INDIANA STATE BAR ASSOCIATION
BIG 10 CONSTRUCTION & SURETY LAW CLE
CONSTRUCTION CONTRACTING WITHOUT BORDERS
MARCH 10-11, 2016

OHIO CONSTRUCTION LAW OVERVIEW

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I. Breach of Contract

A. Claims by Contractor

i. Standard – To recover damages for breach of contract under Ohio law, a plaintiff must demonstrate by a preponderance of the evidence: (1) that a contract existed; (2) that the plaintiff fulfilled his obligations; (3) that the defendant failed to fulfill his obligations; and (4) that damages resulted from this failure. *Lawrence v. Lorain Cty. Community College*, 127 Ohio App. 3d 546, 548-549, 713 N.E.2d 478 (1998); *J.J.O. Constr., Inc. v. Baljak*, 10th Dist. Franklin No. 06AP-1300, 2007-Ohio-4126, ¶6 (where contractor successfully asserted breach of contract claim against owner for owner's failure to obtain the necessary permits and inspections from the city.); *Burroughs Framing Specialists v. 505 W. Main St., LLC*, 2014-Ohio-3961, 18 N.E.3d 1253, ¶1 (Ohio Ct. App., Ottawa County) (contractor's breach of contract claim was successful where owner failed to pay contractor $92,206.01 for work performed under the contract.) Further, the Spearin Doctrine provides that a contractor has a right to expect complete, accurate, and buildable plans from the owner and may recover its damages resulting from the owner's failure to meet this obligation. *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs.,* 113 Ohio St. 3d 226, 2007-Ohio-1687, 864 N.E.2d 68, ¶1.

Ohio's Fairness in Contracting Act, R.C. 4113.62(C)(1), provides additional protection for contractors against owners in breach; the Ohio statute voids any contract provisions that preclude an owner's liability for delay when the delay is caused by the owner's act or failure to act.

ii. Measure of Damages – Generally, Ohio courts measure damages for breach of contract in construction cases based on the actual loss incurred by a party; this method follows the assessment of damages in standard breach of contract cases under Ohio law, where the court identifies direct costs that can be tied to specific delay or change in construction. "The general measure of damages for a breach of contract is the amount necessary to place the non-breaching party in the position he or she would have been had the breaching party fully performed under the contract." *Watershed Mgmt., LLC v. Neff,* 4th Dist. Pickaway Case No. 10CA42, 2012-Ohio-1020, ¶33, citing *F. Enters., Inc. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154, 351 N.E.2d 121 (1976). In other words, plaintiffs are

entitled to those damages which "arise naturally from the breach of the contract, or such as may reasonably . . . have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach." *W & W Dev. Co. v. Hedrick,* 8th Dist. No. 73965, 1999 Ohio App. LEXIS 1679, *19 (Apr. 15, 1999).

B. Claims by Owner

i. Standard – To prevail on a breach of contract claim against a contractor, the owner must prove the following: a contract did indeed exist, the owner performed, the contractor breached the contract, and the owner suffered damages. *See Regency Ctr. Dev. Co. v. Constr. Dimensions, Inc.,* 8th Dist. Cuyahoga NO. 81171, 2003-Ohio-5067, ¶57.

Ohio law requires the owner to prove material breach in order to recover under breach of contract: "mere nominal, trifling or technical departures are not sufficient to constitute breach." *Hansel v. Creative Concrete & Masonry Constr. Co.,* 148 Ohio App. 3d 53, 2002-Ohio-198, 772 N.E.2d 138 (10th Dist.). In *Hansel*, the court noted that a contractor does not breach a contract "when the unperformed or wrongfully performed work does not destroy the value or purpose of the contract." *Id* at 56. Ohio courts will allow proof of substantial performance in most cases. *Enterprise Roofing & Sheet Metal Co. v. Howard Inv. Corp.,* 105 Ohio App. 502, 152 N.E.2d 807 (1957).

