.

To determine that there was a waiver, you must find that

1. **at the time of the waiver, there existed a right, privilege, advantage, or benefit that *(name of party)* may have waived**;
2. ***(name of party)* had actual or constructive knowledge of its authority to allow the waiver; and**
3. ***(name of party)* had intended to give up that right, privilege, advantage, or benefit**.

For *(name of party)* to prevail on this issue, you must find that *(name of party)*, by its actions, led *(name of party)* to believe that the performance of *(name of party)* was adequate. You may determine this from the conduct of *(name of party)*.

Authorities: Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (1945); Emerald Estates Community Ass'n, Inc. v. Gorodetzer, 819 So.2d 190 (Fla. 4th DCA 2002); Woodlands Civic Ass'n v. David W. Darrow, D.C., P.A., 765 So.2d 874 (Fla. 5th DCA 2000); Taylor v. Kenco Chemical & Mfg. Corp., 465 So.2d 581 (Fla. 1st DCA 1985); Arbogast v. Bryan, 393 So.2d 606 (Fla. 4th DCA 1981); Fireman's Fund Insurance Co. v. Vogel, 195 So.2d 20 (Fla. 2d DCA 1967).

3. By Knowledge

As a defense to its nonperformance under the contract, *(name of party)* claims that, although contract performance was not perfect, *(name of party)* was aware of any inconsistencies and waived the right to object to them.

Waiver means the intentional or voluntary relinquishment of a known right. You must find that *(name of party)* accepted *(name of party)*'s performance without timely objection to the defects that *(name of party)* now alleges were present for *(name of party)* to be excused from performing under the agreement.

Authorities: Rylander v. Sears Roebuck & Co., 302 So.2d 478 (Fla. 3d DCA 1974); Rank v. Sullivan, 132 So.2d 32 (Fla. 2d DCA 1961).

4. Late Performance

(name of party) **claims as a defense that, although [he] [she] [it] may have been late in performing under the contract,** ***(name of party)*** **waived any objection to the lateness**.

For ***(name of party)*** **to prevail on this issue, you must find that**

1. ***(name of party)*** **failed to claim that** ***(name of party)*** **performed in an untimely manner; and**
2. **an unreasonable period of time had passed**.

Authorities: Adrian Developers Corp. v. de l a Fuente, 905 So.2d 155 (Fla. 3d DCA 2005); Aetna Life Insurance Co. v. Hughes, 282 So.2d 661 (Fla. 4th DCA 1973); Ferre Florida Corp. v. B & B Auto Parks, Inc., 254 So.2d 795 (Fla. 3d DCA 1971).

5. Extras And Change Orders

a. Oral Changes

A requirement to give written notice of claims for extra work may be waived by the parties during the course of performance of the contract. This waiver may occur when a party accepts oral changes and additions in the work.

Authorities: Pathway Financial v. Miami International Realty Co., 588 So.2d 1000 (Fla. 3d DCA 1991); King Partitions & Drywall, Inc. v. Donner Enterprises, Inc., 464 So.2d 715 (Fla. 4th DCA 1985); Pan American Engineering Co. v. Poncho's Construction Co., 387 So.2d 1052 (Fla. 5th DCA 1980).

b. Default

Some construction contracts contain a clause requiring that notice of additional work must be put in writing before the work is performed.

However, when the need for the additional work is caused by a failure of ***(name of party)*****, that work is not required to be in writing**.

Authorities: Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989); City of Miami v. Nat Harrison Associates, Inc., 313 So.2d 99 (Fla. 3d DCA 1975).

6. Satisfaction Requirement

The contract calls for ***(name of party)*** **to perform its contract work to the satisfaction of** ***(name of party)*****. That satisfaction was a part of the full performance under the contract unless** ***(name of party)*** **waived this requirement**.

You must find that ***(name of party)*** **waived the satisfaction requirement if you find that**

1. ***(name of party)*****'s work knowingly was approved and accepted by** ***(name of party)*****; or**
2. ***(name of party)*** **prevented** ***(name of party)*** **from obtaining that approval, or implied or represented that the approval was not required, and that** ***(name of party)*** **relied on that representation**.

Authorities: Johnson v. Dichiara, 84 So.2d 537 (Fla. 1955); Poranski v. Millings, 82 So.2d 675 (Fla. 1955); Clement v. Pensacola Builders Supply Co., 138 Fla. 629, 189 So. 852 (1939); City National Bank of Miami v. Chitwood Construction Co., 210 So.2d 234 (Fla. 3d DCA 1968).

7. By Specific Document

Whether this document is a waiver is determined by the intent of the parties.

You should determine whether the parties considered this document to be a waiver by examining the conduct and the language of the parties as well as the circumstances that existed at the time that this document allegedly was executed by the parties.

If you determine that the document was a waiver, your verdict must be for ***(name of party)*** **on this issue**.

Authorities: F.S. 713.20(4)-(5), (7)-(8); Orlando Central Park, Inc. v. Master Door Co. of Orlando, Inc. 303 So.2d 685 (Fla. 4th DCA 1974).

8. Claim

(name of party) **claims as a defense that** ***(name of party)*** **waived the right to demand full performance from** ***(name of party)***.

For ***(name of party)*** **to prevail on this issue, you must find that** ***(name of party)***

1. **made no timely objection to the performance**;
2. **allowed the performance to continue without objecting to the accepted or approved work; or**

3. gave *(name of party)* no notice that the work was unacceptable.

Authorities: Montgomery Enterprises, Inc. v. Atlantic National Bank of Jacksonville, 338 So.2d 1078 (Fla. 1st DCA 1976); Rylander v. Sears Roebuck & Co., 302 So.2d 478 (Fla. 3d DCA 1974).

K. Fraud

See Fla. Stand. Jury Instr. Civ. 409.1-409.13 and Fla. Stand. Jury Instr. Contr. & Bus. 416.28.

L. Fraud In The Inducement

See Fla. Stand. Jury Instr. Civ. 409.1-409.13 and Fla. Stand. Jury Instr. Contr. & Bus. 416.28.

M. Statute Of Limitations

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)*'s claim is barred by a statute of limitations. To find that *(name of party)*'s claim is barred by a statute of limitations, you should consider whether *(name of party)*'s causes of action and items of damage did not accrue within the time prescribed by (identify statute of limitations) before this action was brought. In this case the particular statute of limitations reads:

[(read statute of limitations applicable to case)**]**.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, then *(name of party)*'s claim is time barred and your verdict should be for *(name of party)*. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: F.S. 95.11; Fla.R.Civ.P. Form 1.965; F.S. 713.22; Major League Baseball v. Morsani, 790 So.2d 1071 (Fla. 2001); Federal Insurance Co. v. Southwest Florida Retirement Center, Inc., 707 So.2d 1119 (Fla. 1998); Pierson D. Construction, Inc. v. Yudell, 863 So.2d 413 (Fla. 4th DCA 2004); Alexander v. Suncoast Builders, Inc., 837 So.2d 1056 (Fla. 3d DCA 2003); Otis Elevator Co. v. Theodore, 677 So.2d 966 (Fla. 3d DCA 1996); Elizabeth N. v. Riverside Group, Inc., 585 So.2d 376 (Fla. 1st DCA 1991); Dubin v. Dow Corning Corp., 478 So.2d 71 (Fla. 2d DCA 1985); Engle v. Acopian, 432 So.2d 113 (Fla. 5th DCA 1983).

N. Laches

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)*'s claim is barred by the doctrine of laches. To find that *(name of party)*'s claim is barred by laches, your verdict must be based on all of the following elements by the greater weight of the evidence:

1. Conduct on the part of *(name of party)*, or one under whom [he] [she] [[it] claims, giving rise to the situation of which the complaint is raised.

2. Delay by *(name of party)* in asserting [his] [her] [its] rights, the *(name of party)* having had knowledge or notice of *(name of party)*'s conduct and having been afforded an opportunity to institute suit.

3. Lack of knowledge or notice on the part of *(name of party)* that *(name of party)* would assert the right on which [he] [she] [it] bases this lawsuit.

4. Injury or prejudice to *(name of party)* in the event relief is given to *(name of party)*.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); Lennar Homes, Inc. v. Dorta-Duque, 972 So.2d 872 (Fla. 3d DCA 2007); Miami-Dade County v. Fernandez, 905 So.2d 213 (Fla. 3d DCA 2005); Gaines v. Gaines, 870 So.2d 187 (Fla. 4th DCA 2004); McIlmoil v. McIlmoil, 784 So.2d 557 (Fla. 1st DCA 2001); Niagara Fire Insurance Co. v. Allied Electrical Co., 319 So.2d 594 (Fla. 3d DCA 1975); Blumin v. Ellis, 186 So.2d 286 (Fla. 2d DCA 1966).

O. Payment

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* has made payment for [his] [her] [its] obligation under the contract. In determining whether *(name of party)* has made payment, you should consider if *(name of party)* has already satisfied the *(name of party)*'s claim through the payment of money or has satisfied the obligation by otherwise providing *(identify method of discharge)* to satisfy *(name of party)*'s claim.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this

issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Black's Law Dictionary (10th ed. 2014); Fla.R.Civ.P. 1.110(c) and Fla.R.Civ.P. Form 1.966.

P. Release

Release is the waiver or relinquishment of the right to bring a claim against a person or entity. As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* has released [his] [her] [its] right to bring a claim against *(name of party)*. If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Mazzoni Farms, Inc. v. E.I. Dupont De Nemours & Co., 761 So.2d 306 (Fla. 2000); Pilot Construction Services, Inc. v. Babe's Plumbing, Inc., 111 So.3d 955 (Fla. 2d DCA 2013); Plumpton v. Continental Acreage Development Co., 830 So.2d 208 (Fla. 5th DCA 2002); Bruce v. Heiman, 392 So.2d 1026 (Fla. 5th DCA 1981); see also Fla.R.Civ.P. Form 1.970.

Q. Statute Of Frauds

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)*'s claim is barred by the statute of frauds. The statute of frauds bars the enforcement of an oral contract for [the payment of a debt of another] [performance of a contract to occur in a year or beyond] [sale of goods for $500 or more]. *(name of party)* claims the oral contract in this case was for [the payment of a debt of another] [performance of a contract to occur in a year or more] [sale of goods for $500 or more] and therefore invalid.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Peterson v. Paxton-Pavey Lumber Co. of Florida, 102 Fla. 89, 135 So. 501 (1931); Smith v. Royal Automotive Group, Inc. 675 So.2d 144 (Fla. 5th DCA 1996); F.S. 672.201, 672.206, F.S. Chapter 725; Fla.R.Civ.P. Form 1.969.

R. Duress

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* performed [his] [her] [its] obligations while under the duress of *(name of party)*. Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes [him] [her] [it] to do an act or make a contract not of [his] [her] [its] own choice. To find that duress exists, your verdict must be based on all of the following elements by the greater weight of the evidence:

1. That one side involuntarily accepted the terms of another.

2. That circumstances permitted no other alternative.

3. That said circumstances were the result of coercive acts of the opposite party.

In this case *(name of party)* claims the duress to be:

[(describe actions and circumstances that constitute duress)**]**.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Davis v. Hefty Press, 11 So.2d 884 (Fla. 1943); Woodruff v. TRGHarbour House, Ltd., 967 So.2d 248 (Fla. 3d DCA 2007); W.T. v. Dept. of Children & Families, 846 So.2d 1278 (Fla. 5th DCA 2003); Riedel v. NCNB National Bank of Florida, Inc., 591 So.2d 1038 (Fla. 1st DCA 1992); Mullan v. Bishop of the Diocese of Orlando, 540 So.2d 174 (Fla. 5th DCA 1989); Associated Housing Corp. v. Keller Building Products of Jacksonville, Inc., 335 So.2d 362 (Fla. 1st DCA 1976).

