



STATE OF WYOMING CONSTRUCTION COMPENDIUM OF LAW

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This outline is intended to provide a general overview of the existing construction law in Wyoming. It is important to note that much of the discussion from other state compendiums has either not been litigated in this state, or the existing interpretation is extremely limited. However, the issues that have been addressed by the Wyoming Supreme Court are outlined below. In addition, much of the law from Wyoming concerning construction has been decided in the contexts of mineral development, highway contracts and residential development.

Wyoming is a comparative fault state. Before the enactment of WYO. STAT. ANN. § 1-1-109 (2007), Wyoming's comparative fault statute, contributory negligence, assumption of risk, and the obvious danger rule acted as a bar to recovery. "With the advent of comparative negligence legislation, however, these contributory negligence rules became a basis for an apportionment of fault and no longer operated as a complete bar to recovery. Thus, if appellant was negligent, it was for the jury to measure the relative degrees of fault." *Roberts v. Estate of Randall*, 2002 WY 115, ¶ 18, 51 P. 3d 204, 211 (Wyo. 2002) (citing *Stephenson v. Pacific Power & Light Co.*, 779 P.2d 1169, 1179 (Wyo. 1989); *Barnett v. Doyle*, 622 P.2d 1349, 1361 (Wyo. 1981); *Brittain v. Booth*, 601 P.2d. 532, 534 (Wyo. 1979)).

I. Breach of Contract

Breach of contract cases in Wyoming generally involve either a contractor filing suit against a subcontractor, or a home buyer making a claim against the builder. This cause of action is governed by either a ten (10) year (written contract) or eight (8) year (oral contract) statute of limitations as indicated by WYO. STAT. ANN. § 1-3-105 (2015). The statute of limitations does not begin to run until the date of accrual or the completion of the project. Generally, before asserting a claim of this nature, one must complete his or her own obligations under the contract. *Scherer v. Schuler Custom Homes Constr.*, 2004 WY 109, 98 P.3d 159 (Wyo. 2004). To properly interpret contracts, courts in Wyoming must read the contract and then decide on the true intent of the parties based on the unambiguous language of the contract. *Reynolds v. Milatzo*, 2007 WY 104, ¶ 46, 161 P.3d 509, 513 (Wyo. 2007). The Wyoming Supreme Court has delineated that "the words used in the contract are afforded the plain meaning that a reasonable person would give to them." *Rogers v. Wright*, 2016 WY 10, ¶ 9 (Wyo. Jan. 22, 2016) (quoting *Doctors' Co. v. Insurance Corp. of America*, 864 P.2d 1018, 1023 (Wyo.1993)). The Court also determined that "when the provisions in the contract are clear and unambiguous, the court looks only to the "four corners" of the document in arriving at the intent of the parties." *Rogers v. Wright*, 2016 WY 10, ¶ 9 (quoting *Union Pacific Resources Co. [v. Texaco]*, 882 P.2d [212,] 220 [(Wyo.1994)]; *Prudential Preferred Properties [v. J and J Ventures]*, 859 P.2d [1267,] 1271 [(Wyo.1993)]. If there is no ambiguity, the contract will be enforced according to its terms. *Sinclair Oil Corp. v. Republic Ins. Co.*, 929 P.2d 535, 539 (Wyo.1996). An Owner is required to allow contractor an opportunity to perform remedial construction prior to bringing suit for breach of warranty of good workmanship for defects in new home where warranty provision specifically provided that contractor be given opportunity to correct any construction defects within one year of completion, and thus refusal to allow contractor to correct alleged deficiencies, when contractor

was ready and willing to do so, precluded breach of contract claim. *Simek v. Rocky Mountain, Inc.*, 977 P.2d 687 (Wyo. 1999).

A. **Implied Covenant Of Good Faith and Fair Dealing**

A breach of the implied covenant occurs when one party to the contract interferes or fails to cooperate in the other party's performance. In Wyoming, this doctrine may not be used to create new, independent rights or duties beyond those agreed by the parties. It must arise from the language used in the contract or be necessary to effectuate the parties' intentions. The Wyoming Supreme Court stated the implied covenant "requires that parties to a contract not commit an act that would injure the rights of the other party to receive the benefit of their agreement."."

Black Diamond Energy, Inc. v. Encana Oil & Gas (USA) Inc., 2014 WY 64, ¶ 56, 326 P.3d 904, 918 (Wyo. 2014) (citing *Scherer Const., LLC v. Hedquist Const., Inc.*, 2001 WY 23, ¶19, 18 P.3d 645, 654 (Wyo. 2001)). Compliance with the obligation to perform a contract in good faith requires that a party's actions be consistent with the agreed common purpose and justified expectations of the other party. *Black Diamond Energy*, 2014 WY 64, ¶ 56, 326 P.3d 904, 918. The covenant of good faith and fair dealing may not, however, be construed to establish new, independent rights or duties not agreed upon by the parties. *Black Diamond Energy*, 2014 WY 64, ¶ 56, 326 P.3d 904, 918.

