



COMMONWEALTH OF PENNSYLVANIA CONSTRUCTION LAW COMPENDIUM

Prepared by
J. Michael Kunsch
Sweeney & Sheehan, P.C.
1515 Market Street, 19th Floor
Philadelphia, Pennsylvania 19102
(215) 563-9811
www.sweeneyfirm.com

Daniel L. Grill and Corey J. Adamson
Thomas, Thomas & Hafer LLP
305 N. Front Street, 6th Floor
Harrisburg, PA 17101
(717) 237-7100
www.tthlaw.com

Joseph J. Bosick
Pietragallo Gordon Alfano Bosick & Raspanti, LLP
One Oxford Center, 38th Floor
Pittsburgh, PA 15219
(412) 263-2000
www.pietragallo.com

The following synopsis of construction law in the Commonwealth of Pennsylvania is designed as an overview of basic legal principles and for use as a research tool. It is not meant to be a comprehensive summary of relevant law, nor is it to be interpreted as providing legal advice to the reader.

I. BREACH OF CONTRACT

In Pennsylvania, as elsewhere, agreements for the construction of a home, public utilities, private commercial structures, excavation, sewers, roadways and the like are typically memorialized in a contract between the purchaser and the builder. Pennsylvania contract law encompasses general, basic rules of contract construction. Contracts in Pennsylvania are also subject to the statute of frauds.

The general rule in Pennsylvania is that the provisions of UCC Article 2 do not apply to contracts for the construction of residential homes and commercial real estate, in that they are not contracts for the sale of "goods." *DeMatteo v. White*, 336 A.2d 355 (Pa. Super. 1975). *See Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.*, 892 A.2d 830 (Pa. Super. 2006).

Ordinarily, the specifications of a construction contract will clearly denote the "kinds, quality, and quantity of work to be done, the details, time and manner of construction, without which the contract would be incomplete and ineffective." *Z & L Lumber Co. of Atlasburg v. Nordquist*, 502 A.2d 697, 701 (Pa. Super. 1985); *see also Knelly v. Horwath*, 57 A. 957 (Pa. 1904). A violation of one of these numerous provisions could give rise to a breach of contract action against the builder because when performance under a contract is due, any nonperformance is a breach. *Widemer Eng'g, Inc. v. Dufalla*, 837 A.2d 459, 468 (Pa. Super. 2003); *See also* Restatement (Second) of Contracts §235(2) (1981). If a breach constitutes a *material* failure of performance, then the non-breaching party is discharged from all liability under the contract. *Id.* In considering whether a failure of performance is material, the following factors are considered:

- a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- b) the extent to which the injured party can be adequately compensated for that part of that benefit of which he will be deprived;
- c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- d) the likelihood that the party failing to perform or offer to perform will cure his failure, taking into account all the circumstances including any reasonable assurances;
- e) the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

Id. at 469; Restatement (Second) of Contracts §241 (1981).

An *anticipatory* breach occurs whenever there has been a definite and unconditional repudiation of a contract by one party communicated to another. A statement by a party that he will not or cannot perform in accordance with agreement creates such a breach. *Oak Ridge Construction Co. v. Tolley*, 504 A.2d 1343 (Pa. Super. 1985); *see also* Corbin on Contracts § 959 (1993); Restatement (Second) of Contracts § 250 (1981).

When a party to a contract seeks to enforce the agreement or to recover damages for breach of the agreement, that party must prove that he has performed all of his own obligations under the contract. *See Trumbull Corp. v. Boss Construction, Inc.*, 801 A.2d 1289 (Pa. Commw. 2002). Breach of contract actions are also often accompanied by other causes of action.

II. NEGLIGENCE

Typically, defective construction cases include negligence claims. Such cases include allegations that, *inter alia*, the builder breached the duties of reasonable care, reasonable workmanship and/or violated any of the various obligations imposed by law. See Section III, *infra*. However, tort claims may be barred by the economic loss doctrine or the gist of the action doctrine. See Sections VIII and IX, *infra*.

The waiver of subrogation clause contained in a standard American Institute of Architects (AIA) agreement precludes negligence and breach of contracts claims. *Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc.*, 916 A.2d 686 (Pa. Super. 2007). After the insurer paid its insured car dealership for damage resulting from the collapse of a wall, the insured brought a subrogation action against the general contractor and subcontractor, alleging negligent construction. The insurer argued that the waiver of subrogation clause could not be enforced against it because it was not a party to the agreement and did not receive notice or give its consent. In ruling on this issue of first impression, the Superior Court rejected the insurer's contention that notice or consent was required to enforce the provision, stating that in Pennsylvania, a subrogee essentially "stands in the shoes" of its subrogor. *Id.* at 693.

The Superior Court also rejected the insurer's arguments that the waiver of subrogation provision conflicted with other contract provisions, including the warranty that the work would be of good quality and free from defect. *Id.* at 692-693. The Court stated those other provisions could be read as providing a contractual remedy only where alleged damages were not covered by the property insurance obtained pursuant to the contract. The Court further rejected the argument that the waiver of subrogation provision operated to transfer liability for negligence away from the general contractor or subcontractor. The Court stated that the party obtaining insurance coverage to pay claims for which he is liable does not transfer liability away from himself to the other party to the clause in question, but satisfies his debt to that party. *Id.* at 693. The Court explained that through the waiver of subrogation clause, the owner and contractors agreed to share the burden of either party's negligence by requiring the purchase of property insurance covering the construction work and by agreeing not to sue each other for damages covered by that insurance. *Id.*

III. BREACH OF EXPRESS AND IMPLIED WARRANTY CLAIMS

Construction defect cases often include breach of warranty claims. Such claims are based on express warranty provisions contained within the contract between the plaintiff and the builder/developer, and/or those warranties implied by law.