S. Impossibility Of Performance

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)*'s obligations under the contract became impossible to perform and thus *(name of party)* should be excused from performance under the contract.

Impossibility of performance refers to those situations in which the purpose for which the contract was made becomes impossible for one side to perform.

You must apply the doctrine of impossibility with caution. It is not available to excuse intervening difficulties that could have reasonably been foreseen or controlled by the parties or the contract itself. In this case *(name of party)* claims the contract was impossible to perform because:

[(describe circumstances surrounding impossibility)**]**.

If the greater weight of the evidence supports the defense of*(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Mailloux v. Briella Townhomes, LLC, 3 So.3d 394 (Fla. 4th DCA 2009); Walter T. Embry, Inc. v. LaSalle National Bank, 792 So.2d 567 (Fla. 4th DCA 2001); American Aviation, Inc. v. Aero-Flight Service, Inc., 712 So.2d 809 (Fla. 4th DCA 1998); Home Design Center — Joint Venture v. County Appliances of Naples, Inc., 563 So.2d 767 (Fla. 2d DCA 1990); McIntyre v. Norman, 429 So.2d 1296 (Fla. 3d DCA 1983).

T. Failure To Perform Condition Precedent

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* substantially performed the conditions precedent to [[his] [her] [its] contract. In this case, *(name of party)* claims the conditions precedent to be performed are:

[(describe conditions precedent in contract)**]**.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Alvarez v. Rendon, 953 So.2d 702 (Fla. 5th DCA 2007); Racing Properties, L.P. v. Baldwin, 885 So.2d 881 (Fla. 3d DCA 2004); Seaside Community Development Corp. v. Edwards, 573 So.2d 142 (Fla. 1st DCA 1991); Hospital Mortgage Group v. First Prudential Development Corp., 411 So.2d 181 (Fla. 1982). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.21 (Existence of Condition Precedent Disputed) and 416.22 (Occurrence of Agreed Condition Precedent).

U. Prior Independent Breach

A party to an existing valid and enforceable contract cannot enforce that contract if that party is [himself] [herself] [itself] in material breach. To constitute a material breach, the non-performance must go to the essence of the contract.

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* had an existing duty or obligation under the contract and whether *(name of party)*'s failure to perform that existing duty or obligation under the contract excuses performance of *(name of party)*.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Covelli Family, L.P. v. ABG5, L.L.C., 977 So.2d 749 (Fla. 4th DCA 2008); Toyota Tsusho America, Inc. v. Crittenden, 732 So.2d 472 (Fla. 5th DCA 1999); Bradley v. Health Coalition, Inc., 687 So.2d 329 (Fla. 3d DCA 1997), superseded by statute on other grounds 830 So.2d 906.

V. Discharge In Bankruptcy

The obligation of *(name of party)* to *(name of party)* is a debt that is considered dischargeable in bankruptcy. As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* has received a discharge in bankruptcy for [his] [her] [its] obligation under the contract. In determining whether *(name of party)* has received a discharge in bankruptcy, you should consider if *(name of party)* has already received its discharge in *(insert bankruptcy case number)*.

Authorities: Fla.R.Civ.P. 1.110(c); Kalmanson v. Adams, 988 So.2d 1121 (Fla. 5th DCA 2008), Wellington-Hall, Ltd. v. Comprehensive Communities Corp., 321 So.2d 124 (Fla. 4th DCA 1975); 11 U.S.C. § 523.

W. Active Interference/Hindering Of Performance

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* hindered or interfered with the performance of *(name of party)*'s obligations under the contract. One who prevents or makes impossible the performance or happening of a condition precedent or an obligation arising under the parties' contract cannot benefit from its non-performance.

In this case, *(name of party)* claims the interference to be:

[(describe actions and circumstances that constitute interference)**]**.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Hanover Realty Corp. v. Codomo, 95 So.2d 420 (Fla. 1957); Knowles v. Henderson, 22 So.2d 384 (Fla. 1945), 169 A.L.R. 600; Hart v. Pierce, 98 Fla. 1087, 125 So. 243 (1929).

X. Agency

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* is an agent of *(name of party)*. In determining whether an agency relationship exists, you should consider the measure of *(name of party)*'s right to exercise control over *(name of party)* and not the measure of actual control exercised.

To find that an agency relationship exists, your verdict must be based on all of the following elements by the greater weight of the evidence:

1. acknowledgment by the principal that the agent will act for him,

2. the agent's acceptance of the undertaking; and

3. control by the principal over the actions of the agent.

If the greater weight of the evidence supports the defense of (name of party) **on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages]**.

Authority: Fla. Stand. Jury Instr. Civ. 401.14, 402.9; Villazon v. Prudential Health Care Plan, Inc., 843 So.2d 842 (Fla. 2003).

Y. Apparent Agency/Apparent Authority/ Agency By Estoppel

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* has the apparent authority to act on behalf of *(name of party)*. Apparent authority does not arise from the subjective understanding of the person dealing with the purported agent, nor from the appearances of the purported agent [himself] [herself] [itself]. An agent is a person who is employed to act for another, and whose actions are controlled by his or her employer or are subject to his or her employer's right of control.

On this defense you should consider whether *(name of party)* was an apparent agent of *(name of party)* and was acting within the scope of [his] [[her] [its] apparent authority at the time and place of the incident complained of. *(Name of agent)* was an apparent agent if *(name of party)* by [his] [her] [[its] words or conduct caused or allowed *(name of party)* to believe that *(name of agent)* was an agent of and had authority to act for *(name of party)* and if *(name of party)* justifiably relied upon that belief in dealing with (name of agent) as the agent of *(name of party)*. A person is responsible for the acts of his or her apparent agent occurring while the apparent agent is acting within the scope of his or her apparent authority.

To find that an apparent agency relationship exists, your verdict must be based on all of the following elements by the greater weight of the evidence:

1. A representation by *(name of party)* as the purported principal.

2. A reliance on that representation by a third party.

3. A change in position by the third party in reliance on the representation.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Fla. Stand. Jury Instr. Civ. 401.14, 402.9; Mobile Oil Corp. v. Bransford, 648 So.2d 119 (Fla. 1995); Rubin v. Gabay, 979 So.2d 988 (Fla. 4th DCA 2008); Florida State Oriental Medical Ass'n v. Slepin, 971 So.2d 141 (Fla. 1st DCA 2008); Guadagno v. Lifemark Hospitals of Florida, Inc., 972 So.2d 214 (Fla. 3d DCA 2007); Amstar Insurance Co. v. Cadet, 862 So.2d 736 (Fla. 5th DCA 2004); Roessler v. Novak, 858 So.2d 1158 (Fla. 2d DCA 2003).

Z. Failure Of Consideration

As a defense for *(name of party)*, the issue for your determination is whether the parties' agreement failed for lack of consideration. Consideration is a cause, motive, price, or impelling influence inducing one to enter into a contract. The consideration required to support a contract need not be money or anything of monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee.

In this case, *(name of party)* claims the consideration under the contract to be *(describe consideration)*. In considering the defense of *(name of party)* for failure of consideration, you should consider whether *(name of party)* neglected, refused, or failed to perform or furnish the consideration agreed in the contract.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Tampa Northern R. Co. v. City of Tampa, 140 So. 311 (Fla. 1932); Real Estate World Florida Commercial, Inc. v. Piemat, Inc., 920 So.2d 704 (Fla. 4th DCA 2006); Dube v. Puente De La Vega, 505 So.2d 697 (Fla. 5th DCA 1987); Holm v. Woodworth, 271 So.2d 167 (Fla. 4th DCA 1972); Lake Sarasota, Inc. v. Pan American Surety Co., 140 So.2d 139 (Fla. 2d DCA 1962).

AA. Failure To Demand Account Designation

When a payment is made to a [Subcontractor] [Sub-Subcontractor] [Material Supplier], the [Subcontractor] [Sub-Subcontractor] [Material Supplier] is required to demand of the person making the payment to the [Subcontractor] [[SubSubcontractor] [Material Supplier] a designation of the account or the items of account to which the payment should be applied.

An Owner against whom a [claim] [lien] is asserted by a [Subcontractor] [Sub-Subcontractor] [Material Supplier], who has made a payment to a Contractor for materials, has a defense to such [claim] [lien] to the extent of such payment if the Owner proves by the greater weight of the evidence that the Owner's payment was paid over to the [Subcontractor] [Sub-Subcontractor] [Material Supplier] and that:

1. The [Subcontractor] [Sub-Subcontractor] [Material Supplier] failed to make a demand for a designation of the account or the items of the account to which the payment should be applied; or

2. That the [Subcontractor] [Sub-Subcontractor] [Material Supplier] made such a demand, or received a designation from the Contractor, and failed to apply the payment in accordance with the designation.

If you so find by the greater weight of the evidence, any amount otherwise due by the Owner should be reduced by the amount of such payment or payments.

Authorities: F.S. 713.14(2); Standard Acc. Ins. Co. v. Duval Lumber Co., 99 Fla. 525, 126 So. 643 (1930); Arlington Lumber & Trim Co., Inc. v. Vaughn, 548 So.2d 727 (Fla. 1st DCA 1989), disapproved on other grounds 660 So.2d 623.

BB. Mistake

1. Mutual Mistake

See Fla. Stand. Jury Instr. Contr. & Bus. 416.25 (Affirmative Defense — Mutual Mistake of Fact).

Authorities: Rood Co. v. Board of Public Instruction of Dade County, 102 So.2d 139 (Fla. 1958); Flynt v. Progressive Consumers Insurance Co., 980 So.2d 1217 (Fla. 5th DCA 2008); Feldman v. Kritch, 824 So.2d 274 (Fla. 4th DCA 2002); Limehouse v. Smith, 797 So.2d 15 (Fla. 4th DCA 2001); Ali R. Ghahramani, M.D., P.A. v. Pablo A. Guzman, M.D., P.A., 768 So.2d 535 (Fla. 4th DCA 2000); Williams, Salomon, Kanner, Damian, Weissler & Brooks v. Harbour Club Villas Condominium Ass'n, Inc., 436 So.2d 233 (Fla. 3d DCA 1983).

2. Unilateral Mistake

See Fla. Stand. Jury Instr. Contr. & Bus. 416.26 (Affirmative Defense — Unilateral Mistake of Fact).

Authorities: Maryland Casualty Co. v. Krasnek, 174 So.2d 541 (Fla. 1965); Florida Insurance Guaranty Ass'n, Inc. v. Love, 732 So.2d 456 (Fla. 2d DCA 1999); Williams, Salomon, Kanner, Damian, Weissler & Brooks v. Harbour Club Villas Condominium Ass'n, Inc., 436 So.2d 233 (Fla. 3d DCA 1983).

CC. Frustration Of Purpose

As a defense for *(name of party)*, the issue for your determination is whether the purpose of the parties' agreement has been frustrated by the actions or omissions of *(name of party)*. The doctrine of frustration of purpose excuses performance by a party when the value of performance regarding the subject of the contract has been frustrated or destroyed. In this case, *(name of party)* claims the purpose of the contract has been frustrated or destroyed because:

[(describe circumstances support frustration of purpose of contract)**].**

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Mailloux v. Briella Townhomes, LLC, 3 So.3d 394 (Fla. 4th DCA 2009); Hopfenspirger v. West, 949 So.2d 1050 (Fla. 5th DCA 2007); Home Design Center — Joint Venture v. County Appliances of Naples, Inc., 563 So.2d 767 (Fla. 2d DCA 1990); Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A., 493 So.2d 548 (Fla. 3d DCA 1986).

