STATE OF COLORADO COMPENDIUM OF CONSTRUCTION LAW

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The following outline is a brief overview of construction law in the State of Colorado. The fundamentals of 13 construction-related topics are explored and relevant case law is provided. While not all-inclusive to the particular area of law, the summary provides a synopsis of construction law in Colorado.

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I. BREACH OF CONTRACT

Under Colorado law, a party attempting to recover for breach of contract must prove: 1) the existence of a contract; 2) performance by the plaintiff or some justification for nonperformance; 3) failure to perform the contract by the defendant; and 4) resulting damages. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). In Colorado, breach of contract claims can be brought by the owner against various parties with whom the owner has a contractual relationship, including the architect, engineer, contractor, or lender. Likewise, these parties can bring a breach of contract claim against the owner. Furthermore, a breach of contract action can arise from the relationship between the general contractor and the subcontractors. *Horne Eng'g Servs., Inc. v. Kaiser-Hill Co.*, 72 P.3d 451, 452 (Colo. App. 2003).

Claims for breach of contract accrue upon discovery of the breach or on the date when, in the exercise of reasonable diligence, the breach should have been discovered. Colo. Rev. Stat. § 13-80-108(6) (2016); *Hersh Cos. Inc. v. Highline Vill. Assocs*., 30 P.3d 221, 224 (Colo. 2001). In general, a breach of contract action must be filed within a 3-year period. Colo. Rev. Stat. § 13-80-101(1)(a) (2016). However, section 13-80-104 sets forth a limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others. The statute provides a separate limitations period and accrual formula in some construction matters. *Hersh*, 30 P.3d at 224; *see also* Colo. Rev. Stat. § 13-80-104 (2016). Under this statutory provision:

> [A]ll actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 [two years] after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property[.]

Colo. Rev. Stat. § 13-80-104(1)(a); *see also Hersh*, 30 P.3d at 224. If the action accrues in the fifth or sixth year, the action can be brought within two years of the accrual date. *Hersh*, 30 P.3d at 224; Colo. Rev. Stat. § 13-80-104(2).

The general measure of damages for breach of a construction contract is that amount required to place the violated party "in the same position he would have occupied had the breach

not occurred." *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1381 (Colo. 1993). Where only rebuilding a defective building will provide an injured party with the benefit of its bargain, costs to rebuild rather than repair may be a reasonable measure of damages. *Gold Rush Invs., Inc. v. G.E. Johnson Constr. Co.*, 807 P.2d 1169, 1174 (Colo. App. 1990).

II. NEGLIGENCE

To succeed on a negligence claim, the plaintiff must show (1) the existence of a duty on the part of a defendant, (2) a breach of that duty, (3) a causal connection between the defendant's breach and plaintiff's injury, (4) and injury. *Heagy v. Denver*, 472 P.2d 757, 758 (Colo. App. 1970). Generally, a duty is owed to anybody that could foreseeably suffer damages as a result of a defendant's negligent conduct. *Greenberg v. Perkins*, 845 P.2d 530, 537 (Colo. 1993). To determine whether a duty exists, some Colorado courts may consider "the risk involved, the foreseeability of the injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden on the actor." *Keller v. Koca*, 111 P.3d 445, 448 (Colo. 2005).

In most negligence-based claims, the duty owed is that of the reasonable person; however, Colorado holds professionals to a higher standard. The duty owed by a professional is "measured by the normal standards of skill and competence exhibited by members of a defendant's profession." *Rian v. Imperial Mun. Servs. Grp., Inc.*, 768 P.2d 1260, 1263 (Colo. App. 1988). This professional standard of care does not require a design professional to be perfect or guarantee the results of his services. *Shiffers v. Cunningham Shepherd Builders Co.*, 470 P.2d 593, 598 (Colo. App. 1970). In Colorado, a contractor or subcontractor only has a duty to perform in a workmanlike manner. *Id.* "[T]he test is reasonableness in terms of what the workmen of average skill and intelligence (the conscientious worker) would ordinarily do." *Id*. A contractor can be held liable for negligence if it fails to follow the recommendations of its independent contractors. *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1165 (Colo. App. 2010).

A negligence claim stemming from a construction contract may be barred by Colorado's adoption of the Economic Loss Rule. "Under the economic loss rule, 'a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.'" *Stan Clauson Assocs., Inc. v. Coleman Bros. Const., LLC*, 297 P.3d 1042, 1045 (Colo. App. 2013) (quoting *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000)). However, when a contract neither encompasses a duty nor requires that specific work be done, any work undertaken by a professional must be done in a reasonable manner. Failure to do so could result in an award of actual damages on a negligence claim. *Consol. Hardwoods, Inc. v. Alexander Concrete Constr., Inc.*, 811 P.2d 440, 443 (Colo. App. 1991). Even in the event that a common law negligence claim is barred, the defendant's negligent behavior remains important in establishing that the contractual duties have been breached. A more extensive discussion of the Economic Loss Rule can be found in section VIII. *See infra* VIII, at 9–10.

Whether classified under section 13-80-104's special statute of limitations or the ordinary statute of limitations period for tort, a negligence claim will carry a statute of limitations of two years. Colo. Rev. Stat. §§ 13-80-102(1)(a)–104(1)(a). Section 13-80-104 applies to claims based on injuries to real property that result in a defect in the improvement itself, including negligence in planning, design, construction, supervision, or inspection. *Two Denver Highlands Ltd. P'ship v. Dillingham Constr. N.A.*, 932 P.2d 827, 829 (Colo. App. 1996). However, it does not apply to all injuries resulting from the professional's conduct. *Id.*

III. BREACH OF WARRANTY

Colorado law recognizes two general categories of warranties: express promises and implied obligations.

