



# **STATE OF MISSOURI CONSTRUCTION LAW COMPENDIUM**

**Prepared by**

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This outline is intended to provide a general overview of Missouri Construction Law. While the authors have described several topics below, the discussion of any particular topic is not intended to be a total analysis of the area.

I. Causes of Action and Damages

A. Breach of Contract

1. Substantial Compliance and Material Breach

In *L.L. Lewis Const., LLC v. Adrian*, 142 S.W.3d 255 (Mo. App. 2004), the court held that strict compliance with the terms of a construction contract is not required, and substantial compliance must be accepted. A building is substantially complete, so as to entitle the contractor to the full contract price, when it has reached a state of its construction so that it can be put to the use for which it was intended. A party's performance under a construction contract is substantial, as would entitle the party to payment under contract, even though comparatively minor items remain to be furnished or performed to conform to plans and specifications of completed building. If a breach of contract is not material, the non-breaching party may not cancel the contract, but must pursue other remedies. The material breach of a contract may excuse other party's performance. Whether a breach of contract is material so as to excuse another party's performance is a question of fact. The five factors deemed significant in deciding whether a breach of contract is material are as follows: (1) the amount of benefit lost to injured party; (2) the adequacy of compensation to injured party; (3) the amount of forfeiture by breaching party; (4) the likelihood that the breaching party will cure; and (5) the breaching party's good faith.

Likewise, in *Davis v. Clearly Building Corp.*, 143 S.W.3d 659 (Mo. App. 2004), the court held that literal and precise performance is not demanded and slight or trivial defects, imperfections or variations will not preclude the contractor's recovery of the contract price if the contractor has made an honest endeavor to comply and has substantially done so. A party's performance is deemed substantial when the deviation from the contract is slight and if the other party receives substantially the same benefit it would have from literal performance.

2. Available Damages

Where an owner breaches a construction contract, the contractor may choose to sue upon the contract or in *quantum meruit*. *Statler Mfg., Inc. v Brown*, 691 S.W.2d 445 (Mo. App. 1985). The measure of damages for actions upon the contract is the contract price less the cost to complete performance. In computing the cost of completing performance, the amount saved in overhead should be subtracted for the account. *Juengel Constr. Co., Inc. v. Mt. Etna, Inc.*, 622 S.W.2d 510 (Mo. App. 1981).

Where the cause of action pleaded by the contractor is *quantum meruit*, three elements must be proven: (1) a benefit conferred on a plaintiff by a defendant; (2) the defendant's appreciation of the fact of the

benefit; and (3) the defendant's acceptance and retention of the benefit in circumstances that would render that retention inequitable. *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261 (Mo. App. 1984). Where a subcontractor sues an owner under a *quantum meruit* theory, non-payment by the owner to the general contractor must be pleaded by the subcontractor in order to state a claim based on unjust enrichment. *Id.* at 265. In a *quantum meruit* case, the damages are the reasonable value of the services or materials provided. Such is the price usually and customarily paid for the such services or like services at the time and in the locality where the services were rendered. There must be testimony or other evidence that the rate claimed is objectively reasonable in the marketplace. *Kinetic Energy Development Corp. v. Trigen Energy Corporation*, 107 S.W.3d 301 (Mo. App. 2003)

Generally, in contract actions, actual damages do not need to be proven in order to recover. *Runny Meade Estates v. Datapage Technologies*, 926 S.W.2d 167 (Mo. App. 1996). Proof of the contract and the breach supports a finding for nominal damages at a minimum, even when proof of the actual damages is not established. *Evans v. Werle*, 31 S.W.3d 489 (Mo. App. 2000).

In *Werner v. Ashcraft Bloomquist, Inc.*, 10 S.W.3d 575 (Mo. App. 2000) the plaintiff, a subcontractor of Ashcraft Bloomquist, Inc. was able to establish damages simply by putting its contract in evidence and subtracting the amount it has already been paid. Ashcraft Bloomquist, which had a contract to remodel a shopping center, subcontracted the scope of removing and reinstalling all store signs for \$26,700. Werner removed the signs and was paid \$13,260 under the subcontract; however, before Werner could reinstall the signs, the owner decided it wanted new signs. After Ashcraft Bloomquist, Inc. was issued a deductive change order eliminating reinstallation of the old store signs, it notified Werner that the remaining portion of the subcontract was terminated. Werner then sued Ashcraft Bloomquist, Inc. for breach of contract and the court awarded \$13,400 for the balance of the contract.

