STATE OF NEBRASKA CONSTRUCTION LAW COMPENDIUM

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This outline is intended to provide a general overview of Nebraska construction law. As a state of approximately of 1.8 million residents, Nebraska's case law on any substantive topic is somewhat limited. Therefore, the discussion of any particular topic herein is our effort to find those cases hopefully relevant to the topics discussed, and is not necessarily any indication of the total law related to an area of Nebraska construction law.

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I. ACTIONABLE CLAIMS IN CONSTUCTION DEFECT LITIGATION

A. Breach of Contract

As in most states, the purchase of a home or any other significant construction project in Nebraska typically is recorded in a written contract. The contract sets out terms and conditions of performance and delineates each party's rights and obligations, the violation of which gives rise to an action for breach of contract. Such causes of action are commonly brought against a contractor by a purchaser or against a subcontractor by a general contractor. Nebraska courts hold that express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance. *See Lindsay Manufacturing Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). However, this rule is inapplicable where the acceptance was under protest or induced by fraud or where the defects were latent and unknown to the owner. *City of Gering v. Patricia G. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983).

In Nebraska, an action for breach of a written contract is subject to a five-year statute of limitations. NEB. REV. STAT. § 25-205 (Reissue 2008). However, actions for breach of warranty, design deficiencies and professional negligence are the subject of their own distinct statutes of limitation, discussed below (see section II).

B. Negligence

In Nebraska, actions for negligence may be brought for failure to complete construction in a workmanlike manner or for failure to exercise reasonable care toward individuals rightfully on premises under a party's control. *See Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 437, 345 N.W.2d 300, 305 (1984). Some actions involving "construction" may, however, only be brought in contract. *See J.L. Healy Construction Co. v. State*, 236 Neb. 759, 463 N.W.2d 813 (1990). Failure to distinguish the appropriate "action" and "damages/losses" may be devastating. *See Hawkins Construction Co. v. Matthews Company, Inc*., 190 Neb. 546, 209 N.W.2d 643 (1973); *National Crane Corp. v. Ohio Steel Tube Co*., 213 Neb. 782, 332 N.W.2d 39 (1983) overruling *Hawkins*, in part). Court did not need to instruct on negligence when the duty or damages were co-extensive with those encompassed by the breach of contract theory on which the jury was instructed. *Thurston v. Nelson*, 21 Neb. App. 740, 2014 Neb. App. LEXIS 41 (2014).

In negligence cases generally, the duty is to conform to the legal standard of reasonable conduct in light of the apparent risk. In Nebraska, building codes create a legal duty giving rise to a potential negligence claim against a contractor. *Moglia v. McNeil Co., Inc.*, 270 Neb. 241, 700 N.W.2d 608 (2005). *See also Mondelli v. Kendel Homes Corp*., 262 Neb. 263, 631 N.W.2d 846 (2001) (finding contractor was negligent due to violation of building code and industry standards). Nebraska courts have concluded, however, that violation of safety regulations, established by statute or ordinance, is not negligence as a matter of law, but is evidence of

negligence that may be considered in connection with all other evidence in a case deciding that issue. Similarly, violation of a statute is not negligence per se, but only evidence of negligence. *Krehnke v. Farmers Union Co-op. Ass'n*, 199 Neb. 632, 260 N.W.2d 601 (1977).

Nebraska limits contractor liability in negligence through the "accepted work doctrine." The accepted work doctrine provides that a contractor is not liable for injuries or damage to third parties with whom he is not in a contractual relationship where the injury resulting from the negligent performance of his contractual duty is sustained after the work is completed and accepted by the owner. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998). An exception to the doctrine has been recognized in cases involving inherently dangerous elements or where the defect at issue was latent and could not have been discovered by the owner or employer. *Id.* Fraud or other extraordinary facts may also obviate the privity requirement. *John Day Co. v. Alvine & Assoc.*, 1 Neb. App. 954, 961, 510 N.W.2d 462, 466 (Ct. App. 1993)

In Nebraska, liability for injuries resulting to parties at a construction site depends on the degree of control over the worksite that is retained by an owner or contractor. Delegation of responsibility for control of a site may be established by contractual arrangement unless the duty is deemed nondelegable. A general contractor, in control of the premises where work is to be carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance. *Hand v. Rorick Const. Co*., 190 Neb. 191, 206 N.W.2d 835 (1973). However, liability may adhere to a property owner who employs a general contractor if the property owner retains sufficient control over the work done on the premises. *See Dellinger v. Omaha Pub. Power Dist.*, 9 Neb.App. 307, 611 N.W.2d 132 (2000).

