



STATE OF TENNESSEE CONSTRUCTION LAW COMPENDIUM

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I. Statute of Limitations

A. Generally

In construction cases, there are several statutes of limitations to consider. To determine which statute applies, the claim must first be classified. In Tennessee, courts will look to the gravamen of the complaint or its “substantial point or essence” to determine which period of limitation applies, regardless of whether the claims are designated as an action for breach of contract or tort. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006). When analyzing a complaint that contains alternative causes of action, courts “must ascertain the gravamen of each claim, not the gravamen of the complaint in its entirety.” *Benz-Elliot v. Barret Enter., LP*, 456 S.W.3d 140, 149 (Tenn. 2015); *see also Bluff Springs Apartments, Ltd. v. Peoples Bank of S.*, No. E2009-01435-COA-R3-CV, 2010 WL 2106210, at *7–10 (Tenn. Ct. App. May 26, 2010); *French v. Stratford House*, 333 S.W.3d 546, 557 (Tenn. 2011) (stating that courts must ascertain the nature and substance of a claim and not rely on the designation of the claims given by either the plaintiff or defendant).

It is well settled in Tennessee that if the injury is to the person, the claim must be commenced within one year after the cause of action accrues. Tenn. Code Ann. § 28-3-104 (a)(1). Injuries to property—real or personal—must be brought within three years after the cause of action accrues. Tenn. Code Ann. § 28-3-105. Breach of contract claims are subject to a six-year statute of limitations. Tenn. Code. Ann. § 28-3-109.

B. The Discovery Rule

As a general rule, the statute of limitations does not begin to run until the action accrues. A claim will not accrue until it would be reasonable for the plaintiff to discover the existence of a claim. Accordingly, the discovery rule is an equitable doctrine that tolls the statute from running under certain circumstances. *Cole v. Wyndchase Aspen Grove Acquisition Corp.*, No. 3:05-0558, 2006 WL 2827452, at *4 (M.D. Tenn. Sept. 28, 2006).

C. Statute of Repose

The statute of repose bars an action after a certain period of time, regardless of when the plaintiff may have reasonably discovered the injury. The discovery rule does not toll the statute of repose. *Watts v. Putnam Cty.*, 525 S.W.2d 488, 491 (Tenn. 1975); Tenn. Code Ann. § 28-3-204(a).

Tennessee's statute of repose for claims relating to real or personal property provides:

All actions, arbitrations, or other binding dispute resolution proceedings to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, must be brought against any person performing or furnishing the design, planning, supervision, observation of construction, or construction of the improvement within four (4) years after substantial completion of an improvement.

Tenn. Code Ann. § 28-3-202. If an injury occurs in the fourth year after substantial completion, the plaintiff gains an additional year after the date on which such injury occurs in which to file suit. Tenn. Code Ann. § 28-3-203. The term "substantial completion" is defined as the date on "which the owner can use the [property] for the purpose for which it was intended." Tenn. Code Ann. § 28-3-201(2). The date of substantial completion may be established by written agreement between the contractor and the owner. *Id.*

There are two statutory exceptions to the applicability of the statute of repose. First, if the defendant is in possession or control of the premises, then the defendant is prohibited from relying on the statute of repose as a defense if the improvement is the proximate cause of injury or death underlying a plaintiff's cause of action. See Tenn. Code Ann. §§ 28-3-202, -205(a). Second, if a defendant commits fraud in connection with the "design, planning, supervision, observation of construction, construction of, or land surveying," or if he wrongfully conceals the cause of action once it arises, then the statute of repose is not an available defense. See Tenn. Code Ann. §§ 28-3-205(b), -202.

II. Breach of Contract

"In a breach of contract action, claimants must prove the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011) (citing *ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)).

Under Tennessee law, the plaintiff may recover damages to compensate the plaintiff for losses that are the normal and foreseeable result of the breach of contract. *Bush v. Cathey*, 598 S.W.2d 777, 783 (Tenn. Ct. App. 1979) (finding that purchasers were entitled to award of damages to compensate them for additional moving expenses incurred as result of vendor's failure to perform contract for sale of home). In construction cases, damages may include the value of the breaching party's non-performance or partial performance under the contract in addition to the cost of completion or the cost to remedy substantial defects. See *Tarver v. Garrison's Custom Cabinets, Inc.*, No. W2006-01765-COA-R3-CV, 2007 WL 3194566, at *3 (Tenn. Ct. App. 2007) (holding that because defects in workmanship were so substantial that the performance of the contract was worthless, contractor must pay the cost of having job redone); see also *Wilhite v. Brownsville Concrete Co.*, 798 S.W.2d 772, 775 (Tenn. Ct. App. 1990) (holding that contractor defectively built pool and owners were entitled to recover the full cost of repairing the pool); *Allen v. Elliott Reynolds Motor Co.*, 230 S.W.2d 418, 420 (Tenn. Ct. App. 1950) (applying the doctrine of part performance where, in reliance on defendant's promise of exclusive automobile dealership, plaintiff incurred expenses in converting apartment house to automobile sales room and garage). However, if the defendant shows that repair is not feasible or that the cost to repair is disproportionate to the difference in value of the property from what it would have been worth as contracted for to what it is worth as actually constructed, then the measure of damages will be the difference in value. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005).