The main source of guidance regarding termination for convenience cases originates in federal court. Federal law has generally recognized the principle that "good faith and fair dealing" is implied in every contract. Therefore, a termination for convenience is justified so long as the terminator is acting in good faith, i.e., there is a valid reason for terminating the contract and no fraud has been committed. Missouri courts are likely to follow the "good faith" standard. In *Danella Southwest, Inc. v. Southwestern Bell Tel. Co.*, 775 F.Supp. 1227 (E.D.Mo. 1991), the federal district court for the Eastern District of Missouri found that S.W. Bell could lawfully terminate an excavator's contract after three years despite the significant start-up costs expended by the excavator which had calculated its investment would not be recovered until six years of work. The excavator could not recover its front end costs nor could it recover lost profits.

However, in *Forney v. Missouri Bridge and Concrete*, 112 S.W.3d 471 (Mo. App. 2003), the Court of Appeals rejected a subcontractor's attempt to rely on the *Werner* decision to support its contention that it was owed the balance of the price of its subcontract because the subcontractor failed to present sufficient evidence of its lost profits. *Id.* at 475.

## B. Negligence

### 1. Privity of Contract

Generally, in the context of construction contracts a party is not liable in negligence to a third party with whom the party is not in privity. *Summer Chase Second Addition Subdivision Home Owners Ass. v. Taylor-Morley, Inc.*, 146 S.W. 3d 411 (Mo. App. 2004). In *Summer Chase*, a subcontractor that constructed an allegedly defective retaining wall could not be held liable for negligent construction to the homeowners association with which it was not in privity of contract, where only damage complained of was economic costs of making repairs to the wall. However, Missouri courts will consider the policy concerns of exposing the defendant to an unlimited, indeterminate or excessive number of potential claimants and depriving parties' control over their contracts. Presuming neither of these concerns are present, the courts will consider the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and injury sustained, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

## 2. Design Professionals

The theory of recovery against a design professional can be expressed as either a contract claim or a tort claim because the alleged conduct can be both a breach of contractual obligations and a breach of tort duties.

Generally, a design professional is required to provide plans and designs that are prepared with a reasonable degree of technical skill. A design professional also has a duty to the client to use that degree of ordinary and reasonable skill that another design professional would use in the same or similar circumstance. *Rowe v. Moss*, 656 S.W.2d 318 (Mo. App. 1983).

A design professional may be liable to a party to which he or she is not in privity when the following factors are present: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm. *Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967). However, the Missouri Court of Appeals has indicated that any extensions of liability for one not in the privity with the claimant must be done on a "case by case basis" with "careful definition" *Hardcore Concrete, LLC v. Fortner Ins. Services, Inc.*, 220 S.W.3d 350 (Mo. App. 2007).

Recently, the Missouri Court of Appeals ruled on two issues of first impression in a construction contract case involving a school district and its design professionals. In *Penzel Construction Company, Inc. v. Jackson R-2 School District*, 2017 WL582663 (Mo. Ct. App., February 14, 2017), the general contractor, under a liquidating agreement with the electrical subcontractor, sued the School District based on breach of implied warranty for furnishing "defective and inadequate plans and specifications." The School District filed a third-party claim against its architect and the company to which the architect subcontracted the electrical plans and specifications. Penzel, the general contractor, relied on the *Spearin* Doctrine to establish a breach of contract action against the School District. Under the *Spearin* Doctrine, a governmental entity impliedly warrants that if the plans and specifications are followed, the

resulting product will not be defective or unsafe. If the product is defective or unsafe, the performing contractor(s) is not liable for the consequences.

In this case, Penzel argued that it could use the *Spearin* Doctrine as a sword rather than a shield, i.e., offensively, and was entitled to an award of damages from the School District as a result of delays and additional costs incurred by the electrical subcontractor due to inadequate and defective plans and specifications. The School District argued that the *Spearin* Doctrine could not be used offensively to support a breach of contract action. The court ruled that the *Spearin* Doctrine can serve as a basis for a breach of contract against a public entity, damages resulting from delays are compensable under such a theory, and a contractor, under certain circumstances, can use the total cost method or the modified total cost method in determining its delay damages. The court held that “[e]ffectively, the *Spearin* Doctrine places the risk of loss stemming from defective plans and specifications on the owner who renders the plans to the contractor...The owner in a construction contract is better positioned to assess the accuracy and adequacy of the project’s plans and specifications; therefore, it is better positioned to prevent losses from ever occurring.” The court held that “[p]lacing the burden on contractors to ensure the adequacy of an owner’s plans...is incongruent with contract principles and general notions of fairness.”

