STATE OF WEST VIRGINIA
CONSTRUCTION
COMPRENDIUM OF LAW

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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 a building construction contract. Moreover, there is a presumption that the sales provisions of the Uniform Commercial Code will not apply to such contract unless the party seeking a Uniform Commercial Code right is able to demonstrate substantial justification for its use.” Syl. Pt. 6, Elkins Manor Assoc. v. Eleanor Concrete Works, 183 W. Va. 501, 507-08; 396 S.E.2d 463, 470 (1990).

“[I]n the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties’ assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.” Syl. Pt. 2, State ex rel. U-Haul Co. v. Zakaib, 232 W. Va. 432, 444; 752 S.E.2d 586, 598 (2013).

“As a general rule, where either party to a building contract, before any performance, thereunder, repudiates the agreement, the injured party has the election (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, 142-43; 137 S.E. 223, 225 (1927). However, “there is no breach so long as the injured party elects to treat the contract as continuing.” Id.
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, “an injured party has a genuine election offered him of continuing performance or of ceasing to perform, and any action indicating any intention to continue will operate as a conclusive choice; not indeed depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his own part.” *Id.* (quoting Williston on Contracts § 1334). Where a contract is totally renounced there can be no real election between continuation and cessation of performance. *Id.* 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.*

"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, 505; 396 S.E.2d 463, 467 (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 231. In addition, “one seeking relief under the doctrine of impracticability must have made reasonable efforts to overcome the obstacles to performance.” *Id.*

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
II. Negligence

"The three elements of every tort 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) (internal citations omitted).

"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, 588; 371 S.E.2d 82, 85 (1988) (internal citations omitted).

"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, 401; 549 S.E.2d 266, 275 (2001); (But see *Affholder v. N. Am. Drillers*, 2005 U.S. Dist. LEXIS 44076).

"[W]here 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, *Glascock v. City Nat’l Bank*, 213 W. Va. 61, 67; 576 S.E.2d 540, 546 (2002).

West Virginia law allows a negligence claim for purely economic losses when there is evidence of a "special relationship" between the plaintiff and the defendant. *White v. AAMG Constr. Lending Ctr.*, 226 W. Va. 339, 346; 700 S.E.2d 791, 798 (2010) (internal citations omitted). Whether the defendant has a special relationship with a plaintiff such that the defendant owes a duty of care to the plaintiff is a determination that must be rendered by a court as a matter of law. *Id.* The existence of a special relationship between two parties will differ depending upon the facts of each relationship. *Id.*

Generally, under the "independent contractor" exception to the doctrine of *respondeat superior*, 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. *Zirkle v. Winkler*, 214 W. Va. 19, 22; 585 S.E.2d 19, 22 (2003) (internal citations omitted). 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." *Id.* 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, 142; 483 S.E.2d 265, 271 (1996).


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. Syl Pt. 1, *Dawson v. Canteen Corp.*, 158 W. Va. 516, 520; 212 S.E.2d 82, 84 (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 or fitness 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, 589; 371 S.E.2d 82, 86 (1988).

Properties of common interest ownership (condominiums, timeshare properties, etc.) have implied warranties of quality set forth 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 set forth 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, 301; 268 S.E.2d 886,892 (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. 272 276-77; 280 S.E.2d 66, 69 (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.” Trafalgar House Constr. V. Zmm, Inc., 211 W. Va. 578, 584; 576 S.E.2d 294, 300 (2002) (internal citations omitted). 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. Id. (internal citations omitted). When a plaintiff "undertakes to inform himself 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." Cordial v. Ernst & Young, 199 W. Va. 119, 132; 483 S.E.2d 248, 261 (1996) (internal citations omitted).

"The "independent investigation" doctrine is not an absolute defense.” Trafalgar House Constr. V. Zmm, Inc., 567 S.E.2d at 301 (internal citations omitted). It is not necessary that the fraudulent representations complained of should 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, however, that some investigation is made by the representee is usually held not to amount in and of itself to a bar to the right to rely upon representations. The representee who attempts investigation may have a right to rely upon the representations where expert knowledge is necessary to an effectual investigation. Moreover, if the representee, 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. Furthermore, 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." Id.


V. Strict Liability Claims

West Virginia has adopted the principles contained in the English case of Fletcher v. Rylands with regards to strict liability. The basic principle of Rylands states that when 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. Peneschi v. National Steel Corp., 170 W. Va. 511, 516; 295 S.E.2d 1, 6 (1982) (See 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)). Rylands is essentially a doctrine of liability without fault. Id.

West Virginia has also adopted the Restatement (Second) of Torts, § 519 (1976), which has accepted the principle of Rylands, and limits 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.

Id.

West Virginia is among the majority of jurisdictions that have adopted the strict liability doctrine in blasting cases. The case of 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, being intrinsically dangerous and extraordinarily hazardous, renders the contractor liable for damages proximately resulting to the property of another from such blasting, without negligence on the part of the contractor; and no exception to this general rule results from the fact that the contractor, while using the explosives in blasting operations, is on the land of the complaining property owner and using such explosives in blasting operations pursuant to a written contract with the landowner to perform a construction project on the complaining property owner's land." Id. at Syl. Pt. 2; See also Perdue v. S.J. Groves & Sons Co., 152 W. Va. 222; 161 S.E.2d 250 (1968).

VI. Indemnity Claims


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.” Syl. Pt. 1, Valloric v. Dravo Corp., 357 S.E.2d at 211 (internal citations omitted). “In construing the language of an express indemnity contract, the ordinary rules of contract construction apply.” Syl. Pt. 4, VanKirk v. Green Constr. Co., 195 W. Va. 714, 721; 466 S.E.2d 782, 789 (1995) (internal citations omitted).

