



STATE OF IDAHO COMPENDIUM OF CONSTRUCTION LAW

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Introduction

In the vast majority of construction projects, the owner or developer of a property will contract with a general contractor or project manager, who then contracts with various subcontractors and consultants in order to facilitate specialized work on the project. This can raise complex issues of contract and tort law when defects in the work performed arise because the owner or developer does not have a direct relationship with the at-fault party. As such, matters related to construction are broad, encompassing the law of contract and the law of torts, as well as statutory law specifically applicable to construction litigation. While Idaho construction law shares similarities with other states, some aspects are unique to Idaho. Moreover, Idaho, like many states, has its own unique legal structure, theories, and statutes. With that in mind, we have included a brief overview of the Idaho legal system below.

We hope the following serves as an easy-to-use reference guide to these issues and provides practical tips to help those in Idaho's construction industry.

If you have any questions about the material covered in this guide, please contact Keely Duke or another member of the law firm of Duke Evett, PLLC.



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1. The Idaho State Court System

The trial-level state court in Idaho is the District Court. The state is divided into seven judicial districts, with each county operating a District Court within those districts that hears all civil disputes where the amount in controversy is over \$10,000. A matter where \$10,000 or less is at stake is referred to the Magistrate Court. District Court judges are elected officials who serve four-year terms. Often, however, due to the realities of judicial retirement and resignation, District Judges are appointed by the Idaho Judicial Council and the Governor and generally are unopposed upon re-election.

The appeal of a civil action in Idaho may be heard by either the intermediate appellate court, the Idaho Court of Appeals, or the highest appellate court, the Idaho Supreme Court, depending on the court to which the matter is assigned by a justice of the Idaho Supreme Court, known as the assignments justice. Generally, civil matters are assigned directly to the Idaho Supreme Court. When a civil matter is assigned

to and adjudicated by the Idaho Court of Appeals, either party may petition to have the matter reviewed by the Idaho Supreme Court. Grant or denial of review is a matter within the Idaho Supreme Court's discretion. The judges of the Idaho Court of Appeals and Idaho Supreme Court are elected officials and serve six-year terms. Often, however, due to the realities of judicial retirement and resignation, appellate court judges are appointed by the Idaho Judicial Council and the Governor and generally are unopposed upon re-election.

The procedural rules in Idaho state courts are governed by the Idaho Rules of Civil Procedure and the Idaho Appellate Rules. The Idaho Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure and are similar in many respects. In 2016, the Idaho Rules of Civil Procedure were re-written with the goal of making them track the Federal Rule in even more respects. Additionally, a few of the judicial districts, including the Fourth and Seventh, have local procedural rules that govern practice before those courts.

2. Idaho Federal Courts

Given the similarities between the applicable procedural rules, the main difference between practice in state and federal court in Idaho is the applicable local procedural rules and the ability to use the ECF system for case filings. Idaho federal courts are divided into four divisions, with divisional offices located throughout the state. Prior to 2017, Idaho federal courts had been in an official state of emergency due to the retirement of Judge Edward J. Lodge. On August 1, 2017, Judge David C. Nye was sworn in as a U.S. District Judge for the District of Idaho. As a result, the court has two district judges—Chief District Judge B. Lynn Winmill and District Judge David C. Nye. Although there are two sitting district judges, the caseload of the judges can have significant impacts on the timing of cases. The Court also has two magistrate judges—Chief Magistrate Judge Ronald E. Bush and Magistrate Judge Candy W. Dale.

Breach of Contract

When two parties come to an agreement for valid consideration, a contract is formed and parties to the contract have a cause of action against the other for failing to perform the terms of the contract. To establish a breach of contract, the complaining party must prove: (1) the existence of a contract; (2) the breach of the contract; (3) the breach caused damages; and (4) the amount of those damages.¹ Only a material breach of contract is actionable in Idaho.² A material breach of contract touches the fundamental purpose of the contract and defeats the object of the parties entering into a contract.³ There is no breach of contract when a party substantially performs.⁴ Substantial performance is performance which, despite a

¹ *Hull v. Giesler*, 156 Idaho 765, 774, 331 P.3d 507, 516 (2014).