The *Penzel* case is especially significant for construction practitioners and contractors which deal with delay claims resulting from, among other things, perceived ambiguities in architectural plans and specifications requiring, among other things, an extensive RFI process. Very few published cases examine acceptable damages in the context of delay claims as many of these types of cases are determined in the federal administrative or arbitration forums. The *Penzel* case comprehensively examines the methodology necessary to prove delay damages and, in the context of this particular case, allows use of the total cost methodology which has traditionally been deemed inferior and dubious. The outcome of *Penzel* is that both owners and design professionals are likely to see an uptick in cases in the state of Missouri and other states which adopt *Penzel* as good law.

### C. Breach of Warranty

#### 1. Breach of Implied Warranty

Missouri will imply a warranty of quality and fitness to the builder-contractor in certain situations. Missouri courts have found warranties when houses were defectively built. *Hershewe v. Perkins*, 102 S.W.3d 73 (Mo. App. 2003). However, the warranty is defined narrowly. The implied warranty will only apply to latent structural defects. A Missouri court has interpreted this term to apply to defects in items which are an integral part of the structure or immediately supports it. *Schulze v. C & H Builders*, 761 S.W.2d 219 (Mo. App. 1988). However, privity between the plaintiff and the design professional is necessary to successfully maintain the warranty claim. *O’Dell v. Custom Builders Corp.*, 560 S.W.2d 862 (Mo. 1978).

Implied warranties of quality and fitness do not apply to the transfer of a home to subsequent purchasers. Implied warranties of quality and fitness apply in the purchase of a new home by the first

purchaser from a vendor-builder; this theory of recovery is a limited departure from the strict application of the doctrine of *caveat emptor*. *Summer Chase Second Addition Subdivision Home Owners Ass. v. Taylor-Morley, Inc.*, 146 S.W. 3d 411 (Mo. App. 2004). With respect to alleged breach of implied warranty of fitness for particular use of house plans supplied to plaintiffs by builder, in light of the details specified therein, a reasonable construction of the contract plans was that builder, holding itself out as expert in design and providing that design, would determine necessity for modification of the design and make any changes necessary for the particular lot.. *O'Dell v. Custom Builders Corp.*, 560 S.W.2d 862 (Mo. 1978).

#### D. Misrepresentation

Privity of contract is not required to be liable for negligent misrepresentation. *AAA Excavating, Inc. v. Francis Construction, Inc.*, 678 S.W.2d 889 (Mo. App. 1984). The court found that privity was not an element of the claim for negligent misrepresentation. If a party supplies false information upon which a party relies causing a pecuniary loss, they will be liable for the loss. Fraud might be alleged under similar circumstances when a party fails to provide all applicable information and conditions expected are in fact different than encountered by the contractor.

To state a claim for negligent misrepresentation, a plaintiff must plead facts that establish: (1) the speaker supplied information in the course of his or her business; (2) because of a failure by the speaker to exercise reasonable care, the information was false; (3) the information was intentionally provided by the speaker for the guidance of a limited group of persons in a particular business transaction; (4) the listener justifiably relied on the information; and (5) due to the listener's reliance on the information, the listener suffered a pecuniary loss. *Summer Chase, supra*.

#### E. Fraud

A party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively. *Davis v. Clearly Building Corp.*, 143 S.W.3d 659 (Mo. App. 2004). A victim of fraud can either return what he purchased or keep what he purchased and sue for damages measured as the difference between its value as represented and its true value as of the date of purchase. This is known as the doctrine of election of remedies. The purpose of the election of remedies doctrine is to prevent double recovery for a single injury. The doctrine of election of remedies maintains that one may not obtain both damages for fraudulent inducement to enter into a contract and a remedy prohibiting the enforcement of the contract.

#### F. Unjust Enrichment

Elements of a claim for unjust enrichment are: (1) a benefit conferred upon the defendant; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be

inequitable. In construction cases, a party other than one in privity of contract with the owner must plead non-payment by the owner in order to state a claim for unjust enrichment. *Mays-Maune & Associates, Inc. v. Werner Brothers, Inc.*, 139 S.W.3d 201 (Mo. App. 2004).