In Wyoming it is possible to have a breach of the covenant of good faith and fair dealing without breaching the express terms of the contract. The evidence must show that the party went beyond its contractual rights which amounted to self-dealing or breach of community standards of decency, fairness and reasonableness, in order to effectuate a breach of the covenant of good faith and fair dealing. *City of Gillette v. Hladky Construction, Inc.*, 2008 WY 134, ¶ 32, 196 P.3d at 196-97 (Wyo. 2008).

II. **Negligence**

Much of the negligence law in Wyoming involving contractors has come from other contexts. In Wyoming, negligence claims frequently arise when either a subcontractor or contractor is injured because of another company's failure to maintain a safe working environment. Other Wyoming decisions involving negligence have come from design failure. Negligence claims in construction cases are infrequent due to the effect of the economic loss rule, see discussion in section VIII below.

To prove a negligence claim, the Plaintiff must show: “(1) the defendant[s] owed the plaintiff[s] a duty of reasonable care; (2) the defendant [s] breached the duty; and (3) the [defendants'] breach was the proximate cause of injury or loss to the plaintiff[s].” Rogers v. Wright, 2016 WY 10, ¶ 24 (quoting Halvorson v. Sweetwater County School Dist. No. 1, 2015 WY 18, ¶ 9, 342 P.3d 395, 398 (Wyo.2015)).

The determination of whether a duty exists is a question of law. D&D Transp., Ltd. v. Interline Energy Servs., Inc., 2005 WY 86, ¶ 18, 117 P.3d 423, 429 (Wyo. 2005) (quoting Erpelding v. Lisek, 2003 WY 80, ¶ 13, 71 P.3d 754, 757 (Wyo. 2003)).

Establishing whether a duty existed towards the person, persons, or the entity injured is a deciding factor. A “[d]uty may arise by contract, statute, common law, ‘or when the relationship of the parties is such that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff.’” Hatton, 2006 WY 151, ¶10 (quoting Hamilton v. Natrona County Educ. Ass'n, 901 P.2d 381, 384 (Wyo. 1995)). Negligence actions also contain comparative fault as a mechanism for limiting liability or establishing the amount of fault between the actors under WYO. STAT. ANN. § 1-1-109 (2013).

III. **Breach of Warranty**

A. Express Warranty

A claim for breach of warranty occurs when a plaintiff is not satisfied with the quality of workmanship contractually guaranteed by the contractor. The breach of warranty will be contained in the contract either expressly or impliedly in Wyoming.

Building or construction permits and contracts contain within them either an implied or express warranty that the work will be sufficient for a stated and known purpose and “will be performed in a skillful, careful, diligent, and workmanlike manner.” Matheson Drilling, Inc. v. Padova, 5 P.3d 810, 812 (Wyo. 2000) (citing Cline v. Sawyer, 600 P.2d 725, 732 (Wyo. 1979)).

Complete performance of a contract is proven by substantial performance of the contract. If minor defects exist at the time of complete performance, the defects will be corrected by the contractor at their expense. In Wyoming, a contractor cannot be held liable for damages caused by defects in the plans and specifications, as long as they completed the job in a workmanlike manner and in substantial compliance with those plans and specifications. Miller v. Rissler & McMurry Co., 794 P.2d 91 (Wyo. 1990).

The Wyoming Supreme Court has outlined a contractor’s duty to include areas such as, the employment of skill and care in the selection of materials and performance of their work, completion of the job in a workmanlike manner and substantially complying

with the owner's plans and specifications. These duties continue even after the completion of the project. *Lynch v. Norton Constr., Inc.*, 861 P.2d 1095, 1098 (Wyo. 1993) (citing *Miller*, 794 P.2d 91; *Reiman Constr. Co. v. Jerry Hiller Co.*, 709 P.2d 1271 (Wyo. 1985)).

Part of the duty of performing in a workmanlike manner is "the duty to warn the owner of defects in the project which would be likely to cause the work to fail if the contractor [knows] or reasonably should [know] of those defects." *Lewis v. Anchorage Asphalt Paving Co.*, 579 P.2d 532, 533 (Alaska 1978); see also 41 Am.Jur.2d *Independent Contractors* § 62 (2005). Two corollaries to this general rule are: (1) a contractor is not responsible for defects in the owner's plans and specification in the absence of some negligence on the contractor's part; and (2) the contractor has a duty to warn the owner of defects in subsurface conditions, where the contractor knows or should know of the defective conditions. *Three Way, Inc. v. Burton Enterprises, Inc.*, 2008 WY 18, ¶ 26, 177 P.3d 219, 228 (Wyo. 2008)

A cause of action for defective workmanship is available against a contractor either as breach of contract, negligence, or as individual actions in the same suit. *Cline v. Sawyer*, 600 P.2d 725, 732 (Wyo. 1979).