Nebraska is a contributory negligence state. NEB. REV. STAT. § 25-21,185.09 (Reissue 2008) provides: "[a]ny contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons whom recovery is sought, the claimant shall be totally barred from recovery." Because comparative negligence is intended to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is a task solely for the fact finder. *Fickle v. State*, 273 Neb. 990, 1003, 735 N.W.2d 754, 768 (2007). As a defense, a defendant can assert that the plaintiff is contributorily negligent. Plaintiffs are contributorily negligent if: (1) they fail to protect themselves from injury; (2) their conduct concurs and cooperates with the defendant's actionable negligence; and (3) their conduct contributes to their injuries as a proximate cause. *Fickle*, 273 Neb. at 1003.

Nebraska is also a joint and several liability state. NEB. REV. STAT. § 25-21,185.10 (Reissue 2008) provides:

In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.

In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

C. Breach of Warranty

In construction defect cases, claims are common for breach of an implied warranty that a building will be constructed in a workmanlike manner or for breach of an express warranty against defects. Such claims are frequently joined with actions for negligence and breach of contract.

1. Breach of Implied Warranty

In Nebraska, courts imply a warranty that contractors engaged to erect a building will do so in a workmanlike manner. A contractor's implied warranty provides the building owner with an action against the contractor if the contractor's work is not of good quality and free from defects. *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974). Such warranty has been recognized to extend not only to initial purchasers of a home but also to subsequent purchasers. *See Moglia v. McNeil Co., Inc.,* 270 Neb. 241, 700 N.W.2d 608 (2005). As such, builders and developers cannot avoid liability by arguing that privity of contract does not exist between a subsequent purchaser and the builder or developer.

The implied warranty doctrine has limitations. Although subsequent homeowners may bring an action for breach of implied warranty, Nebraska requires privity of contract for an action to be brought by an owner against a subcontractor, and Nebraska does not allow subsequent owners to bring claims against subcontractors. *Moglia v. McNeil Co., Inc.*, 270 Neb. 241, 700 N.W.2d 608 (2005). A contractor merely obligating himself to perform a designated undertaking as detailed and required by prescribed plans and specifications does not guarantee that work performed as required by plans and specifications will be free from defects or that it will accomplish the intended purpose. *Fuchs v. Parsons Const. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958). Nebraska courts have also declined to extend the implied warranty doctrine to a sale of a vacant lot in which no latent defect was alleged and on which no structure had been built.

Bernstein v. Ainsworth, 220 Neb. 670, 371 N.W.2d 682 (1985) (when land is conveyed, there is often no clearly defined objective in the transfer and it would be impossible to imply a warranty of fitness for any purpose).

2. Breach of Express Warranty

In Nebraska, actions for breach of express warranty are most common in cases involving sales of products between vendor and purchaser. However, such actions also may arise in cases where a contractor adopts the warranty of the product it sells and contracts to install. Although a seller does not adopt a manufacturer's express warranty merely by giving notice of that warranty (even when that notice was contained in the buyer's purchase agreement) adoption does arise where a seller makes an affirmation about the manufacturer's warranty by means of a statement of fact, a promise, or some action which would tend to induce the buyer to purchase the goods. *Hillcrest Country Club v. N.D. Judds Co*., 236 Neb. 233, 461 N.W.2d 55 (1990) (holding that an affirmative statement by contractor covenanted that roof would meet manufacturer's standard and carry a 20-year warranty).

D. Misrepresentation & Fraud

Under certain circumstances, an action for fraud may be brought against a contractor. An action for fraud must be brought within 4 years of when the cause of action accrues. NEB. REV. STAT. § 25-207(4) (Reissue 2008). Such action does not accrue until there has been discovery of the facts constituting the fraud or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which would lead to such discovery. *NECO, Inc. v. Larry Price & Assocs., Inc.*, 257 Neb. 323, 597 N.W.2d 602 (1999).