There are various obligations implied by law upon construction contracts. Under the implied warranty of workmanship, a person working on a construction project under a construction contract or subcontract impliedly warrants that: 1) he will do his work in a good and workmanlike manner according to existing standards of construction in the area in which the building is erected and 2) the materials used are sound. See *Pontiere v. James Dinert, Inc.*, 627 A.2d 1204 (Pa. Super. 1993).

A warranty of habitability is also implied in a construction contract. *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972). Pennsylvania courts have ruled that a breach of the implied warranty of habitability has occurred in a variety of situations, including where no potable water is supplied, *Id.*; furnaces are constructed in a defective manner so as to lead to increased carbon monoxide emissions, *Pontiere, supra*; lead based paint was used to paint the interior of the home, *Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975 (Pa. 2001); leaking skylights, *Fetzer v. Vishneski*, 582 A.2d 23 (Pa. Super. 1990), *appeal denied*, 593 A.2d 842 (Pa. 1991); a basement continually leaks, *Ecksel v. Orleans Const. Co.*, 519 A.2d 1021 (Pa. Super. 1987); and where a crawl space leaks, *Tyus v. Resta*, 476 A.2d 427 (Pa. Super. 1984).

It should be noted that Pennsylvania courts have not reached a consensus on whether a vendor of a new home who was not involved in its construction can be held liable under the *Elderkin* holding. Compare *Brown v. Bankroft*, 13 D. & C.4th 313 (York Co. 1992) (holding in favor of liability in a matter involving a new home) with *Boozell v. Bollinger*, 30 D. & C.3d 247 (Mercer Co. 1983) (holding against liability; used home involved). However, regardless of privity of contract, the builder of a residential unit who is not the seller is held to have extended the implied warranties of workmanship and habitability to the purchaser. *Spivack v. Berks Ridge Corp., Inc.*, 586 A.2d 402 (Pa. Super. 1990).

The implied warranties of workmanship and habitability may be limited and/or disclaimed provided that various requirements are met, including specificity of the rights being waived and the defects excluded. See *Pontiere v. James Dinert, Inc.*, 627 A.2d 1204, 1207 (Pa. Super. 1993), *alloc. denied* 641 A.2d 588; *Tyus v. Resta*, 476 A.2d 427 (Pa. Super. 1984).

Implied warranties are also imposed upon building or site owners. It is a well established doctrine that an owner who issues detailed plans and specifications impliedly warrants that the project is capable of being constructed in accordance with those plans and specifications. *Stabler Constr. v. DOT*, 692 A.2d 1150 (Pa. Commw. 1997). Thus, a contractor who performs according to detailed plans and specifications is not responsible for defects in the result. *Id.* at 1152, *citing Dept. of Transp. v. W. P. Dickerson & Son, Inc.*, 400 A.2d 930, 932 (Pa. Commw. 1979).

IV. CONSTRUCTIVE FRAUD

A contractor may recover expenses incurred as a result of unforeseen construction site conditions when bringing an action based on constructive fraud. The common law recovery theory of constructive fraud is based on the premise of a misleading statement regarding site conditions contained in the contract documents prepared by the owner. *See Acchione & Canuso, Inc. v. Comm. of Pa., Dept. of Transp.*, 461 A.2d 765 (Pa. 1983); *see also I.A. Constr. Co. v. Comm. of Pa., Dept. of Transp.*, 591 A.2d 1146 (Pa. Commw. 1997). Constructive fraud cannot arise unless the owner of the site made positive representations regarding the site conditions. *Black Top Paving Co., v. Comm. of Pa., Dept. of Transp.*, 466 A.2d. 774 (Pa. Commw. 1983) (no constructive fraud if the contractor's own pre-bid site investigation revealed the inaccuracy in the owner's contract documents).

The Pennsylvania Supreme Court listed five (5) factors in the *Acchione* decision that a contractor must prove in order to recover on a common law theory of constructive fraud. These five factors are: 1) whether the owner or its agent (an architect or engineer) made a positive representation of specifications or conditions regarding the contract work; 2) whether the representation relates to material specification in the contract; 3) whether the contractor, due to time or cost constraints, is unable to make an independent investigation of the site conditions or the owner's representations; 4) whether the owner's representations are false and/or misleading due either to actual misrepresentation or a misrepresentation caused by gross mistake or arbitrary action; and 5) whether the contractor suffered financial harm due to reliance on the misrepresentation. *Acchione*, 461 A.2d at 768. *See Dept. of General Services v. Pittsburgh Bldg. Co.*, 920 A.2d 973, 985 (Pa. Commw. 2007).

Design professionals, such as architects, may be held liable where the contractor submitting the winning bid reasonably foreseeably relies upon misrepresentations in the architect's plans for a public construction contract, despite the lack of a contractual relationship between the architect and contractor. *Bilt-Rite Contractors v. Architectural Studio*, 866 A.2d 270 (Pa. 2005) (adopting Restatement (Second) of Torts §552).

