



STATE OF OHIO CONSTRUCTION LAW COMPENDIUM

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The following is an overview of Ohio construction law. It is not meant to be a comprehensive summary of relevant law, nor is it meant to be interpreted as providing legal advice to the reader. Most construction disputes are governed by contract law, as Ohio follows the economic loss rule. With a few variations, the law applicable to construction disputes in Ohio is similar to that found in other states.

I. BREACH OF CONTRACT

A. Statute Of Limitations & Choice of Law

Disputes concerning Ohio construction projects must be litigated in Ohio, subject to Ohio law, regardless of the choice of law provision or forum selection clause in the contract. O.R.C. §4113.62(D)(1) &(2). These statutory requirements cannot be waived. It may be possible to challenge such statutes when federal pre-emption is an issue, such as when the forum selection clause is part of an arbitration clause subject to the Federal Arbitration Act.

The statute of limitations for a contract claim will vary depending on the form of the contract. For example, the statute of limitations for a written contract is eight years, pursuant to O.R.C. §2305.06. A claim based on the breach of an oral contract has a six-year statute of limitations period. See O.R.C. §2305.07. Most breach of warranty claims have a four-year limitations period. See O.R.C. §2305.09. Claims that fall under the Ohio Consumer Sales Practices Act, as would a residential construction or home improvement contract, must be brought within two years of the time the cause of action accrues. Ohio follows a ten-year statute of repose. O.R.C. §2305.131.

A cause of action for breach of contract accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. See O.R.C. §1302.98; See also *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.*, 42 Ohio App.3d 6 (1988). Parties may contract to reduce the period of limitation to not less than one year. See *Hahn v. Jennings*, 10th Dist. App No. 04AP-24, 2004-Ohio-4789. Similarly tolling agreements are enforceable in Ohio. Tolling agreements are contractual agreements that extend the statute of limitations for pursuing a claim. An effective tolling agreement will identify (a) the parties to the dispute; (b) the applicable claims, damages, and defenses; and (c) a specification of the time period during which a lawsuit should be filed, or other means of dispute resolution sought.

B. Discovery Rule

Typically, a cause of action accrues at the time the wrongful act was committed. *Collins v. Sotka*, 81 Ohio St.3d 506, 507 (1998), citing *Kunz v. Buckeye Union Ins. Co.*, 1 Ohio St.3d 79 (1982). However, Ohio's discovery rule provides an exception to this general rule, providing that a cause of action accrues "at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury. *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 179, 546 N.E.2d 206 (1989). This is particularly important in the construction context where there may be latent defects in a project that are not immediately observable.

Accordingly, in Ohio, an action against a developer-vendor of real property for damage to the property accrues when it is first discovered, or through the exercise of reasonable diligence it should have been discovered, that there is damage to the property. *Harris v. Liston*, 86 Ohio St.3d 203, 207 (1999) (where the discovery rule was applied to a negligence action). The question of what is reasonable is a factual determination to be determined by a judge or jury. *Crawford v. Wolfe*, 4th Dist. No. 01CA2811, 2002-Ohio-6163, at ¶ 21-22. The discovery rule typically will not apply in contract claims, because the statute of limitations for written contract breaches is so long this is rarely a concern. It will apply in tort claims, which are the preferred claims when the aggrieved party cannot establish privity of contract with the target defendant. There are notable exceptions to this rule that do not recognize a discovery rule, particularly in breach of warranty claims. Please consult local counsel when in doubt on the applicability of the discovery rule.

C. Substantial Performance

A party must substantially perform its obligations under a contract to recover for breach of contract. “[M]ere nominal, trifling or technical departures are not sufficient to constitute breach.” *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 2002-Ohio-198 (10th Dist.2002). A contractor does not breach a contract when the unperformed or wrongfully performed work does not destroy the value or purpose of the contract. *Id.* In order for a plaintiff’s claim to be actionable, Ohio requires that a material contract breach occur, and courts will allow proof of substantial performance in most cases. *Enterprise Roofing & Sheet Metal Co. v. Howard Inv. Corp.*, 105 Ohio App. 502, 504–5 152 N.E.2d 807 (2d Dist.1957).

D. Drug-Free Compliance

Since 2007, Ohio law has required that all contractors and subcontractors enroll in a drug-free workplace program to be eligible to perform public construction work in Ohio. Failure to comply with this requirement is considered a breach of contract and may prevent a contractor from receiving a public contract for up to five years. O.R.C. §153.03(E)(3).

E. Third Party Beneficiaries and Privity of Contract

Generally, there must be privity of contract between parties in order to recover damages under a contract or negligence theory. *Thomas v. The Guarantee Title & Trust Company*, 81 Ohio St. 432, 442, 91 N.E. 183 (1910). An “action for breach of contract by a third party can be brought only where the parties to a contract intended to benefit the third party.” *Hunter Building & Renovation v. Miller*, 8th Dist. No. 67131, 1996 WL 65811, at *3.

Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio. *Brewer v. H & R Concrete, Inc.* 2d Dist. No. 17254, 1999 WL 49366, at *2; *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103-104 (12th Dist.1997). A landowner can be a third-party beneficiary of a subcontractor's performance, but generally, landowners and subcontractors are not in privity of contract. *Brewer*, at *2. There must be evidence, on the part of the subcontractor, that he intended to directly benefit a third party, and not simply that some

incidental benefit was conferred on an unrelated party by the promisee's actions under the contract. *Mergenthal*, at 103–107.

Ohio does not permit a subcontractor to sue a design professional for errors and omissions in design drawings that caused the subcontractor delays or disruptions in performance unless the subcontractor and design professional are in privity on contract. *Floor Craft Covering, Inc. v. Parma Community Hospital Ass'n*, 54 Ohio St.3d 1, 560 N.E.2d 206 (1990).

F. Pay-if-Paid and Pay-when-Paid

Ohio recognizes the difference between pay-if-paid and pay-when-paid clauses in construction contracts. The pay-when-paid clause represents an unconditional promise to pay a subcontractor within a reasonable time after the general contractor is paid by the owner. A pay-if-paid provision on the other hand, makes the general contractor's receipt of payment from the owner an absolute condition precedent to its obligation to pay the subcontractor. Under a pay-if-paid provision, the subcontractor assumes the risk of owner non-payment, whereas when a pay-when-paid provision, the general contractor assumes the risk of owner non-payment. *Chapman Excavating Co., Inc. v. Fortney & Weygandt, Inc.*, 2004 WL 1631118 (8th Dist.2004). However, because pay-if-paid clauses could result in a forfeiture by the subcontractor in the event of owner non-payment, such clauses tend to be strictly construed, narrowly applied, and require some evidence that it is clear and unambiguous as to its true intent of imposing the risk of non-payment on the subcontractor.

