STATE OF WASHINGTON CONSTRUCTION LAW COMPENDIUM

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-2021-

This Compendium provides a general overview of Washington construction law. We have attempted to provide as comprehensive a summary as possible, and the outline below summarizes major areas of law involved in construction disputes. This summary, of course, cannot cover every legal issue that may arise in a construction dispute, but we hope this compendium provides a helpful background for those engaged in the rough and tumble world that is the Washington construction industry.

I. ACTIONABLE CLAIMS IN CONSTRUCTION DEFECT LITIGATION

A. BREACH OF CONTRACT

Breach of contract is a common claim in construction defect cases. In Washington, a breach of contract is actionable if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Nw. Indep. Forest Mfrs. v. Dep't of Labor and Indus.*, 78 Wash. App. 707, 712, 899 P.2d 6 (1995) (citing *Larson v. Union Inv. & Loan Co.*, 168 Wash. 5, 10 P.2d 557 (1932). Certain questions usually need to be resolved before addressing the specific issue of breach.

For example, did a contract even exist? In terms of offer and acceptance, the mere use of a subcontractor's bid by the general contractor does not constitute an acceptance of the subcontractor's offer to perform work for a stated price. *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wash. 2d 363, 370, 301 P.2d 759 (1956). *But see Indus. Electric-Seattle, Inc. v. Bosko*, 67 Wash. 2d 783, 796, 410 P.2d 10 (1966) (industry custom that use of bid figures created a contract may be admissible to prove the existence of an implied in fact contract).

Was a written contract required? Washington's Statute of Frauds requires a written contract where the agreement, by its terms, is not to be performed within one year from the making of the contract. Wash. Rev. Code § 19.36.010.

Is the contractor licensed with the state of Washington? A contractor must be properly registered with the Washington State Department of Labor and Industries before he or she can bring an action for the collection of compensation for the performance of any work or for breach of any contract for which registration is required. Wash. Rev. Code § 18.27.080. There are several exceptions, however, to Washington's registration requirement. Those exceptions are enumerated at Wash. Rev. Code § 18.27.090.

Often, breach of contract disputes involve change orders. What is the effect of an oral change order, where the contract requires a written change order? A "no oral change order clause" may be modified orally or by conduct evidencing mutual assent to the modification. *Davis v. Altose*, 35 Wash. 2d 807, 814, 215 P.2d 705 (1950). Disputes can also arise relating to whether a contractor should be entitled to compensation for performing "extra work" or "additional work." Extra work is work that is not required in the performance of the contract and is done in addition to or in excess of the requirements of the contract. *Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wash. 2d 214, 221-22, 484 P.2d 399 (1971). Additional work is necessarily required in the performance of the contract and without which it could not be carried out. *Id.* With extra work, a contractor may be entitled to additional compensation (including reasonable profit); whereas, with additional work he or she is not. *Id.*

In order to protect its payment rights, a contractor must strictly comply with notice and claim submission provisions in order to ensure its payment rights for change orders. In the *Mike M. Johnson* case, the contract documents specified a procedure for notice, protest, and claim procedures for change order work to be paid. 150 Wash. 2d 375, 78 P.3d 161 (2003). Despite advising the owner of the change order issues, the Court determined that the contractor was bound to the strict notice and documentation requirements of the contract for change order requests, and that by failing to follow those procedures, the contractor essentially forfeited its right to relief for change order work. *American Safety Casualty Insurance v. City of Olympia*, 162 Wash. 2d 762, 174 P.3d 54 (2007) reaffirmed the Court's holding that a party may insist upon strict compliance with the contract provisions governing change orders and pricing. *But see Wm. Dickson Co. v. Misenar Const., Inc.*, 175 Wash. App. 1033 (2013) (general contractor waived, by its conduct, procedural change order requirements).

Where a contractor performs work that is not covered by the contract, he or she may be able to obtain compensation based on a theory of quantum meruit. A contractor who has suffered substantial loss as a result of furnishing work and/or materials not covered by the contract may be entitled to compensation when substantial changes occurred that were not covered by the contract and were not within the contemplation of the parties. *V. C. Edwards Contracting Co., Inc. v. Port of Tacoma*, 83 Wash. 2d 7, 14, 514 P.2d 1381 (1973). The critical factor is whether the contractor should have discovered or anticipated the changed condition. *Id.*

Questions can also arise regarding whether an owner can sue a subcontractor for defective work based on a third-party beneficiary theory. Generally, only the parties to a contract can sue to enforce the contract's terms. *Lobak Partitions, Inc. v. Atlas Constr. Co.*, 50 Wash. App. 493, 497, 749 P .2d 716 (1988). When one party contracts with another for benefit a third party, however, then the third party may be able to maintain an action for breach of the contract. *Grand Lodge of Scandinavian Fraternity of Am. v. U.S. Fid. & Guar. Co.*, 2 Wash. 2d 561, 569, 98 P .2d 971 (1940). The key question in determining whether a third party may enforce the contract is whether the parties intended the promisor to assume a direct obligation to the third party at the time they entered into the contract. *Lonsdale v. Chesterfield*, 99 Wash. 2d 353, 360-61, 662 P.2d 385 (1983).