Interrelated to an owner's breach of contract claim in Ohio is any claim alleging failure to properly perform under the contract. *Watershed Mgmt., LLC v. Neff* at ¶34. "It is well settled that [Ohio] law imposes a duty on builders to construct [improvements] in a 'workmanlike manner.'" *Simms v. Heskett* 4th Dist. No. 00CA20, 2000 Ohio App. LEXIS 4325 (Sept. 18, 2000). It used to be the case that, in Ohio, an action to recover from a contractor who failed to perform in a workmanlike manner was only a separate cause of action for negligence. *See Velotta v. Leo Petronzio Landscaping, Inc*., 69 Ohio St.2d 376, 378-379, 433 N.E.2d 147 (1982). But the Ohio Supreme Court refined this standard - now, when there is a contract for future construction or services, a claim for the breach of workmanlike duty "arises ex contractu." *Kishmarton v. William Bailey Constr., Inc.,* 93 Ohio St.3d 226, 229, 2001-Ohio-1334, 754 N.E.2d 785; *see also Vistein v. Keeney*, 71 Ohio App.3d 92, 105, 593 N.E.2d 52 (1990).

ii. Measure of Damages

a. Measure of Damages - Contractor Non-Performance – Ohio courts have established that "the increased cost of performance of a contractual term does not excuse non-performance [by contractor]." *Fine v. U.S. Erie Islands Co.,* 6th App. Dist. No. OT-07-048, 2009-Ohio-1531, ¶28. "[F]acts existing when a bargain is made or occurring thereafter making performance of a promise more difficult or expensive than the parties anticipate, do not prevent a duty from arising or discharge a duty that had arisen.'" *Id.* citing

Richards v. Hidden Valley, 8th Dist. No. 43486, 1981 Ohio App. LEXIS 10946 (Dec. 17, 1981).

In addition to damages for "actual loss" awarded to owners suing for nonperformance, specific performance may also be awarded if a valid enforceable contract was breached. In these situations, "[t]he court's goal is to carry out what the parties had intended to do under the contract." *Sandusky Properties v. Aveni*, 15 Ohio St.3d 273, 276, 473 N.E.2d 798 (1984). "[A]n action for specific performance, any accounting that might be ancillary to it, and the award of any damages that may under the circumstances appear to be necessary, are matters in equity and may be determined by the trial court in its sound discretion." *Sandusky Properties* at 274. Ohio courts have enumerated several requirements for determining whether to award specific performance. These requirements include: "The contract must be concluded, certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; and finally, it must be capable of specific execution through a decree of the court." *Fine v. U.S. Erie Islands Co.* at ¶30, citing *Roth v. Habansky,* 8th Dist. No. 82027, 2003-Ohio-5378, ¶16.

Finally, owners may be able to recover against contractors for damages related to emotional distress due to non performance. *Kishmarton v. William Bailey Constr., Inc.,* 93 Ohio St. 3d 226, 229, 2001-Ohio-1334, 754 N.E.2d 785 (2001) ("Emotional distress injuries are injuries for which our Constitution guarantees a right to a remedy [and] it is reasonable to allow emotional distress damages because some contract breaches cause them.")

b. Measure of Damages - Defects in Contractor's Work – In general, where defects may be remedied by the owner at a reasonable expense, damages are measured by the cost of remedying such defect. *Daniels v. Albert J. Corey Co.*, 2 Ohio App.2d 297, 298, 208 N.E.2d 150 (1965). More specifically, under Ohio law, the owner's damages "are measured by the cost of putting the building in the condition in which it would have been if [the contractor] would have properly performed." *Scheider-Dietrich, Inc. v. Bowling Green State Univ.*, 61 Ohio Misc.2d 52, 57, 573 N.E.2d 798, 802 (1989). "The owner of the structure is entitled to the proper performance of the contract." *Platner v. Herwald*, 20 Ohio App.3d 341, 342, 486 N.E.2d 202 (1984); *see also Sites v. Moore*, 79 Ohio App.3d 694, 702, 607 N.E.2d 1114 (1991) (the owner of the defectively constructed structure is "entitled to have what [it] contracted for or its equivalent"); *Daniels* at 299 ("the owner is entitled to recover the full reasonable cost of eliminating the defect").