In the absence of the required clarity in the contract language, Ohio courts typically will convert the clause to a pay-when-paid clause, and enforce it accordingly. In the event of owner non-payment under a pay-when-paid clause, the general contractor will still have an unconditional obligation to pay the subcontractor, and will be given a reasonable time within which to do so after it becomes clear that the owner will not or cannot make the required payments.

II. NEGLIGENCE

Negligence claims against design professionals are governed by a four-year statute of limitations. O.R.C. 2305.09(D). Such a claim accrues on the date the damage occurs or on the date when, through reasonable diligence, it should have been discovered. *Point East Condo. Owners' Ass'n, Inc. v. Cedar House Assoc., Inc.*, 104 Ohio App.3d 704, 663 N.E.2d 343 (8th Dist.1995). Contractors and builders are also subject to tort liability based on the implied duty to construct in a workmanlike manner, discussed below.

To assert a claim for negligent construction, one must demonstrate that the builder or designer breached the applicable standard of care. Builders who perform faulty construction projects can be held liable under Ohio tort law. Ohio law charges contractors with a common-law duty to perform construction work in a workmanlike manner. *Barton v. Ellis*, 34 Ohio App.3d 251, 252-53 (10th Dist.1986). This standard requires a construction professional to act reasonably in exercising the degree of care which a member of the construction trade in good standing in the

community would exercise under the same or similar circumstances. *Ohio Valley Bank v. Copley*, 121 Ohio App.3d 197, 205, 699 N.E.2d 540 (4th Dist.1997).

Ohio law does not require expert testimony to establish a standard of care when the action involves conduct within the common knowledge and experience of jurors. This general rule also applies to construction and architectural projects. *Floyd v. United Home Imp. Ctr., Inc.*, 119 Ohio App.3d 716, 721 (2nd Dist.1997) (applying rule to builder's alleged deviation from common standards of workmanship or failure to exercise ordinary care); *Simon v. Drake Constr. Co.*, 87 Ohio App.3d 23, 26 (8th Dist.1993), (applying rule to architect's alleged deviation from standard of care).

A builder has a contractual duty to use proper materials and workmanlike skill and judgment when performing a project, taking into consideration the hazards of the lot and area and the risk of harm to the structure from those hazards. *Tibbs v. National Homes Const. Corp.*, 52 Ohio App.2d 281, 292–3 (1st Dist.1977). However, privity of contract is not a necessary element of negligence actions by vendees against builder-vendors. Remote vendors can still file construction defect suits against builders, provided the claim is not barred by the statute of limitations or other legal defenses. Vendors are not strictly liable for building defects, and vendees are required to prove “traditional negligence elements.” *McMillan v. Brune-Harpenau-Torbeck Builders, Inc.*, 8 Ohio St.3d 3, 3–4 (1983).

III. BREACH OF WARRANTY

The duty to perform in a workmanlike manner is imposed by common law upon builders and contractors, as well as by contract in most projects. A contract to perform work creates an implied warranty that the contractor will perform the work in a workmanlike manner. *Point East Condominium Owners' Assn.*, 104 Ohio App.3d at 716. The duty to construct in a workmanlike manner extends to subsequent vendees not in privity with the builder-vendor. *Id.*, citing *McMillan*, 8 Ohio St.3d 3. However, a plaintiff cannot raise a claim of an implied warranty of workmanship and craftsmanship under a theory based upon breach of an implied warranty of fitness for a particular purpose. *Corporex Dev. & Const. Mgt., Inc. v. Shook, Inc.*, 10th Dist. No. 03AP-269, 2004-Ohio-1408, 2004 WL 557339, judgment reversed and remanded on other grounds, 106 Ohio St.3d 412, 2005-Ohio-5409. These are two separate theories of liability which cannot be joined.

Ohio law sets express requirements for workmanship warranties on specific types of construction projects. For example, a condominium developer must provide a minimum two-year warranty covering the cost of labor and materials for any repairs to common service areas of the condominium property that may occur based on a defect in material or workmanship. Similarly, a condominium developer must provide a minimum one-year warranty to cover the cost of labor and materials for repairs individual units of a condominium resulting from defects in materials or workmanship. O.R.C. § 5311.25(E)(1).

A. Breach of Implied Warranty

Implied duties often form the basis of contract disputes when problems arise. Implied duties are those that are not expressly set forth in the contract documents but can be implied or deduced from what has been expressed in the contracts. The law certainly recognizes the validity of implied contract promises, but different rules apply as to when they can be argued.

Most contract documents contain integration clauses. These clauses are familiar because they form the boilerplate and generally state that the written contract is a complete expression of the parties' agreement and that no party owes the other any obligation except as to what is set forth in the written agreement. The goal of such contract provision is to eliminate the risk and uncertainty that go along with implied promises. Therefore, in all cases of alleged breach of an implied promise, the first question is whether an implied promise is even enforceable if there is a valid integration clause as part of the contract documents. See, e.g., *Galmish v. Cicchini*, 90 Ohio St.3d 22 (2000).

The other limitation in enforcement of implied duties surrounds the fact that most contracts go to great lengths to express the party's contract duties. In those situations, if the contract sets forth an express promise dealing with a given issue, then a court will not enforce a contrary implied promise on that same issue. For example, in *Trucco Construction Co. v. Columbus*, Franklin App. No. 05AP-1134, 2006 -Ohio- 6984, there were numerous delays on the project due to a variety of causes. The contractor argued that it should receive compensation because the owner caused delays in awarding the contracts and dewatering the site. The contractor claimed the owner breached its implied duty not to hinder or interfere with the work and that the delay constituted a breach of this duty. The city argued that the contract contained an express condition that allowed the City to suspend work or delay certain phases without it being in breach, and therefore, the court could not imply a duty of cooperation that conflicted with that express provision. The Tenth District Court of Appeals held that imposing an implied duty not to hinder or delay performance conflicted with the express contract right to delay work, and therefore, the court refused to imply such a duty into the contract. *Id.*

Understanding the limitations on enforcement of implied duties, Ohio courts remain willing to recognize such claims in appropriate circumstances. For example, "if a municipal corporation, by its own act, causes the work to be done by a contractor to be more expensive than it otherwise would have been according to the terms of the original contract, it is liable to him for the increased cost or extra work." *Synergy Mechanical Contractors v. Kirk Williams Co.*, Franklin App. No. 98AP-431, 1998 WL 938592 at *4. "A contracting party impliedly obligates himself to cooperate in the performance of his contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove." *Id.* at *5.

There may also be other implied duties in a contract that play into scheduling and delay issues. These include an owner's duty to provide reasonable access to the project (*Avon Excavating Co. v. Parma*, No. 41557, 1980 WL 140377 (8th Dist. Dec. 31, 1980)), perform reviews and make decisions on discretionary items in a timely manner so as not to delay the work, provide adequate

plans and specifications (*Cent. Ohio JVS v. Peterson Constr. Co.*, 129 Ohio App.3d 58, 716 N.E.2d 1210 (12th Dist.1998)), and coordinate separate contractors on multi-prime jobs (*Norment Sec. Group, Inc. v. Ohio Dept. of Rehab. & Correction*, Ct. of Cl. No. 2001-11472, 2003-Ohio-6572, 2003 WL 22890088).