² *Id.*

³ *Id.*

⁴ *Id.*

deviation from the contract requirements, provides the important and essential benefits of the contract to the promise.⁵

1. Implied Warranties

In addition to any express terms of a contract requiring work to be performed to specific standards, construction contracts carry an implied warranty of fitness guaranteeing that the work will be completed in a “workmanlike” manner.⁶ This implied warranty of fitness does not require a party to construct a structure free of defects.⁷ In home construction contracts, only defects that render the residence unfit for habitation and not readily remedial would entitle a buyer the ability to rescind the contract and seek monetary damages.⁸

2. Privity Requirement

Generally, Idaho’s appellate courts have held that privity of contract is required to assert a claim for design defects. For example, in *Nelson v. Anderson Lumber Co.*,⁹ the Idaho Court of Appeals held that the owner of a cabin could not assert a negligence claim against a supplier of materials used in the construction of the cabin where there was no contract between the supplier and the owner. It should be noted, however, that this finding was based, in part, on the determination that the lawsuit sought only economic losses as damages, which are not recoverable under a negligence theory.¹⁰

Where a home has been involved, the Idaho Supreme Court has relaxed the requirements for privity with respect to breach of warranty claims where the warranties relate to habitability of a residence. Specifically, the court has held that subsequent purchasers of real property may bring a cause of action against the builder, in absence of privity, for breach of the warranty of habitability, which the Court adopted with the following limitation:

This extension of liability is limited to latent defects, not discoverable by a subsequent purchaser’s reasonable inspection, manifesting themselves after the purchase. The standard to be applied in determining whether or not there has been a breach of warranty is one of reasonableness in light of surrounding circumstances. The age of the home, its maintenance, the use to which it has been put, are but a few factors entering into this factual determination at trial.¹¹

⁵ *Id.*

⁶ *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 699, 874 P.2d 506, 510 (1993).

⁷ *Id.*

⁸ *Id.*

⁹ 140 Idaho 702, 709, 99 P.3d 1092, 1099 (Ct. App. 2004).

¹⁰ *Id.* at 710, 99 P.3d at 1100.

¹¹ *Tusch Enterprises v. Coffin*, 113 Idaho 37, 50, 740 P.2d 1022, 1035 (1987).

In the context of engineering defects, the Idaho Supreme Court recognized the rule articulated in *Tusch, supra*, and refused to relax the privity requirement with respect to claims against engineers.¹²

3. Third-Party Beneficiaries

Under Idaho law, a party who can demonstrate that a contract was made expressly for its benefit has standing to enforce the contract, prior to rescission, as a third-party beneficiary.¹³ The Idaho Supreme Court strictly enforces the requirement that the contract was expressly made for the benefit of the third party. For example, in *DeGroot v. Standley Trenching, Inc.*,¹⁴ the court held that the owner of a dairy could not maintain suit for breach of contract and breach of warranties, express and implied, against subcontractors who provided a manure handling system because there was, admittedly, no contract between the parties, and because the owner of the dairy was not an intended third-party beneficiary of that contract. The court reached this holding despite the fact that the dairy owner had been involved in discussions and negotiations concerning the purchase and installation of the equipment at issue, the equipment was shipped to the dairy site, and the company providing the equipment named its file on the matter “DeGroot,” in reference to the dairy’s owner.

Negligence

To prove negligence, a plaintiff must prove the following: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of the defendant’s duty; (3) a causal connection between the defendant’s conduct and the plaintiff’s injury; and (4) actual loss or damage.¹⁵

1. The Economic Loss Rule

“The economic loss rule is a judicially created doctrine of modern product liability law.”¹⁶ The Idaho Supreme Court has recognized that its application is not limited to products liability and applies the economic loss rule to negligence actions as well.¹⁷

¹² See *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005) (holding that a subsequent purchaser could not sue an engineer for damages arising from settling foundation and resultant property damage in absence of privity because the damages constituted economic losses).

¹³ *Idaho Power Co. v. Hulet*, 140 Idaho 110, 112, 90 P.3d 355, 337 (2004). See I.C. § 29-102.

¹⁴ 157 Idaho 557, 563, 338 P.3d 536, 542 (2014).

¹⁵ *Nelson*, 140 Idaho at 710, 99 P.3d at 1100 (citing *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999)).

¹⁶ *Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 26, 244 P.3d 166, 170 (2010) (citing 63B Am. Jur. 2d *Products Liability* § 1794 (2010)).

¹⁷ See *Ramerth v. Hart*, 133 Idaho 194, 197, 983 P.2d 848, 851 (1999).

