



# STATE OF WEST VIRGINIA CONSTRUCTION LAW COMPENDIUM

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This compendium of West Virginia construction law is intended to provide a general overview of West Virginia construction law as of the date of publication. This information is not intended to provide legal advice. As West Virginia construction law can frequently change as a result of statutory changes and developments in case law, the reader should follow-up with additional legal research for any particular topic.

## **I. Breach of Contract**

In West Virginia, as in most other states, construction agreements are often memorialized in the form of a contract. As such, West Virginia recognizes claims for breach of contract. There is a general 10 year statute of limitations for contract claims. W. Va. Code § 55-2-6 (2008). Most breach of contract claims are also accompanied by other causes of action

West Virginia will normally **not** allow the provisions of the Uniform Commercial Code (“UCC”), W. Va. Code § 46-2-101, et seq, to modify the express language of construction contracts. West Virginia law applies a presumption that the sales provisions of the Uniform Commercial Code will not apply to a construction contract unless the party seeking a UCC right is able to demonstrate substantial justification for its use. *Elkins Manor Assoc. v. Eleanor Concrete Works*, 183 W. Va. 501, 396 S.E.2d 463, Syl. pt. 6 (1990).

As a general rule, where either party to a building contract, before any performance, repudiates the agreement, the injured party has the choice (1) to keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover under the contract; or (2) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing. Syl. pt. 1, *Atlantic Bitulithic Co. v. Edgewood*, 103 W. Va. 137, 137 S.E. 223 (1927). However, there is no breach so long as the injured party elects to treat the contract as continuing. *Id.* at 143.

In contrast, when there has been a *material breach* of contract, which does not indicate any intention to renounce or repudiate the remainder of the contract, there can be no real election between continuation and cessation of performance. In the material breach situation, the repudiator has announced that he will not perform and ordinarily maintains this attitude; and the law though giving the injured party in such a case an election of remedies, denies him in most cases the right to continue performance. *Id.* (quoting Williston on Contracts § 1334).

Where time is of the essence in the performance of a contract, a delay in performance beyond the period specified in the contract, unless caused by the other party or waived by such party, will constitute a breach of the contract, entitling the aggrieved party to terminate it." Syl. pt. 2, *Elkins Manor Ass'n v. Eleanor Concrete Works, Inc.*, 183 W. Va. 501, 396 S.E.2d 463 (1990).

West Virginia has adopted the Restatement (Second) of Contracts § 261 for the doctrine of impracticability. As such, a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance must demonstrate each of the

following: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance. *Waddy v. Riggleman*, 216 W. Va. 250, 258, 606 S.E.2d 222, 230 (2004). A party relying on a defense of impracticability must show more than a mere increase in difficulty and/or cost to be excused from performance of a contractual obligation. *Id.* at 259. In addition, one seeking relief under the doctrine of impracticability must have made reasonable efforts to overcome the obstacles to performance. *Id.* (referencing *Kama Ripa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842 (2d Cir.1975) ("The party pleading impossibility as a defense must demonstrate that it took virtually every action within its powers to perform its duties under the contract.")).

In determining whether an underlying action is merely one of breach of contract or is a tort claim, West Virginia courts find the following helpful: The law of torts is well equipped to offer redress for losses suffered by reason of a breach of some duty imposed by law to protect the broad interests of social policy. Tort law is not designed, however, to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts. As a sextant for determining whether the damages claimed in a particular case may more readily be classified as having their origin in tort or contract, the controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. *Silk v. Flat Top Constr.*, 192 W. Va. 522, 526, 453 S.E.2d 356, 360 (1994).

## II. Negligence

The three elements of every negligence action are the existence of a legal duty, the breach of that duty, and damage as a proximate result. In matters of negligence, liability attaches to a wrongdoer, not because of a breach of a contractual relationship, but because of a breach of duty that results in an injury to others. *Sewell v. Gregory*, 179 W. Va. 585, 587, 371 S.E.2d 82, 84 (1988).

A builder is under a common law duty to exercise reasonable care and skill in the construction of a building, and a subsequent homeowner can maintain an action against a builder for negligence resulting in latent defects which the subsequent purchaser was unable to discover prior to purchase. Syl. pt. 4, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

A design professional (e.g. an architect or engineer) owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the owner, notwithstanding the absence of privity of contract between the contractor and the design professional, due to the special relationship that exists between the two. Consequently, the contractor may, upon proper proof, recover purely economic damages in

an action alleging professional negligence on the part of the design professional. Syl. pt. 6, *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001).