Implied duties may also exist between a general contractor to a subcontractor. For example, in the absence of contract language to the contrary, a general contractor impliedly promises to provide its subcontractor with reasonable access to the project site, make reasonable efforts to coordinate the subcontractor's work, and not interfere or hinder the subcontractor's performance.

One of the perennial problems are delays associated with securing necessary government approvals or permits. This is a bigger problem in fast track projects or those where the design work is proceeding simultaneously with construction. If there is a problem with the drawings, a code compliance issue, or other concern by the entity performing the plan review, it can delay progress until the issue is resolved. In *Carrabine Construction Co. v. Chrysler Realty Corp.*, 25 Ohio St.3d 222 (1986), the court found that the delays associated with the failure to obtain zoning approvals were the contractor's responsibility because of how the obligations were allocated in the contract. The same principle holds true universally – if there is a delay associated with a design problem, or in obtaining government approvals, the entity who took responsibility for those tasks under the contract will face liability for any and all costs associated with the failure to fulfill that obligation.

B. Breach of Express Warranty

Like many states, Ohio has adopted what is known as the *Spearin* Doctrine, which holds that “when a contractor follows an owner's plans, the owner impliedly warrants that the plans are accurate. If the construction is revealed to be defective [because the plans are inaccurate], the owner is the responsible party.” *Cent. Ohio JVS*, at 64, citing *United States v. Spearin*, 248 U.S. 132, 136 (1918).

Under the *Spearin* doctrine, it is generally accepted that a public owner warrants the accuracy, completeness, and suitability of the project plans and specifications. See *Central Ohio JVS*. An owner is required to furnish sufficient plans, specifications, and building site for the contractor to evaluate, price and bid the project and perform the work. If the owner provides the contractor with materials and equipment or specifies proprietary products for use on the project, then the owner impliedly warrants the suitability of the equipment or materials. See, *Jurgens Real Estate Co. v. Eastgate Development Partnership*, 103 Ohio App.3d 292 (12th Dist.1995); *Floor Craft Floor Coverings, Inc. v. Parma Community General Hospital*, 8th Dist. Case No. 56145 1989 WL 24948 (Mar. 16, 1989), *aff'd*, 54 Ohio St.3d 1 (1990); *Lathrop v. City of Toledo*, 5 Ohio St.2d 165 (1966).

The Ohio Supreme Court, however, has recently limited the scope of the *Spearin* Doctrine in Ohio. In *Dugan & Meyers Constr. Co., Inc. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, 864 N.E.2d 68, the court held that, under Ohio law, the *Spearin* doctrine only applies in those cases where damages flow from the owners “affirmative indications of job site conditions”

and not to “cases involving delay due to plan changes.” *Id.* at 230–31. Furthermore, the court held that it will not impose an implied warranty regarding accuracy of plans to address delays if the contract already has a provision in it to deal with that problem. *Id.* at 231. In this case, Dugan & Meyers Construction, the lead contractor on a project for The Ohio State University (“OSU”), signed a contract agreeing to give OSU notice and request an extension of time within 10 days of any event taking place on the project that Dugan & Meyers believed would impact the schedule. *Id.* When Dugan & Meyers failed to abide by this contract provision, the court would not allow them to use an implied warranty regarding the accuracy of plans under the *Spearin* doctrine to escape those consequences. *Id.* at 233. The court held that it would not elevate an implied warranty regarding plan accuracy over an express contract provision that was intended to address the effect of inaccurate plans. *Id.*

As a result of this ruling, contractors must strictly adhere to contract notice requirements regarding delays and other project impacts to avoid a waiver of such claims. Additionally, contractors can no longer take for granted that there is an implied warranty of accuracy of the plans and specifications issued by the owner. Although Ohio continues to recognize the *Spearin* doctrine, it is important to know that Ohio courts will not imply owner duties regarding plan requirements, but will look to the parties’ contract language to decide the consequences and remedies in the event of errors and omissions in the plan document. Therefore, it is very important that contracts are drafted to address this issue.

IV. STRICT LIABILITY CLAIMS

The Ohio Supreme Court recognizes strict liability claims involving implied warranties as to fitness for ordinary purposes with respect to materials incorporated into a real-property structure. In *Lonzrick v. Republic Steel Corp.*, 6 Ohio St.2d 227 (1966), the Supreme Court imposed strict liability upon the manufacturer of defective joists, finding that an implied warranty existed with respect to steel roof joists incorporated in a structure. Similarly, in *Iacono v. Anderson Concrete Corp., et al.*, 42 Ohio St. 2d 88 (1975), the Supreme Court imposed strict liability with respect to concrete supplied to a contractor for use in an outdoor driveway where the concrete was not fit for that purpose causing pop-outs and damage to the driveway. In both of these cases, the Supreme Court imposed strict liability, without requiring privity, with respect to materials incorporated into a real-property structure.

V. MISREPRESENTATION AND FRAUD

Fraud is defined as: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 475, 700 N.E.2d 859 (1998). In order to establish a claim of fraud, it is necessary for the party to prove all of these elements.

A vendor has a duty to disclose material facts which are latent, not readily observable or discoverable through a purchaser's reasonable inspection. *Miles v. Perpetual Savings & Loan Co.*, 58 Ohio St.2d 97 (1979). In cases where a vendor does not disclose these facts, O.R.C. § 2305.09 requires that a cause of action for fraud be brought within four years after the fraud was or should have been discovered. Ohio's discovery rule applies to cases of fraud, however "once sufficient indicia of fraud are shown, a party cannot rely on its unawareness or the efforts of the opposition to lull it into a false security to toll the statute." *Aluminum Line Products Co. v. Brad Smith Roofing Co., Inc.*, 109 Ohio App.3d 246, 260 (8th Dist.1996).

Caveat emptor is a defense to fraud claims in failure to disclose cases. The doctrine of *caveat emptor* prevents a buyer from recovering for defects in the real property when (1) the defect [is] open to observation or discoverable on reasonable inspection, (2) the purchaser [had] an unimpeded opportunity to examine the property and (3) the vendor [has] not engage[d] in fraud." *Lapos Constr. Co. v. Leslie*, 9th Dist. App. No. 06CA008872, 2006-Ohio-5812, at ¶13, citing *Layman v. Binns*, 35 Ohio St.3d 176, 177 (1988). The doctrine of *caveat emptor* is nullified by a fraudulent misrepresentation or fraudulent failure to disclose. *Dito v. Wozniak*, 9th Dist. No. 04CA008499, 2005-Ohio-7, at ¶13. However, a real estate purchaser cannot claim fraud if a seller's misstatements or misrepresentations are not significantly reprehensible in nature. *Id.* citing *Traverse v. Long*, 165 Ohio St. 249, 252 (1956).