“Unless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another.”¹⁸ Where the damages sought are for harm to person or property, they do not constitute purely economic losses.¹⁹

Economic losses are recoverable in tort only if they are parasitic to personal injury or property damage.²⁰ Property damage includes damage to property other than that which is the subject of the transaction.²¹ The subject of the transaction determines whether a loss is property damage or economic loss, not the status of the party being sued.²² The Idaho Supreme Court has held that the subject matter of the transaction is defined by the subject matter of the contract.²³

There are two exceptions to the general rule that prevents a party from recovering purely economic loss in a tort claim: (1) where a special relationship exists between the parties; or (2) where unique circumstances require a reallocation of the risk.²⁴

a. Special Relationship Exception

“A special relationship exists ‘where the relationship between the parties is such that it would be equitable to impose such a duty.’”²⁵ This special relationship exception to the economic loss rule is an extremely narrow exception that applies in only limited circumstances.²⁶ The Idaho Supreme Court has found a special relationship to exist in only two situations, where: (1) “a professional or quasi-professional performs personal services;” and (2) “where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function.”²⁷ In applying this exception, however, the Idaho Supreme Court has held that there must have actually been reliance upon professional services by the putative plaintiff.²⁸ The Idaho Supreme Court has applied the special relationship exception in a very narrow fashion.

b. Unique Circumstances Exception

The unique circumstances exception is applicable under situations “requiring a different allocation of risk.”²⁹ As with the special circumstances exception, the unique circumstances exception is very narrow

¹⁸ *Stapleton v. Jack Cushman Drilling & Pump Co.*, 153 Idaho 735, 742, 291 P.3d 418, 425 (2012) (quoting *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1000).

¹⁹ *Id.* (quoting *Brian & Christie, Inc.*, 150 Idaho at 28, 244 P.3d at 172).

²⁰ *Id.*

²¹ *Id.* (quoting *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975)).

²² *Blahd*, 141 Idaho at 301, 108 P.3d at 1001.

²³ *Stapleton*, 153 Idaho at 742, 291 P.3d at 425.

²⁴ *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 792, 215 P.3d 505, 512 (2009).

²⁵ *Id.* (quoting *Duffin v. Idaho Crop Improvement Ass’n*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995)).

²⁶ *Id.*

²⁷ *Id.* (quoting *Blahd*, 141 Idaho at 301, 108 P.3d at 1001).

²⁸ *Blahd*, 141 Idaho at 301-02, 108 P.3d at 1001-02.

²⁹ *Just's, Inc. v. Arrington Const. Co.*, 99 Idaho 463, 470, 583 P.2d 997, 1005 (1978).

and one commentator described it as virtually non-existent.³⁰ While the Idaho Supreme Court “has recognized the existence of the unique circumstances exception to the economic loss rule, it has never applied the exception.”³¹ In construction cases, for example, the Court has found that the exception does not apply because construction is an everyday occurrence.³² As such, there is very little case law in Idaho providing guidance as to the applicability of this exception.

Mechanic’s Lien

Generally, any person who performs labor or furnishes materials used to improve real property or structures located on real property can record a lien against the real property as a means to structure payment for the labor or materials.³³ These liens are a statutory in their nature and the purpose of the statutes are to compensate people who perform labor or furnish material used in construction, alteration, or repair of a structure.³⁴

The statutes creating mechanic’s liens are liberally construed in favor of the persons whom provided the labor or furnished the materials.³⁵ Despite this liberal construction, courts are unable to create a lien where none exists or was intended by the legislature and the statutory requirements “must be substantially complied with in order to perfect a valid mechanic’s lien.”³⁶

1. Filing a Mechanic’s Lien

To perfect a mechanics lien the claim of lien must be filed within 90 days “after the completion of the labor or services, or furnishing of materials.”³⁷ When a lien claimant provides labor or materials pursuant to two separate contracts, the claimant cannot utilize work performed under the second contract to render a claim of lien timely as to labor provided pursuant to the first contract.³⁸

A mechanics lien must contain (1) a statement of the demand, “after deducting just credits and offsets; (2) the name of the owner, or reputed owner, if known; (3) the name of the person whom was employed or furnished the materials; and (4) a “description of the property to be charged with the lien,

³⁰ A. Dean Bennett, *The “Unique Circumstances” Exception to the Economic Loss Doctrine*, Advocate, March/April 2009.

³¹ *Blahd*, 141 Idaho at 302, 108 P.3d at 1002.

³² *Id.*.

³³ Idaho Code Ann. § 45-501 (2020).

³⁴ *Sims v. ACI Northwest, Inc.*, 157 Idaho 906, 909, 342 P.3d 618, 621 (2014).