Nebraska has adopted the definition of misrepresentation found in Restatement (Second) of Torts §552 (1977), *Knights of Columbus Council 3152 v. KFS Bd., Inc.*, 280 Neb. 904 (2010). The Restatement defines misrepresentation as follows:

1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

2) The liability is limited to loss suffered: (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends.

In order to show misrepresentation, the party alleging it must plead and prove that the representation was made, that the representation was false, that the representation was known to be false when made or was made recklessly without knowledge of its truth and as positive assertion, that the representation was made with the intention that plaintiff should rely on it, that the plaintiff reasonably did so rely, and that the plaintiff suffered damages as result. *Pawnee County Bank v. Droge*, 226 Neb. 314, 411 N.W.2d 324 (1987). Section 6-1109(b) of the Nebraska Rules of Pleading in Civil Actions requires that all averments of fraud must state with particularity the circumstances constituting fraud. NEB. CT. R. PLDG. § 6-1109(b) (2008).

E. Strict Liability

Nebraska cases have not applied strict liability to claims involving defects in real property. In *Bernstein v. Ainsworth*, 220 Neb. 670, 371 N.W.2d 682 (1985), the Nebraska Supreme Court found that the plaintiff failed to plead a cause of action for strict liability in a claim involving a lot developed alongside a lake subject to flooding where no structure had been built. In what appears to have been the first and only case involving strict liability and real estate in Nebraska, the court declined to extend holdings from *Avner v. Longridge Estates*, 272 Cal.App.2d 607, 77 Cal.Rptr. 633 (1969) (applying strict liability where developer's massive moving of earth resulted in unstable soil), *Schipper v. Levitt & Sons, Inc*., 44 N.J. 70, 207 A.2d 314 (1965) (applying strict liability to defects in manufactured homes), and *Kriegler v. Eichler Homes, Inc*., 269 Cal.App.2d 224, 74 Cal.Rptr. 749 (1969) (applying strict liability to defects in manufactured homes). The court concluded that no factual allegations existed that would bring the case within the holdings of those cases because there were no allegations of mass production of homes nor any allegations as to massive moving of earth resulting in unstable soil for foundations. The court stated, "we will not impose strict liability on all owners of residential houses who sell their residences."

Regarding strict liability, the Nebraska Supreme Court has also stated, "the purchaser of a product pursuant to a contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product." *National Crane Corp. v. Ohio Steel Tube Co*., 213 Neb. 782, 332 N.W.2d 39 (1983).

F. Indemnity

Indemnity is a right which inures to persons who, without active fault on his or her part, has been compelled by reason of some legal obligation to pay damages occasioned by the initial negligence of another party. *Motor Club Ins. Ass'n v. Fillman*, 5 Neb.App. 931, 568 N.W.2d 259 (1997). Nebraska recognizes the obligation to indemnify in construction law, which may grow out of an express contractual obligation or an implied contractual relation (liability imposed by law).

1. Express Indemnity

A contract of "indemnity" is the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit. *Lyhane v. Durtschi*, 144 Neb. 256, 13 N.W.2d 130 (1944). The general rules governing construction and interpretation of contracts apply in construing the rights and obligations of parties under an indemnity contract. *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc*., 191 Neb. 50, 213 N.W.2d 731 (1974). Thus, an indemnity contract should be construed so as to ascertain and give effect to the intention of the parties, if that can be done consistent with legal principles. *Id.* Indemnity provisions that are ambiguous are construed against the contractor who wrote it. *Id.* The 8th Circuit, however, has regularly note that the rule of construing ambiguities against the drafter is one of "last resort" and should only be applied if the extrinsic evidence does not resolve the contract's ambiguous language. *See DeGeare v. Alpha Portland Indus., Inc*., 837 F.2d 812, 816 (8th Cir. 1988) ("Ambiguities should be construed against the drafter only if after application of ordinary rules of construction and consideration of extrinsic evidence, the ambiguities remain.") See also *Natural Gas Pipeline Co. of Am. v. E Energy Adams, LLC*, 2011 Neb. App. LEXIS 9, *8 (unpublished) (affirming trial court's decision not to apply the rule in light of decisive extrinsic evidence).