Where a lender making a construction loan to a borrower creates a special relationship with the borrower by maintaining oversight of, or intervening in, the construction process, that relationship brings with it a duty to disclose any information that would be critical to the integrity of the construction project. Syl. pt. 6, *Glascocock v. City Nat'l Bank*, 213 W. Va. 61, 576 S.E.2d 540 (2002).

Generally, if one hires a contractor and retains no control over the manner of its performance, he is not liable for the negligence of the contractor or his servants. However, if the work is intrinsically dangerous, or is of such character that injury to third persons or their property, might be reasonably expected to result directly from its performance if reasonable care should be omitted, the employer is not relieved from liability by delegating the performance of the work to an independent contractor. *Zirkle v. Winkler*, 214 W. Va. 19, 22, 585 S.E.2d 19, 22 (2003). In other words, a principal has a non-delegable duty to exercise reasonable care when performing an inherently dangerous activity; a duty that the principal cannot discharge by hiring an independent contractor to undertake the activity. Syl. Pt. 2, *King v. Lens Creek Ltd. P'ship*, 199 W.Va. 136, 483 S.E.2d 265 (1996).

Under West Virginia law, a violation of a statute is prima facie evidence of negligence. In order to be actionable, however, such violation must be the proximate cause of the plaintiff's injury. Syl. Pt. 1, in part, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990). Only a rebuttable prima facie presumption of negligence arises on a showing that the statute was violated. *Waugh v. Traxler*, 186 W.Va. 355, 358, 412 S.E.2d 756, 759 (1991). Once a statutory violation is demonstrated, and there is no dispute regarding the fact of the violation, it is up to the violator to rebut the presumption of negligence that is created. Whether the violator rebuts this presumption of negligence is a matter for the jury. Syl. Pt. 3, *Simmons v. City of Bluefield*, 159 W.Va. 451, 225 S.E.2d 202 (1975). Proof of a statutory violation is not sufficient alone to establish negligent hiring. *Kizer v. Harper*, 211 W. Va. 47, 52, 561 S.E.2d 368 (2001).

In West Virginia, under W. Va. Code § 55-2-12 (2008), tort actions must be brought within a maximum of 2 years of the time they accrue. The two year statute of limitation for a tort action arising from latent defects in the construction of a house begins to run when the injured parties knew, or by the exercise of reasonable diligence should have known, of the nature of their injury and its sources, and determining that point in time is a question of fact to be answered by the jury. Syl. pt. 1, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

### **III. Breach of Warranty**

Construction cases arising from defects often include breach of warranty claims. Claims may be based upon express warranty terms contained within a contract and/or those warranties implied by law.

West Virginia abolished the requirement of privity of contract in an action for breach of an express or implied warranty. Syllabus, *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975)

a. Breach of Implied Warranty

The purchaser of a new home is entitled to an implied warranty of habitability or fitness which requires that the dwelling be constructed by the builder in a workmanlike manner and that the property be reasonably fit for its intended use of human habitation. Syl. pt. 1, *Gamble v. Main*, 171 W. Va. 469, 300 S.E.2d 110 (1983). Absent some express contractual provision, a home builder's implied warranty of habitability does not extend to adverse soil conditions which the builder is unaware of or cannot discover by the exercise of reasonable care. *Id.* at Syl. pt. 2.

Implied warranties of habitability and fitness for use as a family home may be extended to second and subsequent purchasers for a reasonable length of time after construction, but such warranties are limited to latent defects which are not discoverable by the subsequent purchasers through reasonable inspection and which become manifest only after purchase. Syl. pt. 6, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

Properties of common interest ownership (condominiums, timeshare properties, etc.) have implied warranties of quality by statute. W. Va. Code § 36B-4-114 (2008).

b. Breach of Express Warranty

Most express warranties are explicitly included in the wording of construction contracts or contracts of sale. Properties of common interest ownership (condominiums, timeshare properties, etc.) have express warranties of quality by statute and do not require formal words or intention to make a warranty. W. Va. Code § 36B-4-113 (2008).