A. Breach of Express Warranty

To recover for breach of express warranty, a plaintiff must prove that a warranty existed, the defendant breached the warranty, the breach proximately caused the losses claimed as damages, and timely notice of the breach was given to defendant. *Fiberglass Component Prod. v. Reichhold Chems.*, 983 F. Supp. 948, 953 (D. Colo. 1997) (citing *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984)). An express warranty is not required to be in any specific form and "may be either written or oral." *Erickson v. Oberlohr*, 749 P.2d 996, 998 (Colo. App. 1987). Whether a statement is an express warranty is a question of fact. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 208 (Colo. 1984).

Colorado builders often provide homebuyers with express warranties protecting various elements of the physical construction. Additionally, express warranties are often included to disclaim or limit implied warranties of habitability, fitness, and workmanship. *Belt v. Spencer,* 585 P.2d 922, 925 (Colo. App. 1978). However, while several cases support the validity of such disclaimers, the Colorado Supreme Court has refused to answer whether they are enforceable, and it remains an open question under Colorado law. *Sloat v. Matheny*, 625 P.2d 1031, 1034 (Colo. 1981). It should be noted that the *Sloat* court concluded that “at a minimum such disclaimers by a builder-vendor must be by clear and unambiguous language” and that such disclaimers shall be strictly construed against the builder-vendor. *Id.* Various defenses for a breach of warranty claim are recognized by Colorado courts. Privity of contract or standing as a third-party beneficiary of the contract is required in order to be protected by the warranty. *Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 166 (Colo. App. 1994). Additionally, Colorado courts recognize integration clauses in contracts as limiting the availability of parol evidence in establishing the existence of an express warranty. *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 72 (Colo. 1991). Lastly, Colorado courts recognize the defense of waiver when a party relinquishes protection by not relying on or expecting the warranty to be fulfilled. *Assocs. of San Lazaro v. San Lazaro Park Props.*, 864 P.2d 111, 115–16 (Colo. 1993).

B. Breach of Implied Warranty

There are various implied warranties available in Colorado. Two important warranties are the implied warranty of habitability and the implied warranty of workmanlike construction.

1. Implied Warranty of Habitability

A buyer is "entitled to relief based on the theory of implied warranty of habitability if he proves the house was not built in a workmanlike manner or that it was not suitable for habitation." *Roper v. Spring Lake Dev. Co.*, 789 P.2d 483, 485 (Colo. App. 1990). The warranty of habitability "has been likened to strict liability for construction defects, and proof of a defect due to improper construction, design, or preparations is sufficient to establish liability in the builder-vendor." *Wall v. Foster Petroleum Corp.*, 791 P.2d 1148, 1150 (Colo. App. 1989). Colorado courts have extended the implied warranty of habitability to situations in which a home becomes uninhabitable for reasons other than the workmanship, such as soil expansion. *Id*. Generally, in these cases, the breach of the implied warranty of habitability occurs in the builder's selection of the building location. *Roper*, 789 P.2d at 485–86.

2. Implied Warranty of Workmanlike Construction

The warranty of workmanlike construction is another implied warranty. It does not, however, guarantee perfect construction by the builder. "For construction to be done in a good and workmanlike manner, there is no requirement of perfection; the test is reasonableness in terms of what the workmen of average skill and intelligence (the conscientious worker) would ordinarily do." *Shiffers v. Cunningham Shepherd Builders Co.*, 470 P.2d 593, 598 (Colo. App. 1970).

C. Statute of Limitations for Breach of Warranty

In general, a breach of warranty is governed by the statute of limitations for contract actions and must be filed within a three-year period. Colo. Rev. Stat. § 13-80-101. Section 13-80-104, however, likely shortens the statute of limitations in a breach of warranty case against a design or construction professional to two years. Colo. Rev Stat §§ 13-80-101; 13-80-104(1)(a). The Colorado Supreme Court has determined that section 13-80-104 is "not intended to apply to claims for breach of warranties to repair and replace, even when the party against whom the claim is asserted is within the class of individuals protected by that statute. Instead, they are governed by the general statute of limitations for contracts and warranties." *Hersh Cos. v. Highline Vill. Assocs*., 30 P.3d 221, 226 (Colo. 2001).

IV. MISREPRESENTATION/FRAUD

A. Intentional Misrepresentation/Fraud

To recover from a builder on a claim of fraud, a home buyer must show that the builder made a false representation of a past or present fact, the fact was material, the builder made the representation knowing it to be false or was unsure whether it was true or false, the builder made

the representation with the intent that the buyer would rely on the representation, the buyer relied on the representation, the buyer's reliance was justified, and this reliance caused damages to the buyer. *Morrison v. Goodspeed*, 68 P.2d 458, 477–78 (Colo. 1937); CJI-Civ. 4th § 19:1 (2020); *see Bristol Bay Products. LLC v. Lampack*, 312 P.3d 1155, 1160–61 (Colo. 2013). Circumstantial evidence can play an important role in a construction fraud case by helping to demonstrate a systematic method of business by the builder or establish reliance on the part of the buyer. *Kopeikin v. Merchs. Mortg. & Trust Corp.*, 679 P.2d 599, 602 (Colo. 1984).

Colorado's Economic Loss Rule may bar a tort action stemming from the construction contract between the parties unless negligence occurred from a duty of care that existed independent of a contractual duty. *A.C. Excavating v. Yacht Club Homeowners Ass'n*, 114 P.3d 862, 867 (Colo. 2005); *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262–63 (Colo. 2000); *Colo. Homes v. Loerch-Wilson*, 43 P.3d 718, 721–22 (Colo. App. 2001); *see also* Economic Loss Rule, section VIII, *infra*. However, where the tort claim is available, damages generally will be the difference in actual value and the represented value, or the cost to improve the property to the represented condition. *Dann v. Perrotti & Hauptman Dev. Co.*, 670 P.2d 448, 451 (Colo. App. 1983).

