STATE OF SOUTH DAKOTA CONSTRUCTION COMPENDIUM OF LAW

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South Dakota

South Dakota is a contributory negligence state. Contributory negligence in South Dakota is defined as negligence on the part of a plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in bringing about the injury to the plaintiff. (SDCL 20-9-1). South Dakota is a joint and several liability state. Under SDCL 15-8-11, a joint tort-feasor means two or more persons jointly or severally liable in tort for the same injury to a person or property, whether or not judgment has been recovered against all or some of them. See section on right of contribution among joint tort-feasors for more information.

I. Breach of Contract

A breach of contract claim under South Dakota law is subject to a six-year statute of limitations. See SDCL 15-2-13. In an action for relief on the grounds of fraud, the cause of action shall not be deemed to have accrued until the aggrieved party discovers, or has actual or constructive notice of, the facts constituting the fraud. See SDCL 15-2-3. The statute of limitations ordinarily begins to run when the plaintiff either has actual notice of a cause of action or is charged with notice. Actual notice consists of express information of a fact. See SDCL 17-1-2. Constructive notice is notice imputed by the law to a person not having actual notice. See SDCL 17-1-3. An individual having actual notice of circumstances sufficient to put a prudent person on inquiry about a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. See SDCL 17-1-4. Either actual or constructive notice, therefore, will equally suffice to start the statute of limitations' clock running. See *Strassburg vs. Citizens State Bank* 581 N.W. 2d 510 (S.D. 1998)

South Dakota recognizes a breach of contract claim and negligence claims against contractors and engineers for faulty construction. See *Gettysburg School District v. Helms and Associates, et al*, 751 N.W. 2d 266 (2008)

A cause of action for a breach of any contract for sale must be commenced within four years after the cause of action has accrued. See SDCL 57A-2-725. A cause of action under this section accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty claim occurs when the tender of the delivery is made. There is an exception if a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance. In that cause, the cause of action accrues when the breach is or should have been discovered.

II. Negligence

The court in *Ehresmann v. Muth*, 757 N.W.2d 402, (S.D. 2008) stated that "claims of negligent construction and breach of implied warranty exist where a builder-vendor fails to construct in a reasonably good and workmanlike manner. See also *Waggoner v. Midwestern Development*, 154 N.W.2d 803, 807 (S.D.1967). Liability extends to the sale

of newly constructed buildings that are fully completed at the time of sale. *Id.* at 65, 154 N.W.2d at 807-08 (quoting Williston on Contracts, 3d ed. § 926A (1963)). In this situation, 'a purchaser relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of the house; and that the house will be fit for human dwelling.' 154 N.W.2d at 807-08 (quoting Williston on Contracts, 3d ed., § 926A (1963))."

The court, in *Mid-Western Elec., Inc. v. DeWild Grant Reckert & Associates Co*. 500 N.W.2d 250, (S.D.1993)**,** discusses the fact that a majority of courts that have looked at professional negligence have upheld a cause of action where there was economic damage that was foreseeable. The court in Mid-Western Elec. discussed the holdings of multiple jurisdictions on the question of allowing a cause of action against an architect or engineer for economic damages if a party was forseeably harmed by the professional. South Dakota has recognized a claim against a professional architect. The court found that an architect could be held responsible if a third party is physically inured due to his negligence. See *Duncan v. Pennington County Housing Auth.,* 283 N.W.2d 546 (S.D.1979).

The Mid-Western court reasoned that "[t]o deny a plaintiff his day in court would, in effect, be condoning a professional's right to do his or her job negligently with impunity as far as innocent parties who suffer economic loss. We agree the time has come to extend to plaintiffs recovery for economic damage due to professional negligence. We therefore recognize that in South Dakota a cause of action exists for economic damage for professional negligence beyond the strictures of privity of contract." *Id.* at 254.

III. Breach of Warranty

Plaintiff may establish a breach of warranty without proof of negligence on the part of the defendant. A breach of warranty claim may be brought based upon an implied or expressed warranty. A breach of an express warranty claim accrues under SDCL 57A-2-313.

A breach of an implied warranty accrues under SDCL 57A-2-314. Under South Dakota law, warranty of merchantability generally provides that goods will conform to ordinary standards and that they are of average grade, quality, and value of like goods which are generally sold in the stream of commerce. SDCL 57A-2-314(2). Implied warranty of merchantability accompanies the sale of used goods.