However, if the cost of eliminating the defect "will involve *unreasonable economic waste*, damages are measure by the difference between the market value that the structure contracted for would have had and that of

the imperfect structure received by the plaintiff." *Ohio Valley Bank v. Copley*, 121 Ohio App.3d 197, 210, 699 N.E.2d 540 (1997) (emphasis added). Further, as explained above, when a contractor breaches its workmanlike duty, the proper measure of damages is the cost of repair. *Jarupan v. Hanna,* 173 Ohio App. 3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶1 (Ohio Ct. App., Franklin County). "The repair of deficient work may involve both additional activities necessitated by the deficient work, and activities previously omitted, but necessary, to proper performance in a workmanlike manner." *Id.*

c. Forum Selection – Under Ohio's Fairness in Contracting Act, R.C. §4113.62(D)(1) & (2), all disputes concerning Ohio construction projects must be litigated in Ohio, subject to the laws of Ohio, regardless of the choice of law provision or forum selection clause in the contract. These statutory requirements cannot be waived. *See* R.C. 4113.62(D). Ohio courts have held that the Act effectively prohibits out-of-state forum selection clauses in construction contracts between two out-of-state companies when the contract is for work done in Ohio. *E.g., Michels Corp. v. Rockies Express Pipeline LLC,* 2015-Ohio-2218, 34 N.E.3d 160 (7th Dist.).

II. Negligence

A. Standard – A claim for negligence in Ohio is made up of three basic elements: (1) the existence of a duty; (2) a breach of that duty; and (3) an injury, the proximate cause of which is the breach. *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989); *Evanoff v. Ohio Edison Co.,* 1994 Ohio App. LEXIS 5107, *37 (Ohio Ct. App., Portage County Nov. 10, 1994); *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). "Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff." *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989). In order to assert a claim for negligence against a contractor under Ohio law, the owner must prove the contractor breached the relevant standard of care. As noted above, Ohio law subjects contractors to a 'workmanlike duty.' *Barton v. Ellis,* 34 Ohio App.3d 251, 252 (10th Dist.1986). This standard of care requires contractors to "act reasonably in exercising the degree of care which a member of the construction trade in good standing in the community would exercise under the same or similar circumstances." *Ohio Valley Bank v. Copley,* 121 Ohio App.3d 197, 205, 699 N.E.2d 540 (1997); *see also Jarupan v. Hanna,* 173 Ohio App. 3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶1; *Seff v. Davis,* Franklin App. No. 03AP-159, 2003-Ohio-7029, ¶19.

On a related point, Ohio courts have held that a general contractor does not owe the same duty of care to an independent contractor on a construction site, unless the general contractor actively participates in the work performed by the independent contractor. *Cafferkey v. Turner Constr. Co.,* 21 Ohio St.3d 110, 488 N.E.2d 189 (1986), syllabus.

B. Measure of damages – When a contractor breaches the implied duty to perform in a workmanlike manner, causing construction defects as a result, damages are measured by the reasonable cost of repairing such defects. The repair of deficient work may involve additional activities brought on by the deficient work, and all activities necessary to properly perform the work in a workmanlike manner. *Jarupan* at ¶1.

C. Economic Loss Rule – In Ohio, the economic-loss rule prevents plaintiffs from recovering in tort for purely economic damages when there is no privity of contract between the parties. *Fed. Ins. Co. v. Fredericks, Inc.,* 2015-Ohio-694, ¶1, 29 N.E.3d 313, 316 (Montgomery County), citing *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.,* 106 Ohio St. 3d 412, 2005-Ohio-5409, 835 N.E.2d 701. "[T]ort law is not designed to compensate parties for losses suffered as a result of a breach of [contractual] duties * * *; that type of compensation necessitates an analysis of the damages * * * within the contemplation of the parties when framing their agreement, and remains the particular province of the law of contracts." *Corporex Dev. & Constr. Mgt.* at ¶6. Therefore, there must be a contract between two parties in order for a duty of reasonable care to attach to the contractor. *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Ass'n,* 54 Ohio St.3d 1, 3, 560 N.E.2d 206 (1990). Absent a contract, in order to recover, the plaintiff must prove that any indirect economic damages were a result of physical injury to persons or property. *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.,* 73 Ohio St.3d 609, 653 N.E.2d 661 (1995).

However, an exception to the economic loss rule has been recognized by Ohio courts; the exception will apply where a sufficient connection or nexus exists to create a substitute for privity between the parties. *See E. Ohio Gas Co. v. Kenmore Constr. Co.,* 9th Dist. Nos. 19567, 2001 Ohio App. LEXIS 1444 (Summit County).