³⁵ *Id.*

³⁶ *Id.* at 910, 342 P.3d at 622 (quoting *Pierson v. Sewell*, 97 Idaho 38, 41, 539 P.2d 590, 593 (1975)).

³⁷ Idaho Code Ann. § 45-507(2) (2020).

³⁸ *Hap Taylor & Sons, Inc. v. Summerwind Partners, LLC*, 157 Idaho 600, 338 P.3d 1204 (2014).

sufficient for identification.”³⁹ To perfect a mechanic’s lien, the recorded notice must be both verified by the lien claimant, under oath, and the lien claimant’s signature must be acknowledged by a notary.⁴⁰

A copy of the claim of lien must be served on the owner or reputed owner of the property by either personal service delivering or mailing via certified mail.⁴¹ The delivery or mailing must be made no later than five days after the claim was filed.⁴²

2. Lien Priority

Idaho Code section 45-506 “governs the priority between a mechanic’s lien and a mortgage.”⁴³ The Idaho Supreme Court has interpreted the foregoing statute to mean “that the lien claimant could be given priority when either the building, improvement or structure was commenced, some entity or individual began to work on the building, improvement or structure, or when the materials or professional services were first furnished.”⁴⁴ Whichever of the foregoing events occurs first determines the priority for all liens as against a mortgage lien holder.⁴⁵

A lien generally “relates back to the date of commencement of the work or improvement of the commencement to furnish the material,” not when the claim of lien is recorded.⁴⁶ There is an exception to this rule that applies when labor was completed pursuant to one contiguous employment contract.⁴⁷ Under those circumstances, “the lien attached at the time the work began and encompassed all work done under the contract.”⁴⁸ If the lien is filed within ninety days after the completion of the labor or services, the lien may encompass the entirety of the work performed under the contiguous employment contract.⁴⁹ Additionally, an engineer has a lien on services performed off-site and before construction commences, as long as those services were authorized under the subject contract.⁵⁰

3. Foreclosing a Mechanic’s Lien

³⁹ Idaho Code Ann. § 45-507(3) (2020).

⁴⁰ *In re Thames*, 349 B.R. 659, 665 n.11 (Bankr.D.Idaho 2005); Idaho Code Ann. § 45-507 (2020).

⁴¹ Idaho Code Ann. § 45-507(5) (2020).

⁴² *Id.*

⁴³ *Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 198, 321 P.3d 739, 748 (2014).

⁴⁴ *Id.* at 199, 321 P.3d at 748 (quoting *Ultrawall, Inc. v. Washington Mut. Bank, FSB*, 135 Idaho 832, 835, 25 P.3d 855, 858 (2001)).

⁴⁵ *Id.*

⁴⁶ *Sims*, 157 Idaho at 910, 342 P.3d at 622 (quoting *White v. Constitution Mining & Mill. Co.*, 56 Idaho 403, 420, 55 P.2d 152, 160 (1936)); Idaho Code Ann. §§ 45-501, 45-507, 45-510.

⁴⁷ *Credit Suisse AG*, 156 Idaho at 199, 321 P.3d at 749.

⁴⁸ *Id.* (quoting *Terra–West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 400, 247 P.3d 620, 627 (2010)).

⁴⁹ *Id.*

⁵⁰ *Hap Taylor & Sons, Inc.*, 157 Idaho at 606-07, 338 P.3d at 1210-11.

Idaho Code section 45-510 provides district courts with jurisdiction to enforce a mechanic’s lien when the lien is filed and the action commences within six months of the filing date.⁵¹ Unlike a statute of limitations which is waived if not pleaded, the six-month time frame to enforce a mechanic’s lien operates as a limitation of liability.⁵² Due to the operation of Idaho Code Section 45-510 as a limitation on liability, a person loses their interest in a mechanic’s lien if they are not made a party to an action to enforce it within the six month period.⁵³

In *ParkWest Homes, LLC v. Barnson*,⁵⁴ the Idaho Supreme Court held that a leinor seeking to enforce a mechanic’s lien against property encumbered by a deed of trust must name the trustee of the deed of trust within the six months to give effect to the mechanic’s lien against subsequent holders of legal title. Accordingly, in the event a claimant fails to join the trustee within the six-month statutory period, a subsequent holder of legal title to the property encumbered by a deed of trust and a mechanic’s line, takes the property free and clear of the mechanic’s lien.⁵⁵