B. Implied Warranty of Habitability

Where a vendor builds new houses for the purpose of sale, the sale carries with it an implied warranty that it is constructed in a reasonably workmanlike manner and is fit for habitation. *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975). The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission. But major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution. *ID.*

Proving a breach of the warranty of this kind requires evidence of a violation of the standard of workmanship. 13 Am.Jur.2d *Building and Construction Contracts* §§ 12, 29 (updated Feb. 2015); *Carter v. Krueger*, 916 S.W.2d 932, 935 (Tenn.Ct.App.1995). As is also the case in tort actions, that in turn requires the testimony of someone with sufficient expertise to set out the appropriate standard of care and describe how the contractor fell below it. *Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Eng'rs*, 843 P.2d 1178, 1186 (Wyo.1992). One must produce witnesses who can identify an alleged construction defect with some particularity, show that the contractor's acts or omissions created the defect, and show that those acts or omissions derived from the contractor's failure to exercise, with respect to that specific defective aspect of the project, the level of skill and workmanship expected of others in his profession. *Hatch v. Walton*, 2015 WY 19, ¶ 29, 343 P.3d 390, 396 (Wyo. 2015)

The implied warranty of habitability can be waived by unambiguous language in the contract that the transfer of property is “AS IS”, “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty. *Greeves v. Rosenbaum*, 965 P.2d 669, 672 (Wyo. 1998).

The measure of damages [for breach of implied warranty of habitability and fitness] is the cost of repair but may also include diminished value of the property.” *Deisch v. Jay*, 790 P.2d 1273, 1277 (1990). In *Deisch*, we left the door open to either cost of repair or diminution in market value, depending on the nature of the injury, noting, “these kinds of damages cannot be determined with mathematical precision and may be inherently uncertain. All that is required is that they be determined with a reasonable degree of certainty based upon the evidence adduced and the nature of the injury.” *Legacy Builders, LLC v. Andrews*, 2014 WY 103, ¶ 32, 335 P.3d 1063, 1071 (Wyo. 2014)

An Owner is required to allow contractor an opportunity to perform remedial construction prior to bringing suit for breach of warranty of good workmanship for defects in new home where warranty provision specifically provided that contractor be given opportunity to correct any construction defects within one year of completion, and thus refusal to allow contractor to correct alleged deficiencies, when contractor was ready and willing to do so, precluded breach of contract claim. *Simek v. Rocky Mountain, Inc.*, 977 P.2d 687 (Wyo. 1999).

IV. Misrepresentation and Fraud

As a basis for misrepresentation and fraud, Wyoming has adopted the view presented in the *Restatement of Torts (Second)* § 552, which states: “[f]alse information supplied in the course of one's business for the guidance of others in their business, failure to exercise reasonable care in obtaining or relating the information, and pecuniary loss resulting from justifiable reliance thereon.” *Restatement of Torts (Second)* § 552 (1977).

However, the Wyoming Supreme Court has held that § 552 will not be used as a method to avoid one’s obligations under a contract, nor will it provide a scapegoat for self-inflicted damages. In addition, “when the plaintiff has contracted to protect against economic liability caused by the negligence of the defendant, there is no claim under *Restatement of Torts (Second)*, supra, § 552 for purely economic loss.” *Rissler & McMurry Co. v. Sheridan Area Water Supply*, 929 P.2d 1228, 1235 (Wyo. 1996). The case

encourages parties to negotiate the terms and limits of liability in a contractual situation and holds parties to the terms of the contract.

In order to prevail on an intentional misrepresentation claim, the Plaintiff must demonstrate by clear and convincing evidence that “1) the defendant[s] made a false representation intending to induce action by the plaintiff[s]; 2) the plaintiff[s] reasonably believed the representation to be true; and 3) the plaintiff[s] suffered damages in relying on the false representation.” *Rogers v. Wright*, 2016 WY 10, ¶ 13 (quoting *Claman*, ¶ 43, 279 P.3d at 1016; see also *Alexander v. Meduna*, 2002 WY 83, ¶ 8, 47 P.3d 206, 211 (Wyo.2002)). Disclaimer and merger clauses in a contract will negate any intentional misrepresentation claim if clear and unambiguous. *Id.* When considering whether clear and convincing evidence has been presented, the Wyoming Supreme Court has recognized, “[c]onduct or words which tend to produce an erroneous impression may satisfy the plaintiff's burden. ***In addition, even if someone is not under a duty to speak, if he does speak, he is under a duty to speak truthfully and to make a full and fair disclosure.*** Reliance is reasonable when false representations have occurred prior to the execution of the contract which is sought to be avoided or for which damages are sought to be recovered.” *Rogers v. Wright*, 2016 WY 10, ¶ 13 (quoting *Claman*, ¶ 43, 279 P.3d at 1016) (emphasis in original).

