STATE OF UTAH
RETAIL COMPENDIUM OF LAW

Prepared by
Stanford P. Fitts
STRONG & HANNI
Attorneys at Law
102 South 200 East, Suite 800
Salt Lake City, UT 84111
Telephone: (801) 532-7080
sfitts@strongandhanni.com

Retail, Restaurant, and Hospitality Guide to Utah Premises Liability

OVERVIEW OF UTAH RETAIL PREMISES LIABILITY LAW

I. GENERAL PRINCIPLES OF LIABILITY LAW IN UTAH

Premises liability matters may involve a number of relatively complex relationships which are uniquely prone to disputes and litigation. When accidents or injuries occur on premises involving persons or property other than the owner or those in control of the property, a variety of different plaintiffs may appear and assert claims under a wide range of legal theories. Similarly, a number of different defendants may be involved including the owner and a variety of third-parties. Normally, liability must be premised upon the breach of a duty which arises out of the relationship of the injured party to the premises involved. The existence, nature and extent of such duty depends upon several factors regarding the party's involvement with premises and the relationship of third parties to the premises. When unsafe or defective conditions occur in the design, construction or maintenance of a project, complex issues arise in sorting through the potential liability of the various parties involved with the premises. These following discussion touches, in a general fashion, on a few of these issues which commonly arise in disputes relation to the conditions on real property.

A. Contract

It is fundamental under Utah law that when a party fails to perform a duty under a construction contract, such failure is a breach of the contract for which the non-breaching party may recover its damages. *Quagliana v. Exquisite Home Bldrs., Inc.*, 538 P.2d 301 (Utah 1975).

B. Negligence

The Utah Supreme Court has articulated the essential elements of a negligence action as follows:

> The essential elements of a negligence action are: (1) a duty of reasonable care owed by the defendant to the plaintiff; (2) a breach of that duty; (3) the causation, both actually and proximately of injury; (4) the suffering of damages by the plaintiff.

Williams v. Melby, 699 P.2d 723, 726 (Utah 1985)

In *DCR, Inc. v. Peak Alarm Co.*, 663 P.2d 433, 437 (Utah 1983), the Court defined negligence as the "failure to exercise the degree of care which a reasonable person would have exercised under the same circumstances, whether by acting or by failing to act." *Id.* at 434-45. In cases of failure to act, the Court noted that the plaintiff must show the existence of a special relationship giving rise to a duty to act and exercise due care on behalf of the plaintiff. *Id.* at 435. With respect to the standard of care, the Court stated:

> ...in applying the universally accepted standard of care: that of the ordinary, reasonable and prudent man under the circumstances, the term "ordinary" should be given its true meaning by not requiring the conduct of an extraordinarily careful person. Such an "ordinary" man is not necessarily a super cautious individual devoid of human frailties and constantly preoccupied with the idea that danger may be lurking in every direction about him at any time.

Id. at 435, n. 5 (Quoting *Whitman v. W.T.Grant Co.*, 16 Utah 2d 81, 395 P.2d 918 (1964); In *Erickson v. Bennion*, 28 Utah 2d 371, 503 P.2d 139 (1972) the court held that "the degree of care increases in proportion to the hazards to be anticipated..." *Id.* at 374.

II. Duties Regarding Conditions on Real Property Premises.

A. Owner/Possessor Duty to Invitees

Utah adopts the *Restatement (Second) of Torts*, position that "a property owner's duty to a person injured on his property is determined by that person's status on the property as either an invitee, a licensee, or a trespasser." *Feichko v. Denver & Rio Grande Western R.R.*, 213 F.3d 586, 593 (10th Cir. 2000). An invitee is "one who goes upon the premises of another . . . at the invitation of the owner," whereas, a licensee has no such invitation, but goes on the land of another with the express or implied permission of the landowner. *Stevens v. Salt Lake County*, 25 Utah 2d 168, 478 P.2d 496, 498 (Utah 1970). "An invitee is one who goes upon the premises of the owner or occupant for the purpose of transacting business or for the mutual benefit of each of them or for the benefit of the occupant." *Christensen v. United States*, 2007 U.S. Dist. LEXIS 36717 (D. Utah May 17, 2007)(citing *Hayward v. Downing*, 112 Utah 508, 513, 189 P.2d 442 (Utah 1948)).