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.

b. **Implied Indemnity**

“The right to seek implied indemnity belongs only to a person who is without fault.” Hager v. Marshall, 202 W. Va. 577, 585; 505 S.E.2d 640, 648 (1998). “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.” Id. (internal citations omitted).

“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 whether a third party is an intended beneficiary is based on the construction of the contract. “The intention of the parties in this respect 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

**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). “The statute of limitations begins to run when a breach of the contract occurs or when the act breaching the contract becomes known. 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.’ Generally, the statute of limitations begins to run, when a construction contract is involved, when the work is completed.” *Gateway Communns., Inc. v. John R. Hess, Inc.*, 208 W. Va. 505, 509; 541 S.E.2d 595, 599 (2000) (internal quotations and citations omitted).

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 and bars recovery in three general areas. 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. *Neal v. Marion*, 222 W. Va. 380, 385; 664 S.E.2d 721,726 (2008) (internal quotations omitted).

“West Virginia Code § 55-2-6a sets an arbitrary time period after which no actions, whether contract or tort, seeking damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property may be initiated against
architects and builders. This arbitrary 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.” Syl. Pt. 6, *Neal v. Marion*, 222 W. Va. 380, 386; 664 S.E.2d 721, 728 (2008).

Subsequent work will restart the time limitation of W. Va. Code § 55-2-6, but only with respect to the subsequent work. *Neal v. Marion*, 222 W. Va. 380, 386; 664 S.E.2d 721, 727 (2008).

The statute of repose does not apply to fraud or misrepresentation claims. “Where 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. Stated another way, the claimed damages arise not from the alleged problems . . . but from being induced to act by a false representation. . . . The alleged misrepresentations and any damages arising there from are not subject to the provisions of W. Va. Code §55-2-6a.” *Neal v. Marion*, 222 W. Va. 380, 388; 664 S.E.2d 721, 729 (2008).

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

“[R]ecovery in tort will be barred when any of the following four factors is demonstrated: (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.” *Gaddy Eng. Co. v. Bowles Rice McDavid Graff & Love*, 231 W. Va. 577, 586; 746 S.E.2d 568, 577 (2013).
X. Recovery for Investigative Costs

There is no case law in West Virginia that discusses recovery for investigative costs. Such costs would usually be provided for as an express term in a contract.

XI. Emotional Distress

There is no case law that directly addresses 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).

“A defendant may be held liable for negligently causing a plaintiff to experience serious emotional distress, after the plaintiff witnesses a person closely related to the plaintiff suffer critical injury or death as a result of the defendant’s negligent conduct, even though such distress does not result in physical injury, if the serious emotional distress was reasonably foreseeable.” Heldreth v. Marrs, 188 W. Va. 481, 485; 425 S.E.2d 157, 161 (1992).

Courts have held 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. "Any physical injury resulting from the emotional distress is further evidence of the degree of emotional distress suffered." Id. at 166. In determining the 'seriousness' of the emotional distress, consideration should also be given to whether the particular plaintiff is a “reasonable person, normally constituted.” Id. (internal citations omitted). For the purposes of such consideration, a reasonable person is an "ordinarily sensitive person and not a supersensitive person, 'eggshell psyche' plaintiff." Id. (internal citations omitted).


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, 384; 180 S.E. 440, 442 (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. Id.

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.” Syl. Pt. 2, Trenton Constr. Co. v. Straub, 172 W. Va. 734, 737; 310 S.E.2d 496, 499 (1983) (citing Steinbrecher v. Jones, 151 W. Va. 462, 476; 153 S.E.2d 295, 304 (1967)).

“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. Stenger v. Hope Natural Gas Co., 139 W. Va. 549, 562; 80 S.E.2d 889, 897 (1954).
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 463 (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 residential property is damaged, the owner may recover the reasonable cost of repairing it even if the costs exceed its fair market value before the damage. The owner may also recover the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the repair period. If the damage cannot be repaired, then the owner may recover the fair market value of the property before it was damaged, plus the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the time he has been deprived of his property.” *Brooks v. City of Huntington*, 2012 W. Va. LEXIS 1212, 22 (W. Va. 2014).

d. **Punitive Damages**

“[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. 4, *Harless v. First Nat'l Bank*, 169 W. Va. 673, 691; 289 S.E.2d 692, 702 (1982) (internal citations omitted).

e. **Annoyance and Inconvenience Damages**

f. Attorney’s Fees

“A mutual covenant contained in a commercial lease agreement, providing for the recovery of reasonable attorneys' fees and expense of litigation, available to either party who successfully recovers for breach of the lease 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).

“[W]hen 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.” Aetna Cas. & Sur. Co. v. Pitrolo, 176 W. Va. 190, 195; 342 S.E.2d 156, 161 (1986). 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.” Id.

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

West Virginia courts have held that defective workmanship causing bodily injury or property damage is an "occurrence" under a policy of commercial general liability insurance. Syl. Pt. 6, Cherrington v. Erie Ins. Prop. & Cas. Co., 231 W. Va. 470, 483; 745 S.E.2d 508, 511-512 (2013)

“When a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party’s pleading 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, 740; 356 S.E.2d 488, 494 (1987).

“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. Pt. 2, Shamblin v. Nationwide Mutual Insurance Co., 183 W. Va. 585, 595; 396 S.E.2d 766, 776 (1990).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.