V. STRICT LIABILITY

Strict liability claims against builders in Pennsylvania construction cases do not usually pass muster. The rule is fairly clear; Pennsylvania strict liability law, based on 402A of the Restatement (Second) of Torts, applies to "products," *Burrows v. Jones*, 17 Pa. D. & C.4th 224 (Pa.Com.Pl. 1992), and the construction of homes and the like are not considered "products" for strict liability purposes. *Id.* In *Burrows*, the plaintiffs lived in a pre-fabricated modular residence that had a pre-existing spot for a fireplace. After purchasing the home, the plaintiffs had a fireplace installed by a different individual from the designer and the home constructor. Thereafter, pyrolysis occurred within the fireplace causing an eruption and burning down the home. The plaintiffs sued the fireplace installer, the designer and the constructor of the home in causes of action based in strict liability and negligence. Ultimately, the strict liability claim was dismissed under the authority of *Cox v. Shaffer*, 302 A.2d 456 (Pa. Super.1973), *alloc. denied* 368 A.2d 897, wherein the Pennsylvania Superior Court stated that a silo constructed in place on land was not a "product." *But see Bednarski v. Hideout Homes & Realty, Inc.*, 711 F. Supp. 823

(M.D. Pa. 1989) (federal court predicts that Pennsylvania Supreme Court will find that builders may be held strictly liable for alleged defect in a house).

However, one should see *Ettinger v. Triangle-Pacific Corp.*, 799 A.2d 95 (Pa. Super. 2002), *appeal denied* 815 A.2d 1042 (Pa. 2003) (criticizing *Cox* for providing no explanation underlying its holding, further criticizing *Lupinski v. Heritage Homes, Ltd.*, 535 A.2d 656 (Pa. Super. 1988) for footnote citing *Cox* as existing case law in Pennsylvania suggesting buildings are not products for § 402A purposes). Ultimately, these cases have not been overturned, but merely criticized, and as the Supreme Court of Pennsylvania has not spoken on the issue, it would seem that at present buildings are not “products.”

VI. INDEMNITY

In Pennsylvania, it is established law that a general contractor is not liable for injuries resulting from work entrusted to a subcontractor. *Leonard v. Pennsylvania Dept. of Transp.*, 771 A.2d 1238, 1240 (Pa. 2001). Compare *Farabaugh v. Penna. Turnpike Comm.*, 911 A.2d 1264 (Pa. 2006).

Pennsylvania courts use general rules of contract construction in construing express indemnity provisions. *Brotherton Construction Co. v. Patterson-Emerson-Cornstock, Inc.*, 178 A.2d 696 (Pa. 1962). However, when interpreting a broadly written indemnity provision, courts will not enforce an indemnity agreement that is drafted so broadly that would literally allow the indemnitee to recover for any and all events, unless significant extrinsic evidence indicates an intent to be bound by the provision. *Deskiewicz v. Zenith Radio Corp.*, 561 A.2d 33, 35 (Pa. Super. 1989).

A contract that entitles a party to indemnification for its own negligence is permissible, but such a contract term must be unmistakable. *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 702 (Pa. Super. 2000). Further, indemnification for intentional torts is void as against public policy. *Nationwide Mut. Ins. Co. v. Hassinger*, 473 A.2d 171 (Pa. Super. 1984). Indemnity clauses are construed most strictly against the party who drafts them, especially when that party is the indemnitee. *Ratti*, 758 A.2d at 702. Pass through agreements in a subcontract indemnifying one party for the negligence of another are only enforceable where stated in clear and unequivocal terms. *Bernotas v. Super Fresh Food Markets, Inc.*, 863 A.2d 478 (Pa. 2004).

“Common law” indemnity is derived from a special relationship between the parties. *Sirianni v. Nugent Bros., Inc.*, 506 A.2d 868, 870-871 (Pa. 1986). This special relationship dictates that indemnity will be available to a person, who, without active fault, has been legally compelled to pay damages actually caused by another’s negligence. *Walton v. Avco Corp.*, 610 A.2d 454, 460 (Pa. 1992). Examples of such relationships abound: an employer may secure indemnification from a negligent employee; a retailer has a right of indemnity against a negligent wholesaler or manufacturer; a property owner could recover from a contractor who failed to perform specified duties and thereby caused an injury to another; or a municipality with a duty to ensure that property owners maintain sidewalks may be indemnified by a property owner who failed to maintain a sidewalk that caused an injury to a passerby. *Builders Supply Co. v. McCabe*, 77 A.2d 368 (Pa. 1951).

"Common law" indemnity is not, however, a fault sharing mechanism between one who was predominantly responsible for an accident and one whose negligence was relatively minor. *Sirianni*, 506 A.2d at 871. Thus, parties cannot use indemnity as a tool to "equitably distribute or apportion responsibility" for an individual's injuries. *Kemper Nat'l P.&C. Cos. v. Smith*, 615 A.2d 372, 374 (Pa. Super. 1992). There can be no indemnity between parties who each bear responsibility for the wrong, albeit of varying degrees. *See City of Wilkes-Barre v. Kaminski Bros., Inc.*, 804 A.2d 89 (Pa. Commw. 2002), alloc. denied 828 A.2d 351.