V. Strict Liability

While strict liability has been adopted in Wyoming, it is extremely limited in its application and utilized primarily in the sale of equipment. In a suit alleging strict liability, the plaintiff must prove the product was defective when sold. This burden on the plaintiff may be difficult as defects with the product may not become known until after the fact. Wyoming courts have consistently ruled that strict liability does not apply in construction contracts since there are other alternatives for recovery. However, Wyoming has adopted the five elements necessary to a cause of action for strict liability as set forth in *Restatement (Second) of Torts* § 402A (1965), and reiterated in *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 344 (Wyo. 1986):

- (1) That the sellers were engaged in the business of selling the product that caused the harm;
- (2) that the product was defective when sold;
- (3) that the product was unreasonably dangerous to the user or consumer;
- (4) that the product was intended to and did reach the consumer without substantial change in the condition in which it was sold; and

- (5) that the product caused physical harm to the plaintiff/consumer.

VI. **Negligent Selection of Independent Contractors**

Historically in Wyoming, “one who employs an independent contractor is not generally liable for the contractor’s negligent acts.” *Singer v. New Tech Engineering LP*, 227 P.3d 305, 309 (Wyo. 2010). This concept frequently prevented a general contractor, or upper tier subcontractor, from being responsible for the means and methods used by its subcontractors if they caused bodily injury to another subcontractor or person on the job site. In *Basic Energy Services, LP v. Petroleum Resource Management, Corp*, 2015 WL 691339 (Wyo. 2015), the Wyoming Supreme Court changed this rule when it adopted Restatement (Second) of Torts § 411 (1965) which states:

Negligence in Selection of Contractor

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

- (a) To do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
- (b) To perform any duty which the employer owes to third persons.

VII. **Indemnity**

Much of the case law in Wyoming has dealt with third-party beneficiary indemnity rather than express, implied, or comparative indemnity. There is no clear-cut explanation as to why there is limited case law on the other three. However, express and implied indemnity has been explained in various cases that were decided involving third-party beneficiary indemnity.

As a general rule, “[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.” *Schneider Nat., Inc., v. Holland Hitch Co.*, 843 P.2d 561, 572 (Wyo. 1992) (citing *Restatement of Restitution* § 76 (1937)).

“A prerequisite to a claim for indemnity is the existence of an independent legal relationship under which the indemnitor owes a duty either in contract or tort to the indemnitee apart from the joint duty they owe to the injured party. The independent relationship may be established by an express indemnity agreement, indemnity implied from contract, or indemnity imposed by equitable considerations. Where there is an express indemnity provision, its parameters are derived from the specific language...”

Diamond Surface, Inc. v. Cleveland, 963 P.2d 996, 1002 (Wyo. 1998) (quoting *Schneider Nat., Inc.*, 843 P.2d at 572-73) (internal quotations omitted).

In *Richardson Associates v. Lincoln-Devore, Inc.*, 806 P.2d 790, 811-14 (Wyo. 1991), the Wyoming Supreme Court acknowledged three classifications for indemnity actions which reflect the prior relationship of the parties, frame the nature of the duties between the parties and limit the availability of indemnity. Express indemnity is derived from the specific language of a contract. *Wyoming Johnson, Inc. v. Stag Industries, Inc.*, 662 P.2d 96, 99 (Wyo. 1983). Implied contractual indemnity, also known as implied in fact indemnity, comes from the relationship, contractual or legal, implied between the parties. *Gainsco Ins. Co. v. Amoco Production Co.*, 53 P.3d 1051, 1067 (Wyo. 2002). Finally, equitable implied indemnity is created by a relationship implied in law between the person seeking indemnity and the person from whom indemnity is sought for a negligent or tortious act. See *Miller v. New York Oil Co.*, 243 P. 118, 121-23 (Wyo. 1926).

In reaching the decision in *Wyoming Johnson, Inc. v. Stag Industries, Inc.*, 662 P.2d 96, 99 (Wyo. 1983), the Wyoming Supreme Court stated the applicable law:

“‘A contract of indemnity purporting or claimed to relieve one from the consequence of his failure to exercise ordinary care must be strictly construed. Accordingly, it is frequently stated as the general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it. Mere general, broad, and seemingly all-inclusive language in the indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee's own negligence. It has been so held, for instance, with regard to the words any and all liability.’ 41 Am. Jur. 2d, Indemnity, §15, pp. 669-70 (1968).

‘Where the injury was caused by the concurrent negligence of the indemnitor and the indemnitee, the courts have frequently read into contracts of indemnity exceptions for injuries caused in part by the indemnitee, although there is authority to the contrary. Even the fact that the contract requires the indemnitor to hold the indemnitee harmless from damage caused by the indemnitor’s ‘negligent acts and omissions’ has been held insufficient to make the indemnity clause applicable in a case where the indemnitee’s negligence concurred with that of the indemnitor to cause the injury.’ 41 Am. Jur. 2d, Indemnity, § 16, pp. 703-04 (1978).