III. Warranties

A. Implied warranties – Under Ohio law, a construction contract creates an implied warranty that the contractor will perform the work in a workmanlike manner. *Point East Condominium Owners' Assn.*, 104 Ohio App.3d 704, 663 N.E.2d 343, 716 (1995). "A contracting party impliedly obligates himself to cooperate in the performance of his contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove." *Kirkwood v. FSD Dev. Corp.,* 8th Dist. Cuyahoga No. 95280, 2011-Ohio-1098, HN6.

Ohio has also adopted the Spearin Doctrine, which provides that "when a contractor follows an owner's plans, the owner impliedly warrants that the plans are accurate. If the construction is revealed to be defective [because the plans are inaccurate], the owner is the responsible party." *Cent. Ohio JVS*, at 64, citing *United States v. Spearin*, 248 U.S. 132, 136 (1918). The doctrine also applies to materials and equipment furnished by the Owner. Therefore, if an owner provides the contractor with materials and equipment for their use, then the owner has created an implied warranty regarding the suitability of the materials or equipment. *See, Jurgens Real Estate Co. v. Eastgate Development Partnership*, 103 Ohio App.3d 292 (12th Dist.1995).

A recent Ohio case, *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs.,* 113 Ohio St. 3d 226, 2007-Ohio-1687, 864 N.E.2d 68, ¶1, limited the applicability of the Spearin Doctrine, holding that the doctrine does not invalidate an express contractual provision. "'Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." Dugan at ¶30. While Ohio courts will apply *Spearin*, therefore, they will first look to the contract language to decide the remedies in the event of errors and omissions in the plan document.

B. Express warranties – Implied warranties will not be enforced if the contract sets forth express warranties that cover the same issue. *See, e.g., Construction Co. v. Columbus*, Franklin App. No. 05AP-1134, 2006 -Ohio- 6984 (The court held that imposing an implied duty not to delay conflicted with the express warranty in the contract providing owner with the right to delay work.)

In cases involving an alleged breach of an implied promise, Ohio courts evaluate whether there is a valid integration clause in the contract documents, and determine if the implied promise is still enforceable. *See Galmish v. Cicchini*, 90 Ohio St.3d 22, 734 N.E.2d 782 (2000).

i. Workmanship – Ohio's duty to perform in a workmanlike manner functions as a general implied warranty of workmanship. *See Slip Copy,* 10 Dist. Franklin No. 07AP-502, 2008 -Ohio-765; *Kishmarton v. William Bailey Constr., Inc.*, 93 Ohio St.3d 226, 2001 -Ohio- 1334, 754 N.E.2d 785. Ohio law sets express requirements for workmanship warranties on specific types of construction projects. R.C. § 5311.25(E)(1) (addressing condominium construction requirements).

However, it should be noted, Ohio courts have held that a plaintiff cannot raise a claim for implied warranty of workmanship under a theory based upon breach of an implied warranty of fitness for a particular purpose. *Corporex Dev. & Const. Mgt., Inc. v. Shook, Inc.,* 10th Dist. No. 03AP-269, 2004-Ohio-1408.

ii. Habitability – Ohio courts have drawn distinctions between an implied warranty of habitability and the duty to construct in a workmanlike manner. *Velotta v. Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 433 N.E.2d 147 (1982); *Mitchem v. Johnson* , Ohio St.2d 66, 70, 218 N.E.2d 594 (1966). While courts have held contractors to the duty to construct in a workmanlike manner using ordinary care, they have refused to impose an implied warranty of suitability for the purpose intended on a contractor. *See Velotta.* So long as the contractor proves ordinary care and skill in the construction of a residence, recovery under implied warranty will only be permitted with proof of negligence. *Id.*

The implied warranty of habitability cannot be waived. *Jones v. Centex Homes,* 132 Ohio St. 3d 1, 2012-Ohio-1001.

IV. Indemnity

A. Express/Implied indemnity – Under Ohio law, indemnity arises from contract, either express or implied. *Wagner-Meinert, Inc. v. EDA Controls Corp.,* 444 F. Supp. 2d 800 (N.D. Ohio 2006). Indemnity may be borne from an express agreement or contractual provision when one party, who is obliged to pay what the other party should have paid, reserves the right to require complete reimbursement. *Indiana Ins. Co. v. Barnes*, 165 Ohio App.3d 262, 2005-Ohio-6474, ¶ 14 (10th Dist.).