A person may be an invitee as to a part of the premises, and a mere licensee or a trespasser as to other parts of the premises. *Hayward v. Downing*, 112 Utah 508, 512-513 (Utah 1948).

In *Hevelone v. City Mkt., Inc*., 2005 UT App 215 (Utah Ct. App. 2005), the court held that the defendant market owner was not liable for an injury occuring in a fire lane on adjacent property not owned or possessed by the market. The court held that "to be a business invitee, one must not only be an invitee, but must also be on the premises of the defendant." Id. (citing *Cannon v. University of Utah*, 866 P.2d 586, 589 (Utah Ct. App. 1993)); *But see Conrad v. Walker Bank & Trust Co*., 542 P.2d 1090, 1090-1091 (Utah 1975)(Property owner liable for hole in ground in adjacent property which it undertook to maintain and keep level; Duty to do so in non-negligent manner; Duty not dependent upon actual possession and title.)

Under Utah law, the legal standard regarding invitees subjects the possessor of land to liability "if, but only if, he . . . knows or by exercise of reasonable care would discover the [dangerous] condition." *Hale v. Beckstead*, 2005 UT 24, 116 P.3d 263, 266 (Utah 2005). Similarly, Utah courts have held that "[i]f a plaintiff alleges that a defendant negligently failed to remedy a dangerous condition that the defendant did not create . . . then evidence of notice and a

reasonable time to remedy are required to survive a motion for summary judgment." *Goebel v. Salt Lake City Southern R.R. Co*., 2004 UT 80, 104 P.3d 1185, 1193-94 (Utah 2005).

The landowner or possessor of the premises may be liable to an invitee, "if, but only if, he . . . knows or by exercise of reasonable care would discover the [dangerous] condition." *Id.* (quoting *Hale v. Beckstead*, 2005 UT 24, 116 P.3d 263, 266 (Utah 2005)).

Where the alleged condition is a "temporary unsafe conditions," the plaintiff must show that the owner/possessor of the premises "had actual or constructive knowledge of the condition and that sufficient time elapsed after such knowledge that 'in the exercise of reasonable care [the defendant] should have remedied it.'" Id. (quoting *Schnuphase v. Storehouse Markets*, 918 P.2d 476, 478 (Utah 1996)). Similarly, "[i]f a plaintiff alleges that a defendant negligently failed to remedy a dangerous condition that the defendant did not create . . . then evidence of notice and a reasonable time to remedy are required to survive a motion for summary judgment." *Id*. (quoting *Goebel v. Salt Lake City Southern R.R. Co*., 2004 UT 80, 104 P.3d 1185, 1193-94 (Utah 2005)).

III. SELECTED PREMISES LIABILITY ISSUES.

A. HOTELS

Utah law holds that "the duty of the innkeeper is to keep his hotel premises in a reasonably safe condition for his guests" and to "exercise reasonable care to protect his guests from personal injury." *Moore v. James*, 297 P.2d 221, 223 (Utah 1956). However, an innkeeper is not an insurer of his guests' safety. *See id*.

There is no Utah case law regarding an innkeeper's duty to guests for accidents that occur off the innkeeper's premises. However, Utah law holds that a property owner may be held liable for an injury that occurs on abutting property if that property owner makes "special use" of the property where the accident occurred. *See Rose v. Provo City*, 2003 UT App 77, ¶ 12 (Utah Ct. App. 2003).

B. OPEN AND OBVIOUS DANGERS

A possessor of land may be subject to liability for injuries to invitees caused by a condition on the land if, but only if, she "(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." *Hale v. Beckstead*, 2005 UT 24, ¶ 8, 116 P.3d 263 (emphasis omitted) (quoting *Restatement (Second) of Torts* § 343 (1965)). "'A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.'" Id. ¶ 9 (quoting *Restatement (Second) of Torts* § 343A(1)).