In *Crandell v. Larkin and Jones Appliance Company, et al,* 334 N.W. 2d 31, (1983) the South Dakota Supreme Court stated that while they agreed with the rational provided by the Oregon Supreme Court, those merchants who chose to sell used-products and rebuild or recondition goods are subject to the strict liability doctrine. Application of this doctrine to the sellers of used products will help protect the reasonable expectations of consumers.

The Court in *Waggoner v. Midwestern Development, Inc.* 83 S.D. 57, 154 N.W.2d 803 (S.D. 1967) laid out the law in South Dakota on the issue of breach of warranty. The court stated that "warranties are either express or implied. Implied warranties arise under certain circumstances, by operation of law, and are intended to hold vendors to a course of fair dealing." The court concluded that where in the sale of a new house the vendor is also a builder of houses for sale there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed. The builder is not required to construct a perfect house and in determining whether a house is defective the test is reasonableness and not perfection. The duration of liability is likewise determined by the standard of reasonableness.

The court in *Border States Paving, Inc. vs. South Dakota Department of Transportation*, 574 N.W. 2d 898, (SD 1998) held that where a party agrees to perform for a fixed sum, they will not be excused or become entitled to additional compensation due to unforeseen difficulties that are encountered. Should an individual decide to build a structure upon a particular site, they assume the risk of the soil. But this is not to say that when a contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be held responsible for the consequences of the defects in the plans and specifications. The court goes on further to discuss its holding in *Mooney's Inc. v. South Dakota Department of Transportation*, 482 N.W. 2d 43 (S.D. 1992) where the court held that in determining the allocation of risk, the government will not be liable to a contractor for breach of implied warranty unless there are misrepresentations of material facts through the concealment of false statements on the part of the government.

IV. Misrepresentation –Fraudulent

Fraudulent misrepresentation is the act of willfully deceiving another, intending to cause the other person to act to that person's injury or risk. To establish fraudulent misrepresentation, plaintiff must prove: (1) the defendant deceived the plaintiff or a group of persons of which the plaintiff was a member; (2) the defendant intended or had reason to expect that the plaintiff would act upon the representation; and (3) the plaintiff justifiably relied upon the representation to the plaintiff's detriment. See, SDCL 20-10-1

The reasonableness of plaintiff's reliance on the misrepresentation is treated differently in various states. Some states view the reliance on the misrepresentation as an affirmative defense. Some states view it as part of a plaintiff's prima facie case. South Dakota law is not clear on the point.

According to SDCL 20-10-1, an individual who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. Deceit is defined as any of the following: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead because of failure to communicate that fact; or (4) a promise made without any intention of performing. See, SDCL 20-10-2.

Actual fraud may be a basis of a tort action and contract actions. Constructive fraud is a basis for action for avoidance of contracts only. See, SDCL 20-10-1

V. Remedies For When a Buyer Has Been Defrauded

If a buyer has been defrauded, the buyer can either rescind the contract, restore what he received and recover back what he paid, or affirm the agreement and sue for monetary damages. See, SDCL 53-11-5. *O'Connor vs. King*, 479 N.W. 2d 162 (1991)

VI. Strict Liability

To establish that a defendant is liable to the plaintiff on the basis of strict liability, the plaintiff must prove the following by a greater convincing force of the evidence: (1) That the product was in a defective condition which made it unreasonably dangerous to the plaintiff user; (2) that the defect existed at the time it left the control of the defendant; (3) that the product was expected to and did reach the plaintiff user without a substantial unforeseeable change in the condition the product was in when it left the control of the defendant; (4) the defective condition was a legal cause of the injuries.

Strict liability in South Dakota was not created by legislative fiat; it is the progeny of the judiciary. In *Engberg v. Ford Motor Company*, 87 S.D. 196, 205 N.W. 2d 104 (1973), "the court adopted strict liability as expressed in Restatement of Torts (Second) s 402A. Subsequently in *Shaffer v. Honeywel*l, Inc., S.D., 249 N.W.2d 251 the court affirmed the position taken in *Engberg*.

In *Peterson v. Safway Steel Scaffolds Co.,* 400 N.W.2d 909, (S.D.,1987) South Dakota confirmed the rule of strict liability in tort as expressed in *Engberg v. Ford Motor Co.,* 87 S.D. 196, 205 N.W.2d 104 (1973). *See Zacher v. Budd,* 396 N.W.2d 122 (S.D.1986); *Hamaker v. Kenwel-Jackson Machine, Inc.,* 387 N.W.2d 515 (S.D.1986).