In the construction context, a property owner is generally not an intended third party beneficiary of a contract between a general contractor and a subcontractor. *Warner v. Design & Build Homes, Inc.*, 128 Wash. App. 34, 43, 114 P.3d 664 (2005). Typically, an owner has neither the desire nor the ability to negotiate with and supervise the various subcontractors, which is why the owner hires a general contractor. *Pierce Assoc.'s., Inc. v. Nemours Found.*, 865 F.2d 530, 539 (3d Cir. 1988). The owner looks to the general contractor, not the subcontractors, both for performance of the total construction project and for any damages or other relief if there is a default in performance. *Id.* The general contractor, in turn, looks to the subcontractors for performance and for any damages due to default in performance. *Id.*

B. NEGLIGENCE

Washington courts usually do not recognize claims for negligent construction on behalf of individual homeowners. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash. 2d 406, 417, 745 P.2d 1284 (1987). However, Washington courts do allow negligence actions against contractors in some situations. The courts differentiate negligence claims arising out of contract and tort. When the negligence claim can be traced back to an independent tort duty, the negligence claim is actionable. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash. 2d 380, 393-94, 241 P.3d 1256 (2010). Conversely, when the duty arises only from the contract, then the plaintiff is limited to traditional contract causes of actions and contract damages. *Alejandre v. Bull*, 159 Wash. 2d 674, 682-83, 153 P.3d 864 (2005). A plaintiff may be able to maintain a negligence suit, however, where there are personal or physical injuries resulting from the manner in which a building was constructed. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wash. 2d 413, 420, 150 P.3d 545 (2007). Washington courts have also started allowing claims alleging construction-related negligence between parties in contractual privity where one party, such as an architect or engineer, owes an independent duty to the owner of the project. *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wash. 2d 84, 94, 312 P.3d 620 (2013).

C. BREACH OF WARRANTY

1. BREACH OF EXPRESS WARRANTY

Breach of express warranty may be available in a construction defect case. Such warranties may be contained in construction contracts, sales materials, or advertising/marketing materials. Although Washington's version of the Uniform Commercial Code ("UCC"), Wash. Rev. Code § 62A.2, contains a number of warranty provisions, "construction contracts" are not governed by the UCC. *Arango Constr. Co. v. Success Roofing, Inc.*, 46 Wash. App. 314, 317-20, 730 P.2d 720 (1986) (citing *Christiansen Bros., Inc. v. State*, 90 Wash. 2d 872, 877, 586 P.2d 840 (1978)). *But see Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.*, 79 Wash. App. 250, 258, 902 P.2d 175 (1995) (applying the "predominant factor" test to conclude that contract for sale and installation of air conditioning system was not a "construction contract" and was thus subject to the UCC).

2. BREACH OF IMPLIED WARRANTY

a. IMPLIED WARRANTY OF HABITABILITY

Washington recognizes a limited implied warranty of habitability. There are a number of requirements for the warranty to apply. First, the builder-vendor of dwelling must be a commercial builder. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir.'s v. Blume Dev. Co.*, 115 Wash. 2d 506, 519 n. 7, 799 P.2d 250 (1990). Second, the warranty applies only to the sale of a new residential dwelling. *Id.* Third, the warranty protects only the first occupants of residential property. *Carlile v. Harbour Homes, Inc.*, 147 Wash. App. 193, 200, 194 P.3d 280 (2008). Fourth, the warranty covers only fundamental defects in the structure of a home. *Id.* A fundamental defect is one that renders the home unfit for its intended purpose. *Frickel v. Sunnyside Enters., Inc.*, 106 Wash. 2d 714, 717-20, 725 P.2d 422 (1986). Whether the warranty applies to a particular defect is a case-by-case analysis, *Atherton*, 115 Wash. 2d at 519, which involves is a mixed question of law and fact. *Burbo v. Harley C. Douglass, Inc.*, 125 Wash. App. 684, 694, 106 P.3d 258 (2005).

Although a seller is able to disclaim the implied warranty of habitability, such a disclaimer must be conspicuous, known to the buyer, and specifically bargained for. *Burbo*, 125 Wash. App. at 693.

b. IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION

In Washington, implied warranties of workmanlike performance are not implicit in construction contracts. *Urban Dev., Inc. v. Evergreen Bldg. Prod.'s, LLC*, 114 Wash. App. 639, 646, 59 P.3d 112 (2002). Contracting parties have their remedies for breach and can negotiate for warranties if they so choose. *Id.* An action for implied warranty of workmanlike performance in construction contracts would be too similar to a cause of action for negligent construction, which is not recognized in Washington. *Id.* (citing *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash. 2d 406, 417, 745 P.2d 1284 (1987)).

3. WARRANTIES RELATED TO CONDOMINIUMS

The Washington Condominium Act provides a broad array of warranty protection for condominium purchasers. Wash. Rev. Code § 64.34.443 covers express warranties, while Wash. Rev. Code § 64.34.445 covers implied warranties. The paragraphs below discuss only some of the legal obligations related to the Washington Condominium Act. Construction professionals should refer to Wash. Rev. Code § 64.34 or consult with an attorney to determine his or her specific warranty obligations.

Wash. Rev. Code § 64.34.443 states, "express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows." The statute then lists four ways to create express warranties. *See* Wash. Rev. Code § 64.34.443. For example, one way to create an express warranty is by "[a]ny written affirmation of fact or promise that relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise." Wash. Rev. Code §§ 64.34.443(1)(a).