For goods used in construction, where a seller promises to pay for repairs to goods delivered to the buyer in a defective condition and the buyer accepts the defective goods in reliance upon the promise to repair, such promises of the seller constitute express warranties. Syl. pt. 2, *Mountaineer Contractors v. Mountain State Mack*, 165 W. Va. 292; 268 S.E.2d 886 (1979).

#### **IV. Misrepresentation and Fraud**

To establish a claim for fraud under West Virginia law, a plaintiff must establish three essential elements: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false and that the plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it. Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981).

Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud. However, if a plaintiff performs an independent investigation of facts which are easily ascertainable, that plaintiff cannot later complain of detrimentally relying upon fraudulent misrepresentations or concealment by a defendant. When a plaintiff undertakes to inform itself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller. *See* Syl. Pt. 5, *Cordial v. Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248 (1996).

However, the "independent investigation" doctrine is not an absolute defense. The fraudulent representations do not have to be the sole consideration or inducement moving the plaintiff. If the representations contributed to the formation of the conclusion in the plaintiff's mind, that is enough. The mere fact that some investigation is made by the plaintiff is usually held not to amount in and of itself to a bar to the right to rely upon representations. The exceptions to the defense include when the plaintiff attempts an investigation but expert knowledge is necessary to an effective investigation. Moreover, if the plaintiff, instead of investigating as fully as he may, makes only a partial investigation and relies in part upon such investigation and in part upon the representations of the adverse party, and is deceived by such representations to his injury, it is held that he has a right to rely on, and may maintain an action for, such deceit. Finally, the fact that one makes an examination or inquiries does not necessarily show that he did not rely on the false representations of the other party. *Trafalgar House Constr. v. Zmm, Inc.*, 211 W. Va. 578, 567 S.E.2d 294 (2002).

Under West Virginia law, claims in tort for fraudulent or negligent misrepresentation are governed by a two-year statute of limitation. W. Va. Code § 55-2-12 (2008).

## V. Strict Liability Claims

West Virginia has adopted the principle of the old English case of *Rylands* regarding strict liability. The basic principle of *Rylands* is that where a person chooses to use an abnormally dangerous instrumentality he is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality. *Fletcher v. Rylands*, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

West Virginia has also adopted the Restatement (Second) of Torts, § 519 (1976), limiting strict liability to "abnormally dangerous" activities with six factors to be balanced in determining whether an activity falls within the "abnormally dangerous" category, triggering strict liability. *Peneschi v. National Steel Corp.*, 170 W. Va. 511, 516, 295 S.E.2d 1, 6 (1982). These factors are:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;

- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

West Virginia is among the majority of jurisdictions that have adopted the strict liability doctrine in blasting cases. *Moore, Kelly & Reddish, Inc. v. Shannondale, Inc.*, 152 W.Va. 549, 165 S.E.2d 113 (1968), held that the use of explosives in blasting operations, though necessary and lawfully used by a contractor in the performance of a construction contract with a landowner, renders the contractor liable, without proof of actual negligence, for damages resulting from the blasting. *See also Perdue v. S.J. Groves & Sons Co.*, 152 W.Va. 222, 161 S.E.2d 250 (1968).

## VI. Indemnity Claims

There are two basic types of indemnity: express indemnity, based on a written agreement, and implied indemnity, arising out of the relationship between the parties. Syl. pt. 1, *Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987).

### a. Express Indemnity

One of the fundamental distinctions between express indemnity and implied indemnity is that an express indemnity agreement can provide the person having the benefit of the agreement, the indemnitee, indemnification even though the indemnitee is at fault. Such result is allowed because express indemnity agreements are based on contract principles. Courts have enforced indemnity contract rights so long as they are not unlawful. *VanKirk v. Green Constr. Co.*, 195 W. Va. 714, 721, 466 S.E.2d 782, 789 (1995). In construing the language of an express indemnity contract, the ordinary rules of contract construction apply. *Id.* at Syl. pt. 4.

Where an indemnitor is given reasonable notice by the indemnitee of a claim that is covered by the indemnity agreement and is afforded an opportunity to defend the claim and fails to do so, the indemnitor is then bound by the judgment against the indemnitee if it was rendered without collusion on the part of the indemnitee. *Id.* at syl. pt. 6.