Lastly, Pennsylvania recognizes third party beneficiary indemnity. "[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself ... unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Scarpitti v. Weborg*, 609 A.2d 147, 149 (Pa. 1992) *citing* Restatement (Second) of Contracts §302 (1981). "The first part of this test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third party beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third party beneficiaries. If a party satisfies both parts, a claim may be asserted under the contract." *Id.*, *citing Guy v. Liederach*, 459 A.2d 744 (Pa. 1983). *See also Fizz v. Kurtz, Dowd & Nuss, Inc.*, 519 A.2d 1037, 1039 (Pa. Super. 1987) (it is up to the court to determine "whether recognition of a beneficiary's right to performance is appropriate to effectuate the intention of the parties.").

VII. STATUTE OF LIMITATIONS/STATUTE OF REPOSE

A. Statute of Limitations

The statute of limitations on claims for damages for injury to person or property that are founded on negligent, intentional, or otherwise tortious conduct, or any other action or proceeding sounding in trespass, including deceit or fraud, is two years. 42 Pa.C.S. §5524. The statute of limitations in actions upon contracts is four years. 42 Pa.C.S. §5525. This includes contract actions alleging latent real estate construction defects. *Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.*, 842 A.2d 334 (Pa. 2004), on remand, 892 A.2d 830 (Pa. Super. 2006).

B. Statute of Repose

The Pennsylvania Statute of Repose is codified at 42 Pa.C.S. §5536, and provides that "a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision, or observation of construction, or construction of any improvement to real property must be commenced within twelve (12) years after completion of construction of such improvements." This includes actions to recover damages for "(1) any deficiency in the design, planning, supervision or observation of construction of the

improvement; (2) injury to property, real or personal, arising out of any such deficiency; (3) injury to the person or for wrongful death arising out of such deficiency; and, (4) contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3)."

The Pennsylvania Supreme Court has held that for a party to establish the immunity provided by the Statute of Repose, that party must establish that:

- (1) what is supplied is an improvement to real estate;
- (2) more than twelve years have elapsed between the completion of the improvements to the real estate and the injury; and
- (3) the activity of the moving party must be within the class which is protected by the Statute.

McConnaughey v. Building Components, Inc., 637 A.2d 1331 (Pa. 1994). See also *Noll by Noll v. Harrisburg Area Y.M.C.A.*, 643 A.2d 81 (Pa. 1994); *Vargo v. Koppers Co., Inc.*, 715 A.2d 423 (Pa. 1998). There is little issue in any given case regarding element two of this tripartite test, since "the twelve year period begins to run when the entire construction project is so completed that it can be used by the general public." *Noll*, 643 A.2d at 84.

The Pennsylvania Supreme Court has defined an improvement to real property as

[a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes[.]

McCormick v. Columbus Conveyor Co., 564 A.2d 907, 909 (Pa. 1989). Further, the *McCormick* court indicated that whether a particular party is within the class of persons protected by the Statute of Repose depends on whether that party "performed or furnished the design, planning, supervision of construction, or construction of an improvement." *Id.* at 910.

VIII. ECONOMIC LOSS DOCTRINE

The economic loss doctrine precludes recovery of economic losses in tort actions absent physical injury or property damage. *David Pflumm Paving & Excavating Inc. v. Foundation Services Co.*, 816 A.2d 1164 (Pa.Super. 2003) (holding that action for negligent misrepresentation in construction contract that only caused economic harm would be barred by economic loss doctrine); see also *Spivack v. Berks Ridge Corp., Inc.*, 586 A.2d 402 (Pa. Super. 1990).

However, where a building owner seeks damages in a defective construction case for loss of personal property, cleaning costs, rent and lost profits, in addition to damage to the building

itself, the tort claims will not be barred by the economic loss doctrine. *Clouser's Auto Body, Inc. v. Jewell Bldg. Systems, Inc.*, 41 Pa. D. & C.4th 271 (Pa. Com. Pl. 1998).

Another important exception exists: the economic loss doctrine does not apply to claims of negligent misrepresentation that come under Restatement (Second) of Torts §552. *Bilt-Rite Contractors v. Architectural Studio*, 866 A.2d 270 (Pa. 2005). However, this exception seems to only apply where the individual whose misrepresentation was relied upon is a professional in the business of designing or building (i.e. architects and other design professionals). See *Rock v. Voshell*, 2005 U.S. Dist. LEXIS 36942, 2005 WL 3557841 (E.D. Pa. 2005). But see *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 395 F. Supp.2d 183 (M.D. Pa. 2005) (applying exception to all negligent misrepresentation cases, not just where individual was professional in business of providing/supplying information).

IX. GIST OF THE ACTION DOCTRINE

The gist of the action doctrine applies when a tort claim arises from a contractual duty. It operates to bar tort claims where the duty breached arises from a contractual obligation, such that a breach of contract action is the proper form of suit. *Bash v. Bell Tel. Co.*, 601 A.2d 825 (Pa. Super. 1992). When a breach of contract could also give rise to an actionable tort “to be construed as in tort . . . the wrong ascribed to the defendant must be the gist of the action, the contract being collateral.” *Id.* at 829. If the claims arise from a breach of contractual duties, and not a breach of duties imposed as a matter of social policy, then they are barred by the gist of the action doctrine. *Quorum Health Resources, Inc. v. Carbon-Schuylkill Community Hosp.*, 49 F. Supp.2d 430 (E.D. Pa. 1999). For more on the gist of the action doctrine, please also reference Section XVI, Insurance Coverage for Construction Contracts.