This "open and obvious danger rule," id. ¶ 7, "is a duty-defining rule that simply states that, under appropriate circumstances, a landowner's duty of care might not include warning or otherwise protecting visitors from obvious dangers," id. ¶ 23. Lyman v. Solomon, 2011 UT App 204, P1-P8 (Utah Ct. App. 2011). "…the law simply requires owners to take reasonable steps to protect invitees. This duty does not require that landowners fully remedy potentially unsafe conditions, only that landowners adequately warn invitees about such dangers. Where the danger is so obvious such that no warning is necessary to alert an invitee, the possessor of land is not required to give the warning anyway unless other circumstances, discussed above, warrant." *Hale v. Beckstead*, 116 P.3d 263, 265-270 (Utah 200

C. CONSTRUCTION AND DESIGN DEFECTS

1. Contractors

Construction contractors generally have a duty to perform in a fashion which will meet and satisfy the project specifications, *Corbetta Construction Co. v. Lake County Public Building Commission*, 64 Ill. App.3d 313, 381 N.E.2d 758 (1978).and to perform the work in a reasonably prudent and workmanlike manner. *Morin Building Products Company, v. Baseton Construction*, 717 F.2d 413 (1983). As a general proposition, the contractor is required to follow the specifications. *Mayor v. City Council, Etc. v. Clark-Dietz, Etc*, 550 F.Supp. 610 (N.D. Miss. 1982). This obligation, however, requires analysis of whether the specifications are design specifications or performance specifications. The standard is not one of perfection, but rather a workmanlike manner and average skill. *Sundance Develop., Inc. v. Standard Lbr and Hard. Co.*, 520 P.2d 1056 (Colo. App. 1974).

2. Design Professionals

Design professionals similarly owe a duty to perform their services with reasonable care. Architects and engineers are held to the standard of care exercised by other design professionals in the locality. However, design professionals are not held to a standard of perfection and are not considered to warrant perfection of their services. *Nauman v. Harold K. Beecher & Assocs.*, 24 Utah 2d 172, 178-182 (Utah, 1970).

3. Strict Liability

In *Schafir v. Harrigan*, 879 P.2d 1384 (Utah App. 1994), the Utah Court of Appeals rejected a claim for strict liability against the builder as a seller of defective goods. The Utah Court of Appeals held that the builder is not a "seller" of defective materials where the builder "merely utilized the defective components, if any, in building the house." *Id.* at 1388. The Court further noted that a claim for strict liability requires a showing that the defective products were unreasonably dangerous to people occupying the building. *Id.*

4. Duty to Third Parties

Normally only the parties to a contract have rights under the contract. Under Utah law "it is axiomatic in the law of contract that a third party not in privity cannot not sue on contract." *Shire Dev. v. Frontier Investments*, 799 P.2d 221, 223 (Utah App. 1990). Unless the third party is a third party beneficiary, the third party has no rights under the contract. *Tracy Collins Bank & Trust v. Dickamore*, 652 P.2d 1314 (Utah 1982)(Only intended third party beneficiary can claim contract rights).

Absent a contractual right, an injured third party may assert a claim for negligence. In order for a contractor or design professional to be liable for construction defects, in negligence, there must be a duty on the part of the contractor regarding the alleged defect. It is fundamental that "without a duty, there can be no negligence as a matter of law, and summary judgment is appropriate." *Tallman v. City of Hurricane*, 985 P.2d 892 (Utah 1999).

In *Tallman v. City of Hurricane*, 985 P.2d 892 (Utah 1999), the Utah Supreme Court adopted the forseeability doctine based upon the rule articulated in the *Restatement (Second) of Torts § 385*. The court held that under Utah law, "[t]he creator of an artificial condition on land may be liable to others – both upon or outside of the land – for physical harm caused by its dangerous nature." *Tallman*, 985 P.2d at 895. A full discussion of the history and background of this rule is beyond the scope of these materials. Analysis is required of potential exceptions to this doctrine as applied under Utah law in particular circumstances.