Generally, all actions for fraud, misrepresentation, concealment, or deceit are governed by a three-year statute of limitations. Colo. Rev. Stat. § 13-80-101(c). Under the doctrine of fraudulent concealment, however, when the defendant actively conceals the cause of action and the plaintiff has not discovered the cause of injury, the statute is tolled until the discovery occurs or should have occurred through reasonable diligence. *See, e.g.*, *Murphy v. Dyer*, 260 F. Supp. 822, 823–24 (D. Colo. 1966) (applying Colorado law).

B. Negligent Misrepresentation

Colorado recognizes the tort of negligent misrepresentation in two separate situations: (1) when one negligently gives false information causing physical harm to the plaintiff's person or property; and (2) when false information is negligently provided and results in monetary business transaction losses. *Bloskas v. Murray*, 646 P.2d 907, 914 (Colo. 1982).

> The duty of care owed by the supplier of information is measured by the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect. . . . The damages recoverable for negligent misrepresentation include the difference between the value of what the plaintiff has received in the transaction and its purchase price or other value given for it, and pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

Robinson v. Poudre Valley Fed. Credit Union, 654 P.2d 861, 863 (Colo. App. 1982) (internal quotations omitted).

V. STRICT LIABILITY

Like many states, Colorado's strict or product liability laws are generally only applicable to manufacturers and sellers of products. Colo. Rev. Stat. § 13-21-401(2). Generally, courts distinguish between contracts for services and contracts for the sale of goods. *Samuelson v. Chutich*, 529 P.2d 631, 633 (Colo. 1974). Applying the law of strict liability to professional services fails to accomplish the original purpose of the doctrine. Unlike the sale of goods, professional services are not usually provided in mass, and identifying a negligent act in the chain is not as burdensome. *La Rossa v. Scientific Design Co.*, 402 F.2d 937, 943 n.16 (3d Cir. 1968). Thus, strict liability against design professionals and contractors is generally only available when products are provided. For example, in *Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co.*, a division of the Colorado Court of Appeals held that strict liability applied when the defendant designed, manufactured, and supplied defective trusses to a construction project. 687 P.2d 514, 516–17 (Colo. App. 1984), *superseded by statute*, Colo. Rev. Stat. § 13-21-115, *as recognized in Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 179 P.3d 16, 21–22 (Colo. App. 2007*), rev'd on other grounds*, 187 P.3d 565 (Colo. 2008). Thus, unless a party takes some role in the manufacture or selling of goods, strict liability is unavailable for an injury resulting from a construction defect.

VI. INDEMNIFICATION AND CONTRIBUTION

A. Express Indemnity

Express indemnity exists when the scope of indemnity has been defined through a contract or agreement of the parties. Indemnity provisions are prevalent in construction contracts. While express indemnity generally occurs through a written provision, indemnity contracts can arise orally. *Williams v. White Mountain Constr. Co*., 749 P.2d 423, 426 (Colo. 1988). The word "indemnity" is not required, and its use will not necessarily create an indemnity contract. *Id.* "The inquiry should be whether the intent of the parties was to extinguish liability and whether this intent was clearly and unambiguously expressed." *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781, 785 (Colo. 1989). Ambiguities in indemnity agreements are resolved against the party seeking indemnity. *Williams*, 749 P.2d at 426. Relaxing the rule of strict construction in construing indemnity contracts in commercial settings is a growing trend. *Pub. Serv. Co. v. United Cable Television of Jeffco, Inc.*, 829 P.2d 1280, 1285 (Colo. 1992), *superseded by statute*, Colo. Rev. Stat. § 13-21-111.5(6), *as recognized in Sterling Const. Mgmt., LLC v. Steadfast Ins. Co.*, No. 09-cv-02224-MSK-MJW, 2011 WL 3903074, at *9 n.6 (D. Colo. Sep. 6, 2011). While the general rule is that strict construction applies to indemnity agreements that purport to indemnify for the negligent conduct of an indemnitee, courts have found that, under certain circumstances, broad language is sufficient. *Id.* at 1284.

B. Common Law Indemnity and the Shift to Contribution

Even when there is no contractual right to indemnity, a common law indemnity claim may still exist based on common law agency principles. In recent years, the doctrine has been limited through the Uniform Contribution Among Tortfeasors Act and the enactment of comparative

negligence liability legislation. Colo. Rev. Stat. §§ 13-50.5-101, *et seq*., 13-21-111. The proportionate fault statute abolished the harsh common law doctrine of joint and several liability which required a defendant to bear a disproportionate share of liability for a plaintiff's injuries, regardless of the degree of relative fault. *Graber v. Westaway*, 809 P.2d 1126, 1128 (Colo. App. 1991). Joint tortfeasors are now subject to contribution among themselves based upon their relative degrees of fault. *Brochner v. W. Ins. Co.*, 724 P.2d 1293, 1297–98 (Colo. 1986). The remedies of indemnity and contribution are now, in theory, mutually exclusive, resulting in fewer indemnity claims under the common law. *Id.* at 1297. However, common law indemnity claims remain for principals who are not directly at fault but may be vicariously liable for their agent's tort. *Unigard Mut. Ins. Co. v. Mission Ins. Co.*, 907 P.2d 94, 97 (Colo. App. 1994). Thus, a non-negligent contractor held vicariously liable for the actions of a subcontractor may still recover through common law indemnification.