#### G. Tortious Interference with Contract

Unlike many jurisdictions, Missouri law allows design professionals to be sued for tortious interference with a contract. *Killian Constr. Co. v. Jack D. Ball & Assoc.*, 865 S.W.2d 889 (Mo. App. 1993). There does not need to be a contract; however, there must be reasonable expectations of economic advantage or commercial relations. A design professional may be able to interfere with a contract between a contractor and owner if there is justification.

#### H. Strict Liability Claims

The economic loss doctrine which prohibits liability for purely economic losses due to defects in the building also applies to strict liability claims.

#### I. Indemnity Claims: Missouri's Anti-Indemnity Statute

Missouri legislated against "broad form indemnity" in public and private construction contracts in 1999. § 434.100, R.S.Mo. Such clauses, customarily found in agreements between the owner and the general contractor and between the general and its subcontractors, compel either the general to indemnify the owner or a subcontractor to indemnify the general for the owner's or general's own negligence or intentional acts or omissions. The Missouri legislature has not invalidated subrogation waivers nor does the current statute void any provisions in a construction contract which requires a party to provide liability coverage as an additional insured for another. In fact, Missouri's anti-indemnity statute expressly allows a construction contractor to name another as an "additional insured" on its insurance coverage.

The statute legislating against broad form indemnification does not apply to, among other things, "an agreement containing a party's promise to indemnify, defend or hold harmless another person, if the agreement also requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recover the cost of the required insurance in its contract price; provided, however, that in such case the party's liability under the indemnity obligation shall be limited to the coverage and limits of the required insurance." 434.100.2(8), R.S.Mo.

; and

A Commercial General Liability (CGL) policy provides a party to a construction contract with the greatest opportunity to avoid the broad reach of the Anti-Indemnity Statute. Terry J. Galganski, *The Insurance Exceptions of the Anti-Indemnity Statute*, THE JOURNAL OF THE MISSOURI BAR, February-March 2002. This opportunity is usually implemented by selecting a standard "additional insured" endorsement. *Id.*

## II. Other Damages Issues

### A. Statute of Repose/Statute of Limitations

Any action to recover damages for personal injury, property damage or wrongful death arising out of a defective or unsafe condition of any improvement to real property must be commenced within ten (10) years of the date on which the improvement was completed. § 516.097, R.S.Mo. All actions upon contracts obligations or liabilities must be commenced within five (5) years of the breach. § 516.120, R.S.Mo.

### B. Economic Loss Doctrine

The economic loss doctrine states that where the only damage complained of is an economic loss resulting from a defect in an item built pursuant to a contract, a negligence action does not lie. *Summer Chase Second Addition Subdivision Home Owners Ass. v. Taylor-Morley, Inc.*, 146 S.W. 3d 411 (Mo. App. 2004). If relief is available to a plaintiff through contract for damage to an item constructed pursuant to a contract, an action for negligence is improper. *Korte Const. Co. v. Deaconess Manor Assc.*, 9927 S.W.2d 395, 404-05 (Mo. App. 1996).

In *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901 (Mo. banc 1986), a contracting company brought suit against a crane manufacturer for property damage which occurred when the crane's counterweight broke and crushed the crane's cab. The court held that a plaintiff cannot recovery on a theory in tort where the only damage is to the subject product or construction when there is no personal injury or other item of damage. *Id.*

In *Summer Chase, supra*, the court reaffirmed the economic loss doctrine in Missouri. The plaintiff filed suit against several defendants alleging a defectively designed and constructed retaining wall. In one count of the petition, the plaintiff asserted negligent construction against the general contractor and its subcontractor. The defendants challenged the petition based on the economic loss doctrine and the trial court dismissed the negligence claims and stated that "under these circumstances, the nature of the injury claimed by [plaintiff] precludes liability." *Id.*

### C. Liquidated Damages

Liquidated damages provisions are generally enforceable unless the damages are considered a penalty rather than a reasonable estimation of the actual damages the owner would face as a result of a delay in the project's completion. *Taos Const. Co., Inc. v. Penzel Const. Co., Inc.*, 750 S.W.2d 522 (Mo. App. 1988).