D. SKI RESORT OPERATOR LIABILITY

Utah statutes limit the liability of ski resort operators for skiing accidents. Generally, the limitation bars claims resulting from the "inherent risks of skiing." U.C.A., §78B-4-403 provides that "no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing." In *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), the Utah Supreme Court held that the statute "does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers." *Id*. at 1044. The statute precludes liability for "dangers that skiers wish to confront as essential characteristics of the sport of skiing or hazards that cannot be eliminated by the exercise of ordinary care on the part of the ski area operator." *Id*. at 1046-47; *White v. Deseelhorst*, 879 P.2d 1371, 1375 (Utah 1994) (precluding summary judgment in favor of ski area operator where genuine issue of fact existed concerning necessity of signs warning of cat track traversing expert run). The committee notes to the statute state that "Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991) recognizes that the statutory list is not exclusive and further defines "inherent risk" as "those risks that are essential characteristics of skiing—risks that are so integrally related to skiing that the sport cannot be undertaken without confronting [them]." Id. at 1047."

The Utah statutes also regulate the safety of ski lifts and areal trams. U.C.A. §72-11-201 provides that the statute regarding such facilities is enacted "to safeguard the life, health, property, and welfare of citizens while using passenger ropeways" and that it is state policy to "protect citizens and visitors from unnecessary mechanical hazards in the design, construction, and operation of passenger ropeways, but not from the hazards inherent in the sports of

mountaineering, skiing, snowboarding, mountain biking, and hiking, or from the hazards of the area served by passenger ropeways, all of which hazards are assumed by the sportsman."

E. RECREATIONAL USE OF PRIVATE LANDS

Utah has enacted statutory provisions to encourage the availability of private lands for recreational use. U.C.A. 57-14-3 generally provides that " an owner of land owes no duty of care to keep the premises safe for entry or use by any person entering or using the premises for any recreational purpose or to give any warning of a dangerous condition, use, structure, or activity on those premises to that person." The owner of a public access area does not confer invitee status, represent the condition of the premises, assume responsibility for conduct of others on the land or limit its own use of the land. The provision also applies as to trespassers on the land. Section 57-14-6 sets forth exceptions to the general rules such as where the landowner charges a fee of more than $1.00 per year (excepting payments for leases to the State of Utah) for use of the property and where the property owner engages in deliberate or malicious conduct.

F. FOOD SERVICES

The U.C.A. §26-15a-101, -107 sets forth duties of establishments handling and providing food. The Food Safety Manager Cerification Act sets forth requirements for food handling, training and certification of food handlers and managers of such establishments.

G. THEFT PREVENTION/UNLAWFUL DETENTION

Utah law provides certain protections for retailers taking steps to prevent theft and shoplifting. U.C.A. §76-6-603 provides that a "merchant who has probable cause to believe that a person has committed retail theft may detain such person, on or off the premises of a retail mercantile establishment, in a reasonable manner and for a reasonable length of time" to make "reasonable inquiry" and investigation "as to whether such person has in his possession unpurchased merchandise and to make reasonable investigation of the ownership of such merchandise." The detention may also be made for the purpose of informing authorities and turning the person over to the police. The detention may only be made off of the premises if "pursuant to an immediate pursuit."

U.C.A., §76-6-604 further provides that in an "action for false arrest, false imprisonment, unlawful detention, defamation of character, assault, trespass, or invasion of civil rights" the premises owner/operator is entitled to a defense that "the merchant detaining such person had probable cause to believe that the person had committed retail theft and that the merchant acted reasonably under all circumstances."

IV. INDEMNITY AND APPORTIONMENT OF FAULT.

A. Indemnity

Indemnity provisions in contracts are subject to the normal rules of contract interpretation applicable to other contract terms. Fundamental principles of contract interpretation require that the contract, including indemnity provisions, be viewed as a whole and that all provisions be construed together to give meaning to all provisions of the contract. In some contexts, indemnity provisions regarding an indemnitee's own negligence may also be subject to an additional rule of strict construction. *Pickhover v. Smith's Management Corp*., 771 P.2d 664, 666-667 (Utah App. 1989); *Freund v. Utah Power & Light Co.*, 793 P.2d 362, 370 (Utah 1990); Bishop v. GenTec, Inc., 48 P.3d 218, 224 (Utah 2002). In some instances, an indemnity agreement may impact the protection an employer may otherwise have under the exclusive remedy provision of the Workmen's Compensation Act. See *also Freund v. Utah Power & Light Co*., 793 P.2d 362, 370 (Utah 1990).