### b. Implied Indemnity

The right to seek implied indemnity belongs only to a person who is without fault. The general principle of implied indemnity arises from equitable considerations. At the heart of the doctrine is the premise that the person seeking to assert implied indemnity, the indemnitee, has been required to pay damages caused by a third

party, the indemnitor. In the typical case, the indemnitee is made liable to the injured party because of some positive duty created by statute or the common law, but the actual cause of the injury was the act of the indemnitor. *Hager v. Marshall*, 202 W. Va. 577, 585, 505 S.E.2d 640, 648 (1998).

In non-product liability multi-party civil actions, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault. *Id.*

c. Third Party Beneficiary

The rule with reference to third party beneficiaries is based on the construction of the contract. The intention of the parties towards the third party is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made. Ordinarily, it is sufficient if the contract was evidently made for the benefit of the third person. A provision in a contract that it was made for the benefit of a third person or that he should have the right to enforce the same would clearly indicate the intention of the parties that the promise should inure to the benefit of the third person. But it has been observed that inasmuch as people usually stipulate for themselves, and not for third persons, a strong presumption obtains in any given case that such was their intention, and that the implication to overcome that presumption must be so strong as to amount practically to an express declaration." *Ison v. Daniel Crisp Corp.*, 146 W. Va. 786, 792, 122 S.E.2d 553, 556-7 (1961) (quoting 12 Am. Jur., Contracts, 832) .

## VII. Statute of Limitations/Statute of Repose

a. Statute of Limitation

There is a general 10 year statute of limitations for contract claims. W. Va. Code § 55-2-6 (2008). For contracts, the statute of limitations begins to run, and contract actions accrue, when the breach of the contract occurs or when the act breaching the contract becomes known. *McKenzie v. Cherry River Coal & Coke Co.*, 195 W. Va. 742, 749, 466 S.E.2d 810, 817 (1995). It has also been said that "a right of action upon a contract does not accrue and the statute of limitations does not begin to run until the agreement is to be performed or payment becomes due." *Gateway Communs., Inc. v. John R. Hess, Inc.*, 208 W. Va. 505, 541 S.E.2d 595 (2000) (quoting 51 Am Jur 2d, *Limitation of Actions*, § 160, p. 555 (2000)). Generally, the statute of limitations begins to run, when a construction contract is involved, when the work is completed. *Gateway Communs., Inc. v. John R. Hess, Inc.*, 208 W. Va. 505, 509, 541 S.E.2d 595, 599 (2000).

For torts, claims in tort for negligence and fraudulent or negligent misrepresentation are governed by a two-year statute of limitation. W. Va. Code § 55-2-12 (2008). In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when

the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." Syl. pt. 4, *Gaither v. City Hosp. Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

**b. Statute of Repose**

W. Va. Code § 55-2-6a (2008) has a ten-year limitation on actions related to construction. The statute of repose bars recovery in three general areas after ten years. The first relates to damages for any deficiency in the planning, design, surveying, observation or supervision of any construction. The second involves damages arising from the actual construction of any improvement to real property. The third area is for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property. The time limit begins to run when the builder or architect relinquishes access and control over the construction or improvement and the construction or improvement is (1) occupied or (2) accepted by the owner of the real property, whichever occurs first. Pre-existing statutes of limitation for both contract and tort actions continue to operate within this outside limit. Subsequent work operates to start the time limitation of W. Va. Code § 55-2-6a anew for claims related to that subsequent work. Syl. pt. 6, *Neal v. Marion*, 664 S.E.2d 721 (2008).

The statute of repose does not apply to fraud or misrepresentation claims. When there is a demonstrated reliance upon an affirmative misrepresentation to act in a certain manner, the damages arise not from the subject matter of the misrepresentation, but from the misrepresentation itself. The alleged misrepresentations and any damages arising there from are not subject to the provisions of W. Va. Code §55-2-6a.

**VIII. Economic Loss Doctrine**

The economic loss doctrine prevents recovery of economic losses in tort actions that do not have any physical injury or property damage. An individual who sustains economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor. Syl. pt. 9, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).



## **IX. Gist of the Action Doctrine**

There is no case law in West Virginia addressing the gist of the action doctrine. The gist of the action doctrine applies when a tort claim arises from a contractual duty. In other jurisdictions, it is used to bar tort claims when the duty breached arises from a contractual obligation.

## **X. Recovery for Investigative Costs**

There is no case law in West Virginia discussing recovery for investigative costs. Such costs would usually be provided for as express terms in a contract.