### D. Missouri's "Prompt Payment Act"

Missouri's Public Prompt Payment Act, codified at § 34.057, R.S.Mo., promotes timely payment

of contractors, subcontractors, and suppliers on contracts with public owners for public work construction projects. *Leo Journagan Const. Co. v. City Utils.*, 116 S.W. 3d 711, 724 (Mo. App. 2003). This law “requires public owners and contractors to make prompt payments and limits amounts withheld as retainage.” *Envtl. Prot., Inspection, Consulting, Inc. v. City of Kansas City*, 37 S.W.3d 360, 369 (Mo. App. 2000). “The Prompt Payment Act is considered a remedial statute and therefore requires liberal interpretation.” *Leo Journagan Const. Co. v. City Utils.* at 725. “The threshold requires of this act are the payment due dates, which are the events that trigger the remedies available for untimely payment.” *Id.*

The Act provides that general contractors shall be paid by the public owner 30 days after receipt of invoice. 34.057.1(1). General contractors shall pay subcontractors 15 days after receipt of payment from the public owner. 34.057.1(7). A 2014 amendment of the Act requires the public owner to also pay engineers, architects, landscape architects, and surveyors within 30 days. 34.057.5.

In the 2014 amendment, the legislature also capped retainage which may be withheld from a general contractor, subcontractor, or lower tier contractor on a public works project at 5%. 34.057.1(1). A higher percentage not to exceed 10% may be withheld only on a public works contract less than \$50,000. *Id.* The Prompt Payment Act provides that retainage shall be released to an early-performing subcontractor if the public owner, architect or engineer, and the general contractor believe that the subcontractor has completed its work and the subcontractor can be released without risk to the public owner. 34.057.1(3). The Act also allows a public owner to reduce or eliminate retainage if the owner believes work is “proceeding satisfactorily.” *Id.* Upon substantial completion and acceptance of the work, the public owner is now required to pay 98% of retainage to the general contractor. 34.057.1(4). If the public owner fails to accept the work as substantially complete, the owner is required to give written explanation within 14 days to the general contractor. *Id.* If no such written explanation is provided, 98% of the retainage must be paid within 30 days. If the public owner fails to pay the retainage or is in default under any other payment due under the contract, interest at 1.5% per month shall be paid on the amount of any such unpaid amount. 34.057.1(5).

Under Missouri’s Private Prompt Payment Act, any party to a private construction contract is required to make all “scheduled payments.” 431.180, R.S.Mo. In the event the contract does not provide for a payment schedule, the Act does not apply. Where the contract does provide for scheduled payments and such payments are not made, the damaged party may bring an action and seek the principal amount along with interest at 1.5% per month and reasonable attorneys’ fees. The trial court has the discretion whether to award interest and/or attorneys’ fees.

Under Missouri law, retainage on a private construction project may not exceed 10% unless additional amounts are required “to protect the owner’s interest.” Such retainage shall be held “in trust” for the benefit of the general contractor. 436.303, R.S.Mo. General contractors, subcontractors, and lower tier contractors may tender substitute security in lieu of withholding of retainage. 436.306, R.S.Mo. Substitute security may consist of a certificate of deposit, a retainage bond, or an irrevocable letter of credit. 436.312, R.S.Mo. Like the public act, an early completing subcontractor may apply for release of retainage if the work has been “satisfactorily completed” and the owner is no longer

considered at risk. 436.321, R.S.Mo.

#### E. Prejudgment Interest

Prejudgment interest is permitted by statute. § 408.020, R.S.Mo. states:

Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and demand for payment is made... .

However, § 408.030, R.S.Mo. allows parties to contract for an increased rate of interest, not to exceed ten percent per annum. Furthermore, § 408.092, R.S.Mo. allows attorney's fees to be recovered in actions enforcing credit agreements, provided that the fees are included in the written credit agreement, do not exceed fifteen percent of the outstanding credit balance, and the attorney is licensed to practice in Missouri and a member of the Missouri bar.

A liquidated claim for which prejudgment interest is authorized by statute is one which is fixed and determined or easily determined by computation or some recognized standard. *Baris v. Layton*, 43 S.W.3d 390 (Mo. App. 2001). The entitlement to prejudgment interest accrues only after a demand for payment is made. While the form of the demand is not required to be in any certain form, it must be definite regarding the amount and time. *Id.*

#### F. Lost Profits

A contractor is entitled to recover the specified amount of the contract with the owner because contract prices include profit and overhead. *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924 (Mo. App. 1992). Whether a subcontractor may recover its profit and overhead and the extent to which they may do so is determined by the type of claim.