B. Apportionment of Fault and Contribution

Under Utah law, parties sued in tort are generally liable only for their own proportionate fault. U.C.A. §§ 78-27-38 and 40 provide that a defendant can only be liable for its own fault and not for the fault of any other party. The Utah courts have not yet determined whether this apportionment of fault applies to contractual liability where multiple defendants are sued in contract and tort arising out of the same incident or construction project. In construction cases this may be an important legal issue where contractors, subcontractors, architects, engineers, product manufacturers and others are sued under contract, warranty, products liability and tort theories.

V. SELECTED INSURANCE ISSUES

Retail, business and recreational properties often involve contracts and leases between the property owner and lessees or operators of business and/or recreational activities on the property. These contracts often contain provisions requiring one or both parties to obtain specified insurance coverages and requirements that a party be named as an additional insured under the other party's liability insurance policy. The following is a general discussion of some of the ramifications of failing to obtain the contractually required insurance and the potential for waiver of such provisions.

Although insurance provisions are common in such contracts, it is important for the parties to follow up on the contract requirements to make sure the required insurance and additional insured status are in place. The party seeking such insurance protection should obtain proof of insurance. The documentation provided by the other contracting party regarding insurance and additional insured status should be carefully reviewed. It is not uncommon for a "certificate of insurance" to be provided which contains an express statement that the certificate does not constitute insurance or proof of insurance. In addition, it is important to follow up on the insurance issues to avoid the possibility of a waiver of such provisions.

A. Waiver of Insurance or Additional Insured Provisions

Utah recognizes the general common law concept of waiver. In *Flake v. Flake (In re Estate of Flake)*, 71 P.3d 589 (Utah 2003), the Utah Supreme Court reiterated the doctrine of waiver by stating that "[w]aiver of a contractual right occurs when a party to a contract intentionally acts in a manner inconsistent with its contractual rights, and, as a result, prejudice accrues to the opposing party or parties to the contract." In Utah, "[w]aiver is an intensely fact dependent question, requiring a trial court to determine whether a party has intentionally relinquished a known right, benefit, or advantage." *Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n.*, 857 P.2d 935, 940 (Utah 1993). In order to find that a waiver occurred, the Utah Supreme Court has held that "a fact finder need only determine whether the totality of the circumstances warrants the inference of relinquishment." *Id*. at 942. Although "any waiver 'must be distinctly made . . . it may be express or implied.'" *Id*. at 940 (quoting *Phoenix, Inc. v. Heath*, 61 P.2d 308, 311 (Utah 1936)). Finally, the intent to waive may only be shown by a preponderance of the evidence. *See Soter's* at 942, n. 6.

Although the Utah courts have not addressed the issue directly, some courts have found that the failure to require proof of additional insured status prior to commencement of work may, in certain circumstances, result in a waiver of the additional insured requirement. In *Whalen v. K Mart Corporation*, 519 N.E.2d 991 (Ill. App. 1988), the plaintiff, Whalen, brought a personal injury action against the general contractor, Schostak Brothers, Inc., K-Mart and the landowners. *Id*. at 992. The general contractor and the landowners, as third-party plaintiffs, filed a third-party complaint against A. W. Christianson & Sons, Inc., the painting subcontractor, for contribution and indemnity based on Christianson's agreement to procure insurance naming third-party plaintiffs as an insured. Id. The general contractor also filed a counterclaim against Martin Cement Company, the cement subcontractor, for contribution and indemnity based on Martin's agreement to procure insurance naming the general contractor and landowners as an insured. Id. The contracts also contained a provision stating:

> The Subcontractor shall not commence work under this Subcontract until he has obtained all insurances required by the General Conditions and as hereinafter set forth and certificates of insurance delivered to the Contractor.

See id.

The subcontractors moved to dismiss the third-party complaint and counterclaim and alleged that the general contractor and landowners waived the contractual insurance requirement. Id. Both subcontractors alleged, in their motions to dismiss, that the general contractor did not insist upon their compliance with the contractual insurance requirements of their respective subcontracts. Id. at 993. Both subcontractors performed under their contracts and were paid in full. The trial court dismissed the third-party complaint against both subcontractors. Id.