Under Tennessee's Uniform Arbitration Act, an arbitration provision in a contract for the construction of residential property must be separately signed or initialed by the parties. Tenn. Code Ann. § 29-5-302(a); but see *State Farm Fire & Cas. Co. v. Easyheat, Inc.*, No. M2006-02363-COA-R3-CV, 2007 WL 3306765, at *1, 3 (Tenn. Ct. App. 2007) (holding that the parties were required to arbitrate the dispute although the arbitration provision in the contract for the construction of residential property was unsigned because the Federal Arbitration Act was applicable, which requires the enforcement of a written arbitration agreement when the contract evidences a transaction involving interstate commerce).

III. Negligence

To prevail on a claim for negligence, plaintiff must show: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) injury or loss; and (4) causation in fact and proximate cause of the injury or loss. *Harrison v. Avalon Props., LLC*, 246 S.W.3d 587, 601 (Tenn. Ct. App. 2007) (citing *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000)).

The Tennessee Supreme Court held that contractors have an implied duty to perform services required by their contract with homeowners in a skillful, careful, diligent, and

workmanlike manner, even in the absence of a written agreement. *Winters*, 354 S.W.3d at 292–93. The Court further held that the delegation of performance of a contract to a subcontractor does not relieve the contractor from the duties implicit in the original contract. *Winters*, 354 S.W.3d at 293–96.

IV. Breach of Warranty

A breach of warranty can be based on express warranty provisions contained in the contract between the plaintiff and the general contractor or in the contract between the general contractor and a subcontractor or vendor, and/or on warranties implied by law.

Tenn. Code Ann. § 47-2-314 provides for an implied warranty of merchantability with respect to goods. The Tennessee Supreme Court found that an implicit warranty exists with respect to the construction of homes when the contract is silent regarding the standard of performance: “[T]he home buying public has a legitimate expectation that the workmanship and materials used by the builder-vendor in the construction of a dwelling will meet the standard of the trade for homes in comparable locations and price range and that such a warranty is implicit in the contract and survives the passing of title to the real estate and the taking of possession, as an exception to the doctrine of caveat emptor.” *Dixon v. Mountain City Constr. Co.*, 632 S.W.2d 538, 541 (Tenn. 1982).

V. Claims for Construction Defects

Actions against a contractor, subcontractor, supplier, or design professional relating to construction defects are governed by the notice and remedy provisions of Tenn. Code Ann. § 66-36-103. A claimant’s written notice of a construction defect claim tolls the statute of limitations until the later of (1) 180 days after the receipt of notice, or (2) 90 days after the end of the correction or repair period.

VI. Indemnity Claims

A. Express Indemnity

Express indemnity claims derive from contract provisions in which one party to the contract agrees to pay costs incurred by the other party to the contract as a result of the other party being held liable to a third party or having to defend against a claim filed by a third party. See *Winter v. Smith*, 914 S.W.2d 527, 541–42 (Tenn. Ct. App. 1995). If one is to be indemnified for his own negligence, the indemnifying agreement must clearly and unequivocally so state. *Summers Hardware & Supply Co. v. Steele*, 794 S.W.2d 358, 363 (Tenn. App. Ct. 1990); see also *Kroger Co. v. Giem*, 387 S.W.2d 620, 626 (Tenn. 1965) (holding that in Tennessee it is nearly a “universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by ‘clear and unequivocal terms;’ and general words will not be read as expressing such an intent”).

Tennessee has recognized that the right of parties to allocate liability for future damages through indemnity clauses, under most circumstances, is not contrary to public policy. *Planters Gin. Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 892 (Tenn. 2002). Tennessee courts have found, however, that indemnity clauses are invalid as to damages caused by gross negligence or willful conduct by the party to be indemnified. *Id.* at 893.

The Tennessee General Assembly has barred indemnity in certain cases as against public policy, including, in the construction context, indemnity for damages resulting from the sole negligence of the indemnitee. Tenn. Code Ann. § 62-6-123.

B. Contribution and Implied Indemnity

The Tennessee Supreme Court, in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), adopted the principles of comparative fault and, thus, limited the availability of contribution and implied indemnity. *McIntyre*, 833 S.W.2d at 58.