A defense to strict liability under South Dakota law is recognized where the defendant contends that there was a substantial unforeseeable change in the product and because of that change, the defendant is not liable to the plaintiff under the theory of strict liability. Other defenses are recognized as well. The contributory negligence of the plaintiff, however, is not a defense in South Dakota to plaintiff's strict liability claim. See *Berg v. Sukup Mfg. Co.* 355 N.W. 2d 833 (S.D. 1984). Under a strict liability theory or a breach of warranty claim, assumption of the risk may be used as an affirmative defense.

The issue of the availability of contributory or comparative negligence in a breach of warranty case has not been address specifically by the South Dakota Supreme Court. The rule appears to be that contributory negligence is not available as a defense in a breach of warranty case. See *Southern Illinois Stone Co. vs. Universal Engineering Corp*. 592 F2d 446 (8th Cir. 1979)

According to South Dakota Codified Law 20-9-9, product dealers and sellers are immune from strict liability except for manufacturers and for those who knew of the defect. There is no cause of action based on the doctrine of strict liability in tort against any distributor, wholesaler, dealer, or retail seller of a product which is alleged to contain or possess a latent defective condition unreasonable dangerous to the buyer, user, or consumer unless the said distributor, wholesaler, dealer, or retail seller is also the manufacturer or assembler of said product or the maker of a component part of the final product, or unless said dealer, wholesaler, or retail seller knew, or, in the exercise of ordinary care, should have known, of the defective condition of the final product. In *Peterson vs. Safway Steel Scaffolds Co*, 400 N.W. 2d 909 (1987) the court held that knowledge of defective condition will not be imputed to nonmanufacturing middle man as would otherwise be the case under a strict liability theory.

Under South Dakota law, a plaintiff may recover under a theory of strict liability against a seller of used goods by proving not only that the seller rebuilt or reconditioned the good and also that the seller knew, or in the exercise of ordinary care should have known of the defect. See *Wynia v. Richard-Ewing Equipment Co., Inc.* 17 F. 3d 1084 (1994) and the case discussed on page 2, *Crandell v. Larkin and Jones Appliance Company, et al,* 334 N.W. 2d 31, (1983).

VII. South Dakota Construction Defects Act

South Dakota has a Residential Construction Defects Act, SDCL 21-1-16. This relates to the construction of a single-family house or a unit in a multi-unit residential structure which title to each individual unit is transferred to the owner under a condominium or cooperative system.

Before an action can be brought against a contractor for the construction of a residence, the party must serve an initial notice of claim asserting a contract defect claim. Within thirty (30) days each contractor notified shall serve a written response on the claimant to inspect the alleged construction defect and serve on the home owner a written offer to repair the construction defect or compensate the owner by monetary payment.

If the contractor does not respond in any way to the claimant's defect claim or refuses service of the claim, the claimant can bring a lawsuit.

If the contractor does not respond or if the claimant receives a written statement that the contractor will not precede further to remedy the defect, the claimant may bring an action against the contractor without further notice.

The South Dakota Construction Defects Act also relates to defective remodel work. The Act also provides for tolling of statute of limitations.

Related Issues

I. Indemnity Claims

Indemnity Claims in South Dakota are found under Chapter 56 of the South Dakota Codified Laws. Indemnity for future wrongful acts are void. See SDCL 56-3-2. One can indemnify an individual for past wrongful acts. An agreement to indemnity is valid against an act already done even though the act was known to be wrongful unless it was a felony. See SDCL 56-3-3. Indemnity can be extended to the acts of agents. Under SDCL 56-3-4, an agreement to indemnity against the acts of a certain person, applies not only to his/her acts and their consequences but also to those of his/her agents. Unless a contrary intention appears in the agreement, an agreement to indemnify several persons applies to each. Under South Dakota law, a person who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act. See SDCL 56-3-6.

South Dakota specifically addresses indemnification of architects and engineers in construction contracts under SDCL 56-3-16. Under this law, construction contracts, plans, and specification that contain indemnification provisions shall include the following provisions:

> The obligations of the contractor shall not extend to the liability of the architect or engineer, his agents or employees arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the architect, or engineer, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage. See SDCL 56-3-16

The law goes further to state that any indemnification provision in a construction contract in conflict with the previous referenced law shall be unlawful and unenforceable. See SDCL 56-3-17.