On Appeal, the court held that "[a] party to a contract may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for noncompliance." *Id*. The court also stated that, "it is undisputed that [the general contractor] drafted the contracts. The requirement that proof of insurance be submitted before the

subcontractors could commence work and be paid was clearly for [the general contractor's] benefit." *Id*. at 994. Additionally, the court stated that "[The general contractor] is presumed to know those things which reasonable diligence on its part would bring to its attention, namely, the absence of proof of insurance." Id. Finally, the court found "that [the general contractor] never demanded any proof of insurance; both [subcontractors] completed their performance under the contract; and both were paid in full for their services." *Id*. The court affirmed the trial court's finding of waiver and stated that "[a]n implied waiver of a legal right may arise when conduct of the person against whom waiver is asserted is inconsistent with any other intention than to waive it." *Id*.; *See also Geier v. Hamer Enters., Inc.*, 589 N.E.2d 711, 722 (Ill. App. 1992)(stating that waiver of contractual provisions may be established by conduct indicating that strict compliance with the provision will not be required.)

B. Impact of U.C.A. §13-8-1 on Insurance Provisions in Construction Contracts.

Utah Code Ann. §13-8-1 imposes restrictions on the use of indemnity provisions in construction contracts for indemnification against the negligence or fault of parties other than the indemnitor. Notwithstanding these restrictions, the Utah Court of Appeals has ruled that a construction contract may include a provision requiring a party to provide insurance to indemnify the other party from negligence of others. In *Meadow Valley Contrs., Inc. v. Transcon. Ins. Co.*, 27 P.3d 594 (Utah App. 2001), the general contractor, Meadow Valley, hired BT Gallegos Construction Company, Inc. ("BT Gallegos") as a subcontractor to extend existing drainage lines on a roadway project and to tie those lines into an existing drainage system. The subcontract agreement between BT Gallegos and Meadow Valley required BT Gallegos to purchase an insurance policy with an endorsement naming Meadow Valley as an additional insured. BT Gallegos purchased a commercial general liability insurance policy, with the required endorsement, from Transcontinental Insurance. Id. at 596.

Following a severe rainstorm, during the installation of the drainage system, a number of nearby businesses were damaged by water diverted from the roadway. These businesses submitted claims to Meadow Valley who, in turn, tendered these claims to Transcontinental. Id. Initially, Transcontinental refused the tender submitted by Meadow Valley stating that BT Gallegos could not be required to insure or indemnify Meadow Valley for its own negligence. *Id*. In the later action that ensued, Transcontinental claimed that it was not required to "provide insurance coverage, investigate, defend, or indemnify Meadow Valley for its own negligence." *Id* at 597. Meadow Valley moved for summary judgment, which was granted by the trial court, against Transcontinental claiming that Transcontinental was required to insure and indemnify Meadow Valley. *Id*. On Appeal, Transcontinental argued, citing Utah Code Ann. § 13-8-1(2)(Lexis 2004), that "BT Gallegos was statutorily prohibited from purchasing any sort of insurance policy which would insure Meadow Valley for Meadow Valley's own negligence." *Id* at 598. *Utah Code Ann.* § 13-8-1(2) states that "an indemnification provision in a construction contract is against public policy and is void and unenforceable." *Id*. That section also states that:

> "Indemnification provision" means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract

> requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:
>
> (I) the damages arise out of:
> A. bodily injury to a person;
> B. damage to property; or
> C. economic loss; and
>
> (ii) ***the damages are caused by or resulting from the fault of the promisee, indemnitee, others, or their agents or employees***.

Id. (emphasis added).

The Court stated that "the plain meaning of [this] statute voids only agreements requiring one party in a construction contract to ***personally*** insure against liability stemming from the other party's negligence." *Meadow Valley*, at 598 (emphasis added).