A complaint in which a plaintiff is alleging fraudulent misrepresentation in a construction law context must state the circumstances constituting the fraud or mistake with particularity. See Ohio Civil Rule 9(B).

VI. INDEMNITY CLAIMS

Under Ohio law, indemnity arises from contract, either express or implied, and is the right of a person who has been compelled to pay what another should have paid to require complete reimbursement. *Wagner-Meinert, Inc. v. EDA Controls Corp.*, 444 F. Supp. 2d 800 (N.D. Ohio 2006). The right of indemnity may result from an express agreement or contractual provision when one party, who has been compelled to pay what the other party should have paid, reserves the right to require complete reimbursement. *Indiana Ins. Co. v. Barnes*, 165 Ohio App.3d 262, 2005-Ohio-6474, ¶ 14 (10th Dist.). An implied contract for indemnity exists only within the context of a relationship wherein one party is found to be vicariously liable for the acts of a tortfeasor. *Id.*

Ohio's anti-indemnity statute, ORC §2305.31, renders any construction contract provision that requires one to indemnify another for the other person's own negligence void and unenforceable as a violation of public policy. This rule applies regardless of whether the other person's negligence is sole or concurrent. *Kendall v. U.S. Dismantling Co.*, 20 Ohio St.3d 61, 485 NE 2d 1047 (1985). The goal of the policy is to ensure that the risk of liability remains with the negligent party.

Ohio's anti-indemnity statute has faced recent challenges. Many indemnity provisions include language different from that prohibited by the statute. Modern indemnity clauses proscribe a

"duty to defend," while the statute only mentions "indemnity." Ohio courts have not ruled consistently on this issue. In *Moore*, the Second District Court of Appeals ruled that a "duty to defend" can require one to pay attorney's fees and expenses to defend a claim, even if the anti-indemnity statute precludes liability for personal injury or property damage. *Moore v. Dayton Power and Light*, 99 Ohio App.3d 138 (2nd Dist. 1994). Alternatively, in *Best*, the Ninth District ruled that any duty to defend is unenforceable if the underlying claim for loss is unenforceable. *Best v. Energized Substation*, 88 Ohio App.3d 109, 623 N.E.2d 158 (9th Dist.1993).

VII. ECONOMIC LOSS DOCTRINE

A. Economic Loss Rule

The economic-loss rule prevents recovery in tort for damages based purely on economic loss, where there is no privity of contract between the parties. *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Ass'n*, 54 Ohio St.3d 1, 3, 560 N.E.2d 206 (1990) (as applied in a suit for negligent construction..

In Ohio, "[t]he economic-loss rule generally prevents recovery in tort of damages for purely economic loss," because "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is cognizable or compensable." *Corporex Dev. & Const. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 414, 835 N.E.2d 701, 704 (2005). Therefore, in the absence of a contract between two disputing parties, "[t]here is no duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things." *Floor Craft*, at 3. This well-established general rule applies also in the negligence context, establishing that a plaintiff who has suffered only economic loss has not been injured in a manner which is legally cognizable or compensable. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 44 (1989), quoting *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984). A plaintiff must prove that the indirect economic damages arose from tangible physical injury to persons or from tangible property damage. Indirect economic damages that do not arise from tangible physical injury to persons or from tangible property damage may only be recovered in contract." *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609, 653 N.E.2d 661 (1995).

B. Exceptions to Economic Loss Rule

Ohio courts have created an exception to the economic loss rule where the plaintiff can prove it was an intended third party beneficiary of the contract from which the alleged duty arose, or if the defendant exercised a sufficient amount of control over the construction project that the control will be deemed a substitute for privity. See, *Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist.*, 90 Ohio App.3d 215, 218, 628 N.E.2d 143, 145 (8th Dist. 1993).

A similar exception is recognized where a sufficient nexus exists to create a substitute for privity. In *E. Ohio Gas Co. v. Kenmore Constr. Co.*, an Ohio court found the *Queen City* rule inapplicable and stated that "where privity of contract or its substitute exist, purely economic losses may be recovered in a tort action." *E. Ohio Gas Co. v. Kenmore Constr. Co.* (March 28, 2001), 9th Dist.

Nos. 19567 and 19790, 2001 WL 302818., citing *Floor Craft*, and *United Tel. Co. of Ohio v. Williams Excavating, Inc.*, 125 Ohio App.3d 135, 707 N.E.2d 1188 (3rd Dist.1997).

The Economic Loss Doctrine is important in construction cases because it helps keep tort claims out of what really should be a contract dispute, and limits parties to suits against those with whom they are in privity. There are, however, exceptions that allow tort claims to proceed absent privity.

VIII. RECOVERABLE DAMAGES

A. Direct Damages

In Ohio, the proper measure of damages for a construction defect claim is the reasonable cost of placing the building in the condition contemplated by the parties at the time they entered into the contract. *Jones v. Honchell*, 14 Ohio App.3d 120, 470 N.E.2d 219, syllabus ¶ 3 (12th Dist.1984). This is the proper measure of damages unless the court finds that placing the building in the condition contemplated would create economic waste. In this situation, the court will use the fair market value test, which measures damages by taking the fair market value of the structure as it should have been constructed minus the value of the imperfect structure. *Stackhouse v. Logangate Property Mgt.*, 172 Ohio App.3d 65, 2007-Ohio-3171, 872 N.E.2d 1294 (7th Dist.).

Compensatory damages for construction tort claims, such as negligent workmanship and construction defects, can also be measured using the fair market value test if the injury done to the property is irreparable. *Id.* If the injury is susceptible to repair, the landowner may recover the reasonable cost of restoration plus the reasonable value of the loss of the use of the property. *Id.* (citing *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238, 240 (1923)). Finally, where restoration of the damaged building is practicable, damages should be the reasonable cost of restoration. *Id.* (citing *Northwestern Ohio Natural Gas v. First Congressional Church of Toledo*, 126 Ohio St. 140, 150 (1933)).

B. Delay Damages

There are two basic types of delay damages: direct and indirect. Direct damages are those costs that flow directly from the delay event, while indirect damages flow from other events as a result of the delay and not from the actual delay itself. Examples of direct damages are: labor and equipment costs, governmental fees to extend permits, additional supervision, material price increases, and increased fringe benefits, to name a few. Examples of indirect damages include extended field office overhead, lost/diminished bonding capacity, interest on money borrowed to finish work, and similar expenses. A landowner's direct damages might include lost revenue due to delayed operation of facility, additional project management expenses, or liquidated damages. Indirect expenses could include interest charges and fees to extend financing.