Generally, that which constitutes sufficient consideration for any other kind of contract is sufficient for a contract of indemnity. *U.S. Fidelity & Guaranty Co. v. Curry*, 126 Neb. 705, 254 N.W. 430 (1934). However, contracts containing covenants, promises or agreements to indemnify or hold harmless another person from such person's own negligence are void and wholly unenforceable as against public policy. NEB. REV. STAT. § 25-21,187 (Reissue 2008). Nonetheless, an indemnitee may be indemnified against his own negligence if the contract contains express language to that effect or contains clear and unequivocal language that such is the intention of the parties. *Omaha Public Power Dist. v. Natkin & Co*., 193 Neb. 518, 227 N.W.2d 864 (1975). Furthermore, inclusion of an invalid clause in an indemnity agreement stating that subcontractor was required to indemnify general contractor even if harm was caused by negligence of general contractor was held not to render the entire indemnification provision void and unenforceable. *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc*., 232 Neb. 763, 443 N.W.2d 872 (1989).

2. Implied Indemnity

Indemnification by operation of law or implied contract is available when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his or her conduct. *Cerny v. Todco Barricade Co*., 273 Neb. 800, 733 N.W.2d 877 (2007). Generally, the party seeking indemnification must have been free of any wrongdoing. However, failure to inspect a subcontractor's work does not bar a general contractor from seeking indemnification. See *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc*., 232 Neb. 763, 443 N.W.2d 872 (1989) (holding

that a general contractor had a common-law right of indemnification against its subcontractor, whose active negligence caused injury to a third party where the general contractor's liability was based solely on its failure to adequately inspect work of subcontractor). Thus, if one tort-feasor, by active conduct, has created danger to a plaintiff, and a second tort-feasor has merely failed to discover or to remedy it, the passive tort-feasor may be entitled to indemnification. *Id*.

II. STATUTE OF LIMITATIONS

Neb. Rev. Stat. § 25-223 (Reissue 2008) is the special statute of limitations applicable to builders and contractors making improvements to real property. Nebraska law provides a four-year statute of limitations for acts or omissions constituting a breach of warranty or a design defect. § 25-223. The statute applies only to actions brought against contractors or builders. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). As a general rule, the four-year time period begins to run from the date of completion or substantial completion of the project by the contractor. *Board of Regents of Univ. of Neb. v. Lueder Constr. Co.*, 230 Neb. 686, 695, 433 N.W.2d 485, 491 (1988). There is an exception for causes of action that are not discovered within the four-year period or within one year preceding the end of the four-year period and could not reasonably have been discovered during the four-year period. In such cases, an action may be brought within 2 years of discovery of facts sufficient to reveal a cause of action. § 25-223.

Recently, in *Adams v. Manchester Park,* 291 Neb. 978, 871 N.W.2d 215 (2015), the Nebraska Supreme Court analyzed Neb. Rev. Stat. 25-223 and determined that the statute applies to both implied and express warranties. The Court determined that where a contractor provides the owner with an express warranty to repair defects, the four-year statute of limitations in 25-223 for breach of the warranty does not commence running until the end of the warranty period. Typically, as noted above, the statute of limitations for construction claims begins to run at the time of substantial completion. The *Adams* case, however, extends the statute of limitations in situations where the contractor provides an express warranty.

Similarly, Nebraska law provides a two-year statute of limitations from the time of the act or omission for actions based on professional negligence or breach of warranty. NEB. REV. STAT. § 25-222 (Reissue 2008). For the purposes of section 25-222, architects and engineers are deemed professionals. *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988). For professional negligence, Nebraska follows the occurrence rule, so the two-year time period generally begins to run on the date of the alleged act or omission. However, the discovery rule applies to claims that could not be discovered within the two-year period. In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000). In such cases, an action may be brought within 1 year of discovery of facts sufficient to reveal a cause of action.

Sections 25-222 and 25-223 both include a statute of repose absolutely barring claims after ten years from the accrual of a cause of action, regardless of when they are discovered.