C. Admitting Vicarious Liability Bars Direct Liability Claims Against Employers or Principals

An employer's admission of vicarious liability for an employee's negligence bars a plaintiff's direct negligence claims and related evidence against the employer. *Ferrer v. Okbamicael*, 390 P.3d 836, 844 (Colo. 2017). The Colorado Supreme Court recognized that the majority view was that "once an employer admits respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on other theories of imputed liability. *Id.* at 833 (citing *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995)).

The Colorado Supreme Court adopted the majority rule for a variety of reasons.

First, it agreed with the majority view "that where an employer has conceded it is subject to respondeat superior liability for its employee's negligence, direct negligence claims against the employer that are nonetheless still tethered to the employee's negligence become redundant and wasteful." *Id.* at 844. The *Ferrer* court reasoned that in such a situation, direct negligence claims would be superfluous because both imputed and direct liability claims depend on whether an employee committed tortious conduct. *Id.* Accordingly, the Colorado Supreme Court noted that direct liability claims such as negligent hiring, supervision and retention, or entrustment are not "wholly independent cause[s] of the plaintiff's injuries, unconnected to the employee's negligence" because a "plaintiff has no cause of action against the employer for negligent hiring, for example, unless and until the employee's own negligence causes an accident." *Id.*

Next, the court determined that evidence "necessary to prove direct negligence claims is likely to be unfairly prejudicial to the employee." *Id.* at 845. Further, "there is a danger that a jury will assess the employer's liability twice and award duplicative damages to the plaintiff if it hears evidence of both a negligence claim against an employee and direct negligence claims against the employer." *Id.*

The Colorado Supreme Court declined to adopt the punitive damages exception to the majority rule because "such an exception is not logically consistent with the rule." *Id.* at 848 The

Ferrer court acknowledged that few courts applying the majority rule have recognized an exception for direct negligence claims where the plaintiff seeks punitive damages on his or her direct liability negligence claims. *Id.* at 847-48. It noted that the few jurisdictions that either have recognized a potential punitive damages exception or have suggested in dicta that a theoretical punitive damages exception may exist have done so "with little to no analysis, simply citing McHaffie, 891 S.W.2d at 826, for the proposition that "it is . . . possible that an employer or an entrustor may be liable for punitive damages which would not be assessed against the employee/entrustee." *Id.* The court rejected the punitive damages exception because under Colorado law, a claim for punitive damages is not an independent cause of action. *Id.* at 848. Instead, the punitive damages claim is tied to the direct negligence claim that has been precluded by the majority rule. *Id.* The court reasoned that if such direct liability claims are barred, "there can be no freestanding claim against the employer on which to base exemplary damages[,]" and to hold otherwise would be illogical. *Id.*

VII. STATUTE OF LIMITATIONS/REPOSE

Contract causes of action generally carry a three-year statute of limitations, while tort-based claims are governed by a two-year limitation. Colo. Rev. Stat. §§ 13-80-101 & 102. Notably, Colorado has also enacted section 13-80-104, which provides a separate limitations period and accrual formula for many construction matters. Thus, "all actions against any architect, contractor, builder, or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 [two years] after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property." Colo. Rev. Stat. § 13-80-104(1)(a). If the action accrues in the fifth or sixth year, the action can be brought within two years of the accrual date. Colo. Rev. Stat. § 13-80-104(2).

Section 13-80-104 is not intended to apply to claims for breach of warranties to "repair and replace," even when the party against whom the claim is asserted is within the class of individuals protected by that statute, they are instead governed by the general (3-year) statute of limitations for contracts and warranties. *Hersh Cos. v. Highline Vill. Assocs*., 30 P.3d 221, 226 (Colo. 2001). Additionally, the limitations under section 13-80-104 only apply to negligence in planning, design, construction, supervision, or inspection that results in a defect in an improvement to the property and not to all injuries resulting from the professional's conduct. *Two Denver Highlands, L.P. v. Dillingham Constr. N.A.*, 932 P.2d 827, 829 (Colo. App. 1996).

VIII. ECONOMIC LOSS RULE

In an effort to maintain the boundary between contract law and tort law, the Colorado Supreme Court adopted the Economic Loss Rule in 2000. *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000); *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1269 (Colo. 2000). The rule states that a "party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of

care under tort law." *Town of Alma*, 10 P.3d at 1264. Economic loss is defined generally as damages other than physical harm to persons or property. *Id*. In addition to clear lines between tort and contract, the rule operates to enforce expectancy interests of the parties so that they can reliably allocate risks and costs during their bargaining; and to encourage the parties to build the cost considerations into the contract because they will not be able to recover economic damages in tort. *See id*. at 1262.

The Economic Loss Rule initially targeted tort claims by one party of a construction contract against another party to that contract; however, the Colorado Supreme Court has recently expanded and clarified its application. In *BRW, Inc. v. Dufficy & Sons, Inc.*, the Court found that the "policies underlying the application of the Economic Loss Rule to commercial parties are unaffected by the absence of a one-to-one contract relationship," thus indicating tort claims may be barred even when a direct contract between the parties does not exist. 99 P.3d 66, 72 (Colo. 2004). The Economic Loss Rule focuses on the duties defined in the contract, rather than the status of the parties. Duties can arise from the networks of interrelated contracts that stem from the primary contract, and a tort claim brought by a project participant against a party for the breach of these duties will likely be barred by the Rule. *Id*.