“Generally, contracts excusing one from the consequences of his own acts are looked upon with disfavor by the courts. Therefore, an agreement for indemnity is construed strictly against the indemnitee, especially when the indemnitee was the drafter of the instrument. If the indemnitee means to toss the loss upon the indemnitor for a fault in which he himself individually shares, he must express that purpose beyond any possibility of doubt. The test is whether the contract language specifically focuses attention on the fact that by the agreement the indemnitor was assuming liability for indemnitee's own negligence.” *Wyoming Johnson, Inc.*, 662 P.2d at 99 (internal citations omitted).

A. **Third-Party Indemnity**

In actions for equitable implied indemnity premised on the negligent breach of a duty between the indemnitor and the indemnitee, indemnity liability is allocated among the parties to the third-party claim proportionately to their comparative degree of fault. *Schneider Nat. Inc.*, 843 P.2d at 578-79.

Under this modified or partial form of equitable implied indemnity, the distinctions of ‘active’ and ‘passive’ negligence are factors to be weighed by the jury in assessing the percentage of fault of the parties to the third-party claim. Typically, a jury would be instructed, in a third-party action, that if the third-party defendant is found to have performed certain acts or omissions constituting negligence for which indemnity is permitted as a matter of law and those acts or omissions contributed to cause the injuries and damage to the original plaintiff, then the third-party plaintiff should be awarded partial indemnity, which is stated in *Restatement of Torts (Second)*, § 866B (2) (1979)[sic 886B (2)]. The partial indemnity award is a proportion of the total sum paid by the third-party plaintiff to the original plaintiff corresponding to the degree of fault of the third-party defendant.

Schneider Nat. Inc., 843 P.2d at 578-79.

To state a claim for equitable implied indemnity, the third-party plaintiff must prove: (1) an independent legal relationship with the third-party defendant; (2) negligent breach by the third-party defendant of the duty created by the independent relationship; (3) under circumstances falling within the situations addressed in *Restatement of Torts (Second)* § 886B(2); and (4) that the breach of

the duty to the third-party plaintiff contributed to cause the injuries and damage to the original plaintiff. *Schneider Nat. Inc.*, 843 P.2d at 578-79. Equitable implied indemnity actions under *Restatement of Torts (Second)*, *supra*, at § 886B can be brought on theories of negligence, strict liability, or breach of warranty. The nature of the indemnity relief available will differ depending upon the theory of liability expressed. *Schneider Nat., Inc.*, 843 P.2d at 575-579.

In other words, in order to fully apportion the ‘fault’ of an ‘actor’ who is a third-party defendant [the indemnitor] where each of these elements are present, the jury must consider the consequences arising from two separate claims: (1) the breach of duty of all the actors to the plaintiffs in the original suit, and (2) the breach of an independent duty to the third-party plaintiff [the indemnitee]. If a third-party claim is not allowed, the jury will not have an opportunity to determine whether the third-party defendant (the indemnitor) negligently breached a separate duty to the third-party plaintiff (the indemnitee), and whether **that breach of duty** is the source of some, or all, of the damages owed by the third-party plaintiff to the original plaintiffs. Consequently, unless the third-party claim is viable, a third-party defendant is unjustly enriched to the extent that its negligent performance of duties owed to the third-party plaintiff is not determined in the underlying action.

Diamond Surface Inc., 963 P.2d at 1003 (emphasis in original).

VIII. Statute of Limitations

The statute of limitations in Wyoming for any action based on contract is governed by WYO. STAT. ANN. § 1-3-105 (2015). It explicitly states that any action based on contract signed in writing shall be governed by a ten-year statute of limitations, while any action based on an express or implied contract not in writing shall be an eight-year statute of limitations.

It is important to note that contracts involving any governmental entity are governed by the Wyoming Governmental Claims Act. In accordance with WYO. STAT. ANN. 1-39-113(a), “[n]o action shall be brought under this act against a governmental entity unless the claim upon which the action is based is presented to the entity as an itemized statement in writing within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the

alleged act, error or omission was: (i) Not reasonably discoverable within a two (2) year period; or (ii) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.”

IX. Economic Loss Doctrine

In Wyoming, the “economic loss” doctrine bars recovery in tort when a plaintiff claims purely economic damages unaccompanied by physical injury to a person or property. “The purpose of the ‘economic loss rule’ is to maintain the distinction between those claims properly brought under contract theory and those which fall within tort principles.” *Rissler & McMurry Co.*, 929 P.2d at 1235 (Wyo. 1996). The law of contracts is designed to protect the expectations bargained for in a contract, while tort law protects persons and property from losses resulting from injury. *Id.* As pointed out in *Rissler*, the rule is “founded on the theory that parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover for damages caused by a breach of the contract.” *Id.* at 1235 (quoting *South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp.*, 826 F.Supp. 1549, 1557 (D.S.C.1993)). The rule has barred tort recovery even against an engineer or other design professional with which the contractor is not in contractual privity. *Excel Const., Inc. v. HKM Eng’g, Inc.*, 2010 WY 34, ¶ 18, 228 P.3d 40, 46 (Wyo. 2010).

