CONSTRUCTION DEFECT CLAIMS
AND
DEFENSES IN UTAH

Prepared and Presented
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INTRODUCTION

“No house is built without defects[].” Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at Pilgrims Landing, LC, 2009 UT 65, ¶ 59, 221 P.3d 234 (quoting Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698, 711 (1966). Unfortunately, many owners mistakenly assume every defect gives rise to a claim. More unfortunate is the thinking of many lawyers that claims for defective construction must sound in tort. Although a claim for defective construction might sound in tort, most sound in contract, and some sound in both. The challenge is recognizing what defects give rise to claims and determining what theory or theories of law will apply. To avoid embarrassment and unnecessary fees and costs in construction defect litigation, precision in alleging the relevant facts and pursuing the appropriate claims is required. The purpose of this article is to show how claims and affirmative defenses apply to allegations of defective construction. Among the various potential parties to a defective construction dispute, the claims are often different depending on the role of the party. Therefore, the various claims are addressed in relation to the party against which they potentially apply, namely builder, architect or engineer, manufacturer or merchant/seller, and owner. Many affirmative defenses apply in construction defect cases, but this article discusses only a limited number that are lesser known or understood.

CONSTRUCTION DEFECT CLAIMS

The first question a lawyer should ask when presented with an allegation of defective construction is, “was there personal injury or injury to property other than the construction itself?” If the answer to this question is “no”, the economic loss rule, which is discussed with other affirmative defenses below, bars most non-intentional tort claims. All is not lost, however, and the lawyer should look for breaches of express and implied provisions in the contract that would support claims in contract.

Contract Claims against Builders:

Most construction contracts contain an express promise or covenant to build in conformance with the plans and specifications. The most basic claim for defective construction
against the builder is one for breach of this promise or covenant. Failure to build in accordance with the plans and specifications can give rise to a claim in contract for defective construction.

The builder’s duties, however, vary depending on the nature of the specifications. Broadly speaking, specifications can be divided into two types, design specifications and performance specifications. Design specifications dictate precisely what products or materials will be used. A proprietary specification is a typical example of a design specification. Likewise, specifications of products with specific criteria are design specifications. See e.g., Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298, 445 P.2d 136, 138-39 (Utah 1968)(specifying asphalt emulsion for foundation waterproofing). Specifications referring to a government, industry or professional standard are also typically design specifications. For example, “The fire sprinkler system shall be installed in accordance with NFPA-13” is a design specification. Specifications as to how a product must be installed are also design specifications. See e.g., Meadow Valleys Contractors, Inc. v. Utah Dept. of Transp., 2011 UT 35, ¶ 8, 266 P.3d 671 (Utah 2011)(specifying paving method). If the contract has a design specification, and the builder fails to strictly comply, the builder may be held liable for the breach. When the builder has built in strict conformance to a design specification, however, the owner bears the risk of any defect resulting from the specification.

On the other hand, performance specifications dictate results. See e.g., Jacobsen Constr. v. Structo-Lite Engineering, 619 P.2d 306 (Utah 1980)(tank construction specifying a tensile strength of 100,000 psi and a flexal strength of 150,000 psi with a very smooth, hard surface and good finishing properties). When a builder agrees to a performance specification, he warrants that the result will in fact be achieved.

A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself, and it amounts to a promise to answer in damages for any injury proximately caused if the fact warranted proves untrue. SME Industries, Inc. v. Thompson, Ventulett, Stainback and Associates, Inc., 2001 UT 54, ¶ 18, 28 P.3d 669 (quoting Groen v. Tri-O-Inc., 667 P.2d 598, 604 (Utah 1983)). In the construction context, this means the plaintiff must demonstrate that the warrantor made promises guaranteeing or assuring a specific result. Hone v. Advanced Shoring & Underpinning, Inc., 2012 UT App 327, ¶ 12, 291 P.3d 832.

Recognize that an express warranty might exist outside the contract documents. For example, advertisements might contain warranties. Warranties may also be inferred from statements relating to quality, quantity and condition. In the Hone case, the Hones contracted with Advanced Shoring to install fourteen helical piers and forty-five grouted columns beneath their house to prevent the house from sinking. Afterwards, Advanced Shoring determined more work would be needed to prevent the sinking. The project manager informed the Hones of the need for additional underpinning and allegedly said, “I won’t guarantee it unless I get $10,000 more.” When the house continued to sink, the Hones successfully sued Advanced Shoring for breach of express warranty.

In addition to express warranties, Utah recognizes a narrow implied warranty of workmanlike manner or habitability for residential construction only.
Under Utah law, in every contract for the sale of a new residence, a vendor in the business of building or selling such residences makes an implied warranty to the vendee that the residence is constructed in a workmanlike manner and fit for habitation. . . . [T]o establish a breach of the implied warranty of workmanlike manner or habitability . . . a plaintiff must show (1) the purchase of a new residence from a defendant builder-vendor/developer-vendor; (2) the residence contained a latent defect; (3) the defect manifested itself after purchase; (4) the defect was caused by improper design, material, or workmanship; and (5) the defect created a question of safety or made the house unfit for human habitation.

_Davencourt_, 2009 UT 65 at ¶¶ 34-44.

When discussing implied warranties, one might assume that every construction contract must contain an implied warranty that the builder will comply with applicable building codes. To the contrary, however, Utah does not recognize this as an implied duty. _Davencourt_, 2009 UT 65 at ¶¶ 41-44.

Note that a claim for breach of warranty requires a showing of reasonable reliance. _Management Comm. of Graystone Pines Homeowners Ass’n v. Graystone Pines, Inc._, 652 P.2d 896, 900 (Utah 1982). Therefore, when the promisee knows the assurance is false, he will not prevail on a breach of warranty claim.