While the Economic Loss Rule eliminates many common law actions available to participants in a construction project, Colorado courts have hesitated to completely bar tort-based claims stemming from construction contracts. The protection of homeowners in residential construction projects, independent duties imposed by law to act or refrain from acting in a certain manner, and damage to property or persons unrelated to the construction contract present scenarios in which Colorado has refused to impose the Economic Loss Rule. *See Stiff v. BilDen Homes, Inc.*, 88 P.3d 639, 641–42 (Colo. App. 2003) (stating that the Economic Loss Rule will not bar a tort-based negligence claim against a homebuilder); *see also Davenport v. Cmty. Corr. of Pikes Peak Region, Inc.*, 962 P.2d 963, 967 (Colo. 1998) (expressing that one who reasonably foresees that his act will involve an unreasonable risk of harm to another has a duty to prevent that harm); *Wright v. Creative Corp.*, 498 P.2d 1179, 1182 (Colo. App. 1972) (holding that a child injured by the builder's installation of clear glass rather than safety glass presented a case of actionable negligence).

In 2015, the Colorado Supreme Court summarized and refined the extent of the Economic Loss Rule. *See S K Peightal Engineers, LTD v. Mid Valley Real Estate Solutions V, LLC*, 342 P.3d 868, 872–73, 2015 CO 7, ¶¶ 7–10 (Colo. 2015). The Colorado Supreme Court summarized the Economic Loss Rule and provided "absent an independent tort duty, a plaintiff is generally barred from suing in tort if (1) the plaintiff seeks redress for breach of a contractual duty that caused only economic losses, (2) the plaintiff is a party to a contract or a third-party beneficiary of a contract as defined above, and (3) that contract defines the duty of care that the defendant allegedly violated or is interrelated with another contract that defines that duty of care." *Id.* at 872, 2015 CO at ¶ 8. Regarding construction, builders owe an independent duty "'to use reasonable care in the construction of a home in light of the apparent risk' that extends to 'subsequent purchasers' of the home." *Id.*, 2015 CO at ¶ 9. The Court recognized that this independent duty to act without negligence in the construction of a home extends to

subcontractors *Id*. The Colorado Supreme Court refined the doctrine and concluded that the Economic Loss Rule "can apply even to entities that did not exist at the time that the contract containing the duty was formed if that entity is a party to or third-party beneficiary of the contract (or an interrelated contract)." *Id.* at 872–73, 2015 CO at ¶ 10.

In 2016, the Colorado Supreme Court further clarified the scope of the Economic Loss Rule. In *Van Rees v. Unleaded Software, Inc.*, the Colorado Supreme Court held that the Economic Loss Rule did not bar a party's tort claims where those claims were based on misrepresentations made prior to the formation of contracts. 373 P.3d 603, 607–08, 2016 CO 51, at ¶¶ 3, 13–15, 19 (Colo. 2016). When applying the Economic Loss Rule, the Court observed that the "question is not . . . whether the tort claims relate to a contract . . . but rather whether they stem from a tort duty independent of a contract." *Id.* at 605, 2016 CO at ¶ 3. The Court determined that tort claims based on "pre-contractual misrepresentations" are distinct from the contract itself, and may form the basis of an independent tort claim." *Id.* In that situation, an independent tort duty exists because parties have a duty, independent from the contract, to refrain from engaging in misrepresentations to induce another party to enter the contract. *Id.* at 607, 2016 CO at ¶ 15. Therefore, even when misrepresentations made prior to the formation of a contract induce a party to enter into the contract, the Economic Loss Rule does not bar the induced party from seeking tort claims based on those misrepresentations and contractual claims based on the resulting contract. *Id.*

IX. CONSTRUCTION DEFECT ACTION REFORM ACT (CDARA)

The Construction Defect Action Reform Act (CDARA I) was first signed into law on April 19, 2001, and is applicable to all actions filed after August 8, 2001. Colo. Rev. Stat. § 13-20-801, *et seq.* In 2003, the Act was subject to significant amendments, and the improved legislation (CDARA II) applies to all actions filed after April 25, 2003. *Id.* CDARA was enacted to streamline construction defect litigation. *CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 664 (Colo. 2005). Specifically, the Act discourages the traditional reaction of a defendant general contractor who cross-names and adds everybody and anybody who had any part to play in the construction chain. *Id.*

A. List of Defects

In all actions brought against construction professionals, the claimant must file an initial list and description of construction defects with the court and serve it on the construction professional. Colo. Rev. Stat. § 13-20-803(1) and (2). The list of defects must be filed with the court and served on the defendant within 60 days after the commencement of the action. Colo. Rev. Stat. § 13-20-803(2). The initial list of defects may be amended to identify additional construction defects as they become known to the claimant. Colo. Rev. Stat. § 13-20-803(3). A case will not be set for trial until the list has been filed by the claimant. *Id.*

B. Notice of Claim

Before a claimant can file a cause of action against a construction professional, he must provide statutory notice pursuant to Colo. Rev. Stat. § 13-20-803.5. As used in the notice statute, a "construction professional" is "an architect, contractor, subcontractor, developer, builder, builder vendor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property." *Id.*; *see also* Colo. Rev. Stat. § 13-20-802.5(4) (2016) (defining term).

The notice provision requires that a claimant shall, "[n]o later than seventy-five days before filing an action against a construction professional, or no later than ninety days before filing the action in the case of a commercial property, . . . send or deliver a written notice of claim to the construction professional by certified mail, return receipt requested, or by personal service." Colo. Rev. Stat. § 13-20-803.5(1). "Notice of claim" is "a written notice sent by a claimant to the last known address of a construction professional against whom the claimant asserts a construction defect claim that describes the claim in reasonable detail sufficient to determine the general nature of the defect, including a general description of the type and location of the construction that the claimant alleges to be defective and any damages claimed to have been caused by the defect." Colo. Rev. Stat. § 13-20-802.5(5).