An implied contract for indemnity exists only in a situation where one party is found to be vicariously liable in tort for the acts of the responsible party. *Id; see also Spalding v. Coulso,* 104 Ohio App.3d 62, 75, 661 N.E.2d 197 (1995). In addition, the party seeking indemnification must be passively, not actively, negligent. *Mahathiraj v. Columbia Gas of Ohio, Inc.,* 84 Ohio App. 3d 554, 564, 617 N.E.2d 737 (1992).

B. Anti-indemnity statute – Ohio's anti-indemnity statute, R.C. 2305.31, prohibits any construction contract provision from requiring indemnification for another person's own negligence. Such provisions are void and unenforceable as a violation of public policy. *Kendall v. U.S. Dismantling Co.*, 20 Ohio St.3d 61, 485 NE 2d 1047 (1985). This rule applies whether the other person's negligence is sole or concurrent. *Id.*

Ohio's anti-indemnity statute is unclear as to the enforceability of contractual language proscribing a "duty to defend." *See, e.g., Moore v. Dayton Power and Light*, 99 Ohio App.3d 138 (2nd Dist. 1994) and *Best v. Energized Substation*, 88 Ohio App.3d 109, 623 N.E.2d 158 (9th Dist.1993).

V. Insurance

A. Construction Defects

i. Ohio courts have consistently held that commercial general liability policies do not cover negligent manufacture or defective construction that only damages the product. *Cincinnati Ins. Co. v. Dorsey Reconditioning, Inc.*, 5th Dist. Coshocton No. 10-CA-11, 2011-Ohio; *Bogner Constr. Co. v. Field & Assocs.,* 5th Dist. Knox No. 08CA11, 2009-Ohio-116; *Home Ins. Co. v. OM Group, Inc.,* 1st Dist. Hamilton No. C-020643, 2003-Ohio-3666. It is a generally accepted principle in commercial general liability policies that coverage is "not for contractual liability of the insured for economic loss because the product or completed work." *Id.* at ¶ 13. Expanding on this principle, courts have held that defective workmanship is not an accident or occurrence under standard commercial general liability policies. *Dorsey* at ¶ 59; *Environmental Exploration Co. v. Bituminous Fire & Marine Ins. Co.,* 5th Dist. Stark No. 1999CA00315, 2000 Ohio App. LEXIS 4985, *22."[W]ithout an "accident," there can be no occurrence as such term is defined in [a standard] insurance policy." *Id. See also Westfield Ins. Co. v. Custom Agri Sys.*, 133 Ohio St. 3d 476, 2012-Ohio-4712, 979 N.E.2d 269, 2012 Ohio LEXIS 2485, 2012 WL 4944305 (Ohio 2012) (holding that claims of defective construction or workmanship brought by a property owner are not claims for property damage caused by an occurrence under a commercial general liability policy).

VI. Changes – Generally, where a contract contains plain and unambiguous provisions for requests for compensation for changes in the work, the parties will be held to the terms contained therein. *See Associated Maintenance and Roofing Co. v. Rockwell Int'l. Corp.*, 95 Ohio App.3d 638, 643 (Hardin County, 1993) (contractor's claim for additional work was denied where clear and unambiguous terms of contract required formal approval of written change orders . . . and roofing contractor further admitted to knowing that only these designated individuals could approve the change orders). Further, the Ohio Supreme Court held in *Foster*, "[i]t is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefor[e] in compliance with the terms of the contract, unless waived by the owner or employer." *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.,* 78 Ohio St.3d 353, 360, 1997-Ohio-202, 678 N.E.2d 519; *see also Stanley Miller Constr. Co. v. Ohio Sch. Facilities Comm'n,* 10th Dist. Franklin No. 10AP-298, 2010-Ohio-6397, HN4 ("Something more than actual notice on the part of the State of Ohio is required to excuse a contractor from complying with its obligations regarding change-order procedures in public works contracts.")