DD. Abandonment Of Contract

As a defense for *(name of party)*, the issue for your consideration is whether *(name of party)* abandoned [his] [her] [its] [rights] [performance] under the contract. Parties to a written contract may expressly agree or may by their actions indicate abandonment of the terms of the contract. To constitute abandonment by conduct, the action relied upon must be positive, unequivocal, and inconsistent with the existence of the contract.

If the greater weight of the evidence supports the defense of *(name of party)* on this issue, your verdict should be for the defendant. If, however, the greater weight of the evidence does not support the defense of *(name of party)* on this issue [you shall consider the following additional defenses] [your verdict should be for *(claimant)* in the full amount of [his] [her] [its] damages].

Authorities: Painter v. Painter, 823 So.2d 268 (Fla. 2d DCA 2002); Bilow v. Benoit, 519 So.2d 1114 (Fla. 1st DCA 1988); Gustafson v. Jensen, 515 So.2d 1298 (Fla. 3d DCA 1987); American Enviro-Port, Inc. v. Williams, 489 So.2d 839 (Fla. 1st DCA 1986); McMullen v. McMullen, 185 So.2d 191 (Fla. 2d DCA 1966).

§ 17.5. CONTRACT DAMAGES JURY INSTRUCTIONS

A. In General

1. Measure Of Damages

The measure of damages caused by the breach of an express provision in a contract is the loss that results naturally and proximately from the breach when it is reasonable to conclude that the loss was expected by the parties at the time they made the contract.

The party who has not defaulted has the burden of showing the actual expenditures that resulted from the breach. The defaulting party then may present evidence to prove waste, extravagance, or lack of good faith. The defaulting party also has the burden of showing the unreasonableness of actual expenditures resulting from the breach.

Authorities: Stensby v. Effjohn Oy Ab, 806 So.2d 542 (Fla. 3d DCA 2002); Centex-Rooney Construction Co. v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1998); Young v. Johnston, 475 So.2d 1309 (Fla. 1st DCA 1985); Tuttle/White Constructors, Inc. v. Montgomery Elevator Co., 385 So.2d 98 (Fla. 5th DCA 1980); Cibran Enterprises, Inc. v. BP Products North America, Inc., 365 F.Supp.2d 1241 (S.D. Fla. 2005). See Fla. Stand. Jury Instr. Contr. & Bus. 504.1 (Introduction to Contract Damages) and 504.2 (Breach of Contract Damages).

2. Owner

If you find that the greater weight of the evidence supports *(name of party)*' s claim for breach of contract, then *(name of party)* is entitled to damages. This means that *(name of party)* is entitled to be put in the position [he] [[she] [it] would have been in had *(name of party)* fully performed.

If you find that *(name of party)* is entitled to damages, your verdict must be for *(name of party)* for the losses that *(name of party)* suffered as a direct result of *(name of party)*'s breach of contract.

The measure of damages is the reasonable cost of correcting the defect(s) and completing the work in conformity with the contract and specifications, including the actual expenditures made in good faith and necessary to complete the job, if this is possible and does not involve economic waste.

However, should this involve unreasonable economic waste, you must award the difference between

1. the value that the project contracted for would have had; and

2. the value of the project as built by *(name of party)* as of the date that *(name of party)* breached the contract.

Authorities: Grossman Holdings Ltd. v. Hourihan, 414 So.2d 1037 (Fla. 1982), 41 A.L.R.4th 125; Centex-Rooney Construction Co. v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1998); Young v. Johnston, 475 So.2d 1309 (Fla. 1st DCA 1985); Edgar v. Hosea, 210 So.2d 233 (Fla. 3d DCA 1968). See Fla. Stand. Jury Instr. Contr. & Bus. 504.1 (Introduction to Contract Damages) and 504.2 (Breach of Contract Damages).

B. Contract Partially Performed

1. Owner Claim Against Contractor

If your verdict is for *(name of party)*, you will not consider the matter of damages.

However, if your verdict is for *(name of party)* on its claim for breach of contract for *(name of party)*'s failure to construct the work required by the contract, you must award *(name of party)* the difference between

1. the unpaid contract balance; and

2. the reasonable cost of completing the work according to the plans and specifications.

In determining the reasonable cost of completion, great weight should be given to actual expenditures made in good faith for the cost of completion and/or estimates obtained for the cost of completion.

Authority: R. K. Cooper Builders, Inc. v. Free-Lock Ceilings, Inc., 219 So.2d 87 (Fla. 3d DCA 1969).

COMMENT: This instruction is to be used in a claim for failure to complete work by an owner against a general contractor, or by a general contractor against a subcontractor.

2. Contractor Claim Against Owner

If your verdict is for *(name of party)*, you will not consider the matter of damages. However, if your verdict is for *(name of party)* on the breach of contract claim, you must award (name of party) **damages equal to**

Contractor may elect either of the following formulations:

[*(name of party)*'s lost profits together with the actual costs of labor and materials incurred in good faith in the course of partial performance of the contract.]

[or]

[the reasonable value of the labor, materials, and services that *(name of party)* furnished to *(name of party)* under the contract for which no payment was made to *(name of party)*.]

Authorities: Puya v. Superior Pools, Spas & Waterfalls, Inc., 902 So.2d 973 (Fla. 4th DCA 2005); Nichols v. Michael D. Eicholtz, Enterprise, 750 So.2d 719 (Fla. 5th DCA 2000); Coastal Development & Construction I, Inc. v. T.P. Trucking & Excavation, 708 So.2d 1017 (Fla. 4th DCA 1998); Shadow Lakes, Inc. v. Cudlipp Construction & Development Co., 658 So.2d 116 (Fla. 2d DCA 1995); Robinson v. Albanese, 636 So.2d 831 (Fla. 5th DCA 1994); Nico Industries, Inc. v. Steel Form Contractors, Inc., 625 So.2d 1252 (Fla. 4th DCA 1993); Marshall Construction, Ltd. v. Coastal Sheet Metal & Roofing, Inc., 569 So.2d 845 (Fla. 1st DCA 1990); Brooks v. Holsombach, 525 So.2d 910 (Fla. 4th DCA 1988).

COMMENT: This instruction is to be used in a claim for payment by a general contractor against an owner, or a subcontractor against a general contractor, when the contract was only partially performed when the work under the contract was stopped.

C. Substantial Completion

You must determine whether *(name of party)* substantially performed under the contract and, if so, whether *(name of party)* breached the contract by failing to pay all sums due to *(name of party)*.

If you find that *(name of party)* substantially performed under the contract, then [he] [she] [it] is entitled to recover from *(name of party)* the full contract price less payments previously made to *(name of party)*. If *(name of party)*'s failure to fully complete the work is unexcused, then *(name of party)* may recover those damages, if any, which the greater weight of the evidence shows were caused by *(name of party)*'s unexcused failure to fully perform.

Authorities: Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962); Walker v. Chancey, 96 Fla. 82, 117 So. 705 (1928); Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd., 642 So.2d 766 (Fla. 4th DCA 1994); Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988); Ocean Ridge Development Corp. v. Quality Plastering, Inc., 247 So.2d 72 (Fla. 4th DCA 1971). See also Fla. Stand. Jury Instr. Contr. & Bus. 416.4 (Breach of Contract) and 416.12 (Substantial Performance).

D. Nonpayment — Contract Not Substantially Performed

If you find that *(name of party)* justifiably terminated [his] [her] [its] performance before substantial completion because of nonpayment, you must consider the issue of *(name of party)*'s damages. These damages may be either

1. the reasonable value of labor performed and the market value of the materials furnished minus payments made by *(name of party)*; or

2. lost profits, established by taking the full contract price minus

(a) the total costs incurred in the performance of the contract;

(b) the additional costs necessary for *(name of party)* to complete the contract; and

(c) the payments made by *(name of party)*.

Authorities: Robert A. Huggins General Contractor, Inc. v. Willoughby, 595 So.2d 1003 (Fla. 5th DCA 1992); Brooks v. Holsombach, 525 So.2d 910 (Fla. 4th DCA 1988); Diversified Commercial Developers, Inc. v. Formrite, Inc., 450 So.2d 533 (Fla. 4th DCA 1984); Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998).

E. Contract Fully Performed

If you find that *(name of party)* fully performed the contract, you must award to *(name of party)* the unpaid contract price, that is, the full contract price less any amounts that already have been paid by *(name of party)*.

Authority: Newkirk Construction Corp. v. Gulf County, 366 So.2d 813 (Fla. 1st DCA 1979).

COMMENT: This instruction is to be used in a claim for payment by a general contractor against an owner or a subcontractor against a general contractor.

F. Damages For Delay

1. Defined

The contract between the parties contains what is commonly referred to in the construction industry as a "no damages for delay" clause. The no damages for delay clause in this contract reads as follows:

[(insert the clause from the contract)**]**.

The effect of this clause is to prevent *(name of party)* from recovering any money damages because of delay in completing the project.

***(Name of party)* claims that *(name of party)* seeks damages from [him] [her] [[it] for necessary costs and expenses occasioned by *(name of party)*, for remaining on the job longer than the contract time provided. Furthermore, *(name of party)* asserts that this extra time period increased the cost of *(name of party)*'s performance of the contract**.

Although delay damages clauses are enforceable, if you find that the delay complained of by *(name of party)* was caused by some active interference, concealment, or fraud by *(name of party)*, the no damages for delay clause will have no effect and *(name of party)* will be entitled to recover damages proven to you by the greater weight of the evidence.

Authorities: Triple R Paving, Inc. v. Broward County, 774 So.2d 50 (Fla. 4th DCA 2001); Harry Pepper & Associates, Inc. v. Hardrives Co., 528 So.2d 72 (Fla. 4th DCA 1988); Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970).

Otherwise, you may not permit (name of party) to recover any damages on account of any delay in the completion of the project.

2. Interpretation Of Clause

A "no damages for delay" clause is not to be read literally to prevent every conceivable claim against the party it was designed to protect. An entity who willfully and/or knowingly causes the delay will not be protected by this clause.

Authorities: Triple R Paving, Inc. v. Broward County, 774 So.2d 50 (Fla. 4th DCA 2001); Ajax Paving Industries, Inc. v. Charlotte County, 752 So.2d 143 (Fla. 2d DCA 2000); Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970).

3. Foreseen Circumstances

If you find that *(name of party)* anticipated the circumstances that caused the delay and concealed these conditions from *(name of party)*, you must find that the "no damages for delay" clause in the contract does not apply.
Authorities: Triple R Paving, Inc. v. Broward County, 774 So.2d 50 (Fla. 4th DCA 2001); McIntire v. Green-Tree Communities, Inc., 318 So.2d 197 (Fla. 2d DCA 1975).

4. Non-Enforcement

The [contract] [subcontract] provides that:

[(quote or paraphrase the language that could be interpreted to state that the contractor assumes all risks connected with the work and/or that the contractor has no claim for any payments or damages for delay in the performance of the work)**]**.

However, the court instructs you that these provisions cannot be enforced against *(name of party)* if:

1. the delay was the result of a breach of the [contract] [subcontract] by *(name of party)*;

2. this limitation applied to a delay that was unreasonable under the circumstances; or

3. this limitation applied to a delay that *(name of party)* and *(name of party)* did not have in mind when they agreed to the [contract] [subcontract].

Authorities: Ajax Paving Industries, Inc. v. Charlotte County, 752 So.2d 143 (Fla. 2d DCA 2000); see Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970).

5. Additional Costs

If your verdict is for *(name of party)* on [his] [her] [its] claim, you should award to *(name of party)* the amounts spent by [him] [her] [it] for labor, services, equipment, or materials that *(name of party)* otherwise would not have made but for:

[(describe delays or inefficiencies in the work or acceleration of the work)**]**

caused by *(name of party)*'s breach of the contract.