Wash. Rev. Code § 64.34.445, provides for certain implied warranties related to the purchase of condominiums. By way of illustration, a person or entity that qualifies as a "declarant" or "dealer" impliedly warrants that the units and the common elements are suitable for the ordinary uses of real estate and that any improvements made or contracted for by the declarant will be free from defective materials; constructed in accordance with sound engineering and construction standards; constructed in a workmanlike manner; and constructed in compliance with all laws applicable to such improvements. Wash. Rev. Code § 64.34.445(2). In at least one appellate opinion, Wash. Rev. Code § 64.34.445 has been construed to include a guarantee that the builder has examined the materials used and ensured they are of sound quality and suitable for the use to which they are put. *See, e.g.*, *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wash. App. 175, 159 P.3d 460 (2007) (*mooted on other grounds in* 167 Wash. 2d 781 (2013)). Also, unlike the implied warranty of habitability, the implied warranties of § 64.34.445 include less serious defects (i.e., defects that do not meet the threshold for "fundamental"). *Park Avenue Condo. Owners Ass'n v. Buchan Dev.'s, L.L.C.*, 117 Wash. App. 369, 71 P.3d 692 (2003).

D. MISREPRESENTATION AND FRAUD

1. INTENTIONAL MISREPRESENTATION/FRAUD

Claims for intentional misrepresentation and fraudulent concealment may be available in the construction context. For intentional misrepresentation, a plaintiff must prove the following elements by clear, cogent, and convincing evidence: (1) a representation of existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it be acted upon by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom the representation is addressed; (7) the latter's reliance on the truth of the representation; (8) the right to rely upon it; and (9) consequent damage. *Beckendorf v. Beckendorf*, 76 Wash. 2d 457, 462, 457 P.2d 603 (1969).

To prove fraudulent concealment, a homeowner must show: (1) a concealed defect in the premises of a residential dwelling; (2) the builder knew of the defect; (3) the defect is dangerous to the property, health, or life of the purchaser, and (4) the defect was unknown to the purchaser and a reasonable inspection by the purchaser would not have disclosed the defect. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wash. 2d 506, 524, 799 P.2d 250 (1990). In addition, the defect must substantially reduce the property's value or operate to materially impair or defeat the transaction's purpose. *Id.* Although a fraudulent concealment claim may exist even though the purchaser makes no inquiries that would lead him or her to ascertain the concealed defect, in those situations where a purchaser discovers evidence of a defect, the purchaser is obligated to inquire further. *Id.* at 525. Fraudulent concealment does not extend to those situations where the defect is apparent. *Id.*

2. NEGLIGENT MISREPRESENTATION

Washington courts recognize the tort of negligent misrepresentation and apply the standard set forth in the Restatement (Second) of Torts § 552. Subject to some important exceptions, that section generally states that defendant, in the course of his or her business or profession, may be liable for negligent misrepresentation for failing to exercise reasonable care in the supplying of false information for the guidance of plaintiff in plaintiff's business transactions. Restatement (Second) of Torts § 552(1). Defendant may be liable for plaintiff's pecuniary losses if those losses were caused by justifiable reliance upon the information. *Id.* Liability for negligent misrepresentation is limited to cases where defendant has knowledge of the plaintiff's reliance; or plaintiff is a member of a group that defendant seeks to influence; or defendant has special reason to know that some member of a limited group will rely upon the information. *Schaaf v. Highfield*, 127 Wash. 2d 17, 24, 896 P.2d 665 (1995).

A plaintiff asserting this claim may encounter some difficulty because he or she must meet the burden of proving each element by clear, cogent, and convincing evidence. *Van Dinter v. Orr*, 157 Wash. 2d 329, 333, 138 P.3d 608 (2006). In addition, the economic loss rule—or independent duty doctrine—which is discussed below, may limit the availability of this cause of action in construction cases.

E. STRICT LIABILITY

Generally, in the construction context, a plaintiff's only avenue to seek strict liability against a defendant is Washington's Products Liability Act ("Act"). The Act does not cover construction *services*. *Graham v. Concord Constr., Inc.*, 100 Wash. App. 851, 856, 999 P.2d 1264 (2000). The Act may apply, however, to defective *products* used in construction. Wash. Rev. Code § 7.72.010 *et seq*. Product sellers and manufacturers are potentially strictly liable for defective products that cause personal injury or property damage. Wash. Rev. Code § 7.72.010(6); *Garza v. McCain Foods, Inc.*, 124 Wash. App. 908, 917, 103 P.3d 848 (2004) ("The act imposes strict liability on any manufacturer of a defective product for resulting injuries."). A homeowner can assert a product liability claim against a product seller or manufacturer without meeting any privity requirements. Wash. Rev. Code § 7.72.030.

The definition of "product" covers nearly all materials used in construction. Product means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Wash. Rev. Code § 7.72.010(3).

Defective products are unsafe as designed, do not include adequate warnings or instructions for use, or do not conform to the manufacturer's warranties. Wash. Rev. Code § 7.72.030. The Act applies to any claim or action brought for harm caused by the manufacture, production, construction, design, assembly, or installation of a product. Wash. Rev. Code § 7.72.010(4). Covered claims include but are not limited to those previously based on strict liability, negligence, breach of a duty to warn, or any other substantive legal theory. *Id.*

F. INDEMNITY

1. EXPRESS INDEMNITY

Contractors can freely bargain for indemnity clauses in construction contracts. Indemnity agreements are essentially agreements for contractual contribution, in which one party may look to another for reimbursement. *MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders Inc.*, 133 Wash. App. 828, 831, 138 P.3d 155 (2006). To prove an indemnity claim, a plaintiff must demonstrate that there exists a contract containing an indemnity provision that binds the defendant to reimburse the plaintiff for the amount claimed. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wash. App. 743, 757 n.3, 162 P.3d 1153 (2007). Absent a contractual indemnity clause in a subcontract agreement, a contractor is not entitled to equitable indemnity from its subcontractors even if the work was defective. *Urban Dev., Inc. v. Evergreen Bldg. Prod.'s, LLC*, 114 Wash. App. 639, 644-47, 59 P.3d 112 (2002).