VII. Third-Party Beneficiaries

Tennessee has clearly established its rule on third-party beneficiaries: “Under the modern rule, third parties may enforce a contract if they are intended beneficiaries of the contract. . . . If, on the other hand, the benefit flowing to the third party is not intended, but is merely incidental, the third party acquires no right to enforce the contract.” *Owner-Operator Indep. Drivers Ass’n v. Concord EFS, Inc.*, 59 S.W.3d 63, 68 (Tenn. 2001); *Goot v. Metropolitan Gov’t of Nashville and Davidson County*, No. M2003-02013-COA-R3-CV, WL 3031638 (Tenn. Ct. App. Nov. 9, 2005). In order to maintain an action as an intended beneficiary, a third party must show: (1) a valid contract made upon sufficient consideration between the principal parties, and (2) the clear intent to have the contract operate for the benefit of a third party. *Owner-Operator Indep. Drivers Ass’n*, 59 S.W.3d at 69.

Courts have also ruled that “unless the construction contracts involved clearly provide otherwise, prime contractors on construction projects involving multiple prime contractors will be considered to be intended or third party beneficiaries of the contracts between the project’s owner and all the other prime contractors.” *Moore Constr. Co., Inc. v. Clarksville Dep’t of Elec.*, 707 S.W.2d 1, 10 (Tenn. Ct. App. 1985).

If an agreement explicitly provides that there shall be no third-party beneficiary, then that provision should be enforced as a matter of law. *AmSouth Erectors, LLC v. Skaggs Iron Works, Inc.*, No. W2002-01944-COA-R3-CV, 2003 WL 21878540, at *3–4 (Tenn. Ct. App. Aug. 5, 2003); *see also Owner-Operator Indep. Drivers Ass’n*, 59 S.W.3d at 72.

VIII. Economic Loss Doctrine

There is some question whether, under Tennessee law, the economic loss doctrine applies outside of the context of the sale of goods. See *Ham v. Swift Transp. Co.*, 694 F. Supp. 2d 915, 922 (W.D. Tenn. 2010).

The economic loss doctrine has been described as “a judicially created principle that requires parties to live by their contracts rather than pursue tort actions for purely economic losses arising out of the contract.” *Copper Basin Fed. Credit Union v. Fiserv Solutions, Inc.* No. E2012-02145-COA-R3-CV, 2013 WL 3421916, at * 5 (Tenn. Ct. App., Jul. 3, 2013).

Under Tennessee law, the economic loss doctrine does not bar a plaintiff’s claim for damages to property that are distinct from lost profits. See *SPO GO Holdings, Inc. v. W&O Constr. Co.*, 187 F. Supp. 3d 887, 893 (M.D. Tenn. 2016) (denying a contractor’s motion to dismiss plaintiff golf course owner’s claims for lost profits where plaintiff alleged contractor, who entered into a contract with the city for repair of a sewer line, was negligent in performance of repair of line causing damage to the golf course).

The economic loss doctrine also does not bar claims for negligent misrepresentation or negligent supervision, which are governed by Section 552 of the Restatement (2d) of Torts. *John Martin Co., Inc. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 429, 435 (Tenn. 1991) (holding that a subcontractor, despite lack of privity, could make a claim against a construction manager based on negligent misrepresentation, even though the subcontractor had been fully paid by the owner for performance of his contractual duties); *Acuity v. McGhee Eng’r, Inc.*, 297 S.W. 3d 718, 735 (Tenn. Ct. App. 2008) (finding that although the economic loss doctrine provides that, absent privity of contract, one may not recover in negligence when there is no injury to person or property, there is an exception for claims for purely economic loss based on negligent misrepresentation or supervision).

IX. Recovery for Investigative Costs

Tennessee may allow recovery of investigative costs, but these types of damages are rarely awarded. *Chastain v. Tenn. Water Quality Control Bd.*, 555 S.W.2d 113, 115 (Tenn. 1977).

X. Emotional Distress Claims

In Tennessee, the general rule is that damages for emotional distress claims are not recoverable in contract causes of action. *Johnson v. Woman’s Hosp.*, 527 S.W.2d 133, 141 (Tenn. Ct. App. 1975); *Rice v. Van Wagoner Cos., Inc.*, 738 F. Supp. 252, 253 (M.D. Tenn. 1990) (dismissing plaintiffs’ claim for mental anguish damages as part of breach of contract damages).

The Tennessee Supreme Court, however, follows the modern trend and recognizes exceptions to this general rule in order to “allow damages for mental anguish where it is clearly [foreseeable] within the terms of the contract or transaction and was negligently or wantonly caused by the defendant.” *See Southeastern Greyhound Lines v. Freels*, 144 S.W.2d 743, 745 (Tenn. 1940).