## **XI. Emotional Distress**

There is no case law directly addressing an emotional distress claim directly related to a construction defect. However, West Virginia recognizes a cause of action for negligent infliction of emotional distress without physical injury. Such a cause of action generally must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety. *Brown v. City of Fairmont*, 221 W. Va. 541, 547, 655 S.E.2d 563, 569 (2007). West Virginia has recognized claims for serious emotional distress based upon the fear of contracting a disease (asbestosis, AIDS). See *Marlin v. Bill Rich Constr.*, 198 W. Va. 635, 482 S.E.2d 620 (1997); *Johnson v. W. Va. Univ. Hosp.*, 186 W. Va. 648, 413 S.E.2d 889 (1991). The court holds that such emotional distress may be proven with medical and psychiatric evidence, based on a diagnosis made with or without physical manifestations of the distress; however, any physical injury resulting from the emotional distress is further evidence of the degree of emotional distress suffered. In determining "seriousness", consideration should be given to whether the particular plaintiff is a "reasonable person, normally constituted". For the purposes of such consideration, a reasonable person is an ordinarily sensitive person and not a supersensitive person. See *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992).

Additionally, West Virginia recognizes claims for intentional infliction of emotional distress. See *Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982). Such a claim requires proof of the requisite intent. No mere showing of neglect will satisfy the element of intent necessary to an action for intentional infliction of emotional distress. *Id.*

## **XII. Stigma Damages**

There is no law in West Virginia regarding the recovery of stigma damages. However, the West Virginia Supreme Court of Appeals has indicated that diminution of value would be an appropriate element of damages, and may even be worthy of injunctive relief if the injury would be irreparable, or would be a continuous trespass or nuisance. See *Thacker v. Ashland Oil & Ref. Co.*, 129 W. Va. 520, 538, 41 S.E.2d 111, 120 (1946).

### **XIII. Economic Waste**

The owner of a damaged building is ordinarily entitled to recover the entire cost of restoring its former condition so that it can be used again for the same purposes, provided that, if that cost exceeds the diminution in the value of the building as the result of the injury, then the recovery must be limited to the amount of such diminution. *Stenger v. Hope Natural Gas Co.*, 139 W. Va. 549, 564, 80 S.E.2d 889, 898 (1954).

### **XIV. Delay Damages**

West Virginia case law recognizes a variety of delay damages. Damages claimed for delay caused by a party before its formal breach of the contract are distinct and separate from damages for anticipated profits, had the other party been permitted to complete the contract after the delay. *Miller v. County Court*, 116 W. Va. 380; 180 S.E. 440 (1935) (*quoting* 9 C. J. 914; Sutherland on Damages (4th Ed.), Vol. 3, page 2692). A contractor is entitled to damages for delay, caused by the owner, in beginning or completing the work.

### **XV. Recoverable Damages**

#### a. Direct Damages

The measure of compensatory damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation. *Stenger v. Hope Natural Gas Co.*, 139 W. Va. 549, 562, 80 S.E.2d 889, 897 (1954).

The proper measure of damages in cases involving building contracts is the cost of repairing the defects or completing the work and placing the construction in the condition it should have been if properly done under the agreement contained in the building contract. *Steinbrecher v. Jones*, 151 W.Va. 462, 476, 153 S.E.2d 295, 304 (1967); Syl. Pt. 2, *Trenton Constr. Co. v. Straub*, 172 W. Va. 734, 310 S.E.2d 496 (1983).

Ordinarily, the actual damage to or destruction of real estate sustained by a plaintiff may be determined with reasonable accuracy by proving the market value thereof immediately before the injury and deducting from the amount of such value whatever the amount of the market value is proved to be of that which remains. Of course, if the property is completely destroyed, the amount of recovery is limited to the market value immediately before the injury. *Id.*

#### b. Delay Damages

Where time is of the essence in the performance of a contract, a delay in performance beyond the period specified in the contract, unless caused by the other party or waived by such party, will constitute a breach of the contract, entitling the aggrieved

party to terminate it. Syl. pt. 2, *Elkins Manor Assoc. v. Eleanor Concrete Works*, 183 W. Va. 501, 396 S.E.2d 46 (1990).

An owner does not waive his right to damages occasioned by the contractor's delay in constructing a building by permitting the contractor to proceed with the work. *Id.* at syl. pt. 3.