Indemnity agreements are subject to the fundamental rules of contract construction, *i.e.*, the intent of the parties controls. *Jones v. Strom Constr. Co.*, 84 Wash. 2d 518, 520, 527 P.2d 1115 (1974). Intent must be inferred from the contract as a whole. *Id.* The meaning afforded the provision and the whole contract must be reasonable and consistent with the purpose of the overall undertaking; and if any ambiguity exists, it must be resolved against the party who prepared the contract. *Id.* In addition, clauses purporting to exculpate an indemnitee from liability flowing solely from its own acts or omissions are not favored and are strictly construed. *Id.* Indemnification

agreements are void and unenforceable if the agreement indemnifies the indemnitee against his or her negligence. Wash. Rev. Code § 4.24.115.

2. IMPLIED INDEMNITY

Washington does not recognize an implied duty of indemnification in construction contracts. Some construction contracts may more properly be characterized as UCC contracts and may contain an implied right to indemnification. However, if the contract is a contract for work, labor, and materials, then the contract is not governed by the UCC. *Whatcom Builders Supply Co. v. H. D. Fowler, Inc.*, 1 Wash. App. 665, 668, 463 P.2d 232 (1969).

A right of implied indemnity "arises when one party incurs liability the other party should discharge by virtue of the nature of the relationship between the parties." *Cent. Wash. Refrigeration, Inc. v. Barbee*, 133 Wash. 2d 509, 513, 946 P.2d 760 (1997). Although the right to indemnity is not implicit in every contractual relationship, a contract governed by the UCC, with its warranties, provides a sufficient basis for an implied indemnity claim. *Id.* at 514 n.4. Likewise, a relationship where one party has expressly warranted its goods to another party provides a sufficient basis for an implied indemnity claim. *Id*. at 516-17. But construction contracts are not governed by the UCC. *Arango Constr. Co. v. Success Roofing, Inc.*, 46 Wash. App. 314, 317-20, 730 P.2d 720 (1986) (citing *Christiansen Bros., Inc. v. State*, 90 Wash. 2d 872, 877, 586 P.2d 840 (1978)).*But see Tacoma Athletic Club, Inc. v. Indoor Comfort Sys., Inc.*, 79 Wash. App. 250 (1995) (applying the "predominant factor" test to conclude that contract for sale and installation of air conditioning system was not a "construction contract" and was thus subject to the UCC). Therefore, UCC implied warranties cannot serve as the basis for an implied indemnification claim in a "construction contract." *Urban Dev., Inc. v. Evergreen Bldg. Prod.'s, LLC*, 114 Wash. App. 639, 645, 59 P.3d 112 (2002).

Because warranties of workmanlike performance are not implicit in Washington construction contracts, there is, likewise, no implied duty of indemnification. *Id.* at 645-46. The reasoning is closely tied to the Economic Loss/Independent Duty rule. *See infra* Section III. A. Thus, absent an express warranty, there is no implied duty of indemnification in Washington construction contracts.

II. STATUTE OF LIMITATIONS & REPOSE

A. STATUTE OF LIMITATIONS

There are several different limitations periods in construction cases. Written contracts carry a six-year period. Wash. Rev. Code § 4.16.040. Oral contracts have a three-year period. Wash. Rev. Code § 4.16.080(3). Tort-based claims also have a three-year period. Wash. Rev. Code § 4.16.080. Claims under Washington's Condominium Act have a four-year limitations period. Wash. Rev. Code § 64.34.452.

Generally, a statute of limitations begins to run when the plaintiff's cause of action accrues. *Malnar v. Carlson*, 128 Wash. 2d 521, 529, 910 P.2d 455 (1996); Wash. Rev. Code § 4.16.005. This often occurs when the plaintiff suffers some form of injury or damage. *In re Estates of Hibbard*, 118 Wash. 2d 737, 744, 826 P.2d 690 (1992). In some instances, however, there is a delay between the injury and the plaintiff's discovery of it. *Allen v. State*, 118 Wash. 2d 753, 758,

826 P.2d 200 (1992). In this circumstance, the court may apply the discovery rule, which operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim. *Id.* at 758.

"Courts apply the discovery rule to two categories of cases. *Crisman v. Crisman*, 85 Wash. App. 15, 20, 931 P.2d 163 (1997). In the first type, "the defendant fraudulently conceals a material fact from the plaintiff and thereby deprives the plaintiff of the knowledge of accrual of the cause of action." *Id.* The discovery rule tolls the limitation period until the time when the plaintiff knew or, through the exercise of due diligence, should have known of the fraud. *Id.*; Wash. Rev. Code § 4.16.080(4). In the second type, "the nature of the plaintiff's injury makes it extremely difficult, if not impossible, for the plaintiff to learn the factual elements of the cause of action within the specified limitation period." *Crisman*, 85 Wash App. at 21.

Many construction cases fit within the second category. The discovery rule applies in actions for breach of construction contracts where latent defects are alleged, even though a breach of contract claim ordinarily accrues upon breach. 1000 *Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wash. 2d 566, 578-79, 146 P.3d 423 (2006).