Generally, under ordinary circumstances, there can be no recovery for mental anguish suffered by plaintiff in connection with an injury to his or her property. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006). However, there can be occasions where a homeowner may be able to recover compensatory damages for emotional distress because of injury to real property. *Id.* (“Where [] the act occasioning the injury to the property is inspired by fraud, malice, or like motives, mental suffering is a proper element of damage.”). For example, the Tennessee Supreme Court has indicated that the recovery of emotional injury damages that stemmed from injury to real property when intentional misrepresentations concerning the property had been made may be recoverable. *See id.*

XI. Stigma Damages/Diminution In Value

Tennessee courts have “uniformly held that the measure of damages for injury to real estate is the difference between the reasonable market value of the premises immediately prior to and immediately after injury, but if the reasonable cost of repairing the injury is less than the depreciation in value, the cost of repair is the lawful measure of damages.” *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551, 560 (Tenn. Ct. App. 1985) (citing *Fuller v. Orkin Exterminating Co.*, 545 S.W.2d 103, 108 (Tenn. App. 1975)). However, in cases where the diminution in value is greatly exceeded by the cost of repair or completion, courts have held that the appropriate damages should equal the diminution in value. *Id.* This alternative is applicable only when proof has been offered on both the cost of repair and the diminution in value. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005).

XII. Economic Waste

As a general rule, the measure of damages for defects and omissions in the performance of a construction contract is the reasonable cost of correcting the defects or completing the omissions. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 542 (Tenn. Ct. App. 2005). However, in a case where this measure of damages would result in economic waste, “the courts generally adhere to the view that if a builder or contractor has not fully performed the terms of the construction agreement, but to repair the defects or omissions would require a substantial tearing down and rebuilding of the structure, the measure of damages is the difference in value between the work if it had been performed in accordance with the contract and that which was actually done, or (as it is sometimes said) the difference between the value of the defective structure and that of the structure if properly completed.” *Id.*

Despite this rule, there is some authority to the effect that “damages for a contractor's breach of a contract to construct a dwelling, where it is not constructed in accordance with the plans and specifications, are the amount required to reconstruct it to make it conform to such plans and specifications, rather than the difference in loan or market value on the finished dwelling, since unlike a commercial structure, a dwelling has an aesthetic value and must be constructed as the owner wants it, even though the finished dwelling may be just as good.” *Id.* (citing 13 Am. Jur. 2d § 79).

XIII. Delay Damages

Damages for delay and an extension of time for performance are two types of relief available to a contractor when its performance is delayed through no fault of its own. *Moore Constr. Co., Inc. v. Clarksville Dep't of Elec.*, 707 S.W.2d 1, 13–14 (Tenn. Ct. App. 1985) (ruling “that a contractor whose performance is delayed through no fault of its own has two types of relief available under the standard contract prepared by the American Institute of Architects. It first has the right to an extension of the time available for performance. In addition to a time extension, a contractor may have the right to be compensated for the increased costs it has incurred as a result of this delay.”).

“No damages for delay” clauses are commonly used in the construction industry. The clauses are meant to further the protection of the public interest and are “aimed generally against the contractor . . . with a view of limiting the cost of an improvement to the sum agreed upon and such additional sums as are specially provided for.” *Thomas & Assocs., Inc. v. Metro. Gov't of Nashville*, No. M2001-00757-COA-R3-CV, 2003 WL 21302974, at *13 (Tenn. Ct. App. June 6, 2003). Courts normally interpret such clauses according to their plain and ordinary meaning, and are normally valid and enforceable. *Id.*

XIV. Recoverable Damages

A. Direct Damages

Tennessee courts have held that “as a general rule, the measure of damages for defects and omissions in the performance of a construction contract is the reasonable cost of the required repairs. This is especially true when the structure involved is the owner's home. However, in the event that the cost of repairs is disproportionate when compared with the difference in value of the structure actually constructed and the one contracted for, the diminution value may be used instead as the measure of damages.” *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005) (internal citations omitted).

In some situations, reconstruction value may be the correct measure of damages:

It seems to us that when an owner contracts to have a dwelling constructed he wants a particular structure, not just any structure that could be built for the same price. We, therefore, think that the trial court was correct in awarding damages equal to the amount required to reconstruct the dwelling so as to make it conform to the specifications, rather than adopting the difference in loan value on the dwelling as the measure of damages, as contended by appellant.

Id. at 542 (quoting *Edenfield*, 462 S.W.2d at 241).

B. Punitive Damages

Punitive damages are awarded only in the most egregious cases. A plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence to be awarded punitive damages. Tenn. Code Ann. § 29-39-104(a)(1). Evidence is clear and convincing when it leaves "no serious or substantial doubt about the correctness of the conclusions drawn." *Goff v. Elmo Greer & Sons Constr. Co., Inc.*, 297 S.W.3d 175, 187 (Tenn. 2009). The evidence must be such that the truth of the facts asserted be "highly probable." *Id.*

Cases in which punitive damages are sought are bifurcated into the compensatory damages phase and, if compensatory damages are awarded, a punitive damages phase. Tenn. Code Ann. § 29-39-104(a)(2).