However, despite the plain language of *Foster*, Ohio courts have interpreted notice provisions in public and private contracts differently. *Compare Allied Envtl. Servs. v. Miami Univ.,* 2006-Ohio-5668, 2006 Ohio Misc. LEXIS 151 (Ohio Ct. Cl. Sept. 15, 2006) (where a contractor failed to provide contractual notice of change, contract was strictly construed) *with Roger J. Au & Son, Inc. v. Northeast Ohio Regional Sewer Dist.,* 29 Ohio App. 3d 284, 291, 504 N.E.2d 1209 (Ohio Ct. App., Cuyahoga County 1986) ("[T]he appellee, [], had constructive notice of the conditions encountered by the contractor," and such notice was enough to overcome contractual notice requirements.)

In some cases, Ohio courts have deemed actual knowledge or constructive notice of a change sufficient to meet contractual notice requirements. *Roger J. Au & Son, Inc.* at 292 ("A defense based upon lack of notice does not apply if such officials . . . had actual knowledge of the circumstances upon which the claim is based, nor is notice required for extra expenses that result from a work order. Such circumstances give actual knowledge . . . and no prejudice results from a failure to receive notice."); *Valentine Concrete, Inc. v. Ohio Dep't of Administrative Services,* 609 N.E.2d 623, 629, 62 Ohio Misc. 2d 591, 601, 1991 Ohio Misc. LEXIS 96, *6 (Ohio Ct. Cl. 1991) (a "constructive change order" is viable, even when the written change order procedure was not followed.); *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs.*, 152 Ohio App.3d 95, 2003 Ohio 1227, 786 N.E.2d 921.

VII. Differing Site Conditions

A. Type I – Type I differing site conditions claims arise when the "actual site conditions differ from the conditions indicated in the contract." *Sherman R. Smoot Co. v. State*, 136 Ohio App.3d 166, 173,736 N.E.2d 89 (10th Dist. 2000)(internal citation omitted). A Type I claim requires:

> (1) that its contract contains an affirmative indication regarding the subsurface or latent physical condition that forms the basis of the claim; (2) that the contractor interpreted the contract as would a reasonably prudent

> contractor; (3) that the contractor reasonably relied upon the contract indications regarding the subsurface or latent physical condition; (4) that the contractor encountered conditions at the job site which differed materially from the contract indications regarding the subsurface or latent physical condition; (5) that the actual conditions encountered by the contractor were reasonably unforeseeable; and (6) that the contractor incurred increased costs which are solely attributable to the materially different subsurface or latent physical condition.

Id. at 174.

B. Type II – Type II differing site conditions claims arise when the "actual site conditions differ from conditions normally encountered in work of the character provided for in the contract." *Sherman R. Smoot Co. v. State*, 136 Ohio App.3d 166, 173,736 N.E.2d 89 (10th Dist. 2000)(internal citation omitted). A Type II different conditions claim requires the plaintiff to establish three elements: "(i) it encountered an unknown physical condition; (ii) the condition was unusual; and (iii) the condition differed materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in this contract." *Youngsdale & Sons Constr. Co., Inc. v. United States*, 27 Fed. Cl. 516, 528 (1993) (internal citations omitted). If the contract makes no affirmative representation of the site conditions, upon which a contractor allegedly relies, there is no liability. *Id.* (internal citations omitted).

VIII. Delays

A. No Damages for Delay Clauses – "No damages for delay" clauses that waive or preclude liability for delay are void and unenforceable as against public policy if the cause of the delay is the act or failure to act of the owner or someone for whom the owner is responsible. See R.C. 4113.62(C). Clauses that waive other remedies are also void and unenforceable if the cause of the delay is the owner's or contractor's act or failure to act. *Id.*