After serving the notice of claim, the "claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant's property during normal working hours to inspect the property and the claimed defect," and the inspection "shall be completed within thirty days of service of the notice of claim." Colo. Rev. Stat. § 13-20-803.5(2).

"Within thirty days following the completion of the inspection . . . or within forty-five days following the completion of the inspection process in the case of a commercial property, a construction professional may send or deliver to the claimant . . . an offer to settle the claim by payment of a sum certain or by agreeing to remedy the claimed defect described in the notice of claim." Colo. Rev. Stat. § 13-20-803.5(3). If the claimant accepts the offer, the construction professional shall either (1) pay the sum agreed upon in accordance with the offer, or (2) complete "the remedial construction work . . . in accordance with the timetable set forth in the offer . . . ." Colo. Rev. Stat. § 13-20-803.5(5). If, on the other hand, the construction professional fails to make an offer or to comply with an offer's terms, or if the claimant rejects or fails to accept an offer within fifteen days of delivery, the claimant is then permitted to file its action. Colo. Rev. Stat. § 13-20-803.5(4), (6), (7).

When a "notice of claim is sent to a construction professional . . . within the time prescribed for the filing of an action under any applicable statute of limitations or repose, then the statute of limitations or repose is tolled until sixty days after the completion of the notice claim process. . . ." Colo. Rev. Stat. § 13-20-805. Notice to a general contractor does not toll the statute of repose on a general contractor's indemnity claims against subcontractors if the subcontractors do not receive notice, however. *Shaw Const., LLC v. United Builder Servs.*, Inc., 296 P.3d 145, 150–53 (Colo. App. 2012), *rev'd on other grounds*, *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, 401-03 (Colo. 2017). In other words, the claimant must file within sixty days when any of the following transpire: the construction professional fails to inspect the premises

within thirty days of receiving notice, the construction professional fails to make an offer, the claimant rejects or fails to accept an offer, or the construction professional fails to comply with an offer to remedy or settle a claim. Notably, the statutes of limitations and repose can be extended indefinitely because "[a]fter the sending of the notice of claim, a claimant and a construction professional may, by written mutual agreement, alter the procedure for the notice of claim process. . . ." Colo. Rev. Stat. § 13-20-803.5(8).

X. DAMAGES

A. Delay Damages

Because delays in construction projects can be very costly to the parties involved, a party to a construction contract generally is entitled to recover damages resulting from the delays and disruption caused by the other party. *Asphalt Paving Co. v. U.S. Fid. & Guar. Co.*, 671 P.2d 1013, 1014–16 (Colo. App. 1983). The burden is on the party claiming damages to show that the delay resulted from another party's wrongful actions and not from unanticipated events, such as weather. *R.A. Reither Constr., Inc. v. Wheatland Rural Elec. Ass'n*, 680 P.2d 1342, 1345 (Colo. App. 1984). If an unwarranted delay is established, delay and disruption damages can include increased labor or equipment costs, extended overhead, indirect payroll expenses, administrative expenses, interest, and other costs that can be causally linked to the hindrance. *Asphalt Paving*, 671 P.2d at 1015–16. Of course, parties are free to specify recoverable delay damages in their contract and can include provisions that prevent recovery of delay damages incurred absent fraud or bad faith. *W.C. James, Inc. v. Phillips Petroleum Co.*, 347 F. Supp. 381, 385 (D. Colo. 1972).

B. Actual Damages

Since Colorado's adoption of CDARA II, a construction professional is only liable for "actual damages" arising from a construction defect. Colo. Rev. Stat. § 13-20-806(1). Actual damages are defined as the lesser of the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, together with "relocation costs." Colo. Rev. Stat. § 13-20-802.5(2). For residential property, actual damages also include "other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law." *Id.* Under section 13-20-802.5, for actions involving personal injury, damages are those recoverable by law. However, in actions asserting personal injury or bodily injury as a result of a construction defect in which damages for non-economic loss or injury or derivative non-economic loss or injury may be awarded, such damages shall not exceed the sum of $250,000. Colo. Rev. Stat. § 13-20-806(4).

C. Punitive Damages

CDARA II did not immunize the construction field from punitive damages. In cases of personal injury or property damage, upon a showing of fraud, malice, or willful and wanton conduct, a jury may award exemplary damages. Colo. Rev. Stat. § 13-21-102(1).

D. Stigma Damages

The enactment of CDARA II may prevent the recovery of stigma damages in construction defect cases. Damages are limited to "actual damages," which are defined as the lesser of three methods of calculation. Colo. Rev. Stat. § 13-20-802.5(2). Thus, the lingering reduction in the fair market value is unlikely to be accounted for in the "actual damages." *Id.* With residential property, however, it is unclear whether stigma damages can be encompassed in the provision allowing "other direct economic costs related to loss of use." *Id*.

XI. INSURANCE

A. The Duty to Defend and The Duty to Indemnify

When faced with an insurance claim for a construction defect, the insurance company must identify the duties owed to the insured for the particular claim. Insurance companies have two basic duties in third-party policies: (1) a duty to defend; and (2) a duty to indemnify. An insurer's duty to defend is independent of, and broader than, the duty to indemnify. *Globe Indem. Co. v. Travelers Indem. Co.*, 98 P.3d 971, 976 (Colo. App. 2004). The duty to defend includes any potential claims raised by the facts, while the duty to indemnify occurs only when actual liability is imposed. *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299 (Colo. 2003). The duty to defend stems from the allegations in the underlying complaint and is triggered when the insured alleges any facts that could fall within the policy. *Hecla Mining Co. v. New Hampshire Ins. Co*., 811 P.2d 1083, 1089 (Colo. 1991). An insurer is not excused from the duty to defend unless "no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured" exists. *Id.* at 1090.