III. DAMAGES

A. Economic Loss Doctrine

The economic loss rule prohibits tort recovery for situations in which the product damages only itself, the losses or damages are purely economic in nature, and there is no personal injury or damage to other property. Nebraska case law holds that a negligent failure to observe common law duties to perform a contract "with care, skill, reasonable expediency, and faithfulness" may constitute both a tort and a breach of contract. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 437, 345 N.W.2d 300, 305 (1984). Such negligent performance might constitute a tort if it results in damage or loss to the plaintiff's person or property and the duty at issue does not arise solely by contract. *L.J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7, (1988); *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 463 N.W.2d 813 (1990). Again, where the loss is purely economic and does not result in physical damage to one's person or property, then the claim may only be brought under contract law. *See J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 463 N.W.2d 813 (1990) (in which the court held that the action rightly rested in contract and not tort where the allegedly negligent performance of the contract did not result in physical damage). In *Lesiak v. Central Valley AG Cooperative*, 283 Neb. 103, 808 N.W.2d 67 (2012), the Nebraska Supreme Court held that the doctrine applies solely when "the alleged breach is only of a contractual duty, and no independent tort duty exists."

B. Recovery for Investigative Costs

In Nebraska, the costs of litigation and the expenses incident to litigation, including experts fees, may not be recovered unless provided for by a statute or a uniform course of procedure. *Bartunek v. Gentrup*, 246 Neb. 18, 21, 516 N.W.2d 253, 255 (1994). There is neither statutory authority nor a uniform course of procedure established for the recovery of investigative costs in the construction law context.

C. Emotional Distress Claims

There are currently no Nebraska cases directly addressing whether a homeowner can recover emotional distress damages because of construction defects to her home. However, Nebraska courts have held that mental suffering is not a legitimate measure of damages for destruction of personal property. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999) (in which plaintiffs could not recover damages for emotional distress caused by the negligently inflicted death of their racehorses).

D. Stigma Damages

Stigma damages are damages awarded for diminution in value of property due to a perceived problem with the property. Nebraska case law does not specifically provide for a stigma damages claim. However, there is case law allowing diminution in value damages for claims of negligence in construction. *See Hiway 20 Terminal, Inc. v. Tri-Country Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989) (in which $171,360 was awarded for diminution in value where a subcontractor negligently failed to adequately assemble tie-rods providing wall and roof support and where the contractor negligently failed to inspect the work of the subcontractor).

E. Economic Waste

Generally, the damages awarded in a construction contract breach are equal to the cost of completion or repair. *See Nekuda v. Vincent*, 213 Neb. 527, 330 N.W.2d 477 (1983). However, where completion or repair would either damage a "substantial portion of the building" or come at "inordinate cost," the measure of damages is the difference between the value of the structure as constructed and the value if the structure was built according to the contract. *Moss v. Speck*, 209 Neb. 46, 48, 306 N.W.2d 156, 157 (1981).

F. Delay Damages

A contractor has the right to recover damages resulting from delay caused by a breach of contract by the other party. Thus, where (1) there is a breach of contract by the owner or the other party, (2) the breach of contract results in delay in the work of the contractor, and (3) the delay in the work causes damage to him, he has a right of recovery in the absence of a 'no-damage clause' or other provisions to the contrary in the contract and even though the contract contains a provision for the extension of time. *Siefford v. Housing Authority of the City of Humboldt*, 192 Neb. 643, 223 N.W.2d 816 (1974). In *Siefford* a construction contract provision that,"no payment or compensation of any kind shall be made to contractor for damages because of hindrance or delay from any cause in progress of work, whether such hindrances or delays be avoidable or unavoidable," precluded the contractor from recovering damages for delays allegedly caused by owner.

G. Interest on Loans to Repair Property

Recovery of interest paid on funds borrowed in order to make repairs to property during the course of the litigation were not recoverable. *R & D Properties, LLC v. Altech Construction Co*., 279 Neb. 74, 776 N.W. 2d 493 (2009).

H. Recoverable Damages

1. Direct Damages

The measure of damages under Nebraska law can be daunting. *See Omaha Public Power*

District v. Darin & Armstrong, Inc., 205 Neb. 484, 288 N.W.2d 467 (1980).