To determine the amount of punitive damages the court will weigh the following elements: the defendant's financial condition and net worth; the nature and reprehensibility of defendant's wrongdoing; the impact of the defendant's conduct on plaintiff; the relationship of the defendant to plaintiff; the defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm; the duration of defendant's misconduct and whether defendant attempted to conceal the conduct; the expense plaintiff has borne in the attempt to recover the losses; whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior; whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and any other circumstances shown by the evidence that bear on determining the proper amount of punitive damages. Tenn. Code Ann. § 29-39-104(2)-(4).

Absent certain circumstances, the amount of punitive damages recoverable is capped at two times compensatory damages awarded or \$500,000, whichever is greater. Tenn.

Code Ann. § 29-39-104(a)(5). *But see Lindenbergh v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 353 (6th Cir. 2018) (holding that the statutory cap on punitive damages in Tenn. Code Ann. § 29-39-104 is unconstitutional); *McClay v. Airport Mgmt. Servs. LLC*, 596 S.W.3d 686, 693 n.6 (Tenn. 2020) (acknowledging the Sixth Circuit's holding in *Lindenbergh* without expressing an opinion on the issue, but stating that the federal circuit's decision is not binding on the Tennessee Supreme Court).

C. Attorneys' Fees

Tennessee follows the "American Rule" providing that attorneys' fees are generally not recoverable in the absence of a contract provision or statute allowing for their recovery. *See Whitelaw v. Brooks*, 138 S.W.3d 890, 893 (Tenn. Ct. App. 2003) (holding that "in the absence of a contract, statute, or recognized ground of equity so providing there is no right to have attorneys' fees paid by an opposing party in civil litigation").

One commonly used statute to recover attorneys' fees in construction cases is the Prompt Pay Act. Tenn. Code Ann. §§ 66-34-101 *et seq.* The Prompt Pay Act allows attorneys' fees in construction cases to be awarded to an unpaid contractor if that contractor is the "prevailing party" and the non-prevailing party acted in "bad faith." Tenn. Code Ann. § 66-34-602(d). The Tennessee Supreme Court has held "bad faith" is not simply bad judgment or negligence, but implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 675 (Tenn. 2013). Good faith imposes an honest intention to abstain from taking any unconscientious advantage of another, even through the forms and technicalities of the law. *Huntington Nat'l Bank v. Hooker*, 840 S.W.2d 916, 926 (Tenn. Ct. App. 1991).

In addition, a plaintiff may recover attorneys' fees in cases of malicious harassment or frivolous appeals. *See* Tenn. Code. Ann. §§ 4-21-701(b), 27-1-122.

D. Expert Fees and Costs

Under Tenn. R. Civ. P. 54.04(2), "[c]osts not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs." While prevailing parties may be able to recover an expert's witness fee for depositions and trial, they cannot recover expert witness fees for (i) preparing for depositions or trial, (ii) testifying as fact witnesses rather than as experts, and (iii) appearing at depositions for proof when the expert also testifies at trial, no matter how reasonable and necessary these fees are. *Massachusetts Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 38 (Tenn. Ct. App.

2002).

XV. Insurance Coverage for Construction Claims

The duty to defend an insured is generally more extensive than the duty to indemnify the insured. *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 305 (Tenn. 2007). In determining whether a duty to defend has arisen, the Tennessee Supreme Court has stated:

[W]hether a duty to defend arises depends solely on the allegations contained in the underlying complaint. Accordingly, the insurer has a duty to defend when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for which there is a potential basis for recovery. The duty to defend arises if even one of the allegations is covered by the policy. The duty to defend is broader than the duty to indemnify because the duty to defend is based on the facts alleged, while the duty to indemnify is based upon the facts found by the trier of fact. Any doubt as to whether the claimant has stated a cause of action within the coverage of the policy is resolved in favor of the insured.

Id. (internal citations omitted).

When determining coverage questions, insurance policies should be construed as a whole in a reasonable and logical manner to avoid confusion and error. *Standard Fire Ins. Co. v. Chester O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998). The essential elements of a CGL policy should be construed in the following order: the declarations, insuring agreement and definitions, exclusions, conditions, and endorsements. *Id.*

If a policy is ambiguous as to when an injury must occur to be covered, then Tennessee law requires “that language must be construed against the insurance company and in favor of the insured.” *Christenberry v. Tipton*, 160 S.W.3d 487, 494 (Tenn. 2005). An insurance policy's language is ambiguous if it “is susceptible of more than one reasonable interpretation.” *American Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 815 (Tenn. 2000).

Interpreting one “occurrence” policy, the Tennessee Supreme Court has stated that “[a]n ‘occurrence policy’ is a policy in which the coverage is effective if the negligent act or omitted act occurs within the policy period, regardless of the date of discovery.” *State of Tenn. ex rel. McReynolds v. United Physicians Ins. Risk Retention Grp.*, 921 S.W.2d 176, 177 n.1 (Tenn. 1996).