Ohio has adopted the rule that “a building or construction contractor has a right to recover damages resulting from a delay caused by the default of the contractee.” *Backus Associates, Inc.*

v. State of Ohio, 47 Ohio Misc. 11, 13, 352 N.E.2d 663 (Ct. Cl.1976). Owners also have the right to recover delay damages from a contractor's failure to meet the contractual completion date. If a court finds that a delay was caused by an owner's actions, it can award damages that cover the contractor and subcontractors' costs associated with that delay. These costs include pay increases for workers and extended general condition costs such as: job supervision costs, insurance costs, lodging for employees, telephone bills and other office administration costs. However, if delay is caused by a prime contractor or subcontractor, a court may award damages to an owner including loss of use and revenues, liquidated damages, costs for additional project management and engineering, or other costs associated with an extension of the project. *Valentine Concrete, Inc. v. Ohio Depart. of Admin. Svcs.*, 62 Ohio Misc.2d 591, 617, 609 N.E.2d 623 (Ct. Cl.1991). See also *Dugan & Meyers Construction Co. Inc. v. Ohio Dept. of Adm. Servs.*, supra.

At one time owners could avoid liability for their delays under "no damage for delay" clauses, but in 1998 the Ohio legislature passed Ohio Revised Code § 4113.62, which provides that contract provisions that waive or preclude damages or other remedies for delays that are the proximate result of the owner's act or failure to act are "void and unenforceable as against public policy." O.R.C. § 4113.62(C)(1). This also applies to no damage for delay clauses in subcontract agreement where the delay was caused by the higher tier contractor's act or failure to act.

It is also important to note that in a recent case, *Dugan & Meyers Construction Co. Inc. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226 (2007), the Ohio Supreme Court found that a contractor had completely waived its entire delay damage claim because of a failure to follow the contract's notice requirement. *Id.* at 234. Therefore, even though "no damage for delay" clauses no longer protect owners from liability for delay caused by *their* actions, a contractor's failure to perform other contractual provisions can bar it from collecting delay damages. In addition, "no damage for delay" clauses are still enforceable for non-owner/contractor caused delays, such as: Acts of God, materials shortages, and other factors.

Under Ohio law, no damages for delay clauses in construction contracts have traditionally been valid and enforceable, except "where the delay for which recovery is sought was not reasonably contemplated by the parties at the time of contracting." *JWP/HYRE Electric Co. v. Mentor Village School District*, 968 F.Supp. 356, 360 (N.D. Ohio 1996) (citing *Carabine Construction Co. v. Chrysler Realty Corp.*, 25 Ohio St.3d 222, 495 N.E.2d 952 (1986)).

Recently, however, Ohio has recognized several exceptions to this general rule. In *Daniel Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs.*, 152 Ohio App.3d 95, 2003-Ohio-1227 (7th Dist. 2003), the court listed four notable exceptions to enforcement of no damage for delay clauses: (1) the delay was not contemplated by the parties at the time of contracting; (2) the delay resulted from fraud, misrepresentations or bad faith by the party seeking to enforce the clause; (3) the delay has extended the completion date so much that the party suffering the delay would have been justified in abandoning the contract, i.e., performance was made impossible; and (4) the delay is not within the scope of the damage of delay clause. *Id.* at 105.

If there is a “no damage for delay” clause and it is not nullified under O.R.C. 4113.62, to avoid the damage waiver, you must invoke one of the common law exceptions noted above. You must also be able to demonstrate that you have followed all of the contract’s notice requirements as well—such as timely requesting time extensions and/or change order for cost/schedule impacts. Most construction contracts have language instructing the contractors what to do in the event of a delay producing event. As a result of *Dugan & Meyers*, if a contract fails to follow these requirements, there is a good chance the delay damage claim has been waived, or the “time extension as sole remedy” has been waived, thereby opening the door to liquidated damages if the project misses the completion date.

C. Loss of Use

In Ohio, if a court determines that the appropriate measure of damages is the cost of repairing defects in real property, the damages can include “the reasonable value of the loss of the use of the property between the time of the injury and the restoration.” *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238, 240 140 N.E. 356 (1923). Damages can also include business interruption losses and lost profits under appropriate circumstances.

D. Punitive Damages

Ohio will not award punitive damages for a breach of contract, but can award them for tortious actions that involve actual malice. *Tibbs v. National Homes Construction*, 52 Ohio App.2d 281, 290 369 N.E.2d 1218, 1224 (1st Dist.1997). Actual malice, with regard to punitive damages, “can be placed in two general categories: first behavior characterized by hatred, ill will, and a spirit of revenge, and second, extremely reckless behavior revealing a conscious disregard for a great and obvious harm.” *Preston v. Murty*, 32 Ohio St.3d 334, 335, 512 N.E.2d 1174, 1175 (1987). A finding of fraud may also sustain, under appropriate circumstances, an award of punitive damages. *Tibbs*, at 286. Punitive damages in construction cases can only be applied if the plaintiff can establish that the defendant committed an “independent tort.” This means a tort with the requisite degree of malice that is separate and distinct from conduct that would simply be a breach of the parties’ contract.

E. Emotional Distress

In 2001, Ohio courts joined the minority of courts that allow emotional distress damages in contract disputes between homeowners and builders. A plaintiff may now recover against a builder for non-economic, emotional damages, where the breach of contract has caused bodily harm or is “of such a kind that serious emotional distress was a particularly likely result.” *Kishmarton v. William Bailey Constr., Inc.*, 93 Ohio St.3d 226, 230 (2001). However, in *Kishmarton*, the Ohio Supreme Court did allow emotional damages for negligent construction of a home where the breach did not cause bodily injury and was not of a kind that would likely cause emotional disturbance. *Id.* The *Kishmarton* rule has been expressly limited to actions involving vendees and builder-vendors. *Brainard v. American Skandia Life Assurance Corp.*, 432 F.3d 655, 665 (6th Cir.2005); *E.E.O.C. v. Honda of America, Mfg., Inc.* 2007 WL 1541364, at *7 (S.D. Ohio, 2007), unreported.

F. Liquidated Damages

Liquidated damage clauses in Ohio are valid and enforceable in both public and private contracts. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St. 3d 27, 465 N.E.2d 392 (1984). However, liquidated damages can only be applied in those situations where the true damages to the non-breaching party are difficult, unknown, or incapable of being calculated. See *Lakewood Creative Costumers v. Sharp*, 31 Ohio App.3d 116, 117, 509 N.E.2d 77, 79 (8th Dist.1986). Therefore, liquidated damages are usually tied to a contractor's failure to complete the project by the substantial completion deadline, with other types of contract breaches excluded from the liquidated damage clause. For example, it is common for a contract to impose liquidated damages of a specified amount per day for all days beyond the contract completion date, but rare to see liquidated damages imposed for failure to perform in a good and workmanlike manner. In the case of delayed completion, the owner will be delayed in its use of the facility and suffer a consequent loss of use or revenue, the true dollar value of which will probably never be known. In the case of poor workmanship, the owner's damages will be ascertainable by virtue of the simple cost to repair or replace the defective work, or by the diminution in value of the owner's property.