The amounts to be awarded may include payments made for additional labor, services, equipment, and materials, and for increases in the amounts that otherwise would have been paid for the labor, services, equipment, and materials already required. This includes the overhead and profit that *(name of party)* otherwise could have earned from [his] [her] [its] expenditures for additional labor, services, equipment, and materials and for increases in the cost of those items already required under the contract.

Authorities: Houdaille-Duval-Wright Co. v. Charldon Construction Co., 266 So.2d 106 (Fla. 3d DCA 1972); Doyle Electric Co. v. Mathews Corp., 263 So.2d 621 (Fla. 2d DCA 1972); Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688, adhered to on reconsideration 61-1 BCA ¶ 2894.

G. Performance Bond Coverage

If you find that *(name of party)* is entitled to recover from *(name of party)* under the performance bond, then you must award *(name of party)* damages in an amount that will fully compensate *(name of party)* for all losses or harm covered by the performance bond. This would include delay damages if the performance bond expressly permits recovery for delay damages.

Authorities: Federal Insurance Co. v. Southwest Florida Retirement Center, Inc., 707 So.2d 1119 (Fla. 1998); American Home Assurance Co. v. Larkin General Hospital, Ltd., 593 So.2d 195 (Fla. 1992); Hanna v. Martin, 49 So.2d 585 (Fla. 1951); Mycon Construction Corp. v. Board of Regents of State of Florida, 755 So.2d 154 (Fla. 4th DCA 2000).

H. Increased Professional Expenses

If you find that *(name of party)* breached the contract with *(name of party)* by failing to perform work in accordance with the plans, specifications, and industry standards required by the contract, you must award *(name of party)* damages against *(name of party)* in the amount reasonably spent for increased architectural and engineering fees by *(name of party)* to conform the work to the plans, specifications, and industry standards required by the contract.

Authority: Hanna v. Martin, 49 So.2d 585 (Fla. 1951).

I. Liquidated Damages

If you find that *(name of party)* breached the contract with *(name of party)* by failing, without justification or excuse, to substantially complete the project within the time specified in the contract and as extended by change order, you must

award *(name of party)* liquidated damages against *(name of party)* in the amount of $ _____ per day for each day of delay for which you determine by the greater weight of the evidence that *(name of party)* was the substantial cause.

Authorities: Hot Developers, Inc. v. Willow Lakes Estates, Inc., 950 So.2d 537 (Fla. 4th DCA 2007); Central Florida Plastering & Development v. Sovran Construction Co., 679 So.2d 1226 (Fla. 5th DCA 1996); Parrish v. Dougherty, 505 So.2d 646 (Fla. 1st DCA 1987); Ocean Dunes of Hutchinson Island Development Corp v. Colangelo, 463 So.2d 437 (Fla. 4th DCA 1985); Secrist v. National Service Industries, Inc., 395 So.2d 1280 (Fla. 2d DCA 1981).

J. Unjust Enrichment

1. Defined

To find that *(Name of party)* has been unjustly enriched, your verdict must be based on all of the following elements by the greater weight of the evidence:

1. A benefit conferred on *(Name of party)* by *(Name of party)*.

2. Appreciation by *(Name of party)* for the benefit.

3. Acceptance and retention of the benefit so that it would be inequitable for *(Name of party)* to retain the benefit without paying for the value of the benefit.

To find the second and third elements, you must decide either that

1. *(Name of party)* requested *(Name of party)* to perform; or

2. *(Name of party)* knowingly and voluntarily accepted the benefit of *(name of party)*'s performance.

Authorities: JP Morgan Chase Bank National Ass'n v. Colletti Investments, LLC, 199 So.3d 395 (Fla. 4th DCA 2016); Golden v. Woodward, 15 So.3d 664 (Fla. 1st DCA 2009); Shands Teaching Hospital & Clinics, Inc. v. Beech Street Corp., 899 So.2d 1222 (Fla. 1st DCA 2005); Henry M. Butler, Inc. v. Trizec Properties, Inc., 524 So.2d 710 (Fla. 2d DCA 1988); Coffee Pot Plaza Partnership v. Arrow Air Conditioning & Refrigeration, Inc., 412 So.2d 883 (Fla. 2d DCA 1982); see also Commerce Partnership 8098 Limited Partnership v. Equity Contracting Co., 695 So.2d 383 (Fla. 4th DCA 1997).

2. Unjust Enrichment Damages

If you find for *(name of party)* on the unjust enrichment claim, you will not consider the matter of damages for that claim. However, if you find for *(name of party)* on the unjust enrichment claim, you should award *(name of party)* an amount of money equal to the value of the benefit conferred on and accepted by *(name of party)* for which *(name of party)* has not yet been paid.

Authorities: Levine v. Fieni McFarlane, Inc., 690 So.2d 712 (Fla. 4th DCA 1997); Henry M. Butler, Inc. v. Trizec Properties, Inc., 524 So.2d 710 (Fla. 2d DCA 1988); see also Delant Construction Co. v. Doral Enterprises Joint Venture, 13 So.3d 1097 (Fla. 3d DCA 2009).

K. Quantum Meruit

1. Defined

"Quantum meruit" is a legal term that means the reasonable value of services rendered.

The theory of quantum meruit allows a contractor who has furnished services to recover the reasonable value of those services when there is no express oral or written contract between the parties.

If you find that there was no express contract between the parties, but that *(name of party)* in fact furnished labor, materials, or services to *(name of party)* for which *(name of party)* was not paid, and a reasonable person receiving such a benefit normally would expect to pay for it, you should award *(name of party)* the reasonable value of the labor, materials, and services.

Authorities: Hull & Company, Inc. v. Thomas, 834 So.2d 904 (Fla. 4th DCA 2003); W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc., 728 So.2d 297 (Fla. 1st DCA 1999); Interior Design Concepts, Inc. v. Curtin, 473 So.2d 1374 (Fla. 1st DCA 1985).

2. Quantum Meruit Damages

If your verdict is for *(name of party)*, you will not consider the matter of damages.

However, if your verdict is for *(name of party)* on its claim for breach of contract for *(name of party)*'s failure to pay for the work, you must award *(name of party)* the reasonable value of the labor, materials, and services that *(name of party)* furnished to *(name of party)* under the contract for which no payment was made to *(name of party)*.

Generally, the total of the payments received by *(name of party)* from *(name of party)* plus the amount awarded by you may not exceed the contract price. However, if you find that *(name of party)*'s breach of the contract was willful, *(name of party)* may recover [his] [her] [its] outlay even if it exceeds the contract price.

Authorities: Jackson v. Riley, 427 So.2d 255 (Fla. 5th DCA 1983); Ballard v. Krause, 248 So.2d 233 (Fla. 4th DCA 1971).

COMMENT: This instruction is to be used in a claim for payment by a general contractor against an owner, or a subcontractor against a general contractor, when there was a substantial breach of contract and the contractor or subcontractor elects to treat the contract as void.

L. Differing Site Conditions

For *(Name of party)* to prove entitlement to recovery of [his] [her] [its] damages for differing site conditions, *(Name of party)* must show by the greater weight of the evidence each of the following four elements:

1. The existing conditions must differ materially from those conditions shown or disclosed in the contract documents.

2. The existing conditions must not have been reasonably anticipated.

3. *(Name of party)* must have relied on the contract documents.

4. *(Name of party)* must have given prompt written or oral notice to *(Name of party)* of the changed or differing site conditions.

Authorities: Hendry Corp. v. Metropolitan Dade County, 648 So.2d 140 (Fla. 3d DCA 1995); Town of Longboat Key v. Carl E. Widell & Son, 362 So.2d 719 (Fla. 2d DCA 1978); Dawco Construction, Inc. v. United States, 18 Cl.Ct. 682 (1989), modified 930 F.2d 872, overruled on other grounds 60 F.3d 1572.

M. Home Office Overhead

1. Entitlement To Home Office Overhead

Home office overhead costs are those costs that are expended for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract. They are fixed costs that are allocated on a pro-rata basis among various contracts. If you find that *(name of party)* has proven

1. that a[n] [owner] [government] imposed delay occurred;

2. that the [owner] [government] required the contractor to "stand by" during the delay; and

3. while "standing by," *(name of party)* was unable to take on substitute work, then you should find that *(name of party)* is entitled to recover home office overhead. If you determine by the greater weight of the evidence that these three conditions hoccurred, you then must determine whether the [[owner] [government] has shown by the greater weight of the evidence that either it was not impractical for the contractor to obtain replacement work during the delay, or that the contractor's inability to obtain replacement work, or to perform it, was not caused by the government's suspension. If the [owner] [government] establishes either of these two conditions, then you must enter a verdict against *(name of party)* and in favor of [owner] [[government] as to the damages for home office overhead.

Authorities: Broward County v. Brooks Builders, Inc., 908 So.2d 536 (Fla. 4th DCA 2005); Triple R Paving, Inc. v. Broward County, 774 So.2d 50 (Fla. 4th DCA 2001); Central Florida Plastering & Development v. Sovran Construction Co., 679 So.2d 1226 (Fla. 5th DCA 1996); Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed.Cir. 1999).

2. Calculation — *Eichleay* Formula

In determining the additional costs that *(name of party)* otherwise would not have incurred, you should include the additional cost to *(name of party)* of extended home office overhead based on the percentage of billings that this contract represented out of all of the contracts that *(name of party)* was working on during the period of this contract.

In computing the recoverable amount for extended home office overhead, you must take the following three mathematical steps:

1. Contract Billings ÷ Total Billings for Contract Period × Total Home Office Expenditures = Overhead Allocable to Contract.

2. Overhead Allocable to Contract ÷ Days of Performance = Daily Contract Overhead.

3. Daily Contract Overhead × Number of Days' Delay = Amount Recoverable.

Authorities: Broward County v. Brooks Builders, Inc., 908 So.2d 536 (Fla. 4th DCA 2005); Triple R Paving, Inc. v. Broward County, 774 So.2d 50 (Fla. 4th DCA 2001); Central Florida Plastering & Development v. Sovran Construction Co., 679 So.2d 1226 (Fla. 5th DCA 1996); Broward County v. Russell, Inc., 589 So.2d 983 (Fla. 4th DCA 1991); Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688, adhered to on reconsideration 61-1 BCA ¶ 2894.

N. Defective Construction/Economic Waste

If your verdict is for *(name of party)* on *(name of party)*'s claim for defective construction, you will not consider the matter of damages.

However, if your verdict is for *(name of party)*, you must award *(name of party)* damages. Although the law expects that an owner will be fully compensated for defective work, at the same time the law seeks to avoid an award of damages that would result in economic waste.

Therefore, in calculating the amount of damages, you first should determine the reasonable cost of correcting the defective work. If that amount would not result in an unreasonable economic waste, you should award that amount to *(name of party)*.

However, if the cost of correction would result in unreasonable economic waste, you should not award that amount, but should base your damage award on the diminished or reduced value of the property. To determine the diminished value, you should calculate the difference between the value that the property would have had if *(name of party)* had performed the work without the defects complained of, and the value that the property actually had as of the date that *(name of party)* stopped working.

Authorities: Grossman Holdings Ltd. v. Hourihan, 414 So.2d 1037 (Fla. 1982); Gray v. Mark Hall Homes, Inc., 185 So.3d 651 (Fla. 2d DCA 2016); Centex-Rooney Construction Co. v. Martin County, 706 So.2d 20 (Fla. 4th DCA 1998); Aponte v. Exotic Pools, Inc., 699 So.2d 796 (Fla. 4th DCA 1997).

COMMENT: This instruction is to be used in a claim for defective construction by an owner against a general contractor.

O. Lost Profit

Lost profit may be established by subtracting from the contract price the total costs and expenses of labor, services, and materials necessary for the non-breaching party to complete the contract.

In its claim for damages for lost profit, *(name of party)* must establish the amount of the lost profit to a reasonable degree of certainty, not based on mere speculation or conjecture, that satisfies the mind of a prudent and impartial person.