X. RECOVERY FOR INVESTIGATIVE COSTS

There is no case law in Pennsylvania regarding this measure of damages. However, it is unlikely that Pennsylvania courts would allow recovery for such costs, as the long-prevailing general rule is that each party to a lawsuit is responsible for its own costs and fees, absent a statutory rule or exception to the contrary. See e.g., *Merlino v. Delaware County*, 728 A.2d 949, 951 (Pa. 1999); *Koffman v. Smith*, 682 A.2d 1282, 1292 (Pa. Super. 1996).

XI. EMOTIONAL DISTRESS CLAIMS

Except in certain limited circumstances, there can be no claim for negligent infliction of emotional distress in the absence of a physical manifestation of the emotional distress. *Brown v. Philadelphia College of Osteopathic Med.*, 720 A.2d 863, 872 (Pa. Super. 2000). Under Pennsylvania law, damages for emotional distress are generally not recoverable in an action for breach of contract. *Murray v. U. of Pa. Hosp.*, 490 A.2d 839, 842 (Pa. Super. 1985). See also *Spack v. Apostolidis*, 510 A.2d 352, 355 (Pa. Super. 1985); *Ritchey v. Patt*, 636 A.2d 208 (Pa. Super. 1994) (claims for pain and suffering and emotional distress are not considered contract damages); *McIntyre v. Phila. Housing Auth.*, 816 A.2d 1204, (Pa. Commw. 2003) (breach of implied warranty of habitability is a contract claim for which only contract remedies are

available)(albeit this was a landlord-tenant case); *Van Scoyoc v. Gen. Foam Corp.*, 7 Pa. D.&C.4th 621, 623 (Blair C.C.P. 1990) (breach of warranty claim seeking personal injury damages does not set forth valid claim).

This is because Pennsylvania law draws a distinction between *general damages* -- those ordinary damages that flow directly from the breach; and *special or consequential damages* -- those collateral losses, such as expenses incurred or gains prevented, which result from the breach. *Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163, 213 n.62 (E.D. Pa. 1978). However, it should be noted that where damage to real property is suffered due to the negligence of another, a homeowner is entitled to be compensated for the discomfort and inconvenience caused him during the period his home is not habitable. *Dussell v. Kaufman Construction Co.*, 157 A.2d 740 (Pa. 1960); *Houston v. Texaco, Inc.*, 538 A.2d 502 (Pa. Super. 1988), *alloc. denied*, 549 A.2d 136.

XII. STIGMA DAMAGES

There is no law in Pennsylvania regarding the recovery of stigma damages. However, diminution of value may be an appropriate element of damages if the damage to the property is permanent. *Rabe v. Shoenberger*, 62 A. 854 (Pa. 1906). *See also Duquesne Light Co. v. Woodland Hills School District*, 700 A.2d 1038 (Pa. Commw. 1997), *appeal denied*, 724 A.2d 936.

XIII. ECONOMIC WASTE

The proper measure of damages for injury to land is as follows. Assuming the land is reparable, the measure of damage is the lesser of: (1) the cost to repair, or (2) the market value of the damaged property (before it suffered the damage, of course). If the land is not reparable, the measure of damage is the decline in market value as a result of the harm. Generally, the plaintiff has a duty to present sufficient evidence from which a jury can compute the proper amount of damages with reasonable certainty. *Slappo v. J's Dev. Assocs. Inc.*, 791 A.2d 409, 415 (Pa. Super. 2002).

XIV. DELAY DAMAGES

In contract cases, prejudgment interest is awardable at the legal rate of 6% per annum. 41 P.S. §202. *See Pittsburgh Constr. Co. v. Griffith*, 834 A.2d 572, 590 (Pa. Super. 2003). In tort actions, prejudgment interest (a.k.a. delay damages) is awarded pursuant to the provisions of Pennsylvania Rule of Civil Procedure 238, which fixes as the rate for calculating delay damages “the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus 1%, not compounded.” Pa.R.C.P. 238(a)(3).

Regarding breach of contract claims alleging property damage, the Pennsylvania Supreme Court held that Pa.R.C.P. 238 does not permit delay damages in a breach of contract action. *See Touloumes v. E.S.C. Inc.*, 899 A.2d 343 (Pa. 2006). The Court stated that, in a breach of contract action, “pre-judgment interest is the appropriate vehicle to secure monies for the delay of relief.” *Id.* at 349.

XV. RECOVERABLE DAMAGES

A. Direct Damages

The measure of damages for injury to real property is "the cost of repairs where that injury is reparable unless such cost is equal to or exceeds the value of the injured property." *Kirkbride v. Lisbon Contractors, Inc.*, 560 A.2d 809, 812 (Pa. Super. 1989). *See also Matakitis v. Woodmansee*, 667 A.2d 228 (Pa. Super. 1995), *alloc. denied*, 682 A.2d 311. If the cost of repair exceeds the value of the property, "the cost of damages becomes the value of the property." *Kirkbride*, 560 A.2d at 812. If the injury to the property is permanent, "the measure of the damages becomes the decrease in the fair market value of the property." *Id.* *See also Matakitis, supra; Gloviak v. Tucci Const. Co., Inc.*, 608 A.2d 557 (Pa. Super. 1992).

The measure of damages for total loss of personal property is its reasonable value at the time of loss, giving due consideration to the purchase price, the condition of the property at the time of loss, an appropriate depreciation factor and the salvage value of the property. *Denby v. North Side Carpet Cleaning Co.*, 390 A.2d 252, 259 (Pa. Super. 1978). *See also Daughen v. Fox*, 539 A.2d 858 (Pa. Super. 1988), *alloc. denied*, 553 A.2d 967. The measure of damages for repairable damage to personal property is, at the election of plaintiff, the difference between the pre-injury and post-injury value of the property, or the reasonable cost of repair, with allowance for the difference between the pre-injury and post-injury value, and the loss of use. *Kintner v. Claverack Rural Electric Co-operative, Inc.*, 478 A.2d 858 (Pa.1984).