Ohio courts will refuse to enforce liquidated damage clauses when the clause operates as a penalty rather than as a good faith estimate of the non-breaching party's damages. *Schwartz v. Baker*, 59 Ohio Law Abs. 274, 99 N.E.2d 498, 499 (2nd Dist.1950). Courts judge the reasonableness of the liquidated damage clause *at the time the contract was signed* and not at the time the breach took place. In some cases, a party's damages can be ascertained or proven, and in those cases, it may very well appear that the non-breaching party's actual damages are far less than the liquidated damages. However, if the court is satisfied that *at the time the parties signed their contract*, the non-breaching party's damages were: (1) probably going to be difficult to ascertain in the future should a breach occur, and (2) the liquidated amount is not grossly out of step with reality, then the clause will be enforced.

It is only when the liquidated damages are grossly out of proportion with reality that they can be considered punitive will enforcement be denied. In *Anderson v. U.S. Cable, Inc.*, 1995 WL 638567 (Ross Co. 1995), the court found a liquidated damage clause unenforceable as a penalty when it required forfeiture of the contractor's retainage when the actual damages were slight. However, in *Security Fence Group, Inc. v. Cincinnati*, 1st Dist. No. C-020827, 2003-Ohio-5263, 2003 WL 22270179, the court of appeals upheld the assessment of liquidated damages of \$600 per day for the failure to complete guardrail installation on time even though the street arguably could have been opened without the guardrails, and it appeared the city had not suffered any actual monetary losses as a result of not opening the street on time.

G. Lost Profits

Contractors may also look to recover profits lost due to delays. These can be profits lost on the project at issue and profits lost on other projects the contractor would have received but was prevented from bidding due to being tied up completing the subject project. In Ohio, lost profits are a recoverable element of damage provided they can be proven within a reasonable degree of certainty. This means the profit on a particular project or group of anticipated projects is not speculative or uncertain.

Proving profit lost on an impacted project can be made if the contractor's documentation is there and shows with convincing accuracy what the contractor's anticipated profit would have been on that job, and that the contractor would have earned that profit but for the delay. Be aware that if other elements of a contractor's claim already include compensation for overhead and profit on extra work or changed work, or are included in extended general conditions, then a court will not permit the contractor to double dip and recover lost profits twice on the same job.

Proving lost profits on work one was not able to bid is more problematic and very difficult to recover because he must show that he would have received the work but for his inability to bid it. It can be very hard to prove that a contractor would have been the lowest and best bidder on a public job for which he never submitted a bid. Similarly, proving that one would have been hired to perform a private project is challenging when a proposal is not submitted. In these cases, contractors typically look to a long history of annual performance and compare that to the year in which the impacted project occurred to show a decrease in profits. These types of claims are subject to the same attacks as all lost profit claims because they do not precisely account for other market factors unrelated to the project at issue that may have also accounted for lower profits during that year.

IX. COSTS

A. Attorney Fees

Ohio follows the American Rule, which holds that a prevailing party generally cannot collect attorney fees. *Hagans v. Habitat Condominium Owners Ass'n*, 166 Ohio App.3d 508, 517, 851 N.E.2d 544 (2nd Dist.2006). Attorney fees can be awarded, however, if there is statutory authorization to award attorney fees, an enforceable contract provision provides for an award of attorney fees, *Id.*, or the losing party has conducted the case in bad faith or in a vexatious manner. *Wing Leasing, Inc. v. M & B Aviation, Inc.*, 44 Ohio App.3d 178, 183, 542 N.E.2d 671 (10th Dist.1988) (citing *Sorin v. Board of Education*, 46 Ohio St.2d 177 (1976)).

Although there are several statutes in Ohio that allow the prevailing party to seek attorney fees, Ohio Revised Code §§ 2743.19 and 2335.39 are particularly applicable to the construction industry. These sections provide, in pertinent part, that a party who successfully defends itself against a claim brought by the State in the Court of Claims is entitled to attorney fees if "the state's position in initiating the matter in controversy was not substantially justified." O.R.C. § 2743.19(A) ("The court of claims shall award compensation for fees to a prevailing party in an

action under this chapter in accordance with section 2335.39 of the Revised Code.”) and O.R.C. § 2335.39 (B)(1)(c), (2). Thus, if the state brings a claim against a construction company that is not substantially justified, the construction company can collect attorney fees.

In a dispute between parties to a contract, the prevailing party may also be awarded attorney fees if they are provided by terms of the contract. Ohio courts will uphold contract provisions providing for attorney fees “absent a showing of grossly unequal bargaining positions between the parties, misunderstanding, deception or duress,” *Goldfarb v. Robb Report, Inc.*, 101 Ohio App.3d 134, 147, 655 N.E.2d 211, and as long as “the fees awarded are fair, just, and reasonable.” *Northwood Condominium Owners’ Ass’n. v. Arnold*, 147 Ohio App.3d 343, 348, 770 N.E.2d 627 (8th Dist.2002).

Attorneys’ fees may also be recoverable by statute in specific situations. For example, claims under the Prompt Pay Act allow attorneys’ fees to the prevailing party, which could include the general contractor if they successfully defend such a claim.

To determine if the amount of attorney fees award is reasonable, a court should look at a number of factors, the most important of which is how the fee allowed compares to the other damages awarded. *Wing Leasing, Inc.*, 44 Ohio App.3d at 184 (10th Dist.1988). “Apart from the amount recovered, the number of claims successfully litigated in relation to the total number of claims asserted, and the relation between the successful and unsuccessful claims should also have an important bearing on the reasonableness of the fees.” *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983)).

B. Interest

Under Ohio Revised Code § 1343.03(A), a person owed money payable on a contract or judgment is entitled to receive prejudgment interest at a rate per annum on the amount owed. Pursuant to Ohio Revised Code § 5703.47, the interest rate is determined by adding three percent to the federal short-term rate as determined by the Ohio tax commissioner on October 15 of each year. This interest rate is used “unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.”

In a breach of contract claim brought by a contractor against an owner for failure to pay for construction costs, the court can award prejudgment interest to the contractor and that interest will begin to accrue from the time payment on the contract became due. *See, for example, Gordon Constr., Inc. v. Peterbilt of Cincinnati, Inc.*, 2003 WL 22227380, 2003-Ohio-5111 (12th Dist.2003). Such interest is also allowed for damages awarded as part of civil actions against the state “for the same period of time and at the same rate as allowed between private parties to a suit.” O.R.C. § 2743.18(A)(1).

In cases where a court awards damages to a contractor for the delay caused by the state, the contractor is entitled to “prejudgment interest on all damages from the time of the accrual of the

claim,” which is when the contractor, “had substantially completed its work on the project.” *Complete Gen. Constr. Co. v. Ohio Dept. of Transp.*, 94 Ohio St.3d 54, 62, 760 N.E.2d 364, (2002).