Interestingly, the Court distinguished between BT Gallegos's obligation to purchase insurance (which it found enforceable) and any obligation on the part of BT Gallegos to personally indemnify Meadow Valley for Meadow Valley's own negligence (which the court affirmed is unenforceable pursuant to Utah state law). The Court concluded that:

> In this case, the insurance provision of the subcontract agreement requires BT Gallegos to procure insurance and to name Meadow Valley as an additional insured. ***The provision does not, however, require BT Gallegos to personally insure or indemnify Meadow Valley for liability arising out of Meadow Valley's own negligence. Therefore, the insurance provision of the subcontract agreement does not violate section 13-8-1.***

Id. (emphasis added).

C. Liability for Failure to Obtain Contractually Required Insurance

Utah courts have not examined the specific issue of liability for failure to obtain insurance required by a provision in a contract. However, cases from other jurisdictions have established the principle that "where a party breaches its contractual obligation to procure liability insurance on behalf of another, it is liable for damages resulting from the breach, ***including the amount of any judgment up to policy limits and costs of defending any suit that would have been defended by the insurer***." *Nelson v. Metro-North Commuter R.R.*, 1999 U.S. Dist. LEXIS 1773, *9 (S.D.N.Y. 1999)(emphasis added); *See also Kinney v. G.W. Lisk Co., Inc.*, 556 N.E.2d 1090, 1092 (N.Y. 1990)(stating that because a subcontractor breached its agreement to procure liability insurance covering the general contractor, it is liable for the resulting damages, including the general contractor's liability to plaintiff); *Schumacher v. Lutheran Community Services, Inc.*, 177 A.D.2d 568, 569 (N.Y.2d Dept. 1998)(stating that because a lessee breached its agreement to obtain liability insurance covering a lessor, it is liable to

indemnify the lessor for any payments made by the latter to plaintiffs); *Roblee v. Corning Community College*, 134 A.D.2d 803, 805, (N.Y.3d Dept. 1987)(stating that since a food service vendor breached its agreement to procure general liability coverage for the college, it is liable for the college's resultant damages, i.e., its payments in discharge of liability to injured third persons to the extent of the required policy limits and the costs of defending a suit which would have been defended by the insurer under such a policy.)

D. Other Additional Insured Issues

When a contract requires a party to be named as an additional insured under required insurance, the scope of the additional insured protection is governed by the underlying policy. It is important to note that "the additional insured is subject to the same exclusions applicable to the named insured and may receive no greater insurance coverage than the named insured." *Willett Truck Leasing Co. v. Liberty Mut. Ins. Co.*, 410 N.E.2d 376, 379 (Ill. App. 1980). This is consistent with Utah law wherein "[i]nsurers 'may exclude from coverage certain losses by using language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided.'" *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 686 (Utah 1999)(citing *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1275 (Utah 1993).

VI. DAMAGES

Utah courts have recognized that Athe general objective of tort law [is] to place an injured person in a position as nearly as possible to the position he would have occupied but for the defendant=s tort.@ Acculog, Inc. v. Peterson, 692 P.2d 728, 731 (Utah 1984). Thus, as a general rule Aall damages, whether special or general, which are causally connected to a party=s tortious actions are recoverable.@ Id.

A. SPECIFIC DAMAGE CATEGORIES.

Such damages may, in appropriate cases include, past and future medical expenses,[6] past[7] and future pain and suffering shown to be causally linked to the tortuous conduct.[8] The Utah

Supreme Court has also held that "recovery may be had for the loss of affection, counsel and advice, the loss of deceased's care and solicitude for the welfare of his or her family and the loss of the comfort and pleasure the family of deceased would have received."[9]

Damages may also be recovered for lost earning capacity.[10]

B. PUNITIVE DAMAGES

[6] Gorostetia v. Parkinson, 2000 UT 99.
[7] Restatement (Second) of Torts § 910.
[8] See Restatement (Second) of Torts § 910.
[9] See Jones v. Carvell, 641 P.2d 105 (Utah 1982).
[10] Restatement (Second) of Torts § 924.

Utah law is clear that in order to receive an award of punitive damages, the Plaintiff must meet a very high burden. Utah's punitive damages statute states:

> (1)(a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of wilful and malicious or intentionally fraudulent conduct, or contact that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

Utah Code Ann. § 78B-8-201.