The rule, however, does not apply in all tort claims alleging only pecuniary damages; “tort liability may still be premised on a duty independent of contractual duties.” *Id.*

X. Emotional Distress Claims

The Wyoming Supreme Court has permitted recovery for emotional distress as an element of damages in certain underlying actions. Examples of which include some intentional torts, violation of certain constitutional rights, and the breach of the covenant of good faith and fair dealing prior to 1997. Outside of these few instances, the Wyoming Supreme Court has adhered to the general idea that negligence permits recovery for personal injury or property damage, but usually will not result in liability for emotional distress.

In *Blagrove v. JB Mechanical, Inc.*, 934 P.2d 1273 (Wyo. 1997), the Court adhered to the general rule, which precludes emotional distress damages in connection with property damage. The Court found the legislature never intended to abrogate the rule and thus permit emotional distress damages for property damage. *Id.* at 1277.

The Wyoming Supreme Court has adopted *Restatement (Second) of Contracts* § 205 and held that parties to a commercial contract may bring a claim for breach of the implied covenant of good faith and fair dealing based on a contract theory. A significant number of contracts in Wyoming already have a covenant of good faith imposed by statutory operation. All contracts coming under the ambit of the Uniform Commercial

Code have an obligation of good faith imposed in performance or enforcement. Moreover, the Court has said that “it would be incongruous to allow a significant portion of commercial contracts in this state to be governed by an implied covenant of good faith while denying the same to all others.” *Scherer Constr., LLC*, 2001 WY 23, ¶ 24, 18 P.3d at 655 (Wyo. 2001).

XI. Delay Damages

Delay can be either established in the contract itself or within a reasonable amount of time after the signing of the contract. “Where, as here, no time for performance is specified in a contract, the law implies performance must be within a reasonable time, and what is a reasonable time depends upon the circumstances of each case . . . What constitutes a reasonable time in any particular case is a question of fact.” *G.C.I., Inc. v. Haught*, 7 P.3d 906, 909 (Wyo. 2000). Delay damages may be specified in the contract or determined by the amount incurred to fix the breach of contract along with reasonable additional costs incurred.

In *Brashear v. Richardson Constr., Inc.*, 10 P.3d 1115, 1118 (Wyo. 2000), the Wyoming Supreme Court stated “[l]iquidated damages can be drafted to apply whenever work is begun and a specific amount of time is allowed for the work to be completed.” The contract in this case provided for change orders and extensions of time. However, neither party used those remedies to alter the explicit terms of the contract when the deadline date passed. *Id.*

In *Frost Constr. Co. v. Lobo, Inc.*, 951 P.2d 390 (Wyo. 1998), the Wyoming Supreme Court allowed Frost Construction to recover the amount of damages suffered as a result of the delay from Lobo in not performing its obligations under the contract. The Court allowed damages for the costs associated therewith finding a different company to perform those obligations in addition to the other costs involved.

In *City of Gillette*, 2008 WY 134, ¶¶ 44, 50, 196 P.3d at 201 (Wyo. 2008) the Wyoming Supreme Court held that a version of the American Institute of Architects (AIA) provision 8.3.1 is not an example of a “no damage for delay” clause. The provision states:

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either ... or by changes ordered in the Work ... or other causes beyond the Contractor's control, ... then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

The Supreme Court stated that parties may contract out of delay damages, but that this language was not specific enough to achieve that result. The Court instructed that the contract must clearly state what “sole and exclusive” remedies for a delay will be

available. If the contract is not specific then other contract remedies will be available, including contract damages. *City of Gillette*, 2008 WY 134, ¶ 50, 196 P.3d at 201.

XII. Damages

“While damages may not be calculable with absolute certainty, they should be susceptible of ascertainment within a reasonable degree of certainty and if there is evidence from which a reasonable estimate of money damages may be made that is sufficient, the primary objective being to determine the amount of loss, applying whatever rule is best suited to that purpose.” *Douglas Reservoirs Water Users Assoc. v. Cross*, 569 P.2d 1280, 1284 (Wyo. 1977) (citing *Wheatland Irrigation District v. McGuire*, 562 P.2d 287 (Wyo. 1977)). “The proper measure of damages is the amount of the contractor’s extra costs directly attributable to the...breach []. Obviously, the preferable method for calculating such losses would be to itemize and total the cost of each piece of equipment or material and each man hour necessitated by the unanticipated conditions encountered in performing the contract. Such exactness is not always possible or necessary.” *Frost*, 951 P.2d at 397.

The *City of Gillette* case also stated that while the total cost method of calculating damages is not preferred in Wyoming, it is available under certain circumstances. The total cost method compares the actual costs incurred, plus profit, to the bid amount and seeks the difference. It is disfavored because it attributes all responsibility to the owner without establishing a clear causal connection between the breach and the increased costs. The preferred method of calculating breach of contract damages is to itemize the extra costs directly caused by the breach. However, where such precise itemization is not possible, use of the total cost method is permissible if the breach substantially affected performance and the contractor proves the requisite elements. *City of Gillette*, 2008 WY 134, ¶¶ 51-53, 196 P.3d at 202 (citing *Frost*, 951 P.2d at 398).