Authorities: Del Monte Fresh Produce Co. v. Net Results, Inc., 77 So.3d 667 (Fla. 3d DCA 2011); Levitt-ANSCA Towne Park Partnership v. Smith & Co., 873 So.2d 392 (Fla. 4th DCA 2004); Boca Developers, Inc. v. Fine Decorators, Inc., 862 So.2d 803 (Fla. 4th DCA 2004); Brevard County Fair Ass'n, Inc. v. Cocoa Expo, Inc., 832 So.2d 147 (Fla. 5th DCA 2002); Shadow Lakes, Inc. v. Cudlipp Construction & Development Co., 658 So.2d 116 (Fla. 2d DCA 1995); Robert A. Huggins General Contractor, Inc. v. Willoughby, 595 So.2d 1003 (Fla. 5th DCA 1992); Physicians Reference Laboratory, Inc. v. Daniel Seckinger, M.D. & Associates, P.A., 501 So.2d 107 (Fla. 3d DCA 1987); Ballard v. Krause, 248 So.2d 233 (Fla. 4th DCA 1971); Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998).

P. Inefficiencies Or Acceleration — Costs To Contractor

If your verdict is for *(name of party)* on [his] [her] [its] claim against *(name of party)*, you also should award to *(name of party)* the costs incurred by *(name of party)* that [he] [she] [it] otherwise would not have made but for:

[(describe inefficiencies or acceleration)**]**

caused by *(name of party)*'s breach of the contract. This includes payments for additional labor, services, equipment, and materials, and for increases in the costs to *(name of party)* of labor, services, equipment, and materials that already were required under the contract.

Authorities: Perma Builders, Inc. v. JBM Associates, Inc., 472 So.2d 1381 (Fla. 4th DCA 1985); Tuttle/White Constructors, Inc. v. Montgomery Elevator Co., 385 So.2d 98 (Fla. 5th DCA 1980); Houdaille-Duval-Wright Co. v. Charldon Construction Co., 266 So.2d 106 (Fla. 3d DCA 1972).

Q. Prejudgment Interest

If you find that the greater weight of the evidence does not support *(name of party)*'s claim, then your verdict shall be for *(name of party)*.

If you find that *(name of party)* is entitled to [his] [her] [its] damages, then you must consider whether *(name of party)* is entitled to interest on those damages. When considering the matter of interest on the damages, you should consider

whether *(name of party)*'s loss of the use of funds due [him] [her] [[it] is itself a wrongful deprivation by *(name of party)* of *(name of party)*'s property. Any award of interest you determine must be calculated at the existing statutory rate which is *(insert statutory rate)*, unless the interest rate has been agreed to by the parties in their existing contract.

Authorities: F.S. 55.03, 687.01; Florida Steel Corp. v. Adaptable Developments, Inc., 503 So.2d 1232 (Fla. 1986); Argonaut Insurance Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985); Parker v. Brinson Construction Co., 78 So.2d 873 (Fla. 1955); Leila Corp. of St. Pete v. Ossi, 230 So.3d 488 (Fla. 2d DCA 2017); Current Builders of Florida, Inc. v. Certified Lower Keys Plumbing, 105 So.3d 582 (Fla. 3d DCA 2012); Pelaez v. Persons, 664 So.2d 1022 (Fla. 2d DCA 1995); Royal Ambassador Condominium Ass'n, Inc. v. East Coast Supply Corp., 495 So.2d 932 (Fla. 4th DCA 1986); Peter Marich & Associates, Inc. v. Powell, 365 So.2d 754 (Fla. 2d DCA 1978).

§ 17.6. PUBLIC PROJECTS

A. Performance Bond On Public Projects

In this case, *(public entity)* has made a claim against *(contractor)*'s performance bond. In deciding whether *(public entity)* can recover on *(contractor)*'s performance bond, you must find that *(contractor)* failed to perform the construction work in the time and manner prescribed in the contract with *(public entity)*. Therefore, if you find by the greater weight of the evidence that *(contractor)*performed the construction work in the time and manner prescribed in the contract with *(public entity)*, your verdict should be for (contractor). However, if you find by the greater weight of the evidence that (contractor) failed to perform the construction work in the time and manner prescribed in the contract with *(public entity)*, your verdict should be for *(public entity)*.

Authority: F.S. 255.05; American Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360 (Fla. 2005); School Board Of Palm Beach County ex rel. Major Electrical Supplies of Stuart, Inc. v. Vincent J. Fasano, Inc., 417 So.2d 1063 (Fla. 4th DCA 1982).

B. Statutory Payment Bond On Public Projects — Claimant In Privity With Contractor

In this case, *(claimant)* has made a claim against the surety's payment bond. In deciding whether *(claimant)* can recover against [*(contractor)*] [and] [[*(surety)*], you must first find that *(contractor)* failed to pay *(claimant)* the amount due [him] [her] [it] under *(claimant)*'s contract with [*(contractor)*]. If you find by the greater weight of the evidence that *(contractor)* paid *(claimant)* the amount due [him] [her] [it] under *(claimant)*'s contract, your verdict should be for (contractor). However, if you find by the greater weight of the evidence that the contractor failed to pay *(claimant)* the amount due [[him] [her] [it] under the contract, your verdict should be for *(claimant)*.

Authority: F.S. 255.05(1)(c); School Board Of Palm Beach County ex rel. Major Electrical Supplies of Stuart, Inc. v. Vincent J. Fasano, Inc., 417 So.2d 1063 (Fla. 4th DCA 1982).

COMMENT: *F.S.* 255.05(1)(b) provides that for contracts entered into on or after October 1, 2012, and

> [b]efore commencing the work or before recommencing the work after a default or abandonment, the contractor shall provide to the public entity a certified copy of the recorded bond. Notwithstanding the terms of the contract or any other law governing prompt payment for construction services, the public entity may not make a payment to the contractor until the contractor has complied with this paragraph.

F.S. 255.05(10) provides that

> [a]n action, except an action for recovery of retainage, must be instituted against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond within 1 year after the performance of the labor or completion of delivery of the materials or supplies. An action for recovery of retainage must be instituted against the contractor or the surety within 1 year after the performance of the labor or completion of delivery of the materials or supplies; however, such an action may not be instituted until one of the ... conditions

set forth in *F.S.* 255.05(10)(a)-(10)(d) is satisfied. If none of the conditions described in *F.S.* 255.05(10)(a)-(10)(d) is satisfied, and an action for recovery of retainage cannot be instituted within the one-year limitation period, the limitation period must be extended until 120 days after one of the conditions is satisfied. *F.S.* 255.05(10).

C. Statutory Payment Bond On Public Projects — Claimant Not In Privity With Contractor

COMMENT: To be read when written demand for a statement of account was tendered to claimant; if not, skip this instruction.

In this case, *(claimant)* has made a claim against the surety on the payment bond. It is undisputed that *(contractor)* submitted a written demand to *(claimant)*, who is not in privity with *(contractor)*, for a written statement of account under oath of his or her account showing the nature of the labor or services performed and to be performed, if any; the

materials furnished; the materials to be furnished, if known; the amount paid on account to date; the amount due; and the amount to become due as of the date of the statement by *(claimant)*, if known as of that statement date.

You must determine by the greater weight of the evidence whether *(claimant)* is deprived of *(claimant)*'s rights under the bond due to non-compliance or incomplete compliance with the written demand.

1. In deciding whether *(claimant)* is deprived of his or her rights under a payment bond, you must determine whether *(contractor)* served the written demand to *(claimant)*'s address or the address of *(claimant)*'s designee. If you find by the greater weight of the evidence that *(contractor)* failed to serve the demand to *(claimant)*'s address, then your verdict must be for *(claimant)* and against [*(contractor)*] [and] [(surety)].

2. If you find that *(contractor)* served the written demand to *(claimant)*'s address or the address of *(claimant)*'s designee, you must then determine whether *(claimant)* furnished the statement of account within 30 days after the demand and whether *(claimant)*'s statement of account was false or fraudulent in any manner.

If you find by the greater weight of the evidence that *(claimant)* did not furnish the statement of account within 30 days after the demand, your verdict must be in favor of [*(contractor)*] [and] [*(surety)*] and against *(claimant)*.

Or, if you find by the greater weight of the evidence that *(claimant)* furnished a false or fraudulent statement, your verdict must be in favor of [[*(contractor)*] [and] [*(surety)*] and against *(claimant)*.

Alternatively, if you find that *(claimant)* negligently included or omitted any information in the statement of account, and if you find that such inclusion or omission caused prejudice to *(contractor)*, then your verdict must be in favor of [*(contractor)*] [and] [*(surety)*] and against *(claimant)* but only to the extent that the inclusion or omission caused prejudice to *(contractor)*.

If you find by the greater weight of the evidence that *(claimant)* did timely furnish the statement of account, and any negligent inclusion or omission of information in the statement of account did not cause prejudice to *(contractor)*, then you will next consider whether *(claimant)* satisfied the procedural requirements to perfect [his] [her] [its] claim against the bond.

Authority: F.S. 255.05(8); American Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360 (Fla. 2005).

COMMENT: See the Comment at § 17.6.B.

D. Perfection Of Claim Against Public Payment Bond Under *F.S.* 255.05

COMMENT: To be read regardless of applicability of foregoing instruction.

In this case, *(claimant)* has filed a claim against a statutory public payment bond. There are certain procedural requirements that must be met in order for a *(claimant)* to perfect [his] [her] [its] claim against this payment bond. These procedural requirements are:

A claimant who is not in privity — that is, does not have a direct contract — with the contractor, except a laborer, must give written notice to the contractor that the claimant intends to look to the contractor's payment bond for protection on the work. The notice must have been given to the contractor before commencing the work or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work.

A claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials must have delivered to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. The notice of nonpayment may have been served at any time during the progress of the work, but not before 45 days after the first furnishing of the labor, services, or materials by the claimant and not later than 90 days after the final furnishing of labor, services, or materials by the claimant [or, with respect to rental equipment, not later than 90 days after the date that the rental equipment was last on the job site available for use].

Any notice of nonpayment served by a claimant who is not in privity with the contractor, which includes sums for retainage, must have specified the portion of the amount claimed for retainage.

No action may be instituted against the contractor or the surety unless both notices were given.

A claimant must have instituted an action against the contractor or the surety or both within one year after the performance of the labor or completion of delivery of the materials or supplies. An action for recovery of retainage must have been instituted against the contractor or the surety within one year after the performance of the labor or completion of delivery of the materials or supplies; however, such an action may not have been instituted until one of the

following conditions was satisfied, and, if none of these conditions was satisfied within the one-year limitation period, then the one year limitation period must be extended until 120 days after one of these conditions was satisfied:

- **The public entity has paid out the claimant's retainage to the contractor and the time provided under F.S. 218.735 or F.S. 255.073(3) for payment of that retainage to the claimant has expired;**
- **The claimant has completed all work required under its contract and 70 days have passed since the contractor sent its final payment request to the public entity; or**
- **At least 160 days have passed since reaching substantial completion of the construction services purchased, as defined in the contract, or if not defined in the contract, since reaching beneficial occupancy or use of the project;**
- **The claimant has asked the contractor, in writing, for any of the following information, and the contractor has failed to respond to the claimant's request, in writing, within 10 days after receipt of the request:**
  - **whether the project has reached substantial completion, as that term is defined in the contract, or if not defined in the contract, if beneficial occupancy or use of the project has occurred;**
  - **whether the contractor has received payment of the claimant's retainage, and if so, the date the retainage was received by the contractor;**
  - **whether the contractor has sent its final payment request to the public entity, and if so, the date on which the final payment request was sent.**

If you find that *(claimant)* met all of these procedural requirements, then *(claimant)* has perfected [his] [her] [its] claim against the payment bond and you will next consider *(surety)*'s defenses. If, however, you find that *(claimant)* failed to comply with any of these procedural requirements, then your verdict will be for *(contractor)* and *(surety)*.