When a breach of contract occurs, the plaintiff is generally entitled to the full profit he would have realized under the contract. *See Wiebe Constr. Co. v. School Dist. of Millard*, 198 Neb. 730, 255 N.W.2d 413 (1977). In Nebraska, damages for defects in materials, construction, or workmanship are measured by the cost of remedying the defects. *Moss v. Speck*, 209 Neb. 46, 48, 306 N.W.2d 156, 157 (1981). However, where the defects cannot be remedied without material injury to or reconstruction of a substantial portion of the building, the damages are measured by the difference between the value of the structure as constructed and the value of the structure if it had been constructed according to the contract. *Id*.

There is case law in Nebraska supporting an award of damages for lost profits. *See El Fredo Pizza, Inc. v. Roto-Flex Oven Co*., 199 Neb. 697, 261 N.W.2d 358 (1978). However, an award of lost profits is case specific and too complicated an issue to discuss in the limited space provided herein.

2. Stigma Damages

Nebraska case law does not specifically provide for stigma damages in the construction law. However, case law does provide for diminution in value damages in negligence claims. (See stigma damages above.)

3. Loss of Use

Currently there do not appear to be any Nebraska cases addressing whether a plaintiff may recover loss of use damages in a construction case.

4. Punitive

Punitive, vindictive, or exemplary damages violate Nebraska's Constitution and are not allowed. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975). The measure of recovery in all civil cases is compensation for the actual and ascertainable loss. *Karbach v. Fogel*, 63 Neb. 601, 88 N.W. 659 (1902).

5. Emotional Distress

Currently there do not appear to be any Nebraska cases addressing whether a plaintiff may recover emotional distress damages in a construction case. However, Nebraska courts have held that mental suffering is not a legitimate measure of damages for destruction of personal property. *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999) (in which plaintiffs could not recover damages for emotional distress caused by the negligently inflicted death of their racehorses).

6. Attorney Fees

In Nebraska, attorney's fees are allowed to the successful party in the litigation only where Nebraska statute expressly allows or where an accepted uniform course of procedure allows recovery of an attorney fee. *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984). There exists neither a uniform course of procedure nor a Nebraska statute dedicated to the award of attorney's fees in the construction contract context.

Further, Nebraska courts have repeatedly held that a provision in a contract which provides that in the event of litigation involving the contract, the prevailing party shall be entitled to costs, including an attorney's fee, is contrary to public policy and void. *See Id.*; *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984); *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983).

7. Expert Fees & Costs

In Nebraska, the costs of litigation and the expenses incident to litigation, including experts fees, may not be recovered unless provided for by a statute or a uniform course of procedure. *Bartunek v. Gentrup*, 246 Neb. 18, 21, 516 N.W.2d 253, 255 (1994). There is neither statutory authority nor a uniform course of procedure established for the recovery for expert fees.

8. Pre-Judgment Interest on Unliquidated Claims

Pre-judgment interest on unliquidated claims is governed by Neb. Rev. Stat. § 45-103.02(1). An award of prejudgment interest is allowed only if the claim is "liquidated," which means that there is no reasonable controversy as to liability or amount. *See e.g. Countryside Coop. v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). If the claim is unliquidated, a formal pretrial settlement demand must be made, in writing, and sent by certified mail. The final outcome must then be more favorable than the offer. Interest runs only from the date of the demand. § 45-103.02(1). Where the claim is unliquidated and the offer of settlement is exceeded by the judgment, prejudgment interest accrues on the full amount of the judgment starting on the date of the first offer of settlement which offer is exceeded by the judgment. *Martensen v. Rejda Bros*., 283 Neb. 279, 808 N.W.2d 855 (2012).

IV. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

This is a brief summary of some general propositions of the law related to insurance coverage for construction claims.