Under the discovery rule, "a plaintiff cannot ignore notice of possible defects." *Id.* at 581. When a plaintiff is placed on notice of some harm, committed by another, he or she must make reasonably diligent inquiries to determine the scope of the actual harm. *Id.* "The plaintiff is charged with what a reasonable inquiry would have discovered." *Id.* (internal quotations omitted). A person with knowledge sufficient "to put him or her upon inquiry notice is deemed to have notice of all facts that reasonable inquiry would disclose." *Id.* Whether the plaintiff should have been able to detect defects is a factual question. *Id.*

B. STATUTE OF REPOSE

In addition to the limitations periods above, the Washington Legislature promulgated a statute of repose that is applicable in the construction context. *See* Wash. Rev. Code §§ 4.16.300 - .327. Statutes of repose are different than statutes of limitation. *Rice v. Dow Chem. Co.*, 124 Wash. 2d 205, 211, 875 P.2d 1213 (1994). A statute of limitation bars a plaintiff from bringing an already accrued claim after a specific period of time. *Id.* at 211-12. A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred. *Id.*

Washington imposes a six-year statute of repose to actions arising out of the construction of a building. Wash. Rev. Code § 4.16.310; *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wash. 2d 566, 576, 146 P.3d 423 (2006). Wash. Rev. Code § 4.16.310 "requires a [two]-step analysis for computing the accrual of a cause of action arising from the construction, alteration, or repair of any improvement to real property.' *Id.* (*quoting Del Guzzi Constr. Co. v. Global Nw., Ltd.*, 105 Wash. 2d 878, 883, 719 P.2d 120 (1986)) (internal quotations omitted). First, "the cause of action must accrue within six years of substantial completion of the improvement." *Id.* Substantial completion means "the state of completion reached when an improvement upon real property may be used or occupied for its intended use." Wash. Rev. Code § 4.16.310. Second, "a party must file suit within the applicable statute of limitation, depending on the type of action." *1000 Virginia Ltd. P'ship*, 158 Wash. 2d at 575. By requiring that the cause of actions accrue and the statute of limitation begin to run within the six-year window following substantial completion, the repose statute restricts the judicially created discovery rule with a six-year overall bar.

Bellevue Sch. Dist. No. 405 v. Brazier Const. Co., 103 Wash. 2d 111, 119, 691 P.2d 178 (1984). Therefore, the discovery rule, if applicable for accrual of actions, is limited to the six-year period. *Id.*

III. DAMAGES

A. THE ECONOMIC LOSS RULE AND INDEPENDENT DUTY DOCTRINE

Washington traditionally subscribed to the Economic Loss Rule. The economic loss rule maintains the "fundamental boundaries of tort and contract law." *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wash. 2d 816, 826, 881 P.2d 986, 94 Ed. Law Rep. 610 (1994). Where economic losses occur, recovery is confined to contract damages to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. In essence, the economic loss rule prevents a party to a contract from obtaining, through a tort theory, benefits that were not part of the contractual bargain. *See also Alejandre v. Bull*, 159 Wash. 2d 674, 683, 153 P.3d 864, 868 (2007) ("If the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.").

The Washington Supreme Court, however, revisited the Economic Loss Rule in two cases issued on November 4, 2010, *Eastwood v. Horse Harbor Fdn., Inc.*, 170 Wash. 2d 380 (2010), and *In re Affiliated FM Insurance Co, v. LTK Consulting Services, Inc.*, 170 Wash. 2d 442 (2010). The Court concluded that the Economic Loss Rule had been misunderstood. The nature of damages is not determinative (since many kinds of damages can be stated in monetary terms), and the presence of a contract is also not determinative. *Eastwood*, 170 Wash. 2d at 388-89. Instead, the key issue is really whether the plaintiff can identify a duty owed independently of any contract. *Id.* at 389. The court said that the Economic Loss Rule should be renamed the Independent Duty Doctrine. *Id.*

In *Eastwood*, the Court ruled that a tenant's duty to avoid waste was independent of a similar duty stated in the lease, and so the plaintiff in that case could pursue claims in tort and for breach of contract simultaneously. *Id.* at 398-400. In *Affiliated FM Insurance*, the Court held that an engineer hired by the City of Seattle to make recommendations about repairs to the Seattle Monorail owed a duty of care to the company that operated the Monorail, independent of its contractual duty to the City. 170 Wash. 2d at 453. As a result, the operating company could pursue a claim against the engineer for negligence after a Monorail train caught fire. *Id.* at 461.

Accordingly, the Economic Loss Rule has been revised but not overturned. Unless a plaintiff can demonstrate the existence of a recognized independent duty, claims for economic loss arising from an agreement should be dismissed as a matter of law.

The primacy of the Independent Duty Doctrine was affirmed in *Jackowski v. Borschelt*, 174 Wash. 2d 720, 278 P.3d 110 (2012). Purchasers of waterfront home, which sustained damage due to landslide, brought action against vendors, seeking rescission or, in the alternative, damages for fraud, fraudulent concealment, negligent misrepresentation, and breach of contract. *Id.* In addition, purchasers sued the vendors' broker and agent, alleging fraud, fraudulent concealment, negligent misrepresentation, and breach of common law fiduciary duties. Purchasers also leveled similar claims against their own broker and agent together with a claim for breach of statutory

fiduciary duties. *Id.* Ultimately, the Washington Supreme Court held that common law tort causes of action remain the vehicle through which a party may recover for a breach of statutory duties set forth in chapter governing real estate brokerage relationships. *Id.*