Authority: F.S. 255.05(2)(a) 2., 255.05(8), and 255.05(10); American Home Assurance Co. v. Plaza Materials Corp., 908 So.2d 360 (Fla. 2005); Apac-Florida, Inc. v. OneBeach Insurance Co., 888 So.2d 126 (Fla. 3d DCA 2004).

E. Contractual Indemnity On Public Construction Projects

***(Public entity)* has brought an action seeking indemnification from *(contractor)* in connection with *(public construction project)*. In deciding whether *(public entity)* is entitled to indemnification from *(contractor)*, you must find that the liabilities and damages sought from *(contractor)* were caused by *(contractor)*'s negligence, recklessness, or intentional wrongful misconduct or that of *(contractor)*'s employees or persons *(contractor)* utilized in the performance of the construction contract. Therefore, if you find by the greater weight of the evidence, considering the defenses of *(contractor)*, that *(public entity)*'s damages were not caused by the negligence, recklessness, or intentional wrongful misconduct of *(contractor)* or *(contractor)*'s employees or *(contractor)*'s subcontractor, your verdict should be for *(contractor)*. However, if you find by the greater weight of the evidence that such damages were caused by the negligence, recklessness, or intentional wrongful misconduct of *(contractor)* or *(contractor)*'s employees or subcontractors, you should find for *(public entity)*.**

Authority: F.S. 725.06(2)-(3); Peoples Gas System, Inc. v. RSH Constructors, Inc., 563 So.2d 107 (Fla. 1st DCA 1990).

F. Contractual Indemnity For Design Contracts On Public Projects

***(Public entity)* has brought an action for contractual indemnity against *(design professional)* in connection with *(design contract on public project)*. In deciding whether *(public entity)* is entitled to indemnification from *(design professional)* for liabilities and damages under the contract, you must find that *(design professional)* caused such liabilities and damages due to *(design professional)*'s negligence, recklessness, or intentionally wrongful conduct, or that of *(design professional)*'s employees or persons *(design professional)* utilized in the performance of the contract. Therefore, if you find by the greater weight of the evidence, considering the defenses of *(design professional)*, that *(public entity)*'s damages were not caused by the negligence, recklessness, or intentionally wrongful conduct of *(design professional)* or *(design professional)*'s employees or *(design professional)*'s subcontractor, your verdict should be for *(design professional)*. However, if you find by the greater weight of the evidence that such damages were caused by the negligence, recklessness, or intentionally wrongful conduct of *(design professional)* or *(design professional)*'s employees or subcontractors, you should find for *(public entity)*.**

Authority: F.S. 725.08; Auto-Owners Insurance Co. v. Ace Electrical Service, Inc., 648 F.Supp.2d 1371 (M.D. Fla. 2009).

G. Prompt Payment — Entitlement To Costs And Attorneys' Fees

In this case, *(plaintiff)* has brought a claim under the local government prompt payment act. The issue for your determination is whether *(plaintiff)* may recover costs and reasonable attorneys' fees. In deciding whether *(plaintiff)*

may recover costs and reasonable attorneys' fees, you must determine whether *(public entity)* withheld or disputed at least some portion of the payment claimed to be due without any reasonable basis to dispute *(plaintiff)*'s claim to those amounts. If you find by the greater weight of evidence that *(public entity)* withheld at least some portion of the payment that is claimed to be due without any reasonable basis to dispute *(plaintiff)*'s claim, your verdict should be for *(plaintiff)*. If your verdict is for *(plaintiff)*, the court will determine the amount.

Authority: F.S. 218.71-218.79; and 255.076.

§ 17.7. SOVEREIGN IMMUNITY DEFENSE INSTRUCTIONS

A. As Defense To Claims For Fraud, Fraudulent Misrepresentation, Or Fraud In The Inducement

***(Defendant public entity)* has raised the defense of sovereign immunity. State entities are protected by sovereign immunity under Florida law. However, the Florida Legislature has expressly waived the state's sovereign immunity for torts committed by government employees acting within the scope of their employment if that tort was not committed in bad faith. Bad faith is a necessary element of any claim for fraud [such as fraudulent misrepresentation or fraud in the inducement]. Thus, sovereign immunity bars any action for fraud against *(Defendant public entity)*. For fraud to exist, as a matter of law, bad faith must also exist. Fraud claims are therefore outside of the waiver of sovereign immunity provided for by statute**.

If you find by the greater weight of the evidence that the act complained of by *(plaintiff)* was committed in bad faith [or fraudulently], you must enter a verdict against *(plaintiff)* and in favor of *(Defendant public entity)*. If, however, you find by the greater weight of the evidence that the act complained of by *(plaintiff)* was not committed in bad faith or fraudulently, then you must consider the other defenses of *(Defendant public entity)*.

Authority: F.S. 768.28(1); County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1998); Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County, 488 F.Supp.2d 1231 (S.D. Fla. 2007).

B. As Defense To Claims For Damages Outside Contract Terms

***(Defendant public entity)* has raised the defense of sovereign immunity. The doctrine of sovereign immunity precludes recovery of costs for extra work performed for *(Defendant public entity)* under a construction contract unless the additional costs claimed were addressed in the original contract or in a subsequent modification to the contract. When the extra work claimed is outside the terms of the contract and the claimant did not obtain a duly authorized written modification to the contract, such a claim for extra work is not valid**.

Therefore, if you find by the greater weight of the evidence that the compensation claimed by *(plaintiff)* was for extra work that was outside the terms of the contract and the authorized written modifications, then you must enter a verdict against *(plaintiff)* and in favor of *(Defendant public entity)* on *(plaintiff)*'s claim for extra costs.

Authority: County of Brevard v. Miorelli Engineering, Inc. 703 So.2d 1049 (Fla. 1998); Southern Roadbuilders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986); Posen Construction, Inc. v. Lee County, 921 F.Supp.2d 1350 (M.D. Fla. 2013); Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County, 488 F.Supp.2d 1231 (S.D. Fla. 2007).

COMMENT: When the plaintiff proves that a public owner wrongfully refused to enter into a proper change order for extra work, *or* issued a change order for extra work but did not allow adequate compensation for the change order, *and* that the public owner required plaintiff to perform the change order work, then this instruction would not be appropriate without modification. See *C.O.B.A.D. Construction Corp. v. School Board of Broward County*, 765 So.2d 844 (Fla. 4th DCA 2000), and *W&J Construction Corp. v. Fanning/Howey Associates*, 741 So.2d 582 (Fla. 5th DCA 1999). A special verdict form should be requested as to the issues of wrongful refusal to issue a written change order or wrongful refusal to provide adequate compensation for a change order.

In *Posen Construction* the court, applying Florida law, upheld *Miorelli Engineering*, but declined to dismiss the plaintiff's unjust enrichment claim due to the fact that both the plaintiff and defendant public entity made admissions contrary to their respective positions in their pleadings. The defendant public entity's admissions confirmed the court's inference that "the additional work is covered at least in part by the expansive contract between Lee County and Posen." *Id.* at 1358. This court's denial of the defendant public entity's motion to dismiss a claim for unjust enrichment under *Miorelli Engineering* is, however, contradicted by other federal court decisions applying Florida law. See, *e.g., Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County*, 488 F.Supp.2d 1231 (S.D. Fla. 2007); *Cayenta Canada, Inc. v. Orange County, Florida Board of County Commissioners*, 2002 WL 34373972, 2002 U.S. Dist. LEXIS 28257 (M.D. Fla. 2002). Therefore, if a claim for unjust

enrichment is allowed to proceed to the jury for damages that are outside of a written contract or written modifications to the contract, a special instruction may be required to address that specific situation because that claim is not based upon an express, written contract.

C. As Defense To Claim For Knowing Delay Or Interference By Public Owner

(Defendant public entity) **has raised the defense of sovereign immunity.** ***(Defendant public entity)*** **has an implied obligation to**

1. not hinder or obstruct performance by the other person,

2. not knowingly cause unreasonable delay of the performance of duties under the contract when such delay transcends mere lethargy or bureaucratic bungling, and

3. furnish information that would not mislead prospective bidders.

Therefore, if you find by the greater weight of the evidence that ***(Defendant public entity)*** **breached its obligation to**

1. not hinder or obstruct performance by the other person,

2. not knowingly cause unreasonable delay of the performance of (plaintiff) under the contract, and that the interference transcended mere lethargy or bureaucratic bungling, or

3. furnish information that would not mislead prospective bidders, then you must enter a verdict in favor of ***(plaintiff)*** **and against (***(Defendant public entity)***) on** ***(plaintiff)*****'s claim**.

Authority: County of Brevard v. Miorelli Engineering, Inc. 703 So.2d 1049 (Fla. 1998); Ajax Paving Industries, Inc. v. Charlotte County, 752 So.2d 143 (Fla. 2d DCA 2000); Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458 (Fla. 2d DCA 1970).

D. As Defense To Damage Claims For Claim Preparation Costs

(Defendant public entity) **has raised the defense of sovereign immunity as to the damages sought by** ***(plaintiff)*** **for its claims preparation costs. Claim preparation damages are not recoverable against** ***(defendant public entity)*****. Expenses incurred documenting claims are not performance-related; they bear no beneficial relationship to contract performance or to contract administration**.

Therefore, if you find by the greater weight of the evidence that a portion of the damages claimed by ***(plaintiff)*** **are for expenses incurred in preparing its claims against** ***(defendant public entity)*****, you must find against** ***(plaintiff)*** **and in favor of** ***(defendant public entity)*** **as to that portion of the damages claimed by** ***(plaintiff)***.

Authority: Pan-Am Tobacco Corp. v. Dept. of Corrections, 471 So.2d 4 (Fla. 1985); City of Miami v. Tarafa Construction, Inc. 696 So.2d 1275 (Fla. 3d DCA 1997); Southern Roadbuilders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2d DCA 1986). City of Fort Lauderdale v. Israel, 178 So. 3d 444 (Fla. 4th DCA 2015) (although Pan-Am Tobacco indicates that municipality may be liable under an express written contract, it does not indicate that same would be true for an unwritten one); Llorca v. Rambosk, 2015 WL 2095805, 2015 U.S. Dist. LEXIS 58726 (M.D. Fla. 2015).

E. As Defense To Claims For Costs Incurred Before Contract Award

(Defendant public entity) **has raised the defense of sovereign immunity as to the damages sought by** ***(plaintiff)*** **for costs to perform the contract that were incurred prior to the award of the contract to** ***(plaintiff)*****. Costs incurred for work before a written contract existed and was duly approved by** ***(defendant public entity)*** **are not recoverable**.

Therefore, if you find that a portion of the damages claimed by ***(plaintiff)*** **were incurred prior to the approval of a written contract by** ***(defendant public entity)*** **pursuant to [the formalities required by Florida law] [the ordinances and procedures adopted by defendant public entity], then you must find against** ***(plaintiff)*** **and in favor of** ***(defendant public entity)*** **as to that portion of the damages claimed by** ***(plaintiff)***.

Authority: City of Miami v. Tarafa Construction, Inc., 696 So.2d 1275 (Fla. 3d DCA 1997).

F. As Defense To Claims For Implied Covenants Within Written Contract

The ***(defendant public entity)*** **has raised the defense of sovereign immunity. An express representation made by** ***(defendant public entity)*** **within a written contract creates an implied covenant or warranty, consistent with the express written terms of the contract.** ***(Plaintiff)*** **has claimed that** ***(defendant public entity)*** **breached the following implied condition or covenant within the contract**:

[(describe implied condition or covenant)**]**.