For example, in a case involving a tree that fell onto an apartment building killing a child, the U.S. Sixth Circuit Court of Appeals held that even though the tree fell three months

after the owner had cancelled the insurance contract and sold the apartment building, the occurrence of negligence, not the injury, occurred during the coverage period. *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d 433, 440 (6th Cir. 2005) (applying Tennessee law). The Court went on to say that “even though an injury must manifest itself in order to trigger [the insurer’s] obligation to defend [the insured], the policy requires only that the occurrence must take place during the policy period, not the resulting injury.” *Id.*

XVI. Mechanics’ and Materialmen’s Liens

A. Introduction

The statutory requirements for obtaining mechanics’ and materialmen’s liens (collectively, “mechanics’ liens”) are set forth under Tenn. Code Ann. §§ 66-11-101 *et seq.* As a threshold matter, the statute states that mechanics’ liens are available “on any lot or tract of real property upon which an improvement has been made by a prime contractor and any remote contractor. The lien shall secure the contract price.” Tenn. Code Ann. § 66-11-102(a).

The statute defines “real property” broadly to include “real estate, lands, tenements and hereditaments, corporeal and incorporeal, and fixtures and improvements thereon.” Tenn. Code Ann. § 66-11-101(13).

B. Attachment of the Mechanics’ Lien

Mechanics’ liens “attach and take effect from the time of the visible commencement of operations, excluding, however, demolition, surveying, excavating, clearing, filling or grading, placement of sewer or drainage lines, or other underground utility lines or work preparatory therefor, erection of temporary security fencing and the delivery of materials therefor.” Tenn. Code Ann. § 66-11-104(a).

“If there is a cessation of all operations at the site of the improvement for more than ninety (90) days and a subsequent visible resumption of operations, any lien for labor performed or for materials furnished after the visible resumption of operations shall attach and take effect only from the visible resumption of operations.” Tenn. Code Ann. § 66-11-104(b).

C. Prime Contractor vs. Remote Contractor

A prime contractor is a “person . . . who supervises or performs work or labor or who furnishes material, services, equipment, or machinery in furtherance of any improvement; provided, that the person is in direct privity of contract with an owner, or the owner’s agent, of the improvement. A prime contractor also includes a person who takes over from prime contractor the entire remaining work under such a contract.” Tenn. Code Ann. § 66-11-101(12).

In contrast, a remote contractor is a “person . . . who provides work or labor or who furnishes material services, equipment or machinery in furtherance of any improvement under a contract with a person other than an owner.” Tenn. Code Ann. § 66-11-101(14). A remote contractor cannot obtain a lien on residential property unless a prime contractor is the owner of the property. Tenn. Code Ann. § 66-11-146(a)(2).

D. Priority and Enforcement – Prime Contractors

1. Liens on Residential Real Property

Only prime contractors may enforce a lien on residential real property, which is defined as one, two, three, and four dwelling units where the owner of the real property intends to reside in one of the units as the owner’s principal place of residence. Tenn. Code Ann. § 66-11-146(a).

2. Perfection of a Prime Contractor’s Lien

A prime contractor does not have to serve or record any notice regarding its lien in order for it to be valid. Tenn. Code Ann. § 66-11-106. A prime contractor should, however, record the lien to place subsequent purchasers and/or encumbrancers for value on notice of the lien. See Tenn. Code Ann. § 66-11-111.

The statute provides a form “Notice of Lien” that a lienor can use under Tenn. Code Ann. § 66-11-112(d).

3. Enforcement of a Prime Contractor’s Lien

In order to enforce the lien, a prime contractor must file a complaint in a court of law or equity or in a court of general sessions seeking issuance of an attachment. Tenn. Code Ann. § 66-11-126(1). The clerk of the court will require the “plaintiff or the plaintiff’s agent or attorney to execute a bond with sufficient surety payable to the defendant or defendants in the amount of one thousand dollars (\$1,000) or the amount of the lien claimed, whichever is less.” Tenn. Code Ann. § 66-11-126(4).

A prime contractor must enforce the lien in a court of competent jurisdiction within one year from the completion of the work. Tenn. Code Ann. § 66-11-106. The statute, however, does not require attachment to be issued by a Court within the one-year time period. See Tenn. Code Ann. § 66-11-126(3) (stating that “[a] complaint, petition, or civil warrant . . . is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period.”).