The covenant of good faith and fair dealing is another implied provision in all contracts that should not be overlooked in the defective construction context. The covenant implies “a duty to perform in the good faith manner that the parties surely would have agreed to if they had foreseen and addressed the circumstance giving rise to their dispute.” _Young Living Essential Oils, LC v. Marin_, 2011 UT 64, ¶ 8, 266 P.3d 814. The covenant also includes “an implied duty that contracting parties refrain from actions that will intentionally destroy or injure the other party’s right to receive the fruits of the contract.” _Id._ ¶¶ 9, 16 (citations and internal quotation marks omitted). The covenant does not imply new or inconsistent obligations to the contract. _See Oakwood Vill. LLC v. Albertsons, Inc._, 2004 UT 101, ¶ 45, 104 P.3d 1226. However, in an industry where there is great temptation and opportunity to cut corners, install inferior materials or to cover up shoddy workmanship, this covenant comes into play. Note that a breach of the implied covenant of good faith and fair dealing potentially gives rise to a claim for broad consequential damages including mental anguish. _See Billings v. Union Bankers Ins. Co._, 918 P.2d 461, 466 (Utah 1996)(applying the implied covenant of good faith and fair dealing to an insurance contract).

**Contract Claims against Architects and Engineers:**

Most architects and engineers do not expressly warrant the accuracy and suitability of their plans and specifications. _See e.g., Ross v. Epic Engineering, PC_, 2013 UT App 136, ¶ 2, n.1. Furthermore, Utah does not imply this warranty in contracts for architect and engineering services. _SME_, 2001 UT 54 at ¶ 26. In _SME_, the Supreme Court of Utah adopted the following policy for this position:

Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise
measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance.... Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

SME, 2001 UT 54 at ¶ 27 (citation omitted). Accordingly, architects and engineers “do not impliedly warrant or guarantee a perfect plan or satisfactory result.” Id. at ¶ 28; see also, Ross, 2013 UT App 136 at ¶ 26. Implied in contracts for architecture and engineering services, however, is a duty “to use reasonable and customary care in the provision of professional services arising from contract”, which duty “is owed only to the person or entity for whom the professional services are to be rendered.” Id. at ¶ 30. Although this duty is expressed in terms of a professional standard of care, this claim is a contract claim and should not be confused with a professional negligence claim, which is discussed below. Furthermore, while this is a contract claim, expert testimony is required to show a breach of this duty. See e.g., Ross, 2013 UT App 136.

**Contract Claims against Manufacturers and Merchants:**

Goods are the components of all construction projects. Consequently, when the goods as opposed to the installation are defective, the Uniform Commercial Code (“UCC”) might come into play. The UCC might apply if there has been a sale of goods. As between the builder and the owner, most transactions will be hybrid transactions for the sale of goods and services. Utah applies a predominant purpose test to determine whether the sale is for goods or services. Accordingly, “if service predominates, and the transfer of title to personal property is only an incidental feature of the transaction, the contract does not fall within the ambit of [the UCC].” Utah Local Govt. Trust, v. Wheeler Machinery Co., 2008 UT 84 ¶ 30, 199 P.3d 949 (quoting Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827, 832 (Utah Ct. App. 1989). Although service is likely to predominate in many construction contracts, installation is often incidental to the sale of the goods. Furthermore, whether service predominates is a question of fact. Wheeler Machinery, 2008 UT 84 at ¶ 31. Accordingly, builders are often also merchants under the UCC, and UCC claims should never be ignored.

The primary claims under the UCC are claims for breach of express warranties and claims for breach of the implied warranties of merchantability and fitness for a particular use. Pursuant to Utah Code § 70A-2-313:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

Unless disclaimed with conspicuous language, a warranty of merchantability is implied in a contract for the sale of goods. Pursuant to Utah Code § 70A-2-314:

Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

Utah Code § 70A-2-315 defines the implied warranty of fitness for a particular purpose as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Claims under the UCC sound in contract. Accordingly, the injured party must show privity of contract. In the construction context, privity will often be shown by the contract
between the builder and the owner or by assignment from the builder, who purchased the goods, to the owner.

**Contract Claims against Owners:**

Ordinarily, owners are the victims of defective construction. When the plans and specifications are defective, however, and the builder is required to do more work or furnish additional or other materials than originally contemplated, the builder often will have a claim against the owner. This is so because when the owner is obligated under the contract to furnish the plans and specifications, the owner impliedly warrants that the plans and specifications are accurate and suitable for the anticipated construction and that they correctly describe the physical conditions at the site. This is known as the Spearin Doctrine after the landmark case of *U.S. v. Spearin*, 248 U.S. 132 (1918). Utah recognizes the Spearin Doctrine. See e.g., *R. C. Tolman Const. Co., Inc. v. Myton Water Ass’n*, 563 P.2d 780, 782 (Utah 1977) (“We recognize the validity of the proposition advocated by the plaintiff; that if plans and specifications are so deficient or defective that a contractor encounters conditions different from those as represented or reasonably to be anticipated, he should be entitled to recover for extra costs incurred in dealing with those different conditions.”); see also, *Jack B. Parson Constr. Co. v. State*, 725 P.2d 614, 616 (Utah 1986); *Thorn Constr. Co., Inc. v. Utah Dept. of Transp.*, 598 P.2d 365, 368 (Utah 1979); *L. A. Young & Sons Constr. Co. v. County of Tooele*, 575 P.2d 1034, 1037 (Utah 1978). As of yet, the Spearin Doctrine has only been successfully used in claims against governmental entities on public works contracts. In *Frontier Foundations, Inc. v. Layton Const. Co., Inc.*, 818 P.2d 1040 (Utah App. 1991), the Utah Court of Appeals was asked to apply the Spearin Doctrine to a private contract, but the Court of Appeals was unable to do so because the contract effectively disclaimed the warranty.

Also, the builder will not prevail on a claim for breach of this implied warranty if he knew or reasonably should have known of the defect in the plans and specifications. See, *R. C. Tolman*, 563 P.2d at 782. Furthermore, unless the builder reasonably relies on erroneous representations in the plans and specifications, the builder bears the risk of adverse site conditions that are unknown to both the owner and the builder.