"A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to an individual or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitee." is void and unenforceable. See SDCL 56-3-18

The court stated, in Schull *Const. Co. v. Koenig* 121 N.W. 2d 559, 229 (1963) that "the trial court found that there was no provision in the contract between the contractor and subcontractor, express or implied, making the subcontractor liable for the damage that occurred and that the subcontractor did not either expressly or impliedly assume the indemnifying and hold harmless agreement of the contractor with the owner." The court therefore, affirmed the trial court's decision. The court went on to state that "contracts of

indemnity are strictly construed in favor of a subcontractor as against the contractor and unless the language employed clearly and definitely shows an intention to indemnify courts do not read into a written contract indemnity provisions not expressly set forth therein. Such contracts are subject to close scrutiny as to whether such intent was present when the contract was executed."

In *Parker v. Stetson-Ross Mach. Co., Inc.*, 427 F. Supp. 249 (D.S.D1977) the court stated that in "South Dakota, indemnity is an "all-or-nothing" proposition. *Highway Construction Co. v. Moses*, 483 F.2d 812, 817 (8th Cir. 1973). To be entitled to indemnity, one must show "a proportionate absence of contributing fault." *Degen* v. *Bayman*, 86 S.D. 598, 200 N.W.2d 134, 137 (1972). The result of such a showing is to shift the entire liability to the party against whom indemnity is sought. *Degen*, (200 N.W.2d) at 136. Thus, indemnity is not a means by which a portion of liability, comparative with the proportion of fault, can be shifted to another party."

The Supreme Court of South Dakota stated in, *Ebert v. Fort Pierre Moose Lodge No.* 1813. 312 N.W. 2d 119, (S.D. 1981) that "(A) joint tort feasor may recover indemnity where he has only an imputed or vicarious liability for damage caused by the other tort feasor." Degen v. Bayman, 86 S.D. 598, 603, 200 N.W.2d 134, 137 (1972). The court went on to say that in *Degen*, the "Court adopted the viewpoint of the Minnesota Supreme Court as espoused in Hendrickson v. Minnesota Power & Light Co., 104 N.W.2d 843 (1960). The court in Hendrickson held that although indemnity is not necessarily precluded per se among joint tort-feasors, the situations in which indemnity is allowed are exceptional and limited. Summarized, these situations were stated in Hendrickson as: (1) derivative or vicarious liability; (2) action at direction of, and for, another; (3) breach of duty to indemnify; (4) failure to discover negligence of another; and (5) express contract. We believe that only situation (3) is applicable here."

A party to a joint, or joint and several, obligation, who satisfies more than his share of the claim against all, may seek contribution from all the parties joined with him. See SDCL 20-1-6

II. Right of Contribution Among Joint Tort-Feasors.

Under South Dakota law, the right of contribution exits among joint tort-feasors but joint tort-feasors are not entitled to contribution to settlement unless liability has been extinguished. See SDCL 15-8-12. A joint tort-feasor who enters into a settlement with the injured party may not recover contribution from another joint tort-feasor whose liability to the injured person is not released by the settlement. See, SDCL 15-8-14. Under South Dakota law, should a court enter judgment against any party liable on the basis of joint and several liability, any party who is allocated less than fifty percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party. See, SDCL 15-8-15.1

Indemnity rights are not impaired by joint tort-feasor provisions. Sections 15-8-11 to 15-8-22 of South Dakota law do not impair any right of indemnity under existing law.

III. Third Party Beneficiaries

South Dakota Codified Law 53-2-6 is the controlling law for third-party beneficiaries. It provides that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it. This is not applicable to every contract made by one individual with another for the performance of which a third person will derive a benefit. It must be clearly manifested that the intent to make the contract insure to the benefit of the third party. See *Sisney vs. State*, 754 N.W. 2d 639, 2008 SD 71.

Under the third party beneficiary statute, incidental beneficiaries are not entitled to third-party beneficiary status and therefore, cannot enforce a contract. The benefit must be more than merely incidental.

"A contractor that has expressly agreed to pay all claims for labor and material and his guarantor binds himself to pay for such labor and material equally with the contractor, laborers and materialmen may adopt such guaranty and enforce it the same as though made directly to them." See *Evans & Howard Fire Brick Co. v. National Surety Co.,* 173 N.W. 448 (1919).