4. Attorney’s Fees

Attorney fees are available for “the moneys paid for filing and recording” and claim “for each person claiming a lien.”⁵⁶

Public Contract Bond Act

In Idaho, mechanic’s liens are not available for work performed on state and local construction projects.⁵⁷ Security for work performed on these projects is available through Idaho’s Public Contacts Bond Act.⁵⁸ When performing public works projects the public entity must pay for the project through a payment bond. “Every claimant who has furnished labor or material, leased, or otherwise supplied equipment in the prosecution of the work provided for . . . shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit. . . .”⁵⁹ Parties who have either a direct contractual relationship with the prime or general contractor or the prime of general contractor’s subcontractors may assert claims against the primary bond.⁶⁰

⁵¹ *Sims*, 157 Idaho at 910, 342 P.3d at 622; Idaho Code Ann. § 45-510 (2020).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 154 Idaho 678, 683-84, 302 P.3d 18, 23-24 (2013).

⁵⁵ *Id.* at 685, 302 P.3d at 25; *see also Sims*, 157 Idaho 906, 342 P.3d 618 (reaffirming the holding in *ParkWest Homes, LLC*).

⁵⁶ Idaho Code Ann. § 45-413 (2020).

⁵⁷ *La Grand Steel Products Co. v. A.S.C. Constructors, Inc.*, 108 Idaho 817, 818, 702 P.2d 855, 856 (2009)

(overruled on other grounds in *Evco Sound & Electronics, Inc. v. Seaboard Sur. Co.*, 148 Idaho 357, 223 P.3d 740 (2009)).

⁵⁸ Idaho Code Ann. § 54-1925, et seq (2020).

⁵⁹ Idaho Code Ann. § 54-1927 (2020).

⁶⁰ *Id.*

Under the circumstances, where the subcontractor only has a contractual relationship with the general contractor's subcontractor, the subcontractor is required to provide written notice to the general contractor and the surety within ninety days "after the day on which the last labor was done or performed by him or material or equipment was furnished or supplied by him. . . ."61 The lawsuit must be filed within one year from the last day the claimant provided the subject labor or materials.62 Additionally, lawsuits must be filed in the county where the "contract was to be performed. . . ."63

There are two exceptions to the bond requirement. The first exception applies to public sold waste disposal sites.64 The second exemption applies to projects with an estimated cost of less than fifty thousand dollars.65

A contractor who makes a mistake while submitting a bid to a public entity has an avenue for relief.66 In order to obtain this relief, the contractor must establish that: (1) a clerical or mathematical mistake was made; (2) the bidder gave the public entity written notice within five "calendar days after opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred"; and(3) the mistake was material.67

Statutes of Limitation and Repose

Statutes of limitation and repose are two distinct defenses that are generally available in construction litigation. A statute of limitations places a time limitation on a potential cause of action, requiring the cause of action to be commenced within a certain time after it has accrued, generally when some damage has occurred. Conversely, a statute of repose sets an automatic accrual date after a specified period of time, upon which the statute of limitations will begin to run even if the claim would not yet have technically accrued for statute-of-limitations purposes.

1. Statute of Repose

Idaho Code Section 5-241,—Idaho's statute of repose applicable to construction claims--states:

Actions will be deemed to have accrued and the statute of limitations shall begin to run as to actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property, as follows:

- (a) Tort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Idaho Code Ann. § 54-1903(10) (2020).

⁶⁵ Idaho Code Ann. § 54-1903(9) (2020).

⁶⁶ Idaho Code Ann. § 54-1904B (2020).

⁶⁷ Idaho Code Ann. § 54-1904C (2020).

(b) Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement.⁶⁸

The foregoing provisions terminate liability within a set time after completion of a construction project: (a) eight years for tort claims (six years of repose and two years for the applicable statute of limitations as set forth in Idaho Code Section 5-219); (b) five years for written contract claims (reflecting deemed accrual of the five-year statute of limitations set forth in Idaho Code Section 5-216 upon substantial completion of contract work); and (c) four years for oral contract claims (reflecting deemed accrual of the four-year statute of limitations set forth in Idaho Code Section 5-217 upon substantial completion of contract work). These provisions are strictly enforced and there is no discovery rule extending the time to file a lawsuit.⁶⁹

An exception to these time frames exists if a party can establish the elements of equitable estoppel, which are: (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know or could not discover the truth; (3) the false representation or concealment was made with the intent that it be relied upon; and (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.⁷⁰