B. RECOVERABLE DAMAGES

1. DIRECT DAMAGES

Washington courts have ruled that "[a] party injured by a breach of contract may recover all damages that accrue naturally from the breach, including any incidental or consequential losses the breach caused." *Floor Exp., Inc. v. Daly*, 138 Wash. App. 750, 754, 158 P.3d 619 (2007) (finding that a flooring contractor did have standing to bring suit for consequential damages flowing from the subcontractor's failure to properly perform work). In case involving breach of a construction contract, the standard measure of recovery is the "reasonable cost of completing performance or remedying defects in the construction if the cost is not clearly disproportionate to the probable loss in value to property. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wash. App. 422, 427, 10 P.3d 417 (2000); *citing Eastlake Constr. Co., Inc. v. Hess*, 102 Wash. 2d 30, 46, 686 P.2d 465 (1984) (*quoting* Restatement (Second) of Contracts § 348 (1981)). In other words, an injured party to a construction contract is entitled to expectation damages, or to "return the injured party to as good a pecuniary position as [he/she] would have had if the breaching party would have performed properly." *Floor Exp., Inc.*, 138 Wash. App. at 754. If a contractor, for example, performs defective or incomplete work, the owner is entitled to compensation sufficient to repair, replace, or complete the work. The one caveat, as noted in *Panorama*, is that the injured party's recovery may not be disproportionate to their loss. 102 Wash. App. at 427.

In *Panorama*, for instance, a homeowner's association (the "owner") sought damages for a defective roof and submitted evidence that it would be cheaper to replace the roof, rather than engage in a labor-intensive repair. *Id.* at 428. While the contractor argued that the cost of replacement of the roof would be disproportionate to the owner's loss, the court noted that the contractor – which bears the burden to challenge the owner's evidence in order to reduce the award – failed to provide any evidence challenging the reasonableness of the owner's estimate. *Id.* at 428-29. Thus, the appellate court affirmed the trial court's award of damages to the owner to replace the defective roofs.

Moreover, once the repair or replacement has been completed, the contractor (or subcontractor) is entitled to restitution for its part performance. *See Ducolon Mechanical v. Shinstine/Forness*, 77 Wash. App. 707, 711, 893 P.2d 1127 (1995). Such restitution is measured by the reasonable value of its services provided. *Id.*

2. STIGMA DAMAGES

A plaintiff may be able to recover for the loss in marketability of a structure. *Mayer v. Sto Indus., Inc.*, 156 Wash. 2d 677, 694-95, 132 P.3d 115 (2006). In determining whether the recovery of stigma damages is warranted, the critical inquiry is whether there is some permanent loss or harm. If so, then the court should award stigma damages, or diminution in value damages. *Id.* In *Mayer*, for example, the property damage involved a contractor's application of Exterior Insulation Finish System (EIFS), a known defective product. *Id.* at 681. The Plaintiffs proved – by "unrebutted expert testimony" – that they had "suffered a permanent loss because they will have

to disclose that the home is sided with EIFS." *Id.* at 695. As the court held, "where the damage to real property is permanent, a plaintiff is entitled to recover, not only for the costs of restoration and repair, but also for the property's diminished value." *Id.* at 694-95.

In contrast, if the damage is temporary – and the property is capable of being restored – then the damages should be limited to restoration damages. *Pepper v. J.J. Welcome Const. Co.*, 73 Wash. App. 523, 541, 871 P.2d 601 (1994), *rev'd on other grounds, Phillips v. King County*, 87 Wash. App. 468, 490, 943 P.2d 306 (1997). In *Pepper*, for instance, the court held that water run-off and deposits of sediment on plaintiff's property constituted temporary damage that could be remedied. *Id.* at 543. For this reason, the court held that restoration costs were the proper measure of recovery. *Id.*

3. DELAY DAMAGES

Every construction contract implies that the owner will not hinder the contractor's performance, and the contractor may recover additional compensation for such delays. *Bignold v. King County*, 65 Wash. 2d 817, 825, 399 P.2d 611 (1965). In *Bignold*, for instance, the Washington Supreme Court affirmed a monetary award for a contractor due to the county's engineers' arbitrary refusal to shut down a project despite adverse weather conditions. *Id.* at 825-26. The shut down significantly increased the contractor's operating costs and required the contractor to perform extra work. *Id.* at 825-26.

A contractor may similarly be held liable for damages resulting from delays in performance. *See, e.g., Brower Co. v. Garrison*, 2 Wash. App. 424, 428-29, 468 P.2d 469 (1970). If there is no time period for performance prescribed in the contract, performance is presumed to be due within a "reasonable time." *Id.* (discussed in Kelly Kunsch, 1C Wash. Prac., Methods of Practice § 90.27 (4th ed.)). In addition, as delay damages can often be difficult to measure, many owners insert a liquidated damages clause in the construction contract. *Id.* As liquidated damages clause provides a fixed measure of damages, and is generally favored by Washington courts unless the clause constitutes a penalty. *See Id.* at. 433-34 (holding, in 1970, that a $50 per day liquidated assessment was not excessive to compensate an owner for a contractor's delays).

4. PUNITIVE

In general, punitive damages are not awarded in Washington. However, punitive damages may be available when federal law, or the law of some other jurisdiction, governs the merits of a case. *See generally Dailey v. North Coast Life Ins. Co.*, 129 Wash. 2d 572, 919 P.2d 589 (1996) ("Since its earliest decisions, [Washington courts] ha[ve] consistently disapproved punitive damages as contrary to public policy."); *see also* Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 402.20 (5th ed.).

5. ATTORNEY FEES AND COSTS

In Washington, attorneys' fees and costs may be recovered by the prevailing party as costs of litigation where permitted by contract, statute, or a recognized ground in equity. *White Coral Corp. v. Geyser Giant Clam Farms, LLC*, 145 Wash. App. 862, 866 n.4, 189 P.3d 205 (2008); *citing McGreevy v. Oregon Mut. Ins. Co.*, 128 Wash. 2d 26, 35 n.8, 904 P.2d 731 (1995).