In Nebraska, coverage under an insurance policy consists of two separate and distinct obligations: (1) the duty to defend any suit filed against the insured party, and (2) the duty to indemnify the insured party for injury caused to third parties. *Dutton-Lainson Co. v. Continental Ins. Co.,* 271 Neb. 810, 716 N.W.2d 87 (2006). An insurer's duty to defend is broader than its duty

to indemnify. *Peterson v. Ohio Cas. Group,* 272 Neb. 700, 724 N.W.2d 765 (2006). The duty to defend is usually a contractual duty, rather than one imposed by law. *Chief Industries, Inc. v. Great Northern Ins. Co.,* 268 Neb. 450, 683 N.W.2d 374 (2004). The nature of the duty to defend is defined by the insurance policy. *Id.*

In determining its duty to defend, an insurer must look to the petition or complaint filed against its insured and ascertain the relevant facts from all available sources. *Peterson v. Ohio Cas. Group,* 272 Neb. 700, 724 N.W.2d 765 (2006). Insurers are obligated to defend if: (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer discloses facts that would obligate the insurer to indemnify. *Mapes Indus. v. United States F. & G. Co.,* 252 Neb. 154, 560 N.W.2d 814 (1997). An insurer has a duty to defend the insured if there is any potential that any claim asserted against the insured is covered by the policy. *John Markel Ford, Inc. v. Auto-Owners Ins. Co*., 249 Neb. 286, 543 N.W.2d 173 (1996). Accordingly, insurers are obligated to defend all suits against the insured, even if groundless, false, or fraudulent. *Peterson v. Ohio Cas. Group,* 272 Neb. 700, 724 N.W.2d 765 (2006). However, insurers are not bound to defend a suit based on a claim that is outside the coverage of the policy. *Id.* The burden of proving whether an exclusionary clause applies rests on the insurer. *Id.* Where coverage is denied, the insured carries the burden of proving coverage under an insurance policy. *Pogge v. American Family Mut. Ins. Co.,* 13 Neb.App. 63, 688 N.W.2d 634 (2004).

In the absence of a statute to the contrary, the risks insured against under a policy of liability insurance are determined by the terms of the policy and not by the liability of the insured. *Marx v. Hartford Acc. & Indem. Co.,* 183 Neb. 12, 157 N.W.2d 870 (1968). In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved. *Poulton v. State Farm Fire & Cas. Cos.,* 267 Neb. 569, 675 N.W.2d 665 (2004). Where the terms of a contract are clear, they are accorded their plain and ordinary meaning. *Id.*

When parties require a subcontractor to name a general contractor as an additional insured on its commercial general liability policy, the parties intended that the subcontractor would insure against loss caused by the general contractor's negligence. In addition, the additional insured endorsement, which includes coverage for liability arising out of the subcontractor's operations, may be broad enough to provide coverage even if the subcontractor was not negligent. *Federated Service Insurance Company v. Alliance Construction, LLC*, 282 Neb. 638, 805 N.W.2d 468 (2011).

Consistent with the majority of courts, the Nebraska Supreme Court has concluded that faulty workmanship is not an occurrence covered under a standard commercial general liability policy ("CGL policy"). In *Auto-Owners Insurance Company v. Home Pride Companies, Inc*., 268 Neb. 528, 684 N.W.2d 571 (2004), Auto-Owners argued it was not liable under a CGL policy for Home Pride's faulty workmanship in installing shingles on an apartment. More specifically, Auto-

Owners argued that faulty workmanship does not constitute an occurrence under a CGL policy. The policy at issue defined occurrence as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. The Nebraska Supreme Court concluded that although the term "accident" was not defined in the policy, an accident includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby. Faulty workmanship is not an accident and, therefore, not an occurrence. The court went on to state, however, although faulty workmanship, standing alone, is not an occurrence under a CGL policy, an accident caused by faulty workman is a covered occurrence.

V. CONSTRUCTION LIENS

Construction liens are governed by the Nebraska Construction Lien Act, NEB. REV. STAT. § 52-125 to § 52-159 (Reissue 2010).

A. Work/Materials Subject to Lien

A person who furnishes services or materials pursuant to a real estate improvement contract has the right to file a construction lien for non-payment. NEB. REV. STAT. § 52-131 (Reissue 2010). Construction liens may attach to real estate for the furnishing of materials that produce a physical change in the condition of the land or a structure thereon, including excavation and grading, construction or installation, demolition, repair, remodeling, or removal of structures, landscaping, surface or subsurface testing or analysis, and preparation of surveys, architectural and engineering plans, or drawings. *Id*.; NEB. REV. STAT. § 52-130 (Reissue 2010).