In a case involving a corporation's contract with a general contractor, the court held "all claims growing out of the lawful demand of subcontractors, laborers, mechanics, materialman, furnishers, and supplies was not restricted to claims on which a mechanics' lien could be filed but rather included third-party beneficiary claims, and thus the corporation could withhold payment to contractor until subcontractor's outstanding claims had been paid, discharged, or waived in contractor's suit for payments against corporation, where subcontractor had not filed a mechanics' lien." *Carstensen Contracting Inc., v. Mid-Dakota Rural Water System, Inc*., 653 N.W. 2d 875, 2002 SD 136.

According to SDCL 57A-2-318, a seller's warranty, whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. This section of the code may not be excluded or limited by a seller.

IV. Economic Loss Doctrine

Diamond Surface, Inc. v. State Cement Plant Com'm. 583 N. W. 2d 155 (S.D. 1998) cited *City of Lennox v. Mitek Indus., Inc.,* 519 N.W.2d 330, 333 (S.D.1994), where the court affirmed summary judgment against the City of Lennox. The City of Lennox had brought a suit against a subcontractor. The subcontractor has supplied roofing trusses for a municipal building as well as a supplier of component parts of the trusses. The City of Lennox claimed breach of contract, breach of implied warranties and negligence after the trusses failed. The court applied a two step processing in determining the economic loss rule. The court held that the UCC applied since the main purpose of the transaction was a sales transaction. Under South Dakota law, the term "goods" is defined by SDCL 57A-2-

105(1). The court stated that generally the rule is that economic losses are not recoverable under tort theories. Economic losses are limited to commercial theories found in the UCC. The court went on to adopt the general rule with its two recognized exceptions. One exception to the general rule is when personal injury is involved. *Mitek Indus.*, 519 N.W.2d at 333 (citation omitted). The second exception may apply when the damage is to "other property" as opposed to the specific goods that were part of the transaction. *Id.* "Other property has been defined as damage to property collateral to the product itself." *Id.* (citation omitted). The court defined "economic loss as those losses resulting from the failure of the product to perform to the level expected by the buyer and the consequential losses resulting from the buyer's inability to make sure of the ineffective products, such as lost profits." The court found that the damages claimed by the City of Lennox were "in reality repair costs that fall under consequential damages." The damages were therefore not recoverable under the tort theory of negligence but instead were governed by the UCC.

V. Statute of Repose

According to South Dakota Codified Law 15-2A-3, no action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection and observation of construction, or construction, of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of such an improvement more than ten years after substantial completion of such construction. The date of substantial competition shall be determined by the date when construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended. *Id.*

A. **Limitations of 15-2A-3**. The restriction placed on claims under 15-2A-3 may not be asserted by way of defense by any person in actual possession and control as owner, tenant, or otherwise, of the improvement if the deficiency is the proximate cause of the injury or death. See, SDCL 15-2A-4.

A statute of repose is an affirmative defense and the burden of proof to establish an affirmative defense is on the party who seeks to rely on it. See *Clark County v. Sioux Equip. Corp.*, 753 N.W. 2d 406, 2008 SD 60.

VI. Recovery for Investigative Costs

The court in *Atkins v. Stratmeyer* 600 N.W.2d 891 (S.D.,1999) discusses South Dakota's statute on recovery of costs SDCL 15-17-37:

> The prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers,

printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts and other similar expenses and charges. These expenditures are termed disbursements and are taxed pursuant to § 15-6-54(d).

We have not previously addressed awarding costs for investigation fees and impairment ratings. In *Nelson v. Nelson Cattle Co.,* 513 N.W.2d 900 (S.D.1994), this Court had the opportunity to expand SDCL 15-17-37 to allow recovery of expert witness fees beyond the statutorily mandated "court appointed experts." But this Court chose to follow the statutory language word for word "in the absence of some clear reference to expert witness fees being treated different from statutory witness fees." *Id.* at 907. We again decline to expand the statutory language and hold that investigation fees and impairment ratings are not recoverable costs under SDCL 15-17-37.