2. Statutes of Limitation

1. Contracts

The statute of limitations regarding written contracts is contained in Idaho Code Section 5-216, which provides five years to initiate a lawsuit.⁷¹ Oral contracts are governed by Idaho Code Section 5-217, which provides a four-year statute of limitations.⁷²

2. Personal Injuries and Negligence

Idaho has a two-year statute of limitations for personal injuries, negligence, professional malpractice, and implied warranties.⁷³

3. Non-Specified Claims

In the event a cause of action lacks a statute of limitation specially prescribed, Idaho has a four-year statute of limitations.⁷⁴

Damages

1. Notice and Opportunity to Repair Act

⁶⁸ Idaho Code Ann. §§ 5-241(a), 5-241(b) (2020).

⁶⁹ See *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 140 Idaho 144, 90 P.3d 894 (2004).

⁷⁰ See *Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill*, 103 Idaho 19, 22-23, 644 P.2d 341, 344-45 (1982).

⁷¹ Idaho Code Ann. § 5-216 (2020).

⁷² Idaho Code Ann. § 5-217 (2020).

⁷³ Idaho Code Ann. § 5-219(4) (2020).

⁷⁴ Idaho Code Ann. § 5-224 (2020).

In Idaho, construction contractors have a statutory right to cure any defects before they can be liable. This is provided in the Notice and Opportunity to Repair Act (“NORA”), which governs “actions” against “construction professionals” by “homeowners” or “claimants.”⁷⁵ NORA defines “action” as “any civil lawsuit or action in contract or tort for damages or indemnity brought against a construction professional to assert a claim, whether by complaint, counterclaim or cross-claim, for damage or the loss of use of real or personal property caused by a defect in the construction of a residence or in the substantial remodel of a residence.”⁷⁶ NORA defines “construction professional” as, among other things, “an architect, subdivision owner or developer, builder, contractor, subcontractor, engineer or inspector, performing or furnishing the design, supervision, inspection, construction or observation of the construction of any improvement to residential real property.”⁷⁷ NORA defines “homeowner” as “[a]ny person who contracts with a construction professional for the construction, sale, or construction and sale of a residence,” including a subsequent purchaser of the residence.⁷⁸ Finally, NORA defines “claimant” as “a homeowner or association that asserts a claim against a construction professional concerning a defect in the construction of a residence or in the substantial remodel of a residence.”⁷⁹

Under NORA, “[p]rior to commencing an action against a construction professional for a construction defect, the claimant *shall serve written notice of claim on the construction professional.*”⁸⁰ “The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect.”⁸¹ If this provision is not complied with, the action is subject to dismissal without prejudice.⁸² NORA also limits homeowner damages. If the homeowner refuses to allow a construction professional to inspect the home or refuses a reasonable repair proposal, the homeowner’s damages will be limited to either:

- (a) The reasonable cost of the offered repairs which are necessary to cure the construction defect and which are the responsibility of the construction professional; or
- (b) The amount of a reasonable monetary settlement offer made under section 6-2503, Idaho Code; and
- (c) The amount of reasonable and necessary attorney’s fees and costs incurred before the offer was rejected or considered rejected.⁸³

⁷⁵ Idaho Code Ann. § 6-2501, et seq (2020).

⁷⁶ Idaho Code Ann. § 6-2502(1) (2020).

⁷⁷ Idaho Code Ann. § 6-2502(4) (2020).

⁷⁸ Idaho Code Ann. § 6-2502(5)(a) (2020).

⁷⁹ Idaho Code Ann. § 6-2502(3) (2020).

⁸⁰ Idaho Code Ann. § 6-2503(1) (2020) (emphasis added).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Idaho Code Ann. § 6-2504(3) (2020).

Additionally, “total damages awarded in a suit subject to this chapter may not exceed the greater of the claimant’s purchase price for the residence or the current fair market value of the residence without the construction defect.”⁸⁴

2. Consequential Damages

Consequential damages “are losses or injuries that do not flow directly or immediately from an injurious act or omission, but that result as a consequence of that act or omission.”⁸⁵ These damages include, “among other things, damage to reputation, loss of product, loss of revenue, interest or finance charges, loss of efficiency, loss of rents, depreciation, material escalation charges, downtime costs, and additional overhead costs.”⁸⁶ Consequential damages, including lost profits,⁸⁷ are not recoverable unless they are specifically within the contemplation of the parties at the time of contracting.⁸⁸ “Consequential damages need not be precisely and specifically foreseen; but they must have been reasonably foreseeable, and within the contemplation of the parties, when the contract was made.”⁸⁹ These concepts were explained as follows:

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.⁹⁰

3. Delay Damages

Damages caused by a party’s delay are available in Idaho.⁹¹ General contractors can recover delay damages pursuant to a liquidated damages clause. If a subcontractor’s delay is attributable to the general contractor, then the general contractor cannot recover from the subcontractor, under a liquidated damages

⁸⁴ Idaho Code Ann. § 6-2504(4) (2020).