In a mechanic's lien situation, even though the measure of damages is not the subcontractor's contract price, a lien claimant subcontractor still may recover profit and overhead in addition to the reasonable value of its labor, materials, and services in a damages action. In *Fuhler v. Gohman & Levine Constr. Co.*, 142 S.W.2d 482 (Mo. 1940) the lien claimant was a subcontractor who was permitted to recover not only reasonable compensation for his labor and material, but allowed to recover a percentage for profit and overhead. However, the subcontractor was required to show that profit and overhead were included in the value of the labor and materials and that the amount sought was reasonable.

In order to recover damages for lost profits and overhead, the plaintiff must submit evidence that will provide a basis for estimating the lost profits with reasonable certainty without resort to speculation. *Manor Square, Inc. v. Heartthrob of Kansas City, Inc.*, 854 S.W.2d 38 (Mo. App. 1993). The amount of lost profits is the same as the amount of net profits that plaintiff would have realized if the business had not been interfered with or stopped due to the actions or inactions of the defendant.

*Refrigeration Industries, Inc. v. Nemmers*, 880 S.W.2d 912 (Mo. App. 1994). See also *Gorman v. Walmart Stores, Inc.*, 19 S.W.3d 725 (Mo. App. 2000).

#### G. Punitive Damages

Missouri courts confine punitive damages to cases of "willful wrongdoing, or recklessness which is the legal equivalent of willfulness." *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. banc 1990). Punitive damages are imposed to punish and deter; and the remedy should be applied sparingly. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

Punitive damages may be awarded in a negligence case only if the defendant, at the time of the negligent act, "knew or had reason to know that there was a high degree of probability that the action would result in injury." *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 338 (Mo. banc 1996), quoting *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 436 (Mo. banc 1985). The defendant must have displayed complete indifference to, or conscious disregard for, the safety of others. *Id.* at 339. The evidence must meet the clear and convincing standard of proof. *Rodriguez*, 936 S.W.2d at 111.

#### H. Attorney's Fees

Attorney's fees are recoverable only by statute or contract terms. Attorney's fees are special damages which must be pled specifically in order to recover. In addition, facts showing entitlement to attorney's fees must also be pled. *Reeves v. Kessler*, 921 S.W.2d 16 (Mo. App. 1996). In awarding attorney fees, the trial judge is considered to be the expert on the reasonableness of the amount of fees awarded, and the judge's decision to award fees is rarely reviewed by the appellate courts absent finding an abuse of discretion. *Evans v. Werle*, 31 S.W.3d 489, 493 (Mo. App. 2000).

#### I. Expert Fees and Costs

In *George v. Eaton*, 789 S.W.2d 56, 61 (Mo. App. 1990), the Western District Court of Appeals determined that the then-existing language of Missouri Rule of Civil Procedure 56.01(b) (4) (b) required a "party seeking to depose an expert witness . . . to pay a reasonable fee for time spent in preparation for the deposition," depending on the trial court's consideration of certain factors. *Id.* at 61-62. In relevant part, the Rule stated "unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for responding to discovery by deposition." *Id.*

The Eastern District, ten years later, found the application of *George* to be limited because the relevant language of that Rule is more restrictive. The relevant provision of Rule 56.01(b)(4)(b) applicable now states: "unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed." This language expressly limits the payment of a deposed expert witness's fees to fees for hours spent in the deposition and does not include the payment of fees for any time the expert witness spent preparing for the deposition. *Fairbanks v. Weitzman*, 13 S.W.3d 313 (Mo. App. 2000).

## J. Liquidated Damages

The accepted and general rule in Missouri is that liquidated damages clauses in construction contracts are valid and enforceable. However, penalty clauses are invalid. Liquidated damages are an amount of compensation that the parties agree at the time of contracting will represent the damages incurred in the event of a breach. Penalty clauses are designed to punish a party for breaching the contract. *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878 (Mo App. 1994).

Missouri has adopted the Restatement of Contracts rules on liquidated damages which define the difference between liquidated damages clauses and penalty clauses. For a liquidated damages clause to be valid:

1. The amount agreed upon must be a reasonable prediction of the harm that will be caused by the breach. To be considered reasonable, a court stated that "it must not be unreasonably disproportionate to the amount of harm anticipated when the contract was made." *Burst v. R.W. Beal & Co.*, 771 S.W.2d 87, 90 (Mo. App. 1989).
2. The harm must be of a kind that is difficult to accurately estimate. It has been held by Missouri courts that actual damages for the breach of a construction contract are uncertain and difficult to prove. See e.g. *Paragon Group, Inc. v. Ampleman, supra*.
3. The party claiming liquidated damages must show some harm or damage resulting from the breach in order to trigger the liquidated damages clause. Thus, Missouri courts require the plaintiff to establish (1) that a breach occurred and (2) damages have actually accrued as a result of the breach. *Strouse v. Starbuck*, 987 S.W.2d 827 (Mo. App.1999)
4. A party may recover either liquidated damages or actual damages but not both as compensation for the same breach. Liquidated damages are simply a stipulated amount of actual damages as a replacement for the need to prove, with specificity, the actual amount of damages.