Accordingly, wise owners disclaim the implied warranty of accuracy and suitability of plans and specifications, and wise builders contract to shift the risk of adverse site conditions back to the owner. Therefore, prior to pleading, the parties should carefully examine the contract for such disclaimers and risk shifting provisions.

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1 As discussed above, architects and engineers generally do not warrant the accuracy and suitability of their plans and specifications to owners. Accordingly, the owner is exposed to liability for defective plans and specifications without a third party to indemnify or hold the owner harmless. A possible way for owners to avoid this liability is to contract for design/build construction. Under a design/build contract, a warranty of accuracy and suitability of plans and specifications should be implied. See e.g., *Leishman v. Kamas Valley Lumber Co.*, 427 P.2d 747 (Utah 1967); see also, *C.O. Falter Construction Corp. v. City of Binghamton*, 684 N.Y.S.2d 86 (App. Div. 1999); *Fru-con Construction Corp. v. United States*, 42 Fed. Cl. 94 (1998); see also 3 Bruner & O’Conner on Construction Law § 9:87; Edward Hannan, *Whose Design Is It? Sorting Out Liability In Construction Cases*, Defense Counsel Journal 576 (Oct. 1993). Caution must be observed, however, because design/build contracts often disclaim such warranties.
Tort Claims against Builders:

Negligence:

When a defect in construction causes personal injury or injury to property other than the construction itself, claims sounding in negligence arise. Builder’s have a duty to avoid unreasonable risks of the final product injuring persons or property. Williams v. Melby, 699 P.2d 723, 729 (Utah 1985); Reighard v. Yates, 2012 UT 45, ¶ 27-33, 285 P.3d 1168. Accordingly, a builder will be liable if he breaches that duty and his breach is the proximate cause of the injury. See e.g., Romrell v. W. W. Clyde and Co., 531 P.2d 867 (Utah 1975).

Fraudulent Non-Disclosure and Negligent Misrepresentation:

Builders also have an independent duty to disclose to their immediate transferees defects in home construction about which they know or should know. Smith v. Frandsen, 2004 UT 55, ¶ 28, 94 P.3d 919; see also Yazd v. Woodside Homes Corp., 2006 UT 47, ¶¶ 28, 35, 143 P.3d 283; Moore v. Smith, 2007 UT App 101, ¶¶ 36-40, 158 P.3d 562. Failure to do so can give rise to a claim for negligent misrepresentation and fraudulent non-disclosure. Note, however, this duty has only been recognized in the context of residential home construction.

Breach of Fiduciary Duties:

Generally, builders do not owe a fiduciary duty to owners with whom builders contract. The Supreme Court of Utah, however, has recognized that a developer in control of a homeowners association owes a limited fiduciary duty to the homeowners, which duty is independent of contractual duties. Davencourt, 2009 UT 65 at ¶¶ 34-44. In recognizing this duty, the Supreme Court of Utah adopted the Restatement (Third) of Property: Servitudes § 6.20 (2000), which provides in relevant part:

Until the developer relinquishes control of the association to the members, the developer owes the following duties to the association and its members:

1) to use reasonable care and prudence in managing and maintaining the common property;

* * *

5) to comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and the payment of assessments;

6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; . . . .

Accordingly, developers that are in control of the homeowners association may be held liable for defective construction stemming from failures to comply with these duties.
Tort Claims against Architects and Engineers:

In bringing professional negligence claims against an architect or engineer, the plaintiff must show that the injury was caused by the architect’s or engineer’s failure to meet the standard of his profession in preparing plans or supervising the work. *Nauman v. Harold K. Beecher and Associates*, 24 Utah 2d 172, 467 P.2d 610, 615 (Utah 1970); *see also Hunt v. ESI Engineering, Inc.*, 808 P.2d 1137, 1139 (Utah App. 1991) (engineers and other designers have a duty under negligence principles to perform their services so as to eliminate any unreasonable risk of foreseeable injury.) Remember that professional negligence will apply only if the injury is a personal injury or damage to property other than the construction itself. *See e.g., Ross*, 2013 UT App 136, ¶ 8 (negligence claim against engineer barred by economic loss rule). Also, remember that showing a breach of this duty requires expert witness testimony because layperson testimony is insufficient to show that the care given fell below a professional standard. *Nauman*, 808 P.2d at 615.

Claims against Manufacturers and Sellers:

Actions in Utah sounding in tort for defective products are governed by the Product Liability Act, Utah Code § 78B-6-701 et seq. Utah Code § 78B-6-703(1) provides that:

In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product, a product may not be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

The Product Liability Act does not define what a product liability action is, but it does include claims of negligence manufacturing and strict product liability. *Wheeler Machinery*, 2008 UT 84, at ¶ 10.

Strict Liability:

Utah applies the Restatement (Second) of Torts § 402A, at 347-48 (1965) to claims for strict product liability. Section 402A provides in relevant part:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Strict liability is generally directed against manufacturers of products and sellers of
products. In the construction context, however, product sales will often be hybrid transactions for the sale of both products and construction services. In many cases, builders are in fact in the business of selling products, but like with the predominant purpose test under the UCC, builders will avoid strict liability for defective products if they are not in the business of selling products, but simply utilized these component parts in the construction. See e.g., Maack v. Resource Design & Const., Inc., 875 P.2d 570, 581-82 (Utah App. 1994).

Negligent Manufacturing:

Negligent manufacturing is legally distinct from strict product liability. “While strict liability focuses on the condition of the product, ‘[n]egligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production.’” Am. Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 437 (Tex. 1997)(quoting Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 384 (Tex. 1995)). Consequently, while manufacturers of defective products are subject to negligent manufacturing claims, sellers of defective products are generally exempt.

DEFENSES

Any discussion about claims for defective construction would be insufficient without a discussion concerning the economic loss rule and a few other lesser-known defenses that come into play in defective construction cases. The following is intended to introduce these defenses, but is by no means an exhaustive description of applicable defenses.