⁸⁵ Brian R. Buckham, Adam J. Richins, *The Final Hour: Drafting Away Liability*, Advocate, March/April 2012.

⁸⁶ *Id.*

⁸⁷ *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 884-85, 42 P.3d 672, 677-78 (2002).

⁸⁸ *Brown’s Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho 56, 61, 764 P.2d 423, 428 (1988) (overruled on other grounds in *Poole v. Davis*, 153 Idaho 604, 288 P.3d 821 (2012)); *see also Traylor v. Henkels & McCoy, Inc.*, 99 Idaho 560, 661-62, 585 P.2d 970, 971-72 (1978) (“Idaho is in accord with the orthodox rule that damages are recoverable only for the direct consequences of a breach in absence of a special agreement to the contrary.”).

⁸⁹ *Strate v. Cambridge Telephone Co., Inc.*, 118 Idaho 157, 160, 795 P.2d 319, 322 (Ct. App. 1990).

⁹⁰ *Traylor*, 99 Idaho at 561-62, 585 P.2d at 971-72 (quoting *Hadley v. Baxendale*, 156 Eng.Rep. 145, 151 (Ex.1854)).

⁹¹ *City of Idaho Falls v. Beco Const. Co., Inc.*, 123 Idaho 516, 850 P.2d 165 (1993).

clause, for that delay.⁹² “If a liquidated damages clause is unenforceable, the non-breaching party is entitled to compensation for its actual damages.”⁹³

4. Non-Economic Damages

Non-economic damages are not meant to compensate for a specific item of harm, but are instead an attempt to provide compensation to the injured party for those aspects of injury that are not easily quantifiable. Because of the somewhat non-specific nature of these damages, there is a statutory cap on these types of damages that is annually adjusted based on a wage index maintained by the Idaho Industrial Commission.⁹⁴ As of October 2, 2020, non-economic that can be awarded to each claimant are capped at \$386, 622.39.⁹⁵ Because of the unquantifiable nature of non-economic damages, a jury’s non-economic damage award will not be overturned by the court unless it is shown that “excessive damages or inadequate damages, appear[] to have been given under the influence of passion or prejudice.”⁹⁶ Even then, the “court should make such [a decision] only if, after assessing the credibility of the witnesses and weighing the evidence, it determines that ‘the verdict is not in accord with the clear weight of the evidence.’”⁹⁷

5. Special Damages

In contrast to non-economic damages, special damages compensate the plaintiff for cognizable economic losses resulting from the negligence in question. Special damages can only be awarded for those specifically identifiable costs that are shown to be caused by the injury at issue. The jury may award the following as items of special damage upon presentation of competent evidence:

1. The reasonable value of necessary medical care received and expenses incurred as a result of the injury [and the present cash value of medical care and expenses reasonably certain and necessary to be required in the future];
2. The reasonable value of the past earnings lost as a result of the injury;
3. The present cash value of the future earning capacity lost because of the injury, taking into consideration the earning power, age, health, life expectancy, mental and physical abilities, habits, and disposition of the plaintiff, and any other circumstances shown by the evidence[; and]
4. The reasonable value of necessary services provided by another in doing things for the plaintiff, which, except for the injury, the plaintiff

⁹² *Id.* at 521, 850 P.2d 179 (citing *State v. Jack B. Parson Const.*, 93 Idaho 118, 456 P.2d 762 (1969)).

⁹³ *Schroeder v. Partin*, 151 Idaho 471, 476, 259 P.3d 617, 622 (2011).

⁹⁴ Idaho Code Ann. § 6-1603 (2020).

⁹⁵ Idaho Industrial Commission, Calculation—Non-Economic Damage Caps, https://iic.idaho.gov/index/Benefits_Non_economic_caps_thru_2017.pdf (last visited Feb. 28, 2018).

⁹⁶ *Puckett v. Verska*, 144 Idaho 161, 168, 158 P.3d 937, 944 (2007) (quoting Idaho R. Civ. P. 59(a)(5)).