When there is a construction contract, Washington courts will award reasonable attorney fees "where such contract [] specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract [], shall be awarded to . . . the prevailing party." Wash. Rev. Code § 4.84.330; *see Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wash. App. 64, 975 P.2d 532 (1999) (Arbitration panel had authority to award attorney fees to subcontractor and general contractor who prevailed on claims for breach of contract). Thus, all contractual attorney provisions are effectively construed to apply to both parties to a contract.

As for a statutory basis, construction disputes will at times entail violations of the Consumer Protection Act ("CPA"), which provides for recovery of attorney fees to the injured party. *See* Wash. Rev. Code § 19.86.090; *Mayer v. Sto Industries, Inc.*, 123 Wash. App. 443, 98 P.3d 116 (2004) (awarding attorney's fees to homeowners for siding manufacturer's violations of the CPA), *affirmed in part, reversed in part* 156 Wash. 2d 677, 132 P.3d 115 (2006).

Attorney fees may be recoverable as an element of damages in some instances. Where a contract provides for indemnity, that indemnity may include the cost to defend against a lawsuit, and those defense costs and fees will then be recoverable as damages. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wash. App. 743, 759, 162 P.3d 1153 (2007). Similarly, where the "natural and proximate consequence of a wrongful act by defendant involve plaintiff in litigation with others" the plaintiff may recover the costs of defense of a lawsuit from the defendant, even in the absence of a contractual promise to indemnify. *Wells v. Aetna Ins. Co.*, 60 Wash. 2d 880, 882, 376 P.2d 644 (1962); *Manning v. Loidhamer*, 13 Wash. App. 766, 769–74, 538 P.2d 136 (1975).

IV. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

This section will provide a brief summary of insurance law as it relates to construction claims and disputes.

In Washington, "an insurance policy is to be construed in accordance with the general rules applicable to other contracts." *Graingrowers Warehouse Co. v. Central Nat'l Ins. Co. of Omaha,* 711 F. Supp. 1040, 1044 (E.D. Wash. 1989) (citing *State Farm General Ins. Co. v. Emerson*, 102 Wash. 2d 477, 480, 687 P.2d 1139 (1984). An insurer may have a duty to indemnify and/or defend its insured, although the duty to defend (including the obligation to pay for the insured's costs of defense) is separate from and far broader than the insurer's duty to indemnify. *See Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F. Supp. 1400, 1419 (W.D. Wash. 1990); *Woo v. Fireman's Fund Ins. Co.*, 494 Wash. 2d 43, 52, 164 P.3d 454 (2007). Insurers must defend their insured against any claim that is conceivably covered by the policy of insurance. *Robbins v. Mason Cnty. Title Ins. Co.*, 195 Wash. 2d 618, 626-27, 462 P.3d 430 (2020). The Washington Supreme Court summarized the general principles that define liability insurers' broad duty to defend their insured in *Woo v. Fireman's Fund Ins. Co.*

> The rule regarding the duty to defend is well settled in Washington and is broader than the duty to indemnify. The duty to defend arises at the time an action is first brought, and is based on the potential for liability. An insurer has a duty to defend when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.

494 Wash. 2d at 52-53. (citations omitted) ; *see also Griffin v. Allstate Ins. Co.*, 108 Wash. App. 133, 138, 29 P.3d 777 (2001) ("The general rule is that insurers who have reserved the right and duty to defend are obliged to defend any suit which alleges facts wherein, if proven, would render the insurer liable.").

An insurer must look outside the complaint, and reasonably investigate, when allegations in a complaint are not sufficiently clear or when allegations are in conflict with known or readily-ascertainable facts. *See Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wash. 2d 751, 761, 58 P.3d 276 (2002). However, this exception can only be used in favor of the insured. *Id.*

With respect to insurance exclusions, property damage caused by "faulty workmanship" is often excluded from coverage. *See City of Oak Harbor v. St. Paul Mercury Ins. Co.*, 139 Wash. App. 68, 159 P.3d 422 (2007) (holding that coverage for damage to liner of city's wastewater treatment lagoon as result of dredging contractor's negligence was barred by faulty workmanship exclusion of city's property insurance policy). However, there are often exceptions to the faulty workmanship exclusion which provide coverage for an "ensuing loss" – that is, property damage caused as a result of the faulty workmanship. *See Allstate Ins. Co. v. Smith*, 929 F.2d 447, 44950 (9th Cir. 1991).

In *Allstate*, for example, the court held that the faulty workmanship exclusion at issue should be limited to the particular *product* that was faulty; not to the entire construction *process*. In this case, a contractor had failed to place a tarp on a roof and, as a consequence, equipment inside was damaged by rain. The insured argued that the exclusion for faulty workmanship should not apply to the entire construction process (*i.e.*, not placing a tarp over a roof at night), and thus the equipment damaged as a result should be covered under the policy's "ensuing loss" clause. The insurer argued that the faulty workmanship clause should exclude coverage for all damage to the site because the construction process itself was faulty. The court endorsed the insured's interpretation, noting that the faulty workmanship exclusion applies to a product, not process, and that the insurer's broad reading of faulty workmanship would effectively render the ensuing loss clause meaningless. *Id.* at 450. However, this area of law is not clearly defined, as other courts have read the faulty workmanship exclusion more broadly to exclude coverage for the entire construction process. *See e.g. See City of Oak Harbor v. St. Paul Mercury Ins. Co.*, 139 Wash. App. 68, 159 P.3d 422 (2007) (noting cases nationwide that have interpreted the faulty workmanship exclusion broadly to mean a process; not a resulting product).