E. Priority and Enforcement – Remote Contractors

1. Notice of Non-Payment

To perfect a lien, “[e]very remote contractor with respect to an improvement, except one-family, two-family, three-family and four-family residential units, shall serve, within ninety (90) days of the last day of each month in which work or labor was provided or materials, services, equipment or machinery furnished and for which the remote contractor intends to claim a lien . . . a notice of nonpayment . . . to the owner and prime contractor in contractual privity with the remote contractor if its account is, in fact, unpaid.” Tenn. Code Ann. § 66-11-145(a). The Tennessee Court of Appeals has interpreted the phrase “prime contractor in contractual privity with the remote contractor” as the contractor upstream from the remote contractor which is in direct privity of contract with the owner. *Diaz Constr. v. Indus. Dev. Bd. of the Metro. Gov’n of Nashville & Davidson Cty.*, No. M2014-00696-COA-R3-CV, at *6, 2015 WL 1059065 (Tenn. Ct. App. March 6, 2015) (citing *Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012)).

The statute outlines the necessary information required in the notice and also provides a form “Notice of Non-Payment” under Tenn. Code Ann. § 66-11-145(d). A remote contractor who fails to provide notice under Section 66-11-145(a) loses the right to claim a lien for the month in question. Tenn. Code Ann. § 66-11-145(b).

2. Notice of Lien

The remote contractor must serve a Notice of Lien in writing on the owner of the property on which the remote contractor made improvements within ninety (90) days after the date the improvement is complete or is abandoned. Tenn. Code Ann. § 66-11-115(a)(2) (citing Tenn. Code Ann. § 66-11-112(a)). The Notice of Lien can be in substantially the same form as set forth in Tenn. Code Ann. § 66-11-112(d). *Id.* § 66-11-115(c).

The remote contractor must also record the Notice of Lien to preserve priority:

[T]he lienor . . . is required to record in the office of the register of deeds of the county where the real property, or any part affected, lies, a sworn statement of the amount for, and a reasonably certain description of the real property on, which the lien is claimed. . . . Recordation is required to be done no later than ninety (90) days after the date of improvement is complete or is abandoned. . . . Tenn. Code Ann. § 66-11-112(a).

3. Enforcement of Remote Contractor's Lien

Like prime contractors, remote contractors must file a complaint in a court of law or equity or in a court of general sessions seeking issuance of an attachment to enforce the lien. Tenn. Code Ann. § 66-11-126(2). The clerk will require the "plaintiff or the plaintiff's attorney to execute a bond with a sufficient surety payable to the defendant or defendants in the amount of one thousand dollars (\$1,000) or the amount of the lien claimed, whichever is less." Tenn. Code Ann. § 66-11-126(4).

A remote contractor must enforce the lien in a court of competent jurisdiction within ninety days from the date of service of the Notice of Lien. Tenn. Code Ann. § 66-11-115(b). The statute, however, does not require attachment to be issued within the ninety-day time period. *See* Tenn. Code Ann. § 66-11-126(3) (stating that "[a] complaint, petition, or civil warrant . . . is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period"). "The clerk of the court in which the suit is brought shall issue the attachment writ without obtaining fiat of a judge or chancellor." Tenn. Code Ann. § 66-11-126(3).

F. Other Considerations

1. Bond to Discharge the Lien

If a lien is recorded as provided by the statute, "any person may record a bond to indemnify against the lien." Tenn. Code Ann. § 66-11-142(a). Filing a bond operates as a discharge of the lien. Tenn. Code Ann. § 66-11-142(b)(1).

If the owner records a payment bond totaling one hundred percent of the prime contractor's contract price, attachment of the real property is unnecessary and the lien is enforced by filing a complaint, petition, or civil warrant against the bond. Tenn. Code Ann. §§ 66-11-124(c), -126(5).

2. Notice of Completion

In order to protect the owner or purchaser of improved real property against unrecorded liens, the statute allows the owner to record a Notice of Completion in the office of the register of deeds in the county where the real property or any affected part of the real property is located. Tenn. Code Ann. § 66-11-143(a). The statute provides a form "Notice of Completion" at Tenn. Code Ann. § 66-11-143(g).

The owner is required to serve a copy of the Notice of Completion on the prime contractor, except such notice is not required when the owner acts as general

contractor. Tenn. Code Ann. § 66-11-143(a). The owner is also required to serve a copy of the Notice of Completion on any remote contractor that has served a Notice of Non-Payment. Tenn. Code Ann. § 66-11-143(d). A remote contractor who has previously recorded a Notice of Nonpayment has thirty (30) days to serve a written notice in response to the Notice of Completion. Tenn. Code Ann. § 66-11-143(d).

After a Notice of Completion is recorded, a contractor has ten (10) days to record a lien on one, two, three, and four family residential units, and thirty (30) days on other improvements. Tenn. Code Ann. § 66-11-143(e).

3. Attorneys' Fees for Failure to Release a Lien

"If a lienor whose lien has been forfeited, expired, satisfied or adjudged against the lienor in an action on the lien, fails to cause the lien provided by this chapter to be released within thirty (30) days after service of written notice demanding release, the lienor shall be liable to the owner for all damages arising therefrom, and costs, including reasonable attorneys' fees, incurred by the owner." Tenn. Code Ann. § 66-11-135(a). A lien shall be considered released on the day on which the release is recorded in the office where the notice of lien was recorded. Tenn. Code Ann. § 66-11-135(c).