The Economic Loss Rule:

As mentioned at the beginning of this article, the first question a lawyer should ask when presented with an allegation of defective construction is, “was there personal injury or injury to property other than the construction itself?” The reason for this is that the economic loss rule will bar most non-intentional tort claims against builders, architects and engineers for purely economic damages. Simply stated, the economic loss rule is that “economic damages are not recoverable for non-intentional torts absent physical property damage or bodily injury. American Towers Owners Ass’n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1189 (Utah 1996); see also, Reighard, 2012 UT 45 at ¶¶ 19-26; SME, 2001 UT 54 at ¶ 32, n.8. Economic losses are defined as:

‘[d]amages for inadequate value, costs of repair and replacement of the defective product, or consequential loss of profits—without any claim of personal injury or damage to other property . . . as well as ‘the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.’

American Towers, 930 P.2d at 1189 (quoting Maack, 875 P.2d at 579-80 (citation omitted))

Subsequent to the ruling in American Towers, the economic loss rule was codified for application in defective construction cases at Utah Code § 78B-4-513, which provides as follows:
(1) Except as provided in Subsection (2), an action for defective design or construction is limited to breach of the contract, whether written or otherwise, including both express and implied warranties.

(2) An action for defective design or construction may include damage to other property or physical personal injury if the damage or injury is caused by the defective design or construction.

(3) For purposes of Subsection (2), property damage does not include:

   (a) the failure of construction to function as designed; or

   (b) diminution of the value of the constructed property because of the defective design or construction.

(4) Except as provided in Subsections (2) and (6), an action for defective design or construction may be brought only by a person in privity of contract with the original contractor, architect, engineer, or the real estate developer.

(5) If a person in privity of contract sues for defective design or construction under this section, nothing in this section precludes the person from bringing, in the same suit, another cause of action to which the person is entitled based on an intentional or willful breach of a duty existing in law.

(6) Nothing in this section precludes a person from assigning a right under a contract to another person, including to a subsequent owner or a homeowners association.

This section and *American Towers* have made the economic loss rule increasingly important in construction disputes in Utah. Conforming to the products liability origins of the economic loss rule, *American Towers* treated the entire construction project as one integrated product. Accordingly, failure of one component of the project that in turn caused damages to other components of the project was not “damage to other property”. Consequently, damage to the project caused by the failure of one component of the project is purely economic loss that cannot be recovered under a non-intentional tort theory of recovery.

In 2002, the Utah Supreme Court clarified the economic loss rule as follows:

The proper focus in an analysis under the economic loss rule is on the source of the duties alleged to have been breached. Thus, our formulation of the economic loss rule is that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach *absent an independent duty of care under tort law*.

*Hermansen v. Tasulis*, 2002 UT 52, ¶ 16, 48 P.3d 235 (emphasis added). The Court further stated:
The initial inquiry in cases where the line between contract and tort blurs is whether a duty exists independent of any contractual obligations between the parties. When an independent duty exists, the economic loss rule does not bar a tort claim 'because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule.'

_Hermansen_, 2002 UT at ¶ 17 (citing _Town of Alma v. Azco Constr., Inc._, 10 P.3d 1256, 1263 (Colo. 2000)).

The analysis courts undertake to determine whether an independent duty exists in tort is complicated and outside the scope of this article. _See_, _Yazd_, 2006 UT 47 at ¶ 16. Independent duties that have been recognized by courts in Utah in the construction context, however, were discussed above in the claims section of this article.

If the complaint does not allege facts giving rise to a recognized independent duty, but nevertheless asserts a claim for negligence or other non-intentional torts without alleging personal injury or injury to property other than the construction itself, the economic loss rule should be asserted as an affirmative defense.

**The Betterment Doctrine:**

With a claim for defective construction, the plaintiff may recover:

(i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or

(ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

_Rex T. Fuhriman_, 445 P.2d at 138-39 (citing Restatement, Contracts, Section 346(1)). These calculations should never put the plaintiff in a better position than he would have occupied in the absence of the defect. Often times, the parties contracted for construction that in one way or another is insufficient, and the plaintiff prays for relief including the cost of something or some work that is more expensive than he contracted to purchase. Under these circumstances, the defendant should assert the betterment doctrine to prevent the plaintiff from recovering a windfall. If successful on this defense, the defendant should not be held liable for the additional cost the plaintiff would have incurred if the errors had not been made in the first place. _See e.g., St. Joseph Hospital v. Corbetta Construction Co., Inc._, 316 N.E.2d 51 (Ill. App. 1974); _Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd_, 552 S.2d 228 (Fla. App. 1998).

**Warranty of Accuracy and Suitability of Plans and Specifications:**

As discussed above, when the owner furnishes the plans and specifications for the construction, the owner impliedly warrants that the plans and specifications are accurate and
suitable for the anticipated construction. In addition to giving the builder a claim for additional costs incurred due to defective construction, this warranty serves as a defense against a claim for defective construction when the plans and specifications are the cause of the defect. This is effectively a standard defense based on intervening causation, the scope of which is described as follows:

A contractor has a duty to ‘perform the work required by its contract ... with that degree of care ordinarily possessed and exercised by other contractors doing the same or similar work in [the same] locality.’ Andrus v. State, 541 P.2d 1117, 1121 (Utah 1975). However, a ‘contractor is not liable if [it] has merely carried out the plans, specifications and directions given [it], since in that case the responsibility is assumed by the employer, at least when the plans are not so obviously dangerous that no reasonable [person] would follow them.’ Leininger v. Stearns-Roger Mfg. Co., 17 Utah 2d 37, 41, 404 P.2d 33, 36 (1965) (emphasis added).


The Statute of Repose:

In construction defect cases, a number of different statutes of limitations might apply depending on the claims asserted. Contract, UCC, fiduciary duties, negligence, strict liability and fraud all have different statutes of limitations. While all these statutes of limitations apply, construction defect claims are further constrained by the following statute of repose:

(3)(a) An action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

(b) All other actions by or against a provider shall be commenced within two years from the earlier of the date of discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

(4) Notwithstanding Subsection (3)(b), an action may not be commenced against a provider more than nine years after completion of the improvement or abandonment of construction. In the event the cause of action is discovered or discoverable in the eighth or ninth year of the nine-year period, the injured person shall have two additional years from that date to commence an action.