Damages

I. Stigma Damages

In Subsurfco, Inc. v. B-Y Water Dist., 337 N.W.2d 448, S.D., 1983, the court set forth the appropriate measure of recovery stating, "[W]here the defects cannot be remedied without reconstruction of a substantial portion of the work, the measure of damage is the difference in value between what it would have been if built according to contract and what was actually built." citing *Northern Farm Supply, Inc. v. Sprecher*, 307 N.W.2d 870, 873 (S.D.1981), quoting *Dobler v. Malloy*, 214 N.W.2d 510, 518 (N.D.1973). *See also, H.P. Droher and Sons v. Toushin,* 250 Minn. 490, 85 N.W.2d 273 (1957).

II. Damages

The reasonable compensation for damage to plaintiff's property is determined by the lesser of two measures: the difference between the fair market value of the property immediately before the occurrence and immediately after the occurrence or the reasonable expense of making any necessary repairs to the damaged property, plus the difference, if any, in the fair market value of the property, immediately before the occurrence and its fair market value immediately after repair. See, South Dakota Pattern Jury Instruction 50-20-10.

III. Loss of Use

The reasonable cost to rent replacement property during the time reasonably required to repair or replace the damaged property. There is currently no South Dakota decision expressly permitting such a claim where the damaged property must be replaced, rather than repaired. See, South Dakota Pattern Jury Instruction 50-20-60. Under SDCL 57A-2-715, incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charged, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Consequential damages from a seller' breach allow for any loss resulting from general or particular requirements and needs that the seller at the time of contracting had reason to know and which could not reasonable be prevented by cover or otherwise and injury to person or property proximately result from any breach of warranty.

IV. General Measure of Damages

In determining the amount of reasonable compensation for damage to plaintiff's real property it first must be determine whether the injury to the property is permanent or temporary. When the injury is found to be permanent, the measure of damages is the difference between the fair market value of the property immediately before the injury and its fair market value immediately after the injury. Should the injury be found to be temporary, the measure of damages is the reasonable cost to restore/repair the property, and, the difference, if any, between the fair market value of the real property immediately before the injury and its fair market value after the restoration/repair. An award can not be more than the plaintiff could recover for a permanent injury. See South Dakota Pattern Jury Instruction 50-20-80.

V. Damages for Breach of Obligation not to Exceed Gain from Full Performance-Exceptions

According to South Dakota Codified Law 21-1-5, notwithstanding the provisions of these statutes, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in statutes providing exemplary damages, and in statutes relating to damages for breach of promise to marry, for seduction, or wrongful injuries to animals.

VI. Consequential Damages

In addition to awarding general damages, consequential damages may be awarded if it is found that the consequential damages were the natural and probable consequence of the act or omission of the defendant. See SDCL 21-2-1

VII. Implied Contract-Damages

Under a theory of implied contract, [which requires defendant to pay for services and materials] a plaintiff may be awarded the reasonable value of such services and material at the customary rate of pay for such work or material in the community at the time the services were performed or the materials were furnished. In South Dakota, the Supreme Court has held that the evidence of costs is adequate to determine the reasonable value of the benefits conferred. See, *Carnicle v. Swann,* 314 N.W. 2d 311 (SD 1982).

VIII. Punitive Damages

In addition to actual damages, a plaintiff may be awarded punitive damages if it is proven that the plaintiff suffered injury to person or property as a result of oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct of the defendant.
In addition to actual damages, a plaintiff may be awarded punitive damages if it is proven that the plaintiff suffered injury to person or property as a result of oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct of the defendant. (need cite)

In *Roth v. Farner-Bocken Co.* 667 N.W. 2d 651 (S.D. 2003), the court stated that they have previously indicated that, in order to overturn a jury's award of punitive damages, "the amount 'must be so excessive as to strike mankind, at first blush, as being, beyond all measure unreasonable and outrageous, and such as manifestly shows the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant[.]' " *Leisinger v. Jacobson,* 2002 SD 108, ¶ 9, 651 N.W.2d 693, 696 (quoting *Flockhart v. Wyant,* 467 N.W.2d 473, 479 (S.D.1991)).

Courts may impose punitive damages, but they must adhere to constitutional concerns, specifically due process concerns. *Roth*, at 665. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tort feasor." *Id.* To stand, punitive damages must be reasonable. *Id.* In reviewing punitive damage awards, the appellate standard is *de novo*. *Id.*

The Roth court followed the guidance given by the Supreme Court to determine if punitive damages are reasonable, a three prong analysis:

1) the degree of reprehensibility of the defendant's misconduct,

2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and

3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 665-66.