4. Amount Exaggeration

"If, in any action to enforce the lien . . . , the court finds that any lienor has willfully and grossly exaggerated the amount for which that person claims a lien, as stated in that person's notice of lien or pleading filed, in the discretion of the court, no recovery may be allowed thereon, and the lienor may be liable for any actual expenses incurred by the injured party, including attorneys' fees, as a result of the lienor's exaggeration." Tenn. Code Ann. § 66-11-139.

XVII. Retainage

A. Introduction

The Prompt Pay Act of 1991 ("Prompt Pay Act") was created to allow contractors, subcontractors, laborers, and materialmen a mechanism to ensure that they are paid for their services and/or materials within a reasonable time. Tenn. Code Ann. §§ 66-34-101 *et seq.* Under the Prompt Pay Act, all construction contracts on any project in Tennessee, both public and private, allow the owner to withhold up to five percent (5%) of the gross amount of the contract. Tenn. Code Ann. § 66-34-103.

Failure to abide by the provisions of the Prompt Pay Act may subject violators to claims for attorneys' fees, daily fines of up to \$3,000, and other criminal penalties, including a Class A misdemeanor. Tenn. Code Ann. § 66-34-103(c), (e); Tenn. Code Ann. § 66-34-

602(b).

B. Releasing the Retainage

The owner shall pay all retainage for work completed pursuant to the terms of any contract to the prime contractor within ninety (90) days after completion of the work or within ninety (90) days after substantial completion of the project for work completed, whichever occurs first. Tenn. Code Ann. § 66-34-103(b). The prime contractor is required to pay all retainage due any subcontractor within ten days after receipt of the retainage from the owner. *Id.* Any subcontractor receiving the retainage from the prime contractor shall pay to any sub-subcontractor or material supplier all retainages due the sub-subcontractor or material supplier within ten days after receipt of the retainage. *Id.*

C. Funding the Retainage

If a prime construction contract is valued at \$500,000 or greater, the retainage must be deposited in an interest-bearing escrow account, and compliance with the requirements of Tenn. Code Ann. § 66-34-104 may not be waived by contract. Tenn. Code Ann. § 66-34-104(a), (h)–(i). Failure to deposit the funds in an interest-bearing escrow account will subject the party to a \$300 per day penalty. Tenn. Code Ann. § 66-34-104(c); *see also Beacon4, LLC v. I&L Invest., LLC*, 514 S.W.3d 153, 210 (Tenn. Ct. App. 2016) (overruled on other grounds).

D. Relief Under the Prompt Pay Act

An unpaid contractor must serve notice upon the party failing to make payment of the provisions of the Prompt Pay Act and of its intent to seek relief under the statute. Tenn. Code Ann. § 66-34-602(a)(1). The notification must be submitted by registered or certified mail, with return receipt requested, or by another commercial delivery service that provides written confirmation of delivery. Tenn. Code Ann. § 66-34-602(a)(2). If the notified party fails to make payment or give legal justification for its non-payment within ten (10) calendar days after receipt of the notice, then the unpaid contractor may file suit in the chancery court where the real property is located. Tenn. Code Ann. § 66-34-602(a)(3). Tenn. Code Ann. § 66-34-602(a)(5) provides a template for providing notice under the Act.

The notified party can foreclose the contractor’s right to remedies under the Act by either: (1) submitting payment for the disputed amount within ten (10) days, or (2) sending notice setting forth “adequate legal reasons” for failing to make payment under the contract. *Id.* § 66-34-602(3).

E. Limitations to the Prompt Pay Act

There are limitations on the applicability of the Prompt Pay Act. For example, the

Act does not apply to residential construction contracts, including improvements to property containing one to four single-family dwellings. Tenn. Code Ann. § 66-34-702. Further, the Act does not apply “to any bank, savings bank, savings and loan association, industrial loan and thrift company, other regulated financial institution or insurance company.” Tenn. Code Ann. § 66-34-703.

F. Reasonable assurances

Tenn. Code Ann. § 66-34-603 allows a prime contractor to demand reasonable assurances from the owner that the owner has obtained sufficient funding to pay for all labor and materials on a project, if, after visible commencement of the project, the owner fails to make payments required by the contract. If the owner responds to a demand for adequate assurance with reasonable evidence that the owner has made financial arrangements sufficient to fulfill the owner's obligation to make all payments in accordance with the written contract, then the owner shall not materially vary the owner's financial arrangements from those disclosed under this section without prior notice to the prime contractor or remote contractor. Tenn. Code Ann. § 66-34-603(a)(4). The reasonable assurances provision cannot be waived in the contract. *Id.* § 66-34-603(b).