Where a construction contract provides for inspection of the work to assure compliance with the contract specifications, the contractor is required to remedy such defects found at its own expense and is chargeable with the delay occasioned thereby. *Id.* at syl. pt. 5.

c. Loss of Use Damages

When realty is injured temporarily, the owner may recover the cost of repairing it plus his expenses stemming from the injury including loss of use during the repair period. If the injury is permanent, or in other words, cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover the money equivalent of its lost value plus his expenses resulting from the injury including loss of use during the time he has been deprived of his property. Syl. pt. 1, *Jarret v. E.L. Harper & Son, Inc.*, 160 W. Va. 399; 235 S.E.2d 362 (1977).

Ordinarily, loss of use is measured by lost profits or lost rental value. When that standard is difficult to apply because the property in question is not used commercially, it may be necessary to formulate a measure of damages that is more uniquely adapted to the plaintiffs' injury, including damages for annoyance and inconvenience. *Id.* at 404-5.

d. Punitive Damages

West Virginia has no cap or restrictions on the type of actions for punitive damages. Generally, a jury may allow punitive damages against the defendant as punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong. Syl. pt. 1, *O'Brien v. Snodgrass*, 123 W. Va. 483, 16 S.E.2d 621 (1941)." Syl. pt. 4, *Harless v. First Nat'l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982). Punitive damages may be assessed on tort or contract claims.

According to the Court, "Punitive damages serve several purposes. Among the primary ones are: (1) to punish the defendant; (2) to deter others from pursuing a similar course; and, (3) to provide additional compensation for the egregious conduct to which the plaintiff has been subjected." . . . Furthermore, "[punitive damages] encourage a plaintiff to bring an action where he might be discouraged by the cost of the action or by the inconvenience of a criminal proceeding. . . . [They also] provide a substitute for personal revenge by the wronged party." *Coleman v. Sopher*, 201 W. Va. 588, 603 n.22, 499 S.E.2d 592, 607 n.22 (1997).



e. Annoyance and Inconvenience Damages

In issues involving damage to real property, annoyance and inconvenience are considered as elements in the measure of damages that plaintiffs are entitled to recover, provided that these considerations are measured by an objective standard of ordinary persons acting reasonably under the given conditions. Syl. pt. 3, *Jarret v. E.L. Harper & Son, Inc.*, 160 W. Va. 399; 235 S.E.2d 362 (1977).

f. Attorney's Fees

An award of attorney's fees is generally based upon statutory or contract provisions. A mutual covenant, providing for the recovery of reasonable attorneys' fees and expense of litigation, available to either party who successfully recovers for breach of the contract or enforces its provisions, is valid and enforceable in the courts of this State. *Moore v. Johnson Serv. Co.*, 158 W. Va. 808, 822, 219 S.E.2d 315, 324 (1975).

However, the West Virginia courts have held that when a plaintiff is litigating a case involving a significant issue of general application, where the likelihood of success is small and the economic value in terms either of money or of injunctive relief to the prevailing plaintiff is small, it is appropriate for a court to consider those factors in awarding attorneys' fees and allow a contingency enhancement to a prevailing party. *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 82, 380 S.E.2d 238, 249 (1989).

Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Syl. pt. 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986).

g. Expert Fees & Costs

There is no law in West Virginia regarding the recovery of expert costs and fees. Expert costs and fees are generally only recoverable if expressly provided for by the terms of a contract.

## **XVI. Insurance Coverage**

As a general rule, an insurer has a duty to defend and indemnify the insured up to the policy limits. These duties are contractual, based upon the language of the policy. Whether the duty is triggered is tested by whether the allegations in the plaintiff's complaint may be reasonably interpreted that the claim is covered by the terms of the insurance policy. When a complaint is filed against an insured, an insurer must look beyond the bare allegations and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide. *State Auto. Ins. v. Alpha Engineering Serv.*, 208 W.Va. 713, 716, 542 S.E.2d 876, 879 (2000).

It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syl. Pt. 4, *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

A tort duty may arise if an insurer acknowledges a claim and then refuses to settle within policy limits. "Wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to settle and where such settlement within policy limits would release the insured from any and all personal liability, the insurer has prima facie failed to act in its insured's best interest and such failure to so settle prima facie constitutes bad faith toward its insured." Syl. p.t 2, *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990).