## K. Diminution in Value

In recent years, Missouri appellate courts have found that the facts and circumstances of construction cases, where there is substantial but defective performance by a contractor, dictate a measure of damages different from the measure of damages in customary cases involving injury to real property. "In real property cases, courts generally utilize the 'diminution in value' test, turning only to the 'cost of repair' test when it constitutes a lower amount of recovery." *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438, 450 (Mo. App. 1994), affirmed after remand and transfer 984 S.W.2d 501 (Mo. banc 1999). "In defective construction cases, on the other hand, the 'cost of repair' test is favored, so that courts normally determine the damages by assessing the cost of correcting the

defects or supplying the omissions." *Id.* However, a court cannot apply cost of repair damages until after it hears evidence of value. *Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322, 324 (Mo. App. 1998). *Compare White River Dev. v. Meco Systems*, 806 S.W.2d 735, 741 (Mo. App. 1991) (holding that the general rule for damages in construction cases is the cost of repair, and that diminution in value is only appropriate where the cost of reconstruction would involve unreasonable economic waste) and *Lawing v. Interstate Budget Motel, Inc.*, 655 S.W.2d 774, 778 (Mo. E.D. 1983)(holding that the general rule for damages in construction cases is the cost of repair) with *Tull v. Housing Auth. of City of Columbia*, 691 S.W.2d 940, 942 (Mo. App. 1985) (holding that, in non-construction situations, the general test for damages is diminution in value).

### III. Insurance Coverage for Construction Claims

In *St. Paul Fire & Marine Ins. Co. v. Building Constr. Enters., Inc.*, 484 F. Supp. 2d 1004 (W.D. Mo. 2007), affirmed the holding in *St. Paul Fire & Marine Ins. Co. v. Building Constr. Enters., Inc.*, 526 F.3d 1166 (8<sup>th</sup> Cir.) that the substandard work performed by the insured contractor's subcontractor on a governmental contract is not an "accident" and thus not an "occurrence" under the policy. Therefore, in *St. Paul*, there was no coverage for the insured's cost of performing required repairs in order to satisfy its contract.

In *Taylor-Morley-Simon, Inc. v. Michigan Mut. Ins. Co.*, 645 F. Supp. 596 (E.D. Mo. 1986), aff'd, 822 F.2d 1093 (8<sup>th</sup> Cir. 1987), the settling of a slab caused by an insured homebuilder's negligence was ruled an occurrence despite allegations of breach of warranty against the insured.

In *Columbia Mut. Ins. Co. v. Gary Epstein, et al.*, 239 S.W.3d 667 (Mo. App. E.D. 2007), the purchase of defective concrete by the insured contractor was an occurrence; therefore, the loss of use of framing and the sub-floor that had to be replaced as a result of the defective concrete was covered property damage.

In *National Union Fire Ins. Co. of Pitts., Pa. v. Structural Sys. Tech., Inc.*, 964 F.2d 759 (8<sup>th</sup> Cir. 1992), the court upheld coverage for the damage to a radio tower that collapsed due to the faulty workmanship of a subcontractor under the subcontractor exception to Exclusion I, the "Your Work" Exclusion.

In *Amerisure Mut. Ins. Co. v. Paric Corp.*, 2005 WL 2708873 (E.D. Mo. Oct. 21, 2005), the faulty workmanship of a subcontractor of the insured general contractor was an "occurrence" under the general contractor's CGL policy. Furthermore, the court upheld coverage pursuant to the subcontractor exception to Exclusion I, the "Your Work" Exclusion, as to the faulty workmanship of a subcontractor that installed EIFS.