⁹⁷ *Id.* (quoting *Hudelson v. Delta Int’l Mach. Corp.*, 142 Idaho 244, 248, 127 P.3d 147, 151 (2005)).

would ordinarily have performed [and the present cash value of such services reasonably certain to be required in the future].⁹⁸

The jury is also entitled to award any other item of special damage of which the plaintiff presents specific evidence that demonstrates entitlement to the claimed damages with “reasonable certainty.”⁹⁹ In certain contexts, where the damages constitute an estimate of losses that will occur in the future, i.e. lost future earnings, reasonable certainty requires only sufficient evidence to remove the damages from the “realm of speculation.”¹⁰⁰ These types of damages are often proven through expert testimony.¹⁰¹

6. Nominal Damages

“[N]ominal damages are awarded for the infraction of a legal right to demonstrate, symbolically, that the plaintiff’s person or property have been violated.”¹⁰² These damages are available in those cases where the plaintiff presents evidence that his legal rights have been violated, but fails to provide evidence of entitlement to compensatory damages.¹⁰³ These awards are minimal, often taking the form of a \$1 damage award.¹⁰⁴ Nominal damages are generally not awarded in negligence actions because proof of damages proximately caused by the defendant’s breach of duty are an essential element of negligence claims.¹⁰⁵ In those cases where nominal damages are awarded, however, they may serve as the basis for a punitive damage award.¹⁰⁶

7. Punitive Damages

Punitive damages are “damages awarded to a claimant, over and above what will compensate the claimant for actual personal injury and property damage, to serve the public policies of punishing a defendant for outrageous conduct and of deterring future like conduct.”¹⁰⁷ Punitive damages are generally available in construction contract cases as a sanction against oppressive conduct.¹⁰⁸

Entitlement to punitive damages requires something beyond ordinary negligence, requiring instead conduct implicating some degree of moral culpability. “In any action seeking recovery of punitive damages,

⁹⁸ IDJI 2d 9.01-2.

⁹⁹ *Id.*; *Sanchez v. Galey*, 112 Idaho 609, 621, 733 P.2d 1234, 1246 (1986).

¹⁰⁰ *Sanchez*, 112 Idaho at 621, 733 P.2d at 1246.

¹⁰¹ *See id.*

¹⁰² *Harwood v. Talbert*, 136 Idaho 672, 679, 39 P.3d 612, 619 (2001).

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See Hei v. Holzer*, 145 Idaho 563, 181 P.3d 489 (2008) (finding that jury’s zero damage award was supported by substantial and competent evidence because there was no proof of cognizable damages caused by the alleged negligence).

¹⁰⁶ *Id.*

¹⁰⁷ Idaho Code Ann. § 6-1601(9) (2020).

¹⁰⁸ *Cuddy Mountain Concrete Inc. v. Citadel Const., Inc.*, 121 Idaho 220, 824 P.2d 151 (Ct. App. 1992); *see also Linscott v. Rainier Nat. Life Ins. Co.*, 100 Idaho 854, 860-61, 606 P.2d 958, 964-65 (1980) (noting “punitive damages may be useful as a sanction against oppressive conduct in the marketplace.”).

the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.”¹⁰⁹

In Idaho, punitive damages may not be pled in the initial complaint.¹¹⁰ A plaintiff must instead seek the leave of the court to assert a punitive damage claim, which requires the plaintiff to show “a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.”¹¹¹ The jury sets the amount of a punitive damage award.¹¹² An award of punitive damages is limited to “the greater of two hundred fifty thousand dollars (\$250,000) or an amount which is three (3) times the compensatory damages.”¹¹³

About Duke Evett, PLLC

The attorneys at Duke Evett, PLLC have experience in all aspects of complex civil litigation and are able to provide representation to commercial clients in all aspects of civil litigation. For more information concerning our ability to assist you with your litigation needs, please contact, Keely Duke (ked@dukeevett.com), Joshua Evett (jse@dukeevett.com), or visit our website, www.dukeevett.com.

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¹⁰⁹ Idaho Code Ann. § 6-1604(1) (2020).

¹¹⁰ *Id.* § 6-1604(2).

¹¹¹ *Id.*

¹¹² *See Myers v. Workman’s Auto Ins. Co.*, 140 Idaho 495, 95 P.3d 977 (2004).

¹¹³ Idaho Code Ann. § 6-1604(3) (2020).