The Roth court incorporated the three-prong analysis given by the Supreme Court with the five-factors previously used to determine whether punitive damages are reasonable. Id. at 666. The five factors being "analyzing the amount allowed in compensatory damages, the nature and enormity of the wrong, the intent of the wrongdoer, the wrongdoer's financial condition, and all of the circumstances attendant to the wrongdoer's actions. *Id*. at 666.

Insurance

I. Insurance Coverage for Construction Claims

The court in *South Dakota State Cement Plant Com'n v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397 (2002) stated that "[a]n insurer's duty to defend and its duty to pay on a claim are severable and independent duties." Citing *Wertz*, 540 N.W.2d at 638 (citing *Hawkeye-Sec. Ins. Co. v. Clifford*, 366 N.W.2d 489, 490 (S.D.1985)). An insurer's duty to defend " 'is much broader than the duty to pay a judgment rendered against the insured.' " *Id.* (quoting *Hawkeye*, 366 N.W.2d at 490). The insurer has the burden of showing that no duty to defend exists. *Id.* (citing *North Star Mut. Ins. Co. v. Kneen*, 484 N.W.2d 908, 912 (S.D.1992)). The insurer's burden is satisfied by proving that the insured's claim " ' *clearly* falls outside of policy coverage.' " *Id.* (quoting *Kneen*, 484 N.W.2d at 912 (citing *City of Fort Pierre v. United Fire & Cas. Co.*, 463 N.W.2d 845, 847 (S.D.1990); *Bayer v. Employers Reinsurance Corp.*, 383 N.W.2d 858, 861 (S.D.1986); *Hawkeye*, 366 N.W.2d at 492)) (emphasis in original). The existence of the rights and obligations of parties to an insurance contract are determined by the language of the contract, which must be construed according to the plain meaning of its terms. In addition, if it "arguably appears from the face of the pleadings in the action that the alleged claim, if true, falls within the policy coverage, the insurer must defend." *Hawkeye*, 366 N.W.2d at 491. If, after reviewing the complaint and other appropriate record evidence, " 'doubt exists whether the claim against the insured arguably falls within the policy coverage, such doubts must be resolved in favor of the insured.' " *Wertz*, 540 N.W.2d at 638 (quoting *City of Fort Pierre*, 463 N.W.2d at 847 (citing *Hawkeye*, 366 N.W.2d at 492))." Further, the Court may look at evidence outside the record of the underlying action to determine if a duty to defend is imposed under the theory of estoppel. *DeSmet Farm Mut. Ins. Co. of SD v. Gulbranson Development Co., Inc.*, 2010 SD 15, 779 NW2d 148.

In the underlying case, the South Dakota State Cement Plant was sued by property owners and residence of the Brookhurst Subdivision to recover compensation for damages to property and property interest as a result of the defendant's post and present toxic and chemical as well as other emissions and discharges. South Dakota State Cement Plant has several general liability polices with Wausau Underwriters Insurance. These polices provided that they had the "right and duty to defend any suit." *Id*. at 400. The policies did contain exclusions in coverage. The exclusion relieved Wausau of liability on the "policies if the bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." *Id*. Based upon this exclusion, Wausau refused to defend. South Dakota State Cement Plant settled the underlying lawsuit for $200,000.00. They incurred defense cost in the amount of $352,393.00. South Dakota State Cement Plant brought suit against Wausau's for breach of duty to defend. The court held that "because the causes of actions in the complaint are based upon alleged "contamination" assuming that the allegations that SDCP caused contamination are true, no coverage would apply and Wausau would not have a duty to defend because the causes of action in the complaint all clearly fall within the definition of pollution in the pollution exclusion clause." *Id.* at 407.

Corner Construction Company v. United States Fidelity and Guaranty Company, 638 N.W. 2d 887 (2002) is an action brought by a general contractor against its comprehensive general liability insurer for coverage for liability for property damage to the building as a result of a subcontractor's faulty workmanship. The question before the court was whether Corner Construction was afforded coverage under the Board Form Property Damage Endorsement of its comprehensive general liability policy. The main issue was whether "a completed operation hazard exclusion in an endorsement to a CGL policy excludes coverage for damage to the final product, caused by the faulty work of a subcontractor." The court agreed with the trial court that the insurance policies issued United States Fidelity and Guaranty Company would have required them to defend and indemnity Corner to the extent that the subcontractor's defective work resulted in an accident or occurrence which in turn resulted in property damage to the completed work of the general contractor and subcontractor. The court stated that generally a CGL policy along with Board Form Property Damage Endorsement exclusion would not provide coverage for the subcontractor's faulty workmanship, unless the work resulted in an accident or occurrence which resulted in property damage to the work. Should the subcontractor's faulty workmanship result in damage to other property, the damage would be covered. The court defined "occurrence" as "an accident which is an event that is "undersigned, sudden, and unexpected." The court found that there was an accident or unintended event resulting in property damage that was neither expected nor intended by the insured.