C. Stigma Damages/Economic Waste

Under Ohio law, “stigma damages cannot be recovered unless there is actual, physical damage to a plaintiff’s property. *Ramirez v. Akzo Nobel Coatings, Inc.*, 153 Ohio App.3d 115, 117-18, 791 N.E.2d 1031 (5th Dist.2003) (citing *Chance v. BP Chemicals, Inc.*, 77 Ohio St.3d 17, 670 N.E.2d 985 (1996)). Where damage has been done to real property or such property has not been built as specified and the cost to repair such defect is “grossly disproportionate to the good attained,” Ohio courts will award diminution of value damages instead of restoration damages in order to avoid economic waste. *Tru-Built Garage and Lumber Co., Inc. v. Mays*, 1993 WL 15664 at 4 (2nd Dist.1993). Diminution value damages are calculated by finding “the difference in value of the structure contracted for [or before it has been harmed] and the structure received [or after it has been harmed].” *Id.* Thus, in a case where a construction company used roof rafters instead of storage trusses and the cost to replace the roof rafters with the storage trusses was more than the diminution of value caused by having the rafters instead of the trusses, the proper amount of damages was not the cost of replacing the rafters with trusses, but was the difference between the value of the house with the rafters and the value of the house with trusses. *Id.*

Some Ohio courts will require a plaintiff to put on evidence of both repair costs and diminution of value to prove which measure of damages is appropriate. Other courts will allow the plaintiff to elect its remedy and leave it to the defendant to prove the elected remedy is not the best measure of damages as a defense to the claim. This is an issue that depends upon which county and which appellate district you are in, and therefore, you will need to verify which rule applies.

X. INSURANCE COVERAGE FOR CONSTRUCTION CONTRACTS

Like the majority of states, commercial general liability insurance policies (“CGL” policies) in Ohio provide that insurance companies have a duty to defend and indemnify a policy holder whenever there is an “occurrence”, typically defined as an accident that causes property damage or bodily injury, that is not specifically excluded by the policy. The duty to defend is broader than the duty to indemnify, meaning that an insurance company may have to defend a claim that, in the end, its policy did not cover. In order to determine if an insurance company has a duty to defend, Ohio courts must apply four different tests. *Cole v. American Industries and Resources Corporation*, 128 Ohio App.3d 546, 553, 715 N.E.2d 1179 (7th Dist.1998). “If any one of the tests results in a determination that the duty to defend exists, then the insurance company is obligated to defend.” *Id.* These tests are:

- 1) The “Allegations Rule”, which provides that an insurance company is required to defend an insured when the “scope of the allegations contained in the complaint brings the action within the policy coverage.” *Id.* at 554.

- 2) The “Expanded Allegations Rule”, which provides that an insurance company is required to defend a claim even when the duty to defend is not apparent from the pleadings if “the allegations state a claim which is potentially or arguably within the policy coverage.” *Id.*
- 3) The “Groundless, False, or Fraudulent, Claims Test”, which provides that if an insurance company represents that it will cover a claim that appears to fall with the policy’s coverage even if it is factually unsupported, the insurer is required to provide coverage. *Id.*
- 4) The “True Fact Test”, which provides that an insurance company does not have to provide a defense “if there is no set of facts alleged in the complaint against an insured which, if proven true, would result in the insurance company’s duty to pay damages, then the insurance company need not provide a defense.” *Id.*

Although these tests seem to require an insurance company to defend almost any claim brought against its insured, Ohio courts have found that certain types of claims against construction companies are clearly not covered by a CGL policy. For example, Ohio courts have held that claims for defective workmanship of a contractor or its subcontractor do not fall within the definition of “occurrence” under a CGL policy unless the claim alleges that the defective workmanship has caused collateral or consequential damage to other property. *See, Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269 (holding that claims for defective construction or workmanship brought by a property owner are not claims for “property damage” caused by an “occurrence” and are therefore not covered under a CGL policy); *Heile v. Herrmann*, 136 Ohio App.3d 351, 354, 736 N.E.2d 566 (1st Dist.1999) (holding that insurance company did not have duty to defend because the only harm alleged by plaintiff’s claim was the insured’s defective workmanship); *Erie Insurance Exchange v. Colony Development Corporation*, 136 Ohio App.3d 419, 736 N.E.2d 950 (10th Dist.2000) (holding that insurance company had a duty to defend because plaintiff claimed that defective workmanship caused harm to other parts of plaintiff’s property).

XI. MECHANIC’S LIENS

Contractors and material suppliers may use mechanic’s liens a method of obtaining payment from owners. Mechanic’s liens are creatures of statute and are considered in derogation of the common law. Thus, Ohio courts will strictly construe the statutory requirements regarding when and whether a lien arises and substantial compliance with these requirements is not sufficient to secure the lien. However, once the lien has been established, substantial compliance is all that is required to succeed on the lien claim.

A mechanic’s lien will be strictly construed when a question arises as to whether there has been proper perfection. The rule of liberal construction only applies to post-attachment matters, once there has been a determination that all the procedural requirements for perfection have been followed. *See* O.R.C. §1311.22.

Ohio provides mechanic's lien rights to all laborers, subcontractors and material suppliers who perform work or provide materials used to improve real property, regardless of their contractual relationships on the project. Ohio's mechanic's liens law is codified and can be reviewed at O.R.C. §1311.01 et seq.

A. Private Projects

Ohio law treats residential project liens a little differently than non-residential liens. If the work is being done on a residential project as defined in O.R.C. §1311.01, then certain defenses can apply to a lien claim that benefit owners that do not apply in non-residential situations. The idea is to protect homeowners from having to pay twice for the same work or materials. No such protection benefits owners on non-residential projects.

In addition to mechanic's lien rights on traditional construction projects, the Ohio lien law also permits mechanic's liens on oil and gas wells subject to limitations as to whose interest can be liened. Lien rights can also accrue on work done to improve streets, turnpikes, roads, sidewalks, rights of way, drains, ditches and sewers as described in O.R.C. §1311.03.

1. Notice of Commencement

Except for home construction contracts where a residence is built specifically for a homeowner, every project must have a recorded Notice of Commencement recorded prior to beginning any construction activities. *See* O.R.C. 1311.04; O.R.C. 1311.011(A)(1). The purpose of the Notice of Commencement is to put all subcontractors and material suppliers who are not in direct privity of contract with the owner on notice that work is about to begin to improve real property and to provide these parties with the information that they need to perfect mechanic's liens to the extent of the improvements they construct.

If a project owner fails to file a Notice of Commencement, then subcontractors and suppliers who are not in privity of contract with the owner or general contractor, will not have to provide any type of notification to the owner that these individuals are providing labor or materials to the project in order to keep their rights to a lien. The lien statute provides that the Notice of Commencement must contain very specific information. *See* O.R.C. §1311.04(B). The contents of the Notice of Commencement must be verified in affidavit form by the owner, part owner, lessee or the agent completing the form. *Id.*

2. Notice of Furnishing

The first major step for perfecting a mechanic's lien requires the lien claimant to prepare and serve a "Notice of Furnishing," pursuant to O.R.C. §1311.05. This step applies only if (a) the lien claimant is a materialman, subcontractor, or lower-tier subcontractor; and (b) a Notice of Commencement has been filed for a project.