The duty to indemnify arises only when the harm is covered by the policy and typically cannot be determined until the underlying claims are resolved. *Cyprus*, 74 P.3d at 299. Similar to the majority of other jurisdictions, "a breach of the duty to defend does not preclude an insurer from contesting its duty to indemnify." *McGowan v. State Farm Fire & Cas. Co.*, 100 P.3d 521, 527 (Colo. App. 2004).

B. Commercial General Liability Policy (CGL)

The most common coverage under a CGL policy is for bodily injury and property damage. Bodily injury and property damage coverage requires an occurrence and damages. *Am. Emp'r's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 955–56 (Colo. App. 1990). An occurrence is defined as an accident, which is an "unanticipated or unusual result flowing from a commonplace cause." *Carroll v. Cuna Mut. Ins. Soc'y*, 894 P.2d 746, 753 (Colo. 1995). Coverage is triggered only if a

third party suffered actual damage within the policy period. *Browder v. U.S. Fid. & Guar. Co.*, 893 P.2d 132, 134 (Colo. 1995), *overruled on other grounds by Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 804 (Colo. 2007). Generally, the "time of the occurrence of an accident is not the time the wrongful act was committed but the time when the complaining party was actually damaged." *Browder*, 893 P.2d at 134 n.2. Similar to all ambiguities in a construction policy, Colorado law construes "occurrence" broadly against the insurer. *Bobier v. Beneficial Standard Life Ins. Co.*, 570 P.2d 1094, 1096 (Colo. App. 1977).

The definition of property damage is less clear than bodily injury and accounts for more litigation. Property damage is defined as "physical injury to property, including all resulting loss of use of that property." *Globe Indem.*, 98 P.3d at 974 (internal quotations omitted).

C. Faulty Workmanship Exclusion

Comprehensive general liability policies that insure against liability for bodily harm and property damage do not insure the quality of the work provided. The policies normally exclude coverage for faulty workmanship based on the rationale that poor workmanship is considered a business risk to be borne by the policyholder, rather than a "fortuitous event" entitling the insured to coverage. *McGowan*, 100 P.3d at 525. However, Colorado courts have found situations in which faulty workmanship can produce an occurrence. In *Colard v. Am. Family Mut. Ins. Co.*, the court held that the unintended poor workmanship of the defendant created an exposure to a continuous condition that resulted in property damage to the plaintiffs. 709 P.2d 11, 13 (Colo. App. 1985). The court found the damage at issue was the result of an "occurrence," and coverage would not be prevented by the faulty workmanship exception. *Id.*

XII. COLORADO MECHANIC'S LIEN STATUTE

A mechanic's lien is statutory and had no place in the common law. Colo. Rev. Stat. §§ 38-22-101 to -133. Mechanic's liens are based upon the principle that "one who has enhanced the value of property by his labor or material is entitled to a superior lien if he follows certain prescribed procedures." *Amco Elec. Co. v. First Nat'l Bank,* 622 P.2d 608, 609 (Colo. App. 1981). The mechanic's lien statute is to be liberally construed in favor of lien claimants; however, it is also to be strictly construed in determining whether the right to a lien exists. *Fleming v. Prudential Ins. Co.*, 73 P. 752, 753 (Colo. App. 1903). A party that claims entitlement to the benefits of the lien must prove compliance with all the necessary statutory requirements. *Richter Plumbing & Heating, Inc. v. Rademacher*, 729 P.2d 1009, 1012 (Colo. App. 1986). The procedural validity of a lien securing a debt arising from a breach of contract may be decided by a court even when the contract requires all disputes to be submitted to binding arbitration. *Sure-Shock Elec., Inc. v. Diamond Lofts Venture, LLC*, 259 P.3d 546, 549 (Colo. App. 2011); *see also* Colo. Rev. Stat. § 38–22–114(1).

A. Nature of Lien Rights

"The primary purpose of a mechanic's lien is to benefit and protect those who supply labor, materials, or services in order to enhance the value or condition of another's property." *City of Westminster v. Brannan Sand & Gravel Co.*, 940 P.2d 393, 395 (Colo. 1997). Generally, in the absence of a mechanic's lien, a contractor could assert various contract claims against an owner. The mechanic's lien statute affords additional security by granting to persons who fall within its provisions an *in rem* recovery against the land, thus creating an alternative remedy that is broader than an *in personam* contract action. *C & W Elec., Inc. v. Casa Dorado Corp*., 523 P.2d 137, 138 (Colo. App. 1974). Liens can be secured for all materials, labor, tools, and equipment incorporated into the improvement of real property. Colo. Rev. Stat. § 38-22-101. Additionally, liens can be secured for the services of the construction superintendent and architect. *Id.* Interest on all amounts due is available under section 38-22-101(5).