In *Alverson v. Northwestern National Casualty*, 559 N.W. 2d 234 (SD 1997), the insured filed suit against its commercial general liability insurer to establish coverage for replacement of windows scratched due to the cleaning of dirt and mortar from the insured's masonry subcontractor. The circuit court ruled in favor of the insured and the Supreme Court of South Dakota reversed in part. In this case, Alverson contracted to perform only the masonry work on the house. The loss that was suffered was not due to the contracted masonry work but the policy exclusion included the following exclusion: "this insurance does not apply to (6) that particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it." *Id.* at 7. The court stated that the work done by Alverson and his employees could have been done without damage to the windows. The windows were not damaged prior to the removal of the mortar. Some of the windows that had been cleaned were done without damage to them. The employees of Alverson did the cleaning incorrectly therefore the windows had to be replaced. The court found that the exclusion applied and therefore no coverage.

South Dakota Courts recently considered the question of whether terminology concerning "collapse" in building insurance is ambiguous. The claimant in the case asked that the Court construe the policy to cover cracking joists because they would have eventually caused the ceiling to collapse. In *Zoo Properties, LLP v. Midwest Mutual Ins.*, 797 NW 2d 779 (SD 2011), our Court elected to follow the jurisdictions who "define collapse to include not only actual collapse, but also imminent collapse". The Court defined "imminent collapse" as "likely to happen without delay, impending or threatening; and requires a showing of more than substantial impairment". (Citation omitted). The Court

recognized this to be the middle ground between two competing approaches on the question.

J(5), J(6) AND J(7) Exclusions

The South Dakota Supreme Court recently addressed insurance coverage for property damage caused by the insured general contractor's use of materials that had been damaged when left outside, exposed to the snow and rain. *Swenson v. Auto Owners Ins. Co.*, 831 N.W.2d 402 (S.D. 2013)

In 2007, Swenson hired the insured, DJ Construction, LLC, to build a house. DJ Construction was insured by Auto-Owners Insurance Company under a commercial general liability (CGL) policy. The policy, promised to pay "those sums that the insured becomes legally obligated to pay as damages because of ... 'property damage,'" but only if that insurance was caused by an "occurrence."

DJ Construction stopped work because Swenson ran into financial difficulties. The contractor left lumber and other building materials outside and also failed to protect the home's basement from the snow and rain.

In mid 2008, the parties executed a new construction contract and work began. By August 2009, Swenson stopped the still uncompleted work because of the presence of mold and water damage. Swenson hired an inspector, who concluded the contractor failed to properly protect the building and building materials from the elements while the work was suspended, and that it also did not protect the basement from snow and rain. The inspector advised demolishing the building, rather than attempting repairs.

Swenson sued DJ Construction in 2009 for defective construction. The contractor requested a defense and indemnification from Auto-Owners, which the insurer denied. Swenson and DJ Construction settled. The contractor admitted liability and assigned to Swenson the contractor's claims against the insurance company.

Swenson then brought the present claim against Auto-Owners for breach of contract and bad faith. However, the trial court granted the insurer's motion for summary judgment, finding the claims barred by application of the policy's exclusions j(5), (6) and (7).

Addressing each exclusion in turn, the South Dakota Supreme Court affirmed that the following exclusions apply:

Exclusion j(5) to a contractor's CGL policy, for damage to personal property in the care, custody or control of the insured, applies to lumber left outside in the snow and rain; there is no exclusivity requirement to the custody or control element.

Exclusion j(6), applicable to "[t]hat particular part of real property on which any insured or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations," applies to

damage to the building caused by the contractor's use of lumber damaged through exposure to the elements, and also applies to allowing standing water in the basement.

Exclusion j(7), which excludes coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it," applies to the insured contractor's defective construction practices.