A. Direct

Damages as a result of the breach of contract are recoverable in Wyoming. Generally, the amount receivable from the breach will be the amount spent to correct the breach or finish the job minus the agreed upon contract amount. If the liquidated damages are easily identifiable, the courts will use that figure as the amount recoverable because of the breach. Wyoming applies the Restatement (Second) of Contracts § 348 to determine contract damages. *Graham v. State*, 2001 WY 5, ¶ 10, 16 P.3d 712, 715 (Wyo. 2001). That section provides:

(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on

(a) The diminution in the market price of the property caused by the breach, or

(b) The reasonable cost of completing performance or of remedying defects if that cost is not clearly disproportionate to the probable loss in value to him.

Generally, the lesser of two measures of damage – cost of repair or diminution in value – should generally be awarded for breach of contract and breach of warranty. *Legacy Builders, LLC v. Andrews*, 335 P.3d 1063, 1067 (Wyo. 2014). However, when the defendant has failed to present diminution of value evidence, cost of repair damages can be awarded even when they may be disproportionate. *Id.*

Damages for a breach of contract may include recovery for incidental or consequential loss caused by the breach, as long as such damages are a foreseeable result of the breach. *See JBC of Wyoming Corp. v. City of Cheyenne*, 843 P.2d 1190, 1195 (Wyo.1992); *see also* Restatement (Second) of Contracts, §§ 347, 351 (1981).

B. **Punitive**

As a general rule, exemplary damages are not recoverable in actions for breach of contract. *Waters v. Trenckmann*, 503 P.2d 1187, 1188-89 (Wyo. 1972).

C. **Attorney's Fees**

Attorney's fees are recoverable in actions based on contract in Wyoming if recovery of attorney's fees is permitted under the contract. If damages are awarded, the attorney fees will also be added onto the amount awarded for all damages. The attorney fees claimed have to be reasonable. *City of Gillette*, ¶ 51, 196 P.3d at 213.

The test for reasonableness of attorney's fees was announced in *Alexander v. Meduna*, 2002 WY 83, ¶ 49, 47 P.3d 206, 221 (Wyo. 2002). In addition to following the American rule as to when attorney's fees may be awarded, Wyoming also has adopted the two-factor federal lodestar test to determine the reasonableness of the award:

To determine the reasonableness of the attorneys' fees award, Wyoming employs the two-factor federal lodestar test. These factors are: (1) whether the fee charged represents the product of reasonable hours times a reasonable rate; and (2) whether other factors of discretionary application should be considered to adjust the fee either upward or downward. It follows there from that the trial court's determination concerning attorney's fees is reviewed under an abuse of discretion standard.

D. **Expert Witness Fees and Costs**

WYO. STAT. ANN. § 1-14-102 (2015) establishes the standard for expert witness fees and costs associated with having them testify. In civil cases, expert witnesses may be called to testify. If the court finds the witness qualifies as an expert and their testimony is admitted as evidence, the expert witness shall be allowed witness fees of twenty-five dollars per day or such amount as the court allows under the circumstances. Expert witness fees may also be charged as costs against any party or be apportioned among some or all parties by discretion of the court. Under § 1-14-102 (a)(iii) mileage is includable at the rate set in WYO. STAT. ANN. § 9-3-103 (2015) for each mile actually and essentially traveled in going to and returning from where the trial is taking place.

XIII. Insurance Claims

A. Occurrences That Trigger Coverage

Occurrence in CGL policies has been defined as an accident, which includes the continuous or repeated exposure to the same harmful conditions. Wyoming has defined the term “accident” as a “fortuitous circumstance, event, or happening, an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; chance or contingency; fortune; mishap; some sudden and unexpected event taking place without expectation, upon the instant rather than something which continues, progresses or develops.” *Reisig v. Union Ins. Co.*, 870 P.2d 1066, 1070 (Wyo. 1994) (citing *Wright v. Wyoming State Training Sch.*, 255 P.2d 211, 218 (Wyo. 1953)). The term accident is included in many, if not all CGL policies.

B. Bodily Injury

Typically, CGL policies have defined bodily injury as meaning “bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.” See *First Wyoming Bank v. Cont’l Ins. Co.*, 860 P.2d 1094, 1098 (Wyo. 1993).

C. Property Damage

Property damage in CGL policies typically means “(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting there from, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is cause by an occurrence during the policy period.” *First Wyoming Bank*, 860 P.2d at 1098-99.