Therefore, if you find by the greater weight of the evidence that ***(defendant public entity)*** **breached the implied covenant contained within the express written contract, you must enter a verdict for** ***(plaintiff)*** **and against** ***(defendant public entity)***.

Authority: County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1998); Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988).

G. As Defense To Claims For Waiver And Estoppel

***(plaintiff)* has claimed, under the doctrines of waiver and estoppel, that *(defendant public entity)* may not rely on the express written terms of the contract. *(defendant public entity)* has raised the defense of sovereign immunity. The doctrines of waiver and estoppel cannot be used to defeat the express terms of the contract between *(plaintiff)* and *(defendant public entity)*, unless *(defendant public entity)* issued a written order directing changes to the work pursuant to *(defendant public entity)*'s own procedures and formalities.**

In deciding whether *(defendant public entity)* waived the express written terms of the contract, you must determine by the greater weight of the evidence if the waiver was in writing, and if the waiver complied with the formalities required by the ordinances and procedures adopted by (defendant public entity). If you determine that the waiver was not in writing, or that the waiver did not comply with the applicable formalities of *(defendant public entity)*, you must enter a verdict against *(plaintiff)* and in favor of *(defendant public entity)*.

Authority: County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1998).

H. As Defense To Claims Of Unauthorized Acts Of Public Officers Or Employees

***(Plaintiff)* claims that *(defendant public entity)* entered into a contract because of certain actions of its [officer] [employee]. The *(defendant public entity)* has raised the defense of sovereign immunity. *(defendant public entity)* asserts that the actions of its [officer] [employee] were not duly authorized pursuant to the ordinances and procedures of the *(defendant public entity)*. If *(defendant public entity)* has not approved the [contract] [contract modification] in the manner required by *(defendant public entity)*'s charter, ordinances, and procedures, no binding commitment comes into existence. However, if *(defendant public entity)* subsequently formally ratified the unauthorized actions of its [officer] [employee] by an action that was sufficient to adopt the contract in the first instance, then the commitment is binding. Persons contracting with a municipality must, at their peril, inquire into the power of the municipality, and of its officers, to make the [[contract] [contract modifications] contemplated.**

Therefore, if you find by the greater weight of the evidence that the action of *(defendant public entity)*'s [officer] [employee] was not duly authorized in accordance with the procedures adopted by the ordinances and regulations of *(defendant public entity)*, or were not duly ratified in accordance with the ordinances and procedures of *(defendant public entity)*, then you must enter a verdict against *(plaintiff)* and in favor of *(defendant public entity)*.

Authority: Frankenmuth Mutual Insurance Co. v. Magaha, 769 So.2d 1012 (Fla. 2000); Fruchtl v. Foley, 84 So.2d 906 (Fla. 1956); Ramsey v. City of Kissimmee, 139 Fla. 107, 190 So. 474 (1939); Town of Indian River Shores v. Coll, 378 So.2d 53 (Fla. 4th DCA 1980).

§ 17.8. CONSTRUCTION LIEN JURY INSTRUCTIONS

A. Application Of Payments To Materials Accounts (Designation Of Payments Required)

A(n) [Owner] [Contractor] [Subcontractor] [Sub-Subcontractor] who makes payments to a material supplier with whom the [Owner] [Contractor] [[Subcontractor] [Sub-Subcontractor] has a running account or with whom the [[Owner] [Contractor] [Subcontractor] [Sub-Subcontractor] has more than one account is required to designate the contract or account item to which the payment is to be allocated or paid.

If you find that the [Owner] [Contractor] [Subcontractor] [Sub-Subcontractor] made the required designation, or did not make a false designation, then you should not consider the matter of damages. However, if you find that the [[Owner] [Contractor] [Subcontractor] [Sub-Subcontractor] failed to make a required designation, or made a false designation, then you will consider the issue of damages. A(n) [Owner] [Contractor] [Subcontractor] [Sub-Subcontractor] who fails to make such a designation, or makes a false designation, is liable to anyone suffering a loss because of such failure or false designation for the amount of such loss.

Authority: F.S. 713.14(1); Arlington Lumber & Trim Co. v. Vaugn, 548 So.2d 727 (Fla. 1st DCA 1989), disapproved on other grounds 660 So.2d 623.

B. Fraud Or Negligence Depriving Lienor Of Lien Rights

***(Owner)* claims that *(lienor)* has furnished a false or fraudulent statement in response to *(owner)*'s request for a written statement under oath of *(lienor)*'s account. *(Owner)* claims the responsive sworn statement of account is fraudulent because it says:**

[(insert claimed false or fraudulent statement)**]**.

You must determine from all of the evidence whether the furnished statement was false or fraudulent.

If you find that *(lienor)*'s statement was false or fraudulent, then you must find that

***(lienor)*'s lien is invalid**.

If you find that *(lienor)*'s furnished statement was not false or fraudulent, you must then determine whether *(lienor)* negligently included or omitted any information in [his] [her] [its] furnished statement and, if so, you must determine whether such negligent inclusion or omission prejudiced *(Owner)*.

If you find that *(lienor)* did negligently include or omit information in [[his] [her] [its] furnished statement that caused damage to *(owner)*, then you must find that *(lienor)*'s lien is invalid to the extent of the damage to *(lienor)*. If you find that *(lienor)* did not furnish a false or fraudulent statement and did not negligently include or omit information in [his] [her] [[its] furnished statement that caused damage to *(owner)*, then you shall consider all other defenses to determine if *(lienor)* has a valid claim of lien.

Authorities: F.S. 713.16(2); Florida Wood Services, Inc. v. Osprey Links Joint Venture, 720 So.2d 591 (Fla. 5th DCA 1998).

C. Final Contractor's Affidavit — Negligent Inclusion Or Omission Of Information

***(Owner)* claims that *(lienor)* gave [him] [her] [it] a final contractor's affidavit that included or omitted the following information**:

[(insert claimed inclusion or omission)**]**

and that this inclusion or omission prejudiced the owner in the following way:

[(insert claimed prejudice)**]**.

You must determine from all of the evidence whether the affidavit given by *(lienor)* negligently included or omitted (claimed inclusion or omission of material information)**. If so, you must then determine whether the inclusion or omission prejudiced *(lienor)***.

If you find that *(lienor)* did include or omit *(claimed inclusion or omission of material information)* in [his] [her] [its] affidavit, and that this inclusion or omission did prejudice *(owner)*, then you must identify the damage to the owner so the court may determine whether the lien is invalid.

If you find that *(lienor)* did not include or omit (claimed inclusion or omission of material information) **in [his] [her] [its] affidavit, or that the inclusion or omission did not prejudice *(owner)*, then you shall consider all other defenses to determine whether *(lienor)* has a valid claim of lien**.

Authority: F.S. 713.06(3)(d) 1.

D. Fraudulent Lien

1. Cause Of Action

The next issue for your determination on the claim of *(owner)* against *(lienor)* is whether the lien filed by *(lienor)* is a "fraudulent lien" within the meaning of Florida law.

If you find that *(lienor)*:

1. willfully exaggerated the amount for which it claimed a construction lien, or

2. willfully included in the lien a claim for work it did not perform or materials it did not furnish for the property against which the lien was recorded, or

3. compiled its claim of lien with such willful and gross negligence as to amount to a willful exaggeration,

then you shall find the claim of lien to be fraudulent. However, a minor mistake or error, or a good faith dispute as to the amount due, does not constitute a willful exaggeration so as to make a lien fraudulent.

If, by the greater weight of the evidence, you do not find the lien to be fraudulent, then you will not consider the issue of damages. However, if, by the greater weight of the evidence, you find the lien to be fraudulent, then you will next consider the issue of damages.

Authorities: F.S. 713.31(2)(a)-(2)(c); Castiello v. Sweetwater Homes of Citrus, Inc., 843 So.2d 1019 (Fla. 5th DCA 2003); Levin v. Palm Coast Builders & Construction, Inc., 840 So.2d 316 (Fla. 4th DCA 2003); South Motor Co. of Dade County v. Accountable Construction Co., 707 So.2d 909 (Fla. 3d DCA 1998); Wal-Mart Stores, Inc. v. AAAAsphalt, Inc., 677 So.2d 93 (Fla. 1st DCA 1996); Viyella Co. v. Gomes, 657 So.2d 83 (Fla. 3d DCA 1995); Vinci Development Co. v. Connell, 509 So.2d 1128 (Fla. 2d DCA 1987).

2. Damages

In considering the damages, you shall award *(owner)* the damages that you find by the greater weight of the evidence were incurred by *(owner)* and legally caused by the fraudulent lien filed by *(lienor)*. The damages you award to *(owner)* may include clerk's fees, the amount of any premium for a bond given to obtain the discharge of the lien, [and] [or] interest on any money deposited for the purpose of discharging the lien.

In addition, you may award to *(owner)* punitive damages in an amount determined by you, but not exceeding the difference between the amount claimed by *(lienor)* to be due or to become due and the amount actually due or to become due.

Authorities: F.S. 713.31(2)(a)-(2)(c); Castiello v. Sweetwater Homes of Citrus, Inc., 843 So.2d 1019 (Fla. 5th DCA 2003); Levin v. Palm Coast Builders & Construction, Inc., 840 So.2d 316 (Fla. 4th DCA 2003); South Motor Co. of Dade County v. Accountable Construction Co., 707 So.2d 909 (Fla. 3d DCA 1998); Wal-Mart Stores, Inc. v. AAAAsphalt, Inc., 677 So.2d 93 (Fla. 1st DCA 1996); Viyella Co. v. Gomes, 657 So.2d 83 (Fla. 3d DCA 1995); Vinci Development Co. v. Connell, 509 So.2d 1128 (Fla. 2d DCA 1987).

COMMENT: Intentionally omitted from this instruction are additional items of damages listed in the statute, specifically "court costs" and "a reasonable attorney's fee and costs in securing the discharge of the lien," because those typically would be matters determined by the court. If those items are discrete and ascertainable at the time of trial, then it might be appropriate to prove them up at trial, and include them in the instruction, depending on the preference of the court as to how to handle these issues.

E. Lien Foreclosure — Determination Of Amount Of Lien

1. In General

In this case, *(lienor)* filed a claim of lien under Florida's Construction Lien Law, and the issue for you to determine is the permissible amount of that lien. Other issues regarding the validity and enforcement of the lien will be determined by the court.

A construction lien can only include a claim for labor, services, or materials furnished by the lienor that are actually incorporated into [or made a part of] the real property

Include the following if specially fabricated materials are an issue:

[, unless the materials were specially fabricated for this project, and could not be readily reused elsewhere].

Amounts for labor, services, or materials that are not actually furnished to and made a part of the improvement to real property cannot be included in the lien. In addition, a lien may not include any amounts for delay damages, or overhead and profit on work that was not performed. Finally, a lienor is required to reduce the amount for which it claims a lien by a reasonable estimate of amounts required to correct defective work for which the lienor is responsible.

Authorities: F.S. 713.01(7)-(8), (12)-(15), 713.05, 713.08, 713.31(2)(a); Politano v. GPA Construction Group, 9 So.3d 15 (Fla. 3d DCA 2009); Martin v. Jack Yanks Construction Co., 650 So.2d 120 (Fla. 3d DCA 1995); Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd., 642 So.2d 766 (Fla. 4th DCA 1994); Skidmore, Owings & Merrill v. Volpe Construction Co., 511 So.2d 642 (Fla. 3d DCA 1987); Hobbs Construction & Development, Inc. v. Presbyterian Homes of Synod of Florida, 440 So.2d 673 (Fla. 1st DCA 1983).

Authorities as to Specially Fabricated Materials: F.S. 713.01(13); Stunkel v. Gazebo Landscaping Design, Inc., 660 So.2d 623 (Fla. 1995); Zalay v. Ace Cabinets of Clearwater, Inc., 700 So.2d 15 (Fla. 2d DCA 1997).