(5) Subsection (4) does not apply to an action against a provider:
(a) who has fraudulently concealed his act, error, omission, or breach of duty, or the injury, damage, or other loss caused by his act, error, omission, or breach of duty; or

(b) for a willful or intentional act, error, omission, or breach of duty.

Utah Code § 78B-2-225. Although subsection (3) refers to a period of limitations, this is a not a statute of limitations. “Statutes of limitations are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues.... [S]tatutes of repose abolish a cause of action after a certain period, even if the action first accrues after the period has expired.” Lee v. Gaufin, 867 P.2d 572, 575-76 (Utah 1993). Section 78B-2-225 is a statute of repose because the period begins to run upon completion or abandonment, not the accrual of an action.

CONCLUSION

Unfortunately, “no house is built without defects.” When the claims and defenses applicable to defective construction are seemingly as diverse and complicated as the defects themselves, one might say with regard to these claims and defenses, “no prosecution or defense is without flaw.” Hopefully, the foregoing outline will assist the reader in more effectively prosecuting and defending these most complicated claims.
JASON ROSS,  
Plaintiff and Appellant,  
v.  
EPIC ENGINEERING, PC,  
Defendant and Appellee.

Opinion  
No. 20110537-CA  
Filed June 20, 2013

Eighth District, Duchesne Department  
The Honorable Edwin T. Peterson  
No. 080800020

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Brent E. Johnson and Rebecca A. Ryon, Attorneys  
for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which  
JUDGES CAROLYN B. MCHUGH and MICHELE M. CHRISTIANSEN concurred.

ORME, Judge:

¶1 Jason Ross appeals the district court’s grant of Epic Engineering’s motion in limine that excluded the testimony of Ross’s expert. Ross also appeals the district court’s subsequent grant of Epic’s motion for summary judgment on Ross’s breach of contract claim and the resulting dismissal of Ross’s complaint with prejudice. We affirm.

BACKGROUND

¶2 In reviewing the district court’s grant of summary judgment, we recite the facts in the light most favorable to Ross. See Bowers v.
Ross v. Epic Engineering, PC

Call, 2011 UT App 143, ¶ 2, 257 P.3d 433 (per curiam). Ross retained Epic’s services in 2006 for the design of a small commercial building to be constructed in Roosevelt, Utah. The contract defined the scope of Epic’s work to be “structural engineering and drafting of [a] 70’ x 100’ office and warehouse building” for a fee of $8,250.¹ The plans prepared by Epic included the instruction that “all footings shall bear 12” minimum into original undisturbed earth or on engineered fill.” Ross hired his brother as the general contractor for the building, and Ross’s father assisted in the excavation of the site for the building’s foundation.

¶3 After the building was constructed, it began to settle as a result of unconsolidated fill material underlying the site. Approximately ten months after Ross moved into the building, he notified Epic that the building was settling and that cracks had appeared on the interior and exterior walls. Ross claimed that Epic should have prepared a “soils report” as part of its engineering plans for the building. Epic denied that the contract required it to prepare a soils report and denied that the settling was the result of any inadequacies in the structural engineering plans, as the plans specifically required that “all footings shall bear 12” minimum into original undisturbed earth or on engineered fill.”

¶4 Ross filed suit against Epic for breach of contract and negligence, arguing that Epic “breached the contract by failing to properly engineer the plans.” Early in the litigation, the parties agreed to jointly commission a geotechnical investigation to determine the cause of the settling. The investigation determined that “[n]umerous pieces of asphalt, concrete, and other debris were

¹. Epic later contended that the contract contained a second page of terms and conditions, including a limitation of liability and standard of care provision that read: “Epic[‘s] services shall be rendered without any warranty except that Epic will perform in accordance with a degree of care and skill generally exercised by professionals performing similar work under similar conditions.” Ross denied ever receiving page 2 of the contract. For purposes of this appeal, we assume Ross is correct on this point.
observed in each of the test pits” and that the cause of the settling was insufficient compaction. The investigation revealed that “the footings for the . . . building were placed on undocumented, loosely placed fill material. Moisture later infiltrated the subsurface soils next to the structure, causing the fill soil to settle under foundation loads.”

¶5 Ross and Epic each retained engineers to provide expert testimony. Ross retained a geotechnical engineer, while Epic secured a structural engineer who is also licensed as a general contractor. In his deposition, Ross’s expert explained that his company “provide[s] geotechnical consultation for new construction of buildings [and] dams. . . . We also provide construction materials testing to verify that earthwork and concrete construction is conducted in accordance with the plans and specifications.” He further explained that geotechnical engineers evaluate subsurface soil conditions and the potential impacts of new construction, “and from that provide recommendations for design of whatever constructive facility we are evaluating.”

¶6 Ross’s expert conceded that geotechnical engineers do not actually design buildings and that he did not have an opinion on the standard of care applicable to Epic.² Specifically, he stated:

2. Ross’s expert submitted a proposal to Ross estimating that the cost for him to develop an opinion on the standard of care would be $5,000. The proposal stated:

   In order to provide our professional opinion on the engineer’s standard of care, we recommend that the standard of care prevailing at the time in question be established through investigation. Investigation would include the review of reports, records or opinions of other professionals performing the same or similar service at the time in question. With this in mind, we would propose to visit Roosevelt City and Vernal City building departments to review project files.

   (continued...)

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The standard of care for this project is very important to recognize what happened in that locale with the local engineers at that time. That is not something that we have investigated. Our entire business is based on other engineers calling and asking for guidance and help in the geotechnical area.

He also testified that his personal experience with excavation was limited to operating a backhoe on two occasions: once to grade a road on recreational property that he owns and once to install window wells at his home.