## **XVII. Mechanic's Liens**

A Mechanic's lien is a claim against real property for work done or materials supplied for the property. To bind the interest of the owner of such real estate, the Mechanic's lien "must be based on the contract for such improvement for such owner." Syl. pt. 1, *Dunlap v. Hinkle*, 173 W. Va. 423, 317 S.E.2d 508 (1984). West Virginia's Mechanics' lien laws can be found in W. Va. Code § 38-2-1, *et seq.* (2008).

Contractors, subcontractors, materialmen, architects, surveyors, engineers, landscape architects, mechanics and laborers can obtain Mechanics' liens to ensure they are compensated for their labor and/or materials. Mechanics' liens also are not limited to new constructions, as the statutes apply to any person firm, or corporation who "erects, builds, constructs, alters, removes or repairs any building or other structure, or other improvement appurtenant to any such building or other structure. . . ." W. Va. Code § 38-2-1 (2008).

A Mechanic's lien attaches the day work begins or material is furnished. W. Va. Code § 38-2-17 (2008). This attachment, and subsequent perfection, protects the lien holder from subsequent purchasers, deeds of trust and liens that arise after the date of attachment. *Id.* However, to preserve and perfect a Mechanic's lien, one must follow stringent notice requirements. Failure to provide such notice will result in no recovery under the lien.

While contractors are not required to provide notice to the owner of the property to perfect a lien, they must still record notice of the lien within one hundred days of completing the work in the office of the clerk of the county commission of the county where the property is located. W. Va. Code § 38-2-8 (2008).

Subcontractors and materialmen who are not directly under a contract with an owner must provide the owner notice within one hundred days after the completion of the work or the furnishing of materials. W. Va. Code §§ 38-2-9, -11 (2008). The West Virginia legislature has provided examples of such notices. Here is an example of the notice of subcontractor's lien:

Notice of Mechanic's Lien.

To \_\_\_\_\_

You will please take notice that the undersigned \_\_\_\_\_ was and is a subcontractor with \_\_\_\_\_ who was and is general contractor for the furnishing of materials and doing of the work and labor, necessary to the completion of (here describe the nature of the subcontract) on that certain building (or other structure or improvement as the case may be), owned by you and situate on lot number \_\_\_\_\_ of block number \_\_\_\_\_ as shown on the official map of \_\_\_\_\_ (or other definite and ascertainable description of the real estate) and that the contract price and value of said work and materials is \$ \_\_\_\_\_. You are further notified that the undersigned has not been paid therefor (or has been paid only \$ \_\_\_\_\_ thereof) and that he claims and will claim a lien upon your interest in the said lot (or tract) of land and upon the buildings, structures and improvements thereon to secure the payment of the said sum.

State of West Virginia,

County of \_\_\_\_\_, being first duly sworn, upon his oath says that the statements in the foregoing notice of mechanic's lien are true, as he verily believes.

Taken, subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

My commission expires \_\_\_\_\_.

\_\_\_\_\_  
(Official Capacity)

W. Va. Code § 38-2-9 (2008). This notice must substantially acquaint the owner with all the facts and costs bearing on the claim. Materialmen must provide an itemized account with details regarding dates, materials, quantities, and price. W. Va. Code § 38-2-11 (2008). Subcontractors and materialmen also must file notice of the lien within one hundred days of completing the work or providing the materials in the office of the clerk of the county commission of the county where the property is located. W. Va. Code §§ 38-2-9, -11 (2008). Failure to do so will cause the lien to lose force. *Id.*



If sufficient notice has been provided pursuant to West Virginia law, the lien holder can file suit to enforce the mechanic's lien in the event payment has not been received. This suit must be filed within six months after notice shall have been filed in the clerk's office. W. Va. Code § 38-2-34 (2008).

If the lien holder proves successful in the suit to enforce the mechanic's lien, "the court shall order a sale of the property on which the liens are established . . . and the court may, in addition, give a personal decree in favor of such creditors for the amount of their claims against any party against whom they may be established . . . ." W. Va. Code § 38-2-35 (2008).

Mechanics' liens can also be obtained against an incorporated company doing business in West Virginia by workmen, laborers or any other person who performs work or labor for the incorporated company, its general contractor or its subcontractors. W. Va. Code § 38-2-31 (2008). The deadline to provide notice to the county court is one hundred days from the time the person has ceased to work for the incorporated company or contractor. W. Va. Code § 38-2-32 (2008).

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