Missouri courts have typically taken an insurer-friendly approach in concluding that a simple breach of contract for poor construction does not constitute an occurrence. Contrary to the position often taken by Missouri courts and liability insurance carriers in Missouri, the Missouri Supreme Court in *D.R. Sherry Construction, LTD v. American Family Mutual Insurance Company*, 316 S.W.3d 899 (Mo.

banc 2010), seems to have taken a large step in clarifying that negligent construction (e.g., construction defect) claims are in fact occurrences and held that progressive damage which begins during the policy period is an occurrence even though the damage was not apparent until after the policy period has expired.

#### IV. Mechanic's Liens

Mechanic's liens did not exist under Missouri common law. *Maran-Cooke, Inc. v. Purler Excavating, Inc.*, 585 S.W.2d 38 (Mo. banc 1979). Rather, they are solely creatures of statute. *State ex rel. Springfield Underground, Inc. v. Sweeney*, 102 S.W.3d 7, 9 (Mo. banc 2003). In Missouri, the construction mechanic's lien is codified at § 429.010, R.S.Mo., et.seq.. This statute grants a lien to any person who performs any "work or labor" or who furnishes any material, fixtures, engine, boiler, machinery, tree, shrubs, bushes, other plants, or outdoor irrigation systems for any "building, erection, or improvements upon land, or for repairing the same." The work or materials must be supplied in accordance with a contract with the owner of the property or the owner's "agent, trustee, contractor, or subcontractor."

The theory behind most construction liens is that an unpaid contractor should be entitled to recoup the value of its work from the improvements the contractor has made to the owner's real estate. *Arthur Morgan Trucking Co. v. Shartzler*, 174 S.W.2d 226, 227 (Mo. App. 1943). Therefore, actually physical improvement to the property is an essential element of a mechanic's lien. *Independent Plumbing & Heating Supply Co. v. Glennon*, 287 S.W. 824 (Mo. App. 1926).

In order to create an enforceable mechanic's lien, one must first satisfy the statutory prerequisites. "Original Contractors" must put the owner of the property on notice that mechanic's liens are possible by explicitly providing the language contained in § 429.012.1, R.S.Mo. This Notice to Owner requirement is a condition precedent to a lien by the "Original Contractor" and is considered jurisdictional. Courts have dismissed lien claims *sua sponte* when the Notice to Owner was not given timely. *Bledsoe Plumbing & Heating, Inc. v. Brown*, 66 S.W.3d 169, 171-72 (Mo. App. 2002).

A subcontractor's notice requirement is found in § 429.100, R.S.Mo. A subcontractor must serve a notice of its intent to file a mechanic's lien on the owner at least ten days before filing the lien. *Id.* The notice must include the legal description of the property, the amount owed, and from whom the money is owed. *Id.* Service of the subcontractor's ten-day notice on the owner may be accomplished "by any officer authorized by law to serve process in civil actions, or by any person who would be a competent witness." § 429.100, R.S.Mo. See also *Fulkerson v. W.A.M. Invs.*, 85 S.W.3d 745 (Mo. App. S.D. 2002) (personal service is required).

A mechanic's lien must be perfected by filing same with the Clerk of Court in the county in which the property is located within 6 months of the last date labor and/or materials were supplied to the project. 429.080, R.S.Mo. The last date does not include repair of work already completed, punch list, warranty work, or unnecessary work. The mechanic's lien statement must include the legal description of the property, a proper description of the parties, a "just and true" account, and a verification by sworn

oath. *Id.* A “just and true account” typically includes the costs of labor, materials, equipment, and supplies, employee benefits attributable to the project, insurance attributed to the project, and taxes together with overhead and profit. Once filed, mechanic’s liens must be enforced by the filing of a lawsuit to enforce the lien within six months after the lien was filed. 429.170-190, R.S.Mo.; *H.B. Deal Constr. Co. v. Labor Disc. Ctr., Inc.*, 418 S.W.2d 940 (Mo. 1967). Mechanic’s liens lawsuits must also be prosecuted without delay to be enforceable. *Hinchey v. Sentinel Fed. Sav. & Loan Ass’n*, 584 S.W.2d 146 (Mo. App. 1979).

Missouri’s mechanic’s lien statute provides unique rules for perfecting liens on new residential property (429.016, R.S.Mo.) and for the repair, remodeling, or addition to owner-occupied residential property of four units or less (429.013, R.S.Mo.). Care must be taken to comply with the unique notices and procedures which are required to properly perfect such residential liens. Missouri law also provides unique notice requirements and procedures for perfecting liens governing rental equipment. 429.010.2, R.S.Mo.

### **About the Authors**

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