¶7 Epic’s expert was a structural engineer and licensed general contractor with “over 36 years of engineering experience in consulting, planning, and designing municipal, commercial and residential projects.” In his report, Epic’s expert stated that he was retained to provide his professional opinion regarding the standard of care expected of structural engineers on projects like the one in this case. The expert opined:

Geotechnical Reports are very expensive and typically never ordered for residential or light commercial buildings. If the structural engineer is familiar with the soils in a particular area it is common to use the values listed in the International Building Code. Essentially the International Building Code has published minimum values that can be used for construction in lieu of data obtained from a geotechnical report. [Epic’s engineer that prepared the plans] testified that he had designed similar projects in Roosevelt using the same design standards.

2. (...continued)
When asked at his deposition, the expert said that he did not perform such an investigation because he “never received a notice to proceed.”
Ross’s expert also concluded that “[t]he existing contours would not necessarily indicate the site had been filled” and “[i]f it was obvious the existing contours indicated the site had been filled I would have expected the City building inspector to alert the contractor/owner he needed to provide a soil report required by the International Building Code[.]

¶8 At the close of discovery concerning the experts’ opinions, Epic moved for summary judgment on both Ross’s negligence claim and his contract claim. Epic contended that the negligence claim was barred by Utah’s economic loss doctrine and that the breach of contract claim failed because Ross had not presented expert evidence demonstrating that Epic “failed to properly engineer the plans.” Epic asserted that Ross’s engineering expert was unqualified to offer an opinion as to the applicable standard of care. The court granted Epic’s motion in part, dismissing the negligence claim but denying summary judgment on the breach of contract claim.

¶9 After the matter was set for trial on the contract claim, Epic filed a motion in limine, essentially rearguing the points made in its earlier motion for summary judgment and seeking to preclude Ross’s expert from testifying. As also argued in the earlier motion for summary judgment, Epic contended that Ross’s expert, a geotechnical engineer, “lacked the relevant knowledge, skill, or experience” necessary to testify as to the standard of care expected of structural engineers, contractors, or excavators. At the final pre-trial hearing, the district court heard argument on the motion in limine. Ross objected because the deadline to respond to the motion had not yet passed. After argument, the district court granted Epic’s motion, stating, “This expert isn’t going to be able to testify to the standard of care. I mean it’s very clear that he in his

3. The district court apparently believed, albeit mistakenly, that there was a five-day deadline for a party to file a response to a motion in limine. See Utah R. Civ. P. 7(c)(1) (“Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition.”).
Ross deposition said he wasn’t asked to make that analysis. He would be testifying to something that is not relevant to the case.” The court also concluded that Ross’s expert’s opinion that “a machine operator or contractor wouldn’t necessarily be able to determine if the soil they were digging into was native or fill” was contrary to Utah law. See Smith v. Frandsen, 2004 UT 55, ¶¶ 18–19, 94 P.3d 919 (explaining that the law deems a contractor to have a high degree of specialized knowledge, including “familiar[ity] with conditions in the subsurface of the ground”).

¶10 The court then, sua sponte, reopened the motion for partial summary judgment on the breach of contract claim. The court clarified, “The reason the Court did not grant summary judgment initially on the first issue was . . . the proffer that the expert[s] would disagree on critical issues. They don’t.” The court then granted the motion, effectively eliminating all of Ross’s claims, and it dismissed Ross’s complaint with prejudice. Ross appeals.

ISSUES AND STANDARDS OF REVIEW

¶11 Ross contends that the district court incorrectly granted Epic’s motion in limine, which effectively precluded the introduction of his expert’s testimony. “A decision to admit or exclude expert testimony is left to the discretion of the trial court, and that decision will not be reversed unless it constitutes an abuse of discretion.” State v. Holm, 2006 UT 31, ¶ 89, 137 P.3d 726 (citation omitted). “Our review of the district court’s exercise of its discretion includes review to ensure that no mistakes of law affected a lower court’s use of its discretion.” Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr., 2010 UT 59, ¶ 5, 242 P.3d 762 (citation and internal quotation marks omitted).

¶12 Ross also argues that the district court erred when it decided Epic’s motion in limine before the expiration of the time allowed for him to respond under the Utah Rules of Civil Procedure. “We review the interpretation and application of a rule of procedure for correctness.” Edwards v. Powder Mountain Water & Sewer, 2009 UT App 185, ¶ 14, 214 P.3d 120. However, “[i]n order to justify
reversal[,] the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different.’” Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc., 2011 UT App 232, ¶ 6, 263 P.3d 397 (second alteration in original) (quoting Ortega v. Thomas, 383 P.2d 406, 408 (Utah 1963)). See Utah R. Civ. P. 61 (“The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”). Epic does not contend that the district court’s interpretation of the applicable rule was correct, but it argues that the error was harmless because the expert’s qualifications and all other relevant matters had been fully briefed during the earlier summary judgment proceedings.

¶13 Finally, Ross contends that genuine issues of material fact exist, precluding summary judgment as a matter of law. See Utah R. Civ. P. 56(c). “An appellate court reviews a trial court’s legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (citations and internal quotation marks omitted). A defendant, as the party moving for summary judgment on an issue on which the plaintiff will have the burden of proof at trial,

may satisfy its burden on summary judgment by showing, by reference to “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” that there is no genuine issue of material fact. Upon such a showing, . . . the burden then shifts to the nonmoving party, who “may not rest upon the mere allegations or denials of the pleadings,” but “must set forth specific facts showing that there is a genuine issue for trial.”

Id. ¶ 18 (emphasis in original) (quoting Utah R. Civ. P. 56(c)).
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ANALYSIS

I. The District Court Did Not Abuse Its Discretion When It Excluded the Testimony of Ross’s Expert.

¶14 In his complaint, Ross alleged that Epic “breached the contract by failing to properly engineer the plans.” Because the contract was silent on the parties’ relevant expectations and obligations, both Ross and Epic retained expert witnesses to provide insight on the appropriate standard of care for a structural engineer.4

Where the average person has little understanding of the duties owed by particular trades or professions, expert testimony must ordinarily be presented to establish the standard of care. For instance, expert testimony has been required to establish the standard of care for medical doctors, architects, engineers, insurance brokers, and professional estate executors.