B. Parties Who Can Claim a Mechanic's Lien

Mechanic's liens are available to numerous parties who participate in a construction project. Section 38-22-101 provides "an express and exhaustive enumeration of those classes of persons entitled to claim a mechanic's lien. . . ." *Ridge Erection Co. v. Mountain States Tel. & Tel. Co.*, 549 P.2d 408, 411 (Colo. App. 1976). Anyone who has supplied equipment, materials, machinery, tools, or labor to be used in the construction, alteration, or repair of any structure, or who makes an improvement upon the land itself, is eligible to assert a mechanic's lien. § 38-22-101. Sub-contractors and materialmen are entitled to their own direct mechanic's liens, regardless of the state of the account between the owner and the contractor. *Great W. Sugar Co. v. F. H. Gilcrest Lumber Co.*, 136 P. 553, 555–56 (Colo. App. 1913). Mechanic's liens are also available to "architects, engineers, draftsmen, and artisans who have furnished designs, plans, plats, maps, specifications, drawings, cost estimates, surveys, or superintendence, or who have rendered other professional or skilled service." Colo. Rev. Stat. § 13-22-101. Architects have been given the right to a mechanic's lien even when their designs are not used for the project. *James H. Stewart & Assocs., Inc. v. Naredel of Colo., Inc.*, 571 P.2d 738, 740 (Colo. App. 1977). Finally, a general contractor is entitled to a lien against the owner when the contract requirements of section 38-22-101 are fulfilled.

C. Lien Statement

Any person who wishes to place a mechanic's lien against property must record a statement of lien with the office of the county clerk and recorder of the county in which the property is located. Colo. Rev. Stat. § 38-22-109. The statement must include: (1) the name of the owner or reputed owner of such property, or in case such name is not known to him, a statement to that effect; (2) the name of the person claiming the lien, the name of the person who furnished the laborers or materials or performed the labor for which the lien is claimed, and the name of the contractor when the lien is claimed by a subcontractor or by the assignee of a subcontractor, or, in case the name of such contractor is not known to a lien claimant, a statement to that effect; (3) a description of the property to be charged with the lien, sufficient to identify it; and (4) a statement of the amount due or owing the claimant. Colo. Rev. Stat. § 38-

22-109(1)(a)–(d). The statement must be sworn and signed by the party seeking the lien. Colo. Rev. Stat. § 38-22-109(2).

A notice of intent to file a lien statement must be served upon the owner at least ten days before the time of filing the lien statement with the county clerk and recorder. Colo. Rev. Stat. § 38-22-109(3). Laborers by the day or piece must file for a lien after their last work is completed and within two months after completion of the project. Colo. Rev. Stat. § 38-22-109(4). Generally, all other liens must be filed at any time within four months after the day on which the last labor is performed or the last laborers or materials are furnished by the lien claimant. Colo. Rev. Stat. § 38-22-109(5). Exceptions and extensions are available, so one should consult the applicable statute when pursuing a lien. *See* Colo. Rev. Stat. § 38-22-109.

No lien shall hold the property longer than six months after completion, unless an action to foreclose is commenced within that time. Colo. Rev. Stat. § 38-22-110. Abandonment of work for three consecutive months is deemed to be completion of the project, thus the six-month period begins at that time. Colo. Rev. Stat. § 38-22-109(7).

XIII. COLORADO PUBLIC WORKS BOND STATUTE

The mechanic's lien statute does not apply to construction projects for government agencies. Rather, the legislature enacted the Public Works Bond Statute protecting those furnishing labor and materials for public projects by requiring that certain payment and performance bonds be posted in connection with those public projects. Colo. Rev. Stat. § 38-26-101, *et seq.* (2016); *Heinrichsdorff v. Raat*, 655 P.2d 860, 862 (Colo. App. 1982).

A. Scope of Statute

Under the statute, a general contractor on a public works project is required to give a bond guaranteeing payment for subcontractors, laborers, and materialmen. Colo. Rev. Stat. § 38-26-105(1). Parties who do not receive payment for work or material provided have a right of action for amounts lawfully due to them from the contractor or subcontractor directly against the principal and surety of such bond. *Id.* If a claimant fails to perfect a lien on funds held by the public entity, he is not barred from maintaining an action on the payment bond. *Montezuma Plumbing & Heating, Inc. v. Hous. Auth. of Montezuma County.*, 651 P.2d 426, 428 (Colo. App. 1982). The statute expressly covers contracts over $50,000 awarded by the State of Colorado, its counties, cities, municipalities, school districts, and other political subdivisions. § 38-26-106(3)(a). State entities can exercise discretion and require penal bonds for contracts that do not meet the $50,000 threshold. Colo. Rev. Stat. § 38-26-105(2).

B. Parties to a Public Works Claim

Various parties are covered by the Public Works Bond Statute. The term "subcontractor" has been broadened to include "sub-subcontractors" within its meaning, placing them within the scope of the statute. *Lovell Clay Prods. Co. v. Statewide Supply Co.*, 580 P.2d 1278, 1280 (Colo.

App. 1978). While materialmen are covered, suppliers to materialmen are not covered by the statute. *W. Metal Lath v. Acoustical and Constr. Supply, Inc.*, 851 P.2d 875, 878 (Colo. 1993).

C. Establishing a Claim Under the Public Works Statute

Actions for material provided or labor rendered must be brought within six months after substantial completion of the work. Colo. Rev. Stat. § 38-26-105(1). Substantial completion occurs when major items are completed and all that remains are minor deviations. *Gen. Elec. Co. v. Webco Constr. Co.*, 433 P.2d 760, 763 (Colo. 1967). In order to establish an enforceable lien on contract funds, a claimant must file a "verified statement" of claim with the public entity on or before the date of final settlement. *Cont'l Cas. Co. v. Rio Grande Fuel Co.*, 119 P.2d 618, 620 (Colo. 1941). Final settlement is the date that all payments from the State to the contractor are complete and the business relationship is concluded. At the time of final settlement between the contractor and State, the claimant will have only ninety days to file suit to foreclose a lien and provide a *lis pendens* to the contracting body. *Montezuma*, 651 P.2d at 429. A claimant who does not sue by this deadline loses the right to sue the State, and the State pays the general contractor the funds that would have otherwise been withheld.

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