2. Rental Equipment

The amount for which a lien may be filed for rental equipment is the rental value of the equipment from the time it was delivered to the site and available for use, through the earlier of:

1. the time the equipment is last available for use at the site; or

2. two business days after the lessor of the rental equipment receives a written notice from the property owner or the lessee of the rental equipment to pick up the equipment.

Authorities: F.S. 713.01(13).

F. Lien Entitlement: Substantial Performance Doctrine And Breach Of Contract By Lienor

The next question for your determination is whether *(lienor)* substantially performed its work, or was justified or excused from substantial performance. A lienor who has not performed its work in a substantial, workmanlike manner is not

entitled to a lien unless it was prevented from such performance by the owner, or the lienor's stopping of work was excusable or justified.

A lienor is considered to have substantially performed its contract if its performance, even if not full performance, was nearly equivalent to what was bargained for, meaning that the owner can use the property for its intended use. However, even if the lienor has otherwise substantially performed its contract, if its breach was willful or intentional, then the lienor is not considered to have substantially performed.

A lienor who has not committed a willful or intentional breach and who has otherwise substantially performed its contract is entitled to recover the full unpaid balance of the contract price, minus the reasonable costs of completion or correction of defects for which the lienor is responsible.

Authorities: Bayshore Development Co. v. Bonfoey, 75 Fla. 455, 78 So. 507 (1918); Langley v. Knowles, 958 So.2d 1149 (Fla. 5th DCA 2007); Keller v. Newman Sons, Inc., 756 So.2d 120 (Fla. 3d DCA 2000); Pullam v. Hercules Inc., 711 So.2d 72 (Fla. 1st DCA 1998); National Constructors, Inc. v. Ellenberg, 681 So.2d 791 (Fla. 3d DCA 1996); Casa Linda Tile & Marble Installers, Inc. v. Highlands Place 1981, Ltd., 642 So.2d 766 (Fla. 4th DCA 1994); Braverman v. Van Bower, Inc., 583 So.2d 381 (Fla. 3d DCA 1991); J.M. Beeson Co. v. Sartori, 553 So.2d 180 (Fla. 4th DCA 1989); Lofter v. Rashide, 523 So.2d 1230 (Fla. 3d DCA 1988); Lockhart v. Worsham, 508 So.2d 411 (Fla. 1st DCA 1987); Hawaiian Inn of Daytona Beach, Inc. v. Robert Myers Painting, Inc., 363 So.2d 125 (Fla. 1st DCA 1978); Rousselle v. B & H Construction Co., 358 So.2d 614 (Fla. 1st DCA 1978); Oven Development Corp. v. Molisky, 278 So.2d 299 (Fla. 1st DCA 1973); In re Jennerwein, 309 B.R. 385 (Bankr. M.D. Fla. 2004).

COMMENT: This instruction is written so that it could be used either as a description of an element required to be proven by the lienor, or as a defense that is to be proven by the owner.

G. Liens: Property Owned By Husband And Wife/ Contract With Only One Spouse

When a contract for improving real property is made with a husband or wife who is not separated and living apart from his or her spouse, and the property is owned by the other spouse, or by both spouses, the spouse who contracts for such improvements is considered to be the agent of the other such that the interest of the non-contracting spouse in the real property is properly subject to liens. However, if the spouse who was not a party to the contract, within ten days of learning of the contract, gives the contractor written notice of his or her objection to the contract, and records a copy of such notice in the clerk's office, then the interest of the non-contracting spouse is not subject to liens.

Authority: F.S. 713.12; Le Roy v. Reynolds, 141 Fla. 586, 193 So. 843 (1940); Mullne v. Sea-Tech Construction, Inc., 84 So.3d 1247 (Fla. 4th DCA 2012); Meadows Southern Construction Co. v. Pezzaniti, 108 So.2d 499 (Fla. 2d DCA 1959).

H. Notice To Owner

1. Did Lienor Have A Contract With Owner?

***(Owner)* claims that *(lienor)* did not have a contract with *(owner)*. If *(owner)* is correct, then *(lienor)* was required, as a condition to having a right to lien, to serve *(owner)* with a document called a "notice to owner."**

You must determine from all of the evidence whether *(lienor)* had a contractual relationship, called privity, with *(owner)*. Contracts may be written or oral. Contracts may be partly written and partly oral. Oral contracts are just as valid as written contracts.

Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or under the circumstances should know, that the other party will understand the conduct as creating a contract.

In deciding whether a contract was created, you should consider the conduct and relationship of the parties as well as all of the circumstances.

If you find that *(lienor)* was not in contractual privity with *(owner)* and failed to furnish *(owner)* with a notice to owner, then you must find that *(lienor)*'s lien is invalid.

If you find that *(lienor)* was in contractual privity with *(owner)*, then *(lienor)* was not required to serve *(owner)* with a notice to owner, and you may consider all other evidence to determine whether *(lienor)* has a valid claim of lien.

Authorities: F.S. 713.01(6); F.S. 713.06(2)(a); Fla. Stand. Jury Instr. Contr. & Bus. 416.5-416.6; See also Marble Unlimited, Inc. v. Weston Real Estate Investment Corp., 125 So.3d 286 (Fla. 4th DCA 2013).

2. Date Of Receipt Of Notice To Owner

If you determine that the notice to owner furnished by *(lienor)* was actually received within forty-five days after the date on which*(lienor)* began furnishing labor, services, or materials for the improvement of *(owner)*'s property, then *(lienor)*'s notice to owner was timely served regardless of when it was mailed or whether *(lienor)* maintained the tracking records the Court has listed. In the event you find that the notice to owner was timely served, you must consider all other evidence to determine whether *(lienor)* has a valid claim of lien.

If, however, you determine the notice to owner furnished by *(lienor)* was not actually received within forty-five days after the date on which *(lienor)* began furnishing labor, services, or materials for the improvement of *(owner)*'s property and *(lienor)* failed to prove it was mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid within forty days of *(lienor)* beginning work on the job, then *(lienor)*'s notice to owner is untimely and you must find that *(lienor)*'s lien is invalid.

For purposes of computing the time period, the first day of work is not included in the forty or forty-five day periods. Also, when the forty-fifth day falls on a day when mail is not delivered, such as a holiday or weekend, the period shall run until the next day on which mail is delivered.

Authorities: F.S. 713.06(2)(a); F.S. 713.18; Fla.R.Civ.P. 1.090(a); Fla.R.Jud.Admin. 2.514; Site-Prep Inc. v. Tai, 472 So.2d 766 (Fla. 5th DCA 1985); Daly Aluminum Products, Inc. v. Stockslager, 244 So.2d 528 (Fla. 2d DCA 1971).

3. Was Notice To Owner Served Within 45 Days Of Special Fabrication Of Materials?

In determining whether the notice to owner was served within the time frames about which the Court just instructed you, you must also consider whether *(lienor)* supplied specially fabricated materials and, if so, when the special fabrication of those materials began. Specially fabricated materials are materials that by their nature are not generally suited for, or readily adaptable to, use in a similar improvement.

If you find that the materials furnished by *(lienor)* included specially fabricated materials, then you must determine whether their fabrication began before what you otherwise determined to be *(lienor)*'s first day of work on the project. If so, then the first day of work from which the notice to owner service deadlines began to run is the date on which special fabrication began.

Authorities: F.S. 713.01(13); F.S. 713.06(2)(a); Stunkel v. Gazebo Landscaping Design, Inc., 660 So.2d 623 (Fla. 1995); Oolite Industries, Inc. v. Millman Construction Co., 501 So.2d 655 (Fla. 3d DCA 1987).

COMMENT: This instruction should be given only when materials were specially fabricated.

4. Identity Or Agency Relationship Between Owner And Contractor

***(Lienor)* claims [he] [she] [it] was excused from the notice to owner requirement due to a common identity or agency relationship between *(owner)* and *(contractor)*. *(Lienor)* claims**:

[(insert claimed common identity or agency relationship)**]**.

You must determine from all of the evidence whether:

1. **the relationship between *(owner)* and *(contractor)* was such that they shared the same identity, or had the same principals or officers, or**
2. ***(contractor)* was held out by *(owner)* as its agent or has been permitted to act for it or manage its affairs in such a way as to justify third persons who deal with *(contractor)* in inferring or assuming that *(contractor)* is doing an act within the scope of an agency relationship**.

If you find that either a common identity or agency relationship existed between *(owner)* and *(contractor)*, then *(lienor)* is exempt from [his] [her] [[its] requirement to serve a notice to owner on (owner)**. In that case, you may consider all other evidence to determine whether *(lienor)* has a valid claim of lien**.

If you find that no common identity or agency relationship existed between *(owner)* and *(contractor)*, then *(lienor)* is not exempt from [his] [her] [[its] requirement to serve a notice to owner on *(owner)*, and you must consider whether *(lienor)* timely and properly served [his] [her] [its] notice to owner.

Authorities: F.S. 713.05; F.S. 713.06(2)(a); King v. Brickellbanc Savings Ass'n, 551 So.2d 604 (Fla. 5th DCA 1989); Symons Corp. v. Tartan-Lavers Delray Beach, Inc., 456 So.2d 1254 (Fla. 4th DCA 1984); Broward Atlantic Plumbing Co. v. R.L.P., Inc., 402 So.2d 464 (Fla. 4th DCA 1981).

5. Error In Notice To Owner

(Owner) **claims that** ***(lienor)*** **has furnished [him] [her] [it] with a notice to owner that contains the following errors or omissions**:

[(insert claimed errors or omissions)**]**

and that these errors or omissions prejudiced the owner in the following way:

[(insert claimed prejudice)**]**.

You must determine from all of the evidence whether the notice to owner furnished by ***(lienor)*** **actually contains the errors or omissions claimed by** ***(owner)*** **and, if so, if these errors or omissions did prejudice** ***(owner)***.

Regardless of your findings regarding any error, omission, or adverse effect, you must still make findings regarding whether any other defenses prevent ***(lienor)*** **from having a valid claim of lien**.

Authority: F.S. 713.06(2)(f); Trump Endeavor 12 LLC v. Fernich, Inc., 216 So.3d 704 (Fla. 3d DCA 2017).

6. Error In Claim of Lien

(Owner) **claims that** ***(lienor)*** **has recorded a claim of lien that contains the following errors or omissions**:

[(insert claimed errors or omissions)**]**

and that these errors or omissions have adversely affected the owner in the following way:

[(insert claimed prejudice)**]**.

You must determine from all of the evidence whether the claim of lien recorded by ***(lienor)*** **actually contains the errors or omissions claimed by** ***(owner)*** **and, if so, if these errors or omissions did adversely affect** ***(owner)***.

If you find that the claim of lien recorded by ***(lienor)*** **did contain the errors or omissions claimed by** ***(owner)*****, and that these errors and omissions did adversely affect the** ***(owner)*****, then you must identify the error or omission and the adverse effect to** ***(owner)*** **so the Court may determine whether the lien is invalid**.

Regardless of your findings regarding any error, omission, or adverse effect, you must still make findings regarding whether any other defenses prevent ***(lienor)*** **from having a valid claim of lien**.

Authority: F.S. 713.08(4)(a); Premier Finishes, Inc. v. Maggirias, 130 So.3d 238 (Fla. 2d DCA 2013).

7. Joint/Multiple Owners — Notice To One

If the real property at issue in this case and against which ***(lienor)*** **asserts its lien was owned by more than one person or by a partnership, then** ***(lienor)*** **may serve any notice or other papers pertinent to the lien on any one of such owners or partners, and such notice, if properly served, is the same as notice to all owners and partners**.

Authority: F.S. 713.18(4).

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