4. As a point of clarification, while the term “standard of care” is usually employed in a tort setting, the parties and the district court used it in this contract dispute in reference to the possibility that Epic had an implied obligation to have a soils report prepared as part of its contractual duties in preparing building plans. While we employ the terminology used in the arguments and analysis as posed by the parties and the district court, we would be remiss if we did not point out that this is really more a matter of whether there was an implied contractual term rather than of establishing a “standard of care” as the term is typically used.

A term is implied-in-law where the contract is silent. An implied-in-law term will be imposed even though the parties may not have intended it and binds the parties to a legally enforceable duty. However, the court can only supply reasonable terms to supplement a contract which is silent.

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¶15 Ross argues that the district court abused its discretion in excluding the testimony of his expert witness. Rule 702 of the Utah Rules of Evidence specifies that

a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Utah R. Evid. 702(a). “The trial court is given discretion under Rule 702 of the Utah Rules of Evidence to determine the admissibility of expert testimony, and to determine if the expert witness is qualified to give an opinion on a particular matter.” Dikeou v. Osborn, 881 P.2d 943, 947 (Utah Ct. App. 1994) (brackets, citation, and internal quotation marks omitted).

¶16 Ross argued that his expert was qualified to provide testimony about the standard practices of structural engineers because the expert was a licensed engineer. Utah law requires that “the standard of care in a trade or profession generally must be determined by testimony of witnesses in the same trade or profession.” Ortiz v. Geneva Rock Prods., Inc., 939 P.2d 1213, 1217 n.2 (Utah Ct. App. 1997) (brackets, citation, and internal quotation marks omitted). But not every engineer is qualified to opine about the standard of care or the standard practices applicable to all other engineers.

¶17 We recognize that “[a]n expert witness belonging to one school may testify against a member of another school once the expert provides sufficient foundation to show that the method of treatment at issue is common to both schools or that the expert is knowledgeable about the standard of care of the other school.” Boice v. Marble, 1999 UT 71, ¶ 14, 982 P.2d 565. See also Arnold v.
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Curtis, 846 P.2d 1307, 1310 (Utah 1993) (stating that a witness is allowed to testify “when a witness is knowledgeable about the standard of care of another specialty or when the standards of different specialties on the issue in a particular case are the same”). On the other hand, an expert may be excluded if unable to establish a common standard of care. See, e.g., Burton v. Youngblood, 711 P.2d 245, 248 (Utah 1985) (“The trial court did not hold that a member of one school cannot testify against a member of another school as a matter of law. It only held that under the facts of this case, the foundation necessary to allow a member of one medical specialty to testify about the standard of care applicable to a member of another medical specialty had not been established.”).

¶18 We disagree with Ross’s contention that his expert “opined about a standard of care that applies to all engineers, regardless of their specialty.” On the contrary, Ross’s expert admitted that he was not asked to and did not prepare an opinion as to the standard of care applicable to Epic. The expert acknowledged that geotechnical engineers—of which he is one—do not design buildings and that he would need to conduct an investigation involving the “review of reports, records or opinions of other professionals performing the same or similar service at the time in question” in order to develop an opinion on the standard of care applicable here. An opinion developed through such an undertaking would not be the result of his “knowledge, skill, experience, training, or education,” as required by the Utah Rules of Evidence. See Utah R. Evid. 702(a). See also Dikeou, 881 P.2d at 947 (“By definition, an expert [in the context of a medical malpractice claim] is one who possesses a significant depth and breadth of knowledge on a given subject. To allow a doctor in one specialty, retained as an expert witness, to become an ‘expert’ on the standard of care in a different medical specialty by merely reading and studying the documents in a given case invites confusion, error, and a trial fraught with unreliable testimony.”). Therefore, we agree that Ross’s expert was not qualified to opine on the standard of care expected of Epic.
The remainder of Ross’s expert’s contentions related either to evidence not in dispute or to matters in which he lacked relevant experience or knowledge. For example, Ross’s expert stated in his report that an engineer looking at the lot where the building was to be constructed should have been immediately concerned with the obvious fill and the slope on the lot. However, the expert could not testify whether such an observation would then entail a related obligation for Epic under the contract. The expert opined “that a machine operator or contractor wouldn’t necessarily be able to determine if the soil they were digging into was native or fill based on personal experience in determining if a soil mass is fill or naturally deposited.” But, he was not qualified to offer this opinion because his personal experience in excavation was limited to two small personal projects. His opinion is also contradictory to our Supreme Court’s decision in Smith v. Frandsen, 2004 UT 55, 94 P.3d 919, which states that “builder-contractors are expected to be familiar with conditions in the subsurface of the ground.” Id. ¶ 19. See id. ¶ 20 (“The facts indicate that [the employee of the general contractor] supervising the excavation and placement of the . . . foundation had ‘no prior construction experience.’ Nevertheless, [the employee] is deemed to possess the knowledge of a reasonably prudent builder-contractor under similar circumstances, and, as a matter of law, a builder of ordinary prudence would have discovered the insufficient compaction on [the] lot[.]”).

While Frandsen involved tort claims, see id. ¶ 1, the underlying logic is equally applicable here. Like Frandsen, this case involves the determination of where liability should fall when no contractual provision specifies which party has the duty to assess whether a building site can support the planned structure. See id. ¶ 27 (“As a policy matter, we believe that our holding will

5. Epic’s limited contractual responsibility was to prepare building plans. The contract terms do not include a requirement that Epic inspect the building site. Ross’s expert did not testify — and was not qualified to testify — about whether an agreement to prepare such plans necessarily implied an obligation to walk the ground where the building would be constructed.
encourage builders and contractors to exercise that level of care consistent with the expertise legally imputed to them. In addition, our decision preserves the contractual expectations of developers and builder-contractors.