Persons claiming construction liens on materials must show the materials were furnished for the purpose of improvement, by: (1) consumption; (2) special fabrication that is not resalable; or (3) operation of machinery or equipment during construction. NEB. REV. STAT. § 52-134(1) (Reissue 2010). Delivery of materials to the site of a particular improvement creates a presumption they were used in the course of construction or were incorporated into the improvement. NEB. REV. STAT. § 52-134(2) (Reissue 2010).

Construction liens cannot attach to real estate for mining or removal of raw materials or things growing on the land. NEB. REV. STAT. § 52-130(2) (Reissue 2010). Such liens may not attach for activities involving the disposal or removal of objects, the planting, cultivation, or harvesting of crops, or for the preparation of the soil for planting crops. *Id.* Additionally, construction liens cannot attach to real estate owned by the state, a county, a municipality, or other governmental agency or political subdivision. NEB. REV. STAT. § 52-132 (Reissue 2010).

The Nebraska Construction Lien Act, NEB. REV. STAT. § 52-125 (Reissue 2010) *et seq*., provides special protections for the owners of residential real estate.

B. Time Limit for Filing Lien

Claimants may record construction liens any time after entering a contract when lien rights arise and no later than 120 days after the final furnishing of services or materials. NEB. REV. STAT. § 52-137(1) (Reissue 2004). The requirements to be included within a construction lien can be found at NEB. REV. STAT. § 52-135 (Reissue 2010).

C. Lien Priorities

The priority of liens depends upon the time of attachment. Liens that attach at the same time have equal priority and share pro rata in the proceeds. NEB. REV. STAT. § 52-138 (Reissue 2010). Liens attaching at different times have priority in the order of attachment. *Id*. If a notice of commencement is filed, attachment dates may be altered. *Id.* Generally speaking, a lien filed after a notice of commencement is recorded has priority from the time the notice of commencement is recorded. NEB. REV. STAT. § 52-145 (Reissue 2010). The contents of a notice of commencement and procedure for recording are provided for by statute. *See Id*; NEB. REV. STAT. § 52-146 (Reissue 2010).

D. Time Limit for Filing Lawsuit to Foreclose Lien

Construction liens are enforceable for up to 2 years after the recording date. NEB. REV. STAT. § 52-140(1) (Reissue 2010). Other persons having an interest in the real estate may give the claimant written demand to institute judicial proceedings to enforce the lien. NEB. REV. STAT. § 52-140(2) (Reissue 2010). In these cases, the claimant must institute judicial proceedings within 30 days or the lien lapses. *Id.*

VI. PROMPT PAYMENT ACT

The Nebraska Construction Prompt Payment Act, Neb. Rev. Stats. §§ 45-1201 to 45-1210 (Reissue 2014) applies to nearly all private and public construction contracts and subcontracts entered into on or after October 1, 2010. For contracts subject to the Act, contractors must be paid within thirty days after the receipt of a payment request pursuant to the contract. In addition, once all work has been performed and all conditions precedent to payment have been satisfied for a subcontract, subcontractors must be paid within ten days of payment made to the contactor.

In 2014, the Act was amended for contracts entered into on or after July 18, 2014. Individuals or entities performing work on State of Nebraska contracts, federal-aid or state-aid project of a political subdivision in which the state pays the contractor or subcontractor on behalf of the subdivision are removed from the definitions of "contractor" and "subcontractor," thereby limiting the parties protected by the Act. The Act also defined the term “substantially complete,” as “the stage of a construction project when the project, or a designated portion thereof, is sufficiently complete in accordance with the contract so that the owner can occupy or utilize the

project for its intended use."

The 2014 amendments also extends the retainage time, requiring that contractors must be paid within forty-five days after substantial completion. In addition, the amendment limited the amount an owner, contractor, or sub could withhold as retainage. Under the Act, retainage may not be withheld until substantial completion and the amount of the retainage may not exceed 10% of the contract price. If the scope of work is 50% complete the contractor may only withhold a 5% retainage.

Finally, the 2014 amendments provide a court with discretion to award reasonable attorney's fees to plaintiffs pursuing claims under the Act.

About the Author

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