B. Loss of Use

Compensation for loss of use sustained due to the repairable damage to real property is appropriate under Pennsylvania law. *Kincade v. Laurel Courts, Inc.*, 644 A.2d 1268 (Pa. Super. 1994).

C. Punitive Damages

The Pennsylvania Supreme Court has adopted Restatement (Second) of Torts §908(2) with respect to punitive damages. *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) ("punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others"). Where "the defendant has acted in a merely negligent manner, or even a grossly negligent manner, there is insufficient culpability and awareness by the defendant of the nature of his acts and of their potential results either to warrant punishment or effectively to deter similar future behavior." *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005).

To constitute sufficient reckless conduct to create a jury question on the issue of punitive damages, Pennsylvania law requires that the "actor knows, or has reason to know... of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk." *Smith v. Celotex*, 564 A.2d 209, 211 (Pa. Super. 1989); *see also SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 704-05 (Pa. 1991). The act or failure to act must be intentional, reckless, or malicious. *Smith*,

564 A.2d at 211. Therefore, in determining whether punitive damages should be awarded, "the act, or the failure to act, must be intentional, reckless or malicious." *Phillips*, 883 A.2d at 445. *See also Smith, supra*.

Punitive damages are not recoverable in Pennsylvania in an action based solely upon breach of contract. *Johnson v. Hyundai Motor America*, 698 A.2d 631 (Pa. Super. 1997), *appeal denied*, 712 A.2d 286 (1998). In contract cases, punitive damages are generally not awarded. *Skurnowicz v. Lucci*, 798 A.2d 799, 797 (Pa. Super. 2002).

A claim for punitive damages arises out of the underlying cause of action, and absent a viable cause of action, an independent claim for punitive damages may not stand. *Costa v. Roxborough Memorial Hospital*, 708 A.2d 490, 497 (Pa. Super. 1998). Punitive damages cannot be recovered unless the plaintiff recovers compensatory damages. *Houston v. Texaco, Inc.*, 538 A.2d 502, 505 (Pa. Super. 1988).

D. Emotional Distress

Where damage to real property is suffered due to the negligence of another, a homeowner is entitled to be compensated for the discomfort and inconvenience caused him during the period his home is not habitable. *Dussell v. Kaufman Construction Co.*, 157 A.2d 740 (Pa. 1960); *Houston v. Texaco, Inc.*, 538 A.2d 502 (Pa. Super. 1988), *alloc. denied* 549 A.2d 136. However, except in certain limited circumstances, there can be no claim for negligent infliction of emotional distress in the absence of a physical manifestation of the emotional distress. *Brown v. Philadelphia College of Osteopathic Med.*, 720 A.2d 863, 872 (Pa. Super. 2000).

E. Attorney's Fees

Generally, attorney's fees are not recoverable as damages in the absence of a contractual or statutory provision to the contrary, or some other established exception. *See, e.g., Putt v. Yates-American Mach. Co.*, 722 A.2d 217, 226 (Pa. Super. 1998), *alloc. denied*, 737 A.2d 743; *Mosaica Acad. Charter Sch. v. Comm. of Pa., Dept. of Ed.*, 813 A.2d 813, 822 (Pa. 2002); *see also* 42 Pa.C.S. 1726(a)(1).

F. Expert Fees and Costs

In Pennsylvania, expert fees and costs are not ordinarily recoverable in the absence of a statutory provision. *See, e.g., In re King*, 249 A.2d 552 (Pa. 1969); *Walasavage v. Marinelli*, 483 A.2d 509 (Pa. Super. 1984). *See also* Pa.C.S. 1726.

G. Special Statutory Provisions

Pennsylvania's Procurement Code, 62 Pa. C.S.A. §§3901 *et seq.*—which applies to public projects—and the Contractor and Subcontractor Payment Act, 73 P.S. §§501 *et seq.*—which applies to private work—contain penalty provisions that may be applied against an owner or general contractor for failure to make timely payments to a general contractor or subcontractor respectively. The premise of both the Code and the Act is the performance in accordance with

the contract entitles the contractor or subcontractor to its payment. The Act and the Code provide for, in certain circumstances, an award of interest. The Code may permit an interest penalty of 1% per month, as well as attorney's fees where payments were withheld in bad faith. The Act contains similar provisions in the event that a withholding a payment be found to be arbitrary or vexatious. In general, such penalties will only be awarded to a substantially prevailing party.

XVI. INSURANCE COVERAGE FOR CONSTRUCTION CONTRACTS

It is well settled that the interpretation of an insurance contract is a matter of law for the court to decide. *401 Fourth Street v. Investors Ins. Group*, 879 A.2d 166, 171 (Pa. 2005). If the policy language is unambiguous and clear, the court will give effect to the language. *Cresswell v. PNMCI*, 820 A.2d 172, 178 (Pa. Super. 2003).