Likewise, we reject Ross’s argument that the case “certainly does not stand for the proposition that [Epic] was absolved of a contractual duty based upon a contractor’s presence on the property” because Ross failed to provide any admissible evidence or testimony indicating that such a duty was imputed to Epic.

¶21 The remainder of the expert testimony offered by Ross related to undisputed matters concerning the cause of the building’s settling, the extent of the settling, and the measures that would be required to stabilize the building. The court was within its discretion to conclude that the expert did not qualify under rule 702 to offer his opinions either because he was unqualified to so opine or because the issue was not in dispute. Accordingly, the district court properly granted Epic’s motion in limine that excluded Ross’s expert’s testimony.

II. The District Court’s Error in Prematurely Ruling on Epic’s Motion in Limine Does Not Warrant Reversal.

¶22 It is undisputed that the district court ruled on Epic’s motion in limine prior to the deadline provided by rule 7(c) of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 7(c) (“Within ten days

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6. In essence, Ross claims that Epic, as the structural engineer in this case, was required to have a soils report prepared even though structural engineers are unable to perform such analyses themselves. Ross’s expert testified that performing a geotechnical study of the site prior to construction would have cost between $4,000 and $5,000, while Epic’s fees under the contract were $8,250. If fully half (or more) of Epic’s fee were allocable to outsourcing a soils study, surely the contract would have referred to this important aspect of the contracted-for work and would not have described the scope of work as being limited to the preparation of plans.
after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition.”). Such an error does not warrant reversal, however, if it is “sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings.” *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 360 (Utah 1997). Ross argues that we are in no position to decide “whether or not [his expert] was qualified to testify, because [Ross] had no chance even to create a record of [the expert’s] specific qualifications.” We disagree. In fact, it was the expert’s own testimony that provided the district court with the foundation for its ruling. The expert stated that he did not have an opinion on the relevant standard of care and that he would need to perform an investigation to form such an opinion.

¶23 Likewise, Ross was not prejudiced by the premature ruling because the district court’s consideration of the motion in limine involved essentially the same evidence submitted with the earlier summary judgment motion. Ross seemed to acknowledge this fact in arguing against the motion in limine, telling the court, “They made the same argument in their summary judgment motion. The exact same argument was there.” While additional time may have allowed Ross to refine his arguments somewhat, he points to nothing new that he would have added had he been permitted the opportunity to submit a memorandum in opposition to the motion. And from all that appears, the pivotal analysis by the district court would have remained the same. See Utah R. Civ. P. 61 (stating that an error is harmless and does not warrant disruption of a ruling or order if it “does not affect the substantial rights of the parties”). Therefore, Ross was not prejudiced by the district court’s error, and we decline to overturn its ruling.

III. The District Court Correctly Granted Epic’s Motion for Summary Judgment on the Breach of Contract Claim.

¶24 While the district court initially denied Epic’s motion for summary judgment on Ross’s contract claim, a trial court has the authority to revisit any prior ruling so long as a final judgment has
not been entered in the case. IHC Health Servs., Inc. v. D&K Mgmt., Inc., 2008 UT 73, ¶ 27, 196 P.3d 588. Summary judgment is proper whenever there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). When the district court revisited its ruling on the motion for summary judgment on the breach of contract claim, it explained that “[t]he reason the Court did not grant summary judgment initially on the first issue was . . . the proffer that the expert[s] would disagree on critical issues. They don’t.” Ross, however, alleges that a standard of care analysis is not essential to his breach of contract claim and granting summary judgment on that basis was inappropriate. Ross seemingly claims that the jury must first determine whether there was a page 2 to the contract, which the parties dispute, and that only then does the standard of care analysis become potentially relevant. In so arguing, Ross overlooks that we must review the facts in a light most favorable to him, including that there was no page 2.

¶25 Without the second page, which Epic claimed defined and limited its liability under the contract, Ross is better positioned to argue that Epic was expected, as an inherent requirement of building plan preparation, to undertake a soil study of the property and assess whether the soils on the building site complied with the standard—“original undisturbed earth or . . . engineered fill”—called for in the plans Epic prepared. But it would still be necessary to determine whether investigation of the soil on the building site was an implied term of the structural engineering contract.7

¶26 The crux of the dispute, then, is whether it is generally understood that a structural engineer owes a duty to determine the

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7. Ross’s brother, who served as general contractor on the project and who presumably was not named as a defendant by reason of the family connection, admitted that he was not aware whether a soils analysis had been performed by Epic, which we assume means he never asked to see such a report and that he would not necessarily be able to recognize non-native soil.
type of soil on a building site, such that in a case where the contract is silent on the issue and calls only for the preparation of plans, it is nonetheless reasonable to assume the parties intended to impose such a requirement. Because we have determined that the district court correctly excluded the testimony of Ross’s expert witness, the only admissible testimony bearing on the question was that of Epic’s expert witness. Epic’s expert testified that soil reports are not typically ordered for projects of this size and that it is proper for the engineer preparing the plans to simply incorporate the values listed in the International Building Code, as was done here.8 Epic’s expert’s opinion dovetails with the decision in Smith v. Frandsen, 2004 UT 55, 94 P.3d 919, which held that “builder-contractors are expected to be familiar with conditions in the subsurface of the ground.” Id. ¶ 19. Because Ross was unable to “set forth specific facts showing that there is a genuine issue for trial” concerning this issue, see Utah R. Civ. P. 56(e), the district court correctly granted summary judgment to Epic.

CONCLUSION

¶27 We conclude that the district court did not abuse its discretion under rule 702 of the Utah Rules of Evidence when it granted Epic’s motion in limine excluding the testimony of Ross’s expert witness. The district court’s procedural error in ruling on the motion before allowing Ross the requisite time to reply under the Utah Rules of Civil Procedure had no impact on the outcome and therefore does not warrant reversal. Because there is no genuine issue of material fact bearing on the pivotal contract issue, the district court correctly granted summary judgment to Epic on the breach of contract claim.

¶28 Affirmed.

8. Indeed, Epic’s expert testified that he had previously designed similar projects in Roosevelt using exactly the same design standards.