The Utah Supreme Court has held that punitive damages should be awarded only in exceptional cases, and should never be intended to vent vindictiveness. *Behrens v. Raleigh Hills Hospital*, 675 P.2d 1179, 1186 (1983). Although actual intent to cause injury need not be shown, Utah case law requires that a defendant must know or ought to know (1) that a high degree of probability exists that the conduct would result in substantial harm; (2) that the conduct is "highly unreasonable or an extreme departure from ordinary care"; and (3) that a "high degree of danger is apparent." *Gleave v. Denver and Rio Grande Western R. Co.,* 749 P.2d 660, 670 (Utah App., 1988) quoting *Behrens*, 675 P.2d at 1186-8. Furthermore, to prove that a tortfeasor's actions were "knowing and reckless," the plaintiff must "prove actual knowledge by the defendant of the danger created by the defendant's conduct." *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶42, 221 P.3d 256.

The Utah Punitive Damages statute also requires that punitive damages must be established "by clear and convincing evidence. . ." Utah Code Ann.§ 78B-8-201. The Utah Supreme Court defined the type of evidence needed to be clear and convincing:

> That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind . . . But for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. (Emphasis added).

Greener v. Greener, 212 P.2d 194, 204 (Utah 1949). *See also Miskin v. Carter*, 761 P.2d 1378, 1380 (Utah 1988) and *Briggs v. Liddell*, 699 P.2d 770, 772, (Utah 1985).

In addition to requiring proof by clear and convincing evidence of willful or knowingly reckless conduct, Utah cases also require the Court to consider the societal interest of imposing punitive damages. In *Behrens v. Raleigh Hills Hospital, Inc.*, 675 P.2d 1179, 1186 (Utah 1983), the Utah Supreme Court stated:

> Although punitive damages may be awarded in an appropriate case, the general rule is that only compensatory damages are appropriate and that punitive damages may be awarded only in exceptional cases. It is not the point to allow punitive damages to be awarded to increase the sorrow that defendants generally suffer when an injury has been inflicted by error or inadvertence, or to give a plaintiff an *in terrorem* weapon in settlement negotiations. Since punitive damages are not intended as additional compensation to a plaintiff, they must, if awarded, serve a societal interest of punishing and deterring outrageous and malicious conduct which is not likely to be deterred by other means.

C. MITIGATION OF DAMAGES

The doctrine of avoidable consequences, also referred to as mitigation of damages, generally operates to prevent one against whom a wrong has been committed from recovering any item of damages arising from the wrongful conduct which could have been avoided or minimized by reasonable means.[11]

VII. EMOTIONAL DISTRESS CLAIMS

In Samms v. Eckles, 11 Ut.2d 289, 358 P.2d 344 (1961), the Court discussed the standard for infliction of emotional distress in the context of alleged indecent proposals.

> Due to the highly subjective and volatile nature of emotional distress in the variability of its causation, the court has historically been wary of dangers in opening the door to recovery therefore. This is partly because such claims may easily be fabricated; or as sometimes stated, are easy to assert and hard to defend against.

Id. at 291.

In White v. Blackburn, 787 P.2d 1315 (Ut. App. 1990), the court discussed the elements of a cause of action for intentional infliction of emotional distress:

> To support a cause of action for intentional infliction of emotional distress, appellant must show the following elements: (1) outrageous conduct by the defendant; (2) the defendant's intent to cause, or the reckless regard of the probability of cause, and emotional distress; (3) severe emotional distress; and (4) an actual and proximate causal link between the conduct and emotional distress.

Id.

[11] Gibbs M. Smith, Inc. v. United States Fid. & Guar. Co., 949 P.2d 337 (Utah 1997).

CONCLUSION

The foregoing general discussion of statutes and legal principles should acquaint owners of commercial and retail properties with some of the common issues which may arise relating to premises liability. However, it is important to keep in mind that variations in factual situations on a project can have a significant impact on the application of the legal principles involved. The statutes and laws discussed herein are frequently changed and modified by the Utah legislature and appellate courts. Further, discussion of statutory provisions and case authorities herein is not a substitute for care reading and legal analysis of the actual language of the referenced statutes and cases. The foregoing is not intended to be used or relied upon as a substitute for legal services or advice, and should not be applied to any particular situation or circumstance encountered without consultation with legal counsel.