**24.06 SUBSTANTIAL PERFORMANCE**

[Plaintiff] claims that [defendant] breached the contract by failing to pay the [full] amount due under the contract. [Defendant] denies that [he she it] is required to [pay plaintiff] [make any further payment to [plaintiff], because [plaintiff] did not fully perform [his her its] obligations under the contract.

In this situation, the law requires you to determine whether [plaintiff] substantially performed [his her its] obligations under the contract. If [plaintiff] did not substantially perform [his her its] obligations under the contract, [plaintiff] is not entitled to [any further] payment from [defendant]. On the other hand, if [plaintiff] substantially performed its obligations under the contract, [defendant] must pay [plaintiff] the amount that is due under the contract, reduced by an amount to reflect any deficiencies in [plaintiff’s] performance of its obligations.

In order to determine whether [plaintiff] substantially performed [his her its] obligations under the contract, you must consider and weigh the following factors:

(1) The nature of the performance that was promised;

(2) The purpose that the contract was meant to serve;

(3) The extent to which any nonperformance by [plaintiff] defeated the purposes or ends that were meant to be achieved by the contract, and deprived [defendant] of the benefits that it reasonably expected to receive under the contract; and

(4) Whether [plaintiff’s] failure to fully perform [his her its] obligations under the contract violated [alt: was consistent with] the standards of good faith and fair dealing.

If you decide that [plaintiff] substantially performed [his her its] obligations under the contract, you will need to determine the amount of any payment that is owed by [defendant]. I will instruct you on how to determine this amount.

If you decide that [plaintiff] did not substantially perform [his her its] obligations under the contract, then your verdict on this claim must be for [defendant].

**Use Note**

This instruction should be given when substantial performance is an issue. *See* the Comment below.

The instruction is written for the most common situation, in which the plaintiff is seeking payment pursuant to the contract, and the defendant defends on grounds the plaintiff’s performance was incomplete or deficient. The instruction may be adapted for other situations that raise substantial performance issues.

This instruction should be accompanied by instructions that address reduction of the contract’s payment terms in order to account for plaintiff’s incomplete performance.

Plaintiff may have an alternative claim for quantum meruit recovery (reflecting the value conferred by plaintiff’s incomplete performance). If so, a determination that the plaintiff did not substantially perform will not necessarily lead to a verdict for the defendant. In that circumstance, this instruction must be modified to inform the jury concerning the quantum meruit alternative.

# **Comment**

The most common application of the doctrine of substantial performance is in construction cases. The contractor sues the owner for payment, and the owner raises the defense that the contractor has not fully performed. The contractor may respond by showing that it has substantially performed the contract. “In such circumstances, the contractor is entitled to recover the contract price, less the reasonable costs of remedying the defects in the work or materials.” *Alaska State Housing Auth. v. Walsh & Co., Inc*., 835 P.2d 831, 835 (Alaska 1980). *See also* Restatement (Second) of Contracts § 237(d):

If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages. If there has not been substantial performance, the building contractor has no claim for the unpaid balance, although he may have a claim in restitution.

There are no precise rules for determining what amounts to substantial performance. *Nordin Constr. Co. v. City of Nome*, 489 P.2d 455, 459 (Alaska 1971). Instead, substantial performance is determined by weighing a number of factors:

Substantial performance is determined by considering such factors as the character of the performance that was promised, the purpose that the contract was meant to serve, and the extent to which any nonperformance by the contractor has defeated the purposes or ends which were meant to be achieved.

*Alaska State Housing Auth*., 625 P.2d at 835. This instruction incorporates these three factors, plus the contractor’s good faith. *See* Restatement (Second) of Contracts § 237 comment e (the factors listed in Restatement (Second) § 241 determine substantial performance) and § 241 (listing the factors). *See also State, Dep’t of Natural Resources v. Alaskan Crude Corp*. 441 P.3d 393, 401 (Alaska 2018) (following Restatement (Second) § 241 to determine material breach); J. Perillo, *Contracts* §11.18(b) (7th ed. 2014) at 398 (good faith factor replacing willfulness of the breach).

The initial burden of proving substantial performance is on the party claiming that it substantially performed its contractual obligations. Once shown, the burden shifts to the opposing party to prove that any deficiencies in the work require a recoupment or set‑off. *Alaska State Hous. Auth.,* 625 P.2d at 835.

Lack of substantial performance is an affirmative defense under Alaska R. Civ. P. 8(c). *Alaska Protection Servs. Inc. v. Frontier Colorcable, Inc*., 680 P.2d 1119, 1123‑25 (Alaska 1984) (equating lack of substantial performance with failure of consideration).