D. Defective Workmanship

A Completed Operations Hazard policy can be obtained which “insures against liability for damages to person or property that occur after the operation is completed. This type of coverage differs from regular liability coverage for damages resulting on or off premises in that it insures against defective workmanship. A policy which excludes coverage on defective workmanship

normally does so by specifying the exclusion.” *Aetna Ins. Co. v. Lythgoe*, 618 P.2d 1057, 1065 (Wyo. 1980).

XIII. Contractor or Materialmen Liens

A. Introduction

Wyoming’s Lien Laws can be found at WYO. STAT. ANN. § 29-1-101 through § 29-8-109. Wyoming Law recognizes several different types of liens, Contractors/Materialman’s liens, Oil & Gas Liens, Agricultural liens, and other miscellaneous liens related to storage, attorney’s fees and irrigation liens.

There have been several legislative changes to Wyoming’s lien statutes. Such changes became effective July 1, 2011. If you have questions about those changes please contact an attorney licensed to practice in Wyoming. This treatise will highlight Contractors/Materialman’s liens as the most common type utilized in the construction area. Please note, not all aspects of Wyoming’s Contractor or Materialmen liens will be discussed. Also, please be aware that if the work was done on cooperative utilities, an oil and gas property, on agricultural land or irrigation systems, different lien rights and procedures may apply.

B. Preliminary Notice

The most important aspect of filing a claim for a Contractor’s lien is notice. If the notice requirements are not met, there will be no lien. The notice must also meet certain substantive and delivery requirements. Lien rights in Wyoming are statutorily created and strict compliance with the statute is required to properly perfect a lien.

There are several notice requirements contained within the newly enacted Wyoming Statutes. First, a preliminary notice is required. WYO. STAT. ANN. § 29-2-112 (2015). Any party working on the property must send written notice to the record owner of the right to assert a lien against the property for which services or materials are provided in the event such party is not paid. Such notice must also inform the owner or contractor to obtain a lien waiver upon payment for services or materials. Each subcontractor and materialman shall provide a copy of the written notice to the contractor.

For contractors, the notice must be sent before receiving any payment from the owner, including advances. For subcontractors or materialmen, the notice must be sent within thirty (30) days after first providing services or materials to the project.

An example form for the preliminary notice is provided in WYO. STAT. ANN. § 29-10-101.

C. **Notice of Intent to Lien**

If the above preliminary notice is provided, and the work is performed but not paid, the next step for a contractor to secure his lien rights is to provide a “Notice of Intent to File Lien” pursuant to WYO. STAT. ANN. § 29-2-107. Such notice must be sent no later than twenty (20) days prior to filing the lien. An example form for the notice of intent to file lien is provided in WYO. STAT. ANN. § 29-10-102.

D. **Lien Statement**

Once the property owner has been provided notice and there is still non-payment, the filing party may then commence the process of obtaining a lien on the subject property. It is important to know the County in which the property is located, to obtain a title opinion reciting all interest holders in the property and have an accurate legal description.

To perfect a lien on the property, a “Lien Statement” sworn to in front of a notary public must be filed in the county real estate records in which the property is located. WYO. STAT. ANN. § 29-1-312.

Under Wyoming’s newly enacted statutes, any contractor asserting a lien shall file the “Lien Statement” within one hundred fifty (150) days and every other person (including subcontractors or materialmen) shall file within one hundred twenty (120) days of the earlier of:

- The last day when work was performed or materials furnished;
- From the date of substantial completion of the project;

WYO. STAT. ANN. § 29-2-106. With respect to a subcontractor, timing may begin to run after the last day work was performed at the direction of the contractor. Also, timing may begin to run for both contractors and subcontractors if the owner files a notice of substantial completion.

The “Lien Statement” must contain the following information:

- (i) The name and address of the person seeking to enforce the lien;
- (ii) The amount claimed to be due and owing;

- (iii) The name and address of the person against whose property the lien is filed;
- (iv) An itemized list setting forth and describing materials delivered or work performed;
- (v) The name of the person against whom the lien claim is made;
- (vi) The date when labor was last performed or services were last rendered or the date when the project was substantially completed;
- (vii) The legal description of the premises where the materials were furnished or upon which the work was performed; and
- (viii) A copy of the contract, if available.

A form of Wyoming's "Lien Statement" is available at WYO. STAT. ANN. § 29-10-104. Additionally, although not specifically addressed in the lien statutes, a form for notice of filing lien is available at WYO. STAT. ANN. § 29-10-103.

E. Complaint to Foreclose

Once filed with the County Real Estate Records, the Lien is effective and will endure for 180 days. If payment is not made during that time, prior to 180 days, a Complaint to Foreclose the lien must be filed in the District Court for the county in which the real property is located. WYO. STAT. ANN. § 29-2-109. The Complaint should allege a cause of action for foreclosure of the lien and sale of the property according to law and could also include direct claims for breach of contract, unjust enrichment or other alternate claims as appropriate. The action will proceed as any other, and if successful the lien claimant could force a sale of the property by the Sheriff and collect and apply the proceeds to the debt and costs incurred. WYO. STAT. ANN. § 29-2-103.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.