V. CONSTRUCTION LIENS

A. WORK/MATERIALS SUBJECT TO LIEN

Mechanics' and materialmens' liens (collectively "construction liens") are governed by statute. Wash. Rev. Code § 60.04.011-.904. The applicable lien statute provides that "any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished." Wash. Rev. Code § 60.04.021. That is, a construction lien is a security interest in property to secure payment for services, labor and material provided to improve the property. As a general matter, the Mechanics' and Materialmen's Liens statute "is construed liberally to protect persons who fall within its provisions." *Inland Empire Dry Wall Supply Co. v. Western Surety Company*, 189 Wash. 2d 840, 408 P.3d 691 (2018) (citing *Williams v. Athletic Field, Inc.*, 172 Wash. 2d 683, 696-97, 261 P.3d 109 (2011). Notably, however, the party filing a lien must strictly comply with statutory time requirements. *Inland Empire Dry Wall Supply Co.*, 189 Wash. 2d at 844. Failure to do so will waive the party's lien rights.

B. TIME LIMIT FOR FILING LIEN

One primary statutory requirement a potential lien claimant must follow is to provide a written "pre-claim notice" to the owner of their right to claim a lien. Wash. Rev. Code § 60.04.031; *Van Wolvelaere v. Weathervane Window Co.*, 143 Wash. App. 400, 404, 177 P.3d 750 (2008). Notice must be given to both the property owner and to the "prime contractor" who contracts directly with the owner "to assume primary responsibility for the creation of an improvement to real property." Wash. Rev. Code § 60.04.031(1). Wash. Rev. Code § 60.04.031 provides a sample pre-claim notice, which even includes guidance on the appropriate font size (ten-point type). In general, the pre-claim notice states that the potential lien claimant is a participant in the project and has or is about to "provid[e] professional services, materials, or equipment for the improvement of [the owner's] property" which would entitle him or her to make a lien claim. Wash. Rev. Code § 60.04.031. However, there are broad exceptions to the pre-claim notice requirement. A pre-claim notice is not required of (1) persons who contract directly with the owner; (2) laborers whose lien is based solely on performing labor; or (3) subcontractors who contract directly with the prime contractor. Wash. Rev. Code § 60.04.031.

For those parties who are required to provide a pre-claim notice, the notice "may be given at any time, but only protects the right to claim a lien for materials, services, or equipment supplied" after 60 days before the date notice is given by mail or personal delivery. Wash. Rev. Code § 60.04.031. That is, the pre-claim notice only permits a lien on those improvements that are furnished 60 days prior to notice. The 60 day time limit is shortened to 10 days for the new construction of a single-family residence. Wash. Rev. Code § 60.04.031.

C. LIEN PRIORITIES

Liens take precedence in order of time – the first in time being the first in right. *See* Wash. Rev. Code § 60.04.061; *see also Seattle Mortg. Co., Inc. v. Unknown Heirs of Gray*, 133 Wash. App. 479, 136 P.3d 776 (2006). Mechanics' and materialmens' liens attach at the time the lien claimant commences work or first delivers material or equipment to the site. Wash. Rev. Code § 60.04.061. Exactly when work "commences" or material is "delivered" is a subject of dispute.

See Mannington Carpets, Inc. v. Hazelrigg, 94 Wash. App. 899, 973 P.2d 1103 (1999).

In *Manningham Carpets*, the court addressed the priority of a materialmen's lien against real property. In this case, a contractor, Manningham, shipped carpet "F.O.B." to a property site in March. In April, two deeds of trust were recorded against the property. In May, a carrier delivered Manningham's carpet to the site. Manningham maintained that his lien took priority over the deeds of trust. By shipping the carpet, Manningham argued, it was placed into the legal possession of another—thus constituting a "delivery" sufficient for a lien to attach. The court disagreed, stating: "The purpose of allowing a lien to attach to secure the price of building materials is that those materials have some *special connection to the property* being encumbered. Because there can be no lien where the material is neither used in the building nor taken to the premises, it follows that at least one of those conditions must occur before the lien will attach." *Id.* at 909 (emphasis added) (citations omitted).

Therefore, courts in Washington analyzing lien priority will make a specific inquiry as to when materials, or services, attach to the site and form some "special connection" to the property. Simply arranging for the delivery of materials to a site is not sufficient to establish lien priority.

D. TIME LIMIT FOR FILING LAWSUIT TO FORECLOSE LIEN

A lien does not "bind the property" for longer than eight months. Wash. Rev. Code § 60.04.141. Thus, once a lien is recorded on property, it remains in effect for eight months and a lien claimant must file suit to foreclose on the lien within that time period. *Id.* In addition to the eight-month restriction, a lien claimant is also required to file suit to foreclose on a lien "not later than 90 days after the person has ceased to furnish labor, professional services, materials, or equipment." *Id.* As one court has noted, these statutory time period restrictions are effectively a statute of limitations upon the duration of a lien. *See Kinskie v. Capstin*, 44 Wash. App. 462, 464, 722 P.2d 876 (1986).

However, the statutory eight-month period for foreclosing on a recorded lien claim does not conclusively limit a claimant's underlying lien rights. *See Geo Exchange Systems, LLC v. Cam*, 115 Wash. App. 625, 65 P.3d 11 (2003). In *Geo Exchange*, the court noted that a lien claimant may "file successive liens so long as the claimant is still working or providing materials under the contract." *Id.* at 633. That is, even though a first lien may expire after eight months, the lien claimant may still revive amounts owed by filing a second lien. In keeping with the statute, however, the lien claimant must file a successive lien "no later than 90 days after the claimant completed the work on the project." *Id.*

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