In Pennsylvania, the duty of an insurer to defend an insured is separate from, and greater than, the insurer's duty to indemnify. *Britamco Underwriters v. Weiner*, 636 A.2d 649, 651 (Pa. Super. 1994). The insurer's duty to defend is determined by the allegations of the complaint, even if the allegations are groundless, false, or fraudulent, if the facts alleged bring the claim within the policy's coverage. *Snyder Heating Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 715 A.2d 483 (Pa. Super. 1998); *General Acc. Ins. Co. of America v. Allen*, 692 A.2d 1089 (Pa. 1997). A duty to defend "also carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy." *General Acc.*, 692 A.2d at 1095.

The Pennsylvania Supreme Court has held that where a first party property policy provision covers "damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building," the policy provides coverage for the imminent collapse of a building. *401 Fourth Street v. Investors Ins. Group*, 879 A.2d 166 (Pa. 2005). The Court declined to define the precise meaning of "collapse," but stated that the entire phrase must be considered, and the policy language covering the "risks" "involving" collapse is ambiguous and as such provides broader coverage, covering either the actual collapse or imminent falling down of a building or part of a building. *Id.* at 174.

The modern trend around the U.S. is to look at the particular facts of a case, examining whether property damage is present, and whether there was indeed an "occurrence." *See, e.g., Vandenberg v. Superior Court*, 982 A.2d 229 (Cal. 1999) (commercial liability insurance policy can provide coverage for liability arising out of a contractual relationship).

Indeed, Pennsylvania trial courts seem to have rejected a "black and white" analysis of coverage for contract based claims, choosing instead to focus on whether the facts show property damage (injury to or loss of use of tangible property) caused by an "occurrence" (accidental or unintended). *See, e.g., Nitterhouse Concrete Products v. PMA Ins. Co.*, 67 Pa. D.&C.4th 225 (Franklin County 2004). The court reiterated that whether damage is caused by an accident must be determined from the perspective of the insured. *Id.* at 230, *citing Cardwell v. Chrysler Financial Corp.*, 804 A.2d 18 (Pa. Super. 2002). Thus, the court concluded, the contention that a breach of contract can never be an accident (i.e., an "occurrence") is unsupported, particularly

when, from the perspective of the insured, the damage is neither intended nor expected. *Nitterhouse*, 67 Pa. D.&C.4th at 232.

Kvaerner Metals v. Commercial Union Ins. Co., 908 A.2d 888 (Pa 2006), held that the definition of “accident” required to establish an “occurrence” under liability policies cannot be satisfied by claims based upon faulty workmanship. It does not matter that the insured did not intend for the damage to occur. Such claims do not present the degree of fortuity required by an insurance policy and the court stated that to hold otherwise would turn a policy of insurance into a performance bond. Note that the *Kvaerner* matter had been consolidated with *Freestone v. New England Log Homes* (See 819 A.2d 550 (Pa Super 2003) and the Supreme Court had directed the parties to brief the appropriate tests for whether the actions sounded in contract or tort for purposes of insurance coverage and thus requiring the parties to address the gist of the action doctrine. But the *Freestone* matter settled while on appeal and the Supreme Court noted in a footnote that it saw no need to address the gist of the action doctrine. Thus *Kvaerner* does not specifically embrace a strict view that all brief of contract claims can never be an “occurrence” but rather focuses instead on faulty workmanship not constituting an “occurrence.”

In a recent decision, the Superior Court, while referencing *Kvaerner* and the lack of coverage for faulty workmanship, also specifically concluded that when a complaint alleges liability based upon contractual duties and not “by the larger social policies embodied by the law of torts,” the gist of the action doctrine (*see* Section IX *supra*) precludes coverage for such claims even when the injured party makes a claim for damages to property other than the insured’s work. *Erie Ins. Exchange v. Abbot Furnace Co.*, 2009 PA Super 88 (Pa. Super. 2009).

XVII. UNIFORM CONSTRUCTION CODE

Pennsylvania has adopted a Uniform Construction Code (UCC), found at 34 Pa. Code §§ 401-405. The UCC’s provisions provide permit and inspection procedures that apply to commercial and residential construction projects. The UCC requirements for commercial structures, including industrial structures, are found at §§ 403.21 through 403.48. The UCC requirements for residential structures are located in §§ 403.61 to 403.66. The requirements of the UCC pertaining to elevators and other lifting devices are in §§ 405.1 to 405.42.

UCC § 403.21 adopts 11 codes for use throughout Pennsylvania, including the International Building Code 2003, the ICC Electrical Code 2003, and the International Energy Conservation Code 2003. During the initial adoption phase, municipalities in Pennsylvania were allowed to decide whether they would administer and enforce the UCC locally (i.e. opt-in or opt-out). Of Pennsylvania’s 2,565 municipalities, 286 municipalities chose to opt-out. A county by county listing of municipal decisions can be found at www.dli.state.pa.us.

The building process under the UCC begins with the completion and submission of an Application for Building Permit. There are many structures for which a permit is not necessary, including emergency repairs if the application is submitted within three days of the repair; construction of fences not over six feet high, construction of oil derricks, construction of certain sidewalks and driveways, certain swings and other playground structures, certain prefabricated

swimming pools, and certain window awnings. “Ordinary repairs” are also generally exempted from the permit requirements.

XVIII. MECHANIC’S LIENS

A mechanic’s lien is the statutory means of securing payment for labor and materials furnished in the improvement of real property. Mechanics’ liens are designed to protect contractors from recalcitrant landowners and, likewise, subcontractors from recalcitrant contractors. Pennsylvania’s Mechanics’ Lien Law can be found at 49 P.S. §§ 1101-1902. Mechanics’ liens may be filed by contractors, first tier subcontractors and second tier subcontractors. 49 P.S. § 1301. Lien waivers are prohibited with the exception of residential construction projects under \$1 million and for subcontractors who are guaranteed payment by contractors in the form of posted bonds. 49 P.S. § 1401.