As with the Notice of Commencement, Ohio's lien statute requires that the Notice of Furnishing must contain very specific information as well. *See* O.R.C. § 1311.05. The Notice of Furnishing

need not be in the form of a sworn affidavit. However, it must substantially comply with the statutory form set forth in O.R.C. §1311.05(B). The party supplying the Notice of Furnishing may rely on the information contained in the Notice of Commencement for the project when completing the statutory form.

B. Public Projects

Ohio's law on public improvement liens are proscribed by sections 1311.25 through 1311.33 of the Revised Code, and are interpreted differently from private improvement liens. Public liens are available to any subcontractor, material supplier, and/or laborer who not only performs specified services for a public entity, but also to those who furnish materials in furtherance of a public improvement project. O.R.C. §1311.251. These materials must be furnished with the intent to be used in the course of the public improvement. Courts may also require the materials are actually incorporated in and/or consumed during the course of the project. *Id.* The delivery of materials to the site of the public improvement creates a conclusive presumption that the materials were used in the course of the public improvement or were incorporated into the public improvement. *Id.* All deliveries and/or sales of materials, tools and machinery constitute a single claim for the unpaid portion of goods, pursuant to O.R.C. §1311.251.

1. Notice of Commencement

A public authority must prepare a Notice of Commencement before any work is performed. The public Notice of Commencement serves a function similar to that of those existing in the context of private projects. The rights of a claimant under O.R.C. §1311.252 are not negatively impacted if the Notice of Commencement is not produced in a timely manner or if it contains incorrect information which the claimant relies upon to his detriment.

O.R.C. §1311.252 requires that the notice incorporate very specific information including: (1) the name, location, and a number, if any, used by the public authority to identify the public improvement; (2) the name and address of the public authority; (3) the name, address, and trade of all principal contractors; (4) the date the public authority first executed a contract with a principal contractor for the public improvement; (5) the name and address of the sureties for all principal contractors; and (6) the name and address of the representative of the public authority upon whom service shall be made for the purposes of serving an affidavit. A claimant's statement of amount and value of labor materials cannot merely list charges and payments received without further elaboration. The statement should set forth in some detail the separate instances in which labor was performed and list the material or machinery furnished. *Crock Constr. Co. v. Stanley Miller Const. Co.* (1993) 66 Ohio St.3d 588.

Another important aspect of Ohio mechanic's lien law is that unlike liens upon privately owned property, mechanic's liens with respect to work done on Ohio public projects attach not to the property, but to a public fund set aside for the payment of subcontracts. O.R.C. §1311.26. *See also Poenisch v. Kingsley-Dunbar, Inc.*, 64 Ohio App.3d 699, 582 (10th Dist.1990); *Talco Capital Corp. v. State Underground Parking Comm'n*, 41 Ohio App.2d 171 (10th Dist.1974), (lien against public works only attaches to fund since law forbids execution against public property). A

materialman who is owed money by the principal contractor may only retain a lien upon payments that the public authority owes to the principal contractor. The lien does not attach to the funds held by the public authority until those funds are due to the principal contractor. *Intercargo Ins. Co. v. Mun. Pipe Contrs., Inc.*, 127 Ohio Misc.2d 48, 2003-Ohio-7363, 805 N.E.2d 606.

In order to obtain a lien, a claimant must first provide the public authority named on the Notice of Commencement with an affidavit stating the amount due and unpaid for the labor and work performed and material furnished. O.R.C. §1311.26. The affidavit must also include the mailing address of the claimant, as well as, the times at which the last of the labor or work was performed, and when the last of the material was furnished, including all credits and setoffs. *Id.* This affidavit must be served within one hundred twenty days of time the work was finished or the materials were last furnished. *Id.* One affidavit may include the claims of more than one laborer as long as each claim is separately identified according to each laborer. *Id.* The affidavit may also be filed and served by an agent of one or more laborers. *Id.*

2. Notice of Furnishing

In order to obtain a lien, a subcontractor or materialman who has performed work or furnished materials to a public authority must serve a Notice of Furnishing. O.R.C. § 1311.261. The Notice of Furnishing must be served on the principal contractor within 21 days after the date the subcontractor or materialman first performed labor or work of furnished materials on the site. *Id.*

It must also contain the name and address of the principal contractor, the subcontractor or material supplier; a description of the work to be done and/or materials that will be used; a description or address of the property where the work will be completed or the materials delivered, and the name of the individual ordering the labor or goods. *Id.* The notice must also contain the date that the work or materials were first performed/furnished or a future date that the labor will be performed or the materials furnished. *Id.* However, subcontractors or materialmen who are in direct privity of contract with the principal contractor are not required provide to provide this notice. O.R.C. § 1311.261(A)(1).

“The filing of the affidavit immediately imposes a duty to withhold all subsequent payments from the principal contractor.” *B.F. Sturtevant Co. v. Bd. of Education of City School Dist. of Cincinnati*, 20 Ohio Law Abs. 48, 51 Ohio App. 348, 352, 1 N.E.2d 148 (1st Dist.1935). When a public authority receives a lien affidavit it is required to detain funds from the principal contractor or from the balance of the funds remaining in the contract with the principal contractor. However, the amount detained cannot exceed the amount claimed by the lien, nor the balance remaining in the contract. O.R.C. § 1311.28. A subcontractor’s lien generally applies only to funds the public authority pays to a general contractor *after* the lien is filed, and not those the authority has already paid. *L.E. Myers Co., High Voltage Systems Div. v. Jordano Elec. Co.*, 47 Ohio App.3d 132, 135 (10th Dist.1988).

A public authority cannot detain any funds unless the claimant files a sworn statement averring the date the Notice of Furnishing was served to the principal contractor. The authority will then place all detained funds in an escrow account as provided for under section 153.63 of the Revised Code.

A claimant who serves an affidavit must also file a copy with the county recorder in the county where the public improvement is situated, or with the county recorder of each of the counties where the public improvement is situated if the public improvement is situated in more than one county. O.R.C. §1311.29. Filing the affidavit with the county recorders gives a claimant preference over other claims not filed with the county recorder. O.R.C. §1311.29. Filing with the county recorder does not grant a claimant a priority on distribution of detained funds. *Id.* Payments to multiple claimants are in prorated amounts, based on the value of each of valid claim. *Id.*

Section 1311.31 requires that a public authority or the claimant, (or appropriate agent) serve the principal contractor with a copy of the claimant's affidavit within five days of the time it is filed. The authority must also inform the principal that he must provide notice of any intention to dispute the claim within twenty days. Failure to dispute the claim within the proscribed time period constitutes assent to the correctness of the claim, and the authority will use detained funds to pay the amount claimed.

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