To obtain a mechanics’ lien in Pennsylvania, two procedural steps must be fulfilled. First, a mechanics’ lien must be filed and perfected pursuant to statute. 49 P.S. § 1501-10. Second, the lien holder must institute an action to enforce the lien pursuant to the Pennsylvania Rules of Civil Procedure. 49 P.S. § 1701(a).

To perfect a lien, claimants must serve the owner with written notice **within one month** after filing the claim. 49 P.S. § 1502(a)(2). Subcontractors, at any tier, have an additional notice requirement. In every case, the subcontractor must serve upon the owner written notice of his/her intention to file a lien **at least 30 days** before filing the lien. 49 P.S. § 1501(b.1). The formal notice must include:

- (1) the name of the party claimant;
- (2) the name of the person with whom he contracted;
- (3) the amount claimed to be due;
- (4) the general nature and character of the labor or materials furnished;
- (5) the date of completion of the work for which his claim is made;
- (6) a brief description sufficient to identify the property claimed to be subject to the lien.

49 P.S. § 1501(c).

If this specific information is not included in the formal written notice, the lien claim itself may be stricken and lost forever. Notice can be served by first class, registered or certified mail, or by the sheriff, or if service cannot be so made then by posting upon a conspicuous public part of the improvement. 49 P.S. § 1501(d).

The claim must be filed with the prothonotary **within six months** of the day the claimant completes his/her work. If the improvement is located in more than one county, the claim may be filed in multiple counties, but the claim is only effective for the part of the improvement in the county it was filed. 49 P.S. § 1502. The filing must include similar information provided in the formal notice:

- (1) the name of the party claimant, and whether he files as contractor or subcontractor;
- (2) the name and address of the owner or reputed owner;
- (3) the date of completion of the claimant's work;
- (4) if filed by a subcontractor, the name of the person with whom he contracted, and the dates on which preliminary notice, if required, and of formal notice of intention to file a claim was given;
- (5) if filed by a contractor under a contract or contracts for an agreed sum, an identification of the contract and a general statement of the kind and character of the labor or materials furnished;
- (6) in all other cases than that set forth in clause (5) of this section, a detailed statement of the kind and character of the labor or materials furnished, or both, and the prices charged for each thereof;
- (7) the amount or sum claimed to be due; and
- (8) such description of the improvement and of the property claimed to be subject to the lien as may be reasonably necessary to identify them.

Service of the notice of filing of claim shall be made by the sheriff, or if service cannot be so made then by posting upon a conspicuous public part of the improvement. Id.

An affidavit of service of notice, or the acceptance of service, must also be filed **within 20 days** after service. This affidavit must contain the date and manner of service. Failing to file an affidavit of service may cause the lien claim to be stricken. Id.

The second step in obtaining a mechanics' lien – the enforcement of the lien – is governed by the Pennsylvania Rules of Civil Procedure. 49 P.S. §1701(a). An enforcement action, which is initiated by the filing of a complaint, Pa. R.C.P. § 1653, must be commenced within two years of the filing of the claim. 49 P.S. §1701(b).

Service requirements under the Pennsylvania's Mechanics' Lien law are strictly construed. If all of the service requirements are not met, a complaint will be stricken. See *Regency Investments, Inc. v. Inlander Ltd.*, 855 A.2d 75, 77 (Pa. Super. Ct. 2004); *Tesauro v. Baird*, 335 A.2d 792, 796 (Pa. Super. Ct. 1975).

As the courts regularly strictly construe the statutes governing mechanics' liens, in lieu of applying the more forgiving Rules of Civil Procedure, parties intending to file a mechanics' lien must be aware that missing a single deadline may constitute a waiver of the protections afforded to them by statute.

If the mechanics' lien is granted, purchase money mortgages and open-end mortgages, which are used to pay all or a portion of the cost of completing erection, construction, alteration or repair of the mortgaged property, take priority over mechanics' liens. 49 P.S. § 1508.

About the Authors

Joseph J. Bosick, a founding partner of Pietragallo Gordon Alfano Bosick & Raspanti, LLP, is Chair of the Construction Practice Consortium at the Pietragallo Law Firm. He holds a bachelor of arts degree in economics from St. Joseph's University, and his law degree is from the University of Pittsburgh School of Law.

Daniel L. Grill, a partner of Thomas, Thomas and Hafer, LLP, holds an engineering degree from the University of Illinois and was awarded a juris doctor from Widener University School of Law (1992). He is board certified in civil trial advocacy and is admitted before courts throughout Pennsylvania. **Corey J. Adamson**, an associate with Thomas, Thomas and Hafer, LLP, was admitted to the bar in 2006 and holds a juris doctor from Dickinson School of Law of the Pennsylvania State University.

J. Michael Kunsch, a member of Sweeney & Sheehan, is a cum laude and Phi Beta Kappa graduate of the University of Arizona (1988). He was awarded a Juris Doctor from the Villanova University School of Law (1991). He is admitted to practice in Pennsylvania and New Jersey and is admitted to the bar of the U.S. Court of Appeals for the Third Circuit, the Eastern and Middle District Courts of Pennsylvania and the District of New Jersey.

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