B. Liquidated Damages – Generally liquidated damages clauses are valid and enforceable if they are "intended by the parties to give reasonable compensation for damages." See *Piketon v. Boone Coleman Constr., Inc.*, Slip Opinion No. 2016-Ohio-628, ¶ 19 (quoting *Samson Sales, Inc. v. Honeywell, Inc.,* 12 Ohio St. 27, 28, 465 N.E. 2d 392 (1984)). However, provisions that impose "manifestly inequitable and unrealistic" amounts are unenforceable penalties. *Id.* In *Boone Coleman*, the Ohio Supreme Court addressed liquidated damages in public-works-construction contracts for the first time. The Court noted that (1) calculating damages to general public interest is uniquely difficult; (2) In public-works-construction, each delay adds to inconvenience and increased costs, but in ways that are difficult to measure; (3) liquidated-damages provisions in these projects play an important role because they encourage timely completion of the project and avoid wasting taxpayers' money; and (4) protection of public interest is a proper consideration in determining validity of such provisions. *Id.* at ¶ 2024. The Court

reaffirmed the requirement to examine liquidated-damages provisions "in light of what the parties knew at the time the contract was formed." *Id.* at ¶ 35 (internal citations omitted). Provisions that were reasonable at the time of formation and bear a relation to actual damages are enforceable. *Id.*

IX. Applicable Statutes of Limitations/Statutes of Repose

A. A cause of action arising from a written agreement, contract, or promise must be brought within eight years after the cause of action accrued. R.C. 2305.06.

B. The Ohio Statute of Repose precludes claims against construction professionals for injuries in certain circumstances occurring more than 10 years after completion of work. R.C. 2305.131 (upheld as constitutional in *McClure v. Alexander*, 2nd Dist. Greene No. 2007CA98, 2008-Ohio-1313.).

X. Payment Issues/Remedies

A. Pay When Paid/Pay If Paid – Ohio courts have held that contracts may contain pay-when-paid or pay-if-paid provisions, but not both. See *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 12. A pay-when-paid provision is an "unconditional promise to pay the subcontractor, usually within a reasonable time to allow the general contractor to be paid. *Id.* at ¶ 10. A pay-if-paid provision is a "conditional promise to pay the subcontractor only if the owner pays the general contractor." *Id.* at ¶ 11. If payment to the subcontractor is conditioned upon the owner's payment to the general contractor, a condition precedent exists, which require the performance of the condition "before obligations in [the] contract become effective." *Id.* at ¶ 22 (internal citations omitted). The Ohio Supreme Court upheld pay-if-provisions as conditions precedent, finding that if the condition is not fulfilled, the parties are excused from performance. *Id.*

- **i.** Does not affect lien rights- A contract or agreement that conditions payment from a contractor to a subcontractor or from a subcontractor to a lower tier subcontractor upon receipt of payment does not prevent a person from filing a claim to protect lien rights. See R.C. 4113.62(E)

B. Prompt Payment Statute – Under the prompt-payment statute enacted by the General Assembly in 1990, "if a subcontractor makes a timely request for payment, a contractor must pay the subcontractor in proportion to the work completed within ten calendar days of receiving payment from the owner. A contractor, however, is permitted to withhold 'amounts that may be necessary to resolve disputed liens or claims involving the work or labor performed or material furnished by the subcontractor.'" *Masiongale Electrical-Mechanical, Inc. v. Construction One, Inc.,* 102 Ohio St. 3d 1, 2004-1748, 806 N.E.2d 148, ¶ 18. However, the statute does not permit a general contractor to withhold from a subcontractor's bill the general contractor's projected legal costs to resolve a dispute between the two involving violations of lien-waiver and forum-selection provisions in a construction contract. *Id* at ¶ 20. *See also* R.C. 4113.61

C. Mechanics' liens –

i. **Who is protected –** Mechanics' liens provide a method for contractors, laborers, and material suppliers who perform work on provide materials used to improve real property to obtain payment from owners. R.C. 1311.02. The statutory requirements for whether a lien arises are strictly construed. Once the lien has been established, only substantial compliance is necessary to succeed on the claim.

ii. **Public Projects –** Any subcontractor, laborer, or material supplier who performs services for a public entity or furnishes materials in furtherance of a public improvement project can assert a claim on public funds. R.C. 1311.251. Materials must be furnished with the intent to be used during the course of the public improvement. *Id.*

iii. **Key Deadlines**

1. A Notice of Furnishing must be supplied within the first 21 days from when work is provided on the property. R.C. 1311.261
2. An affidavit of lien must be filed with the County Recorder's officer for the county where the property is located The affidavit must be filed within:
    a. 60 days from the date on which the last labor or work was performed or material was furnished in connection with a one or two-family dwelling or residential unit of condominium property. R.C. 1311.06(B)(1)
    b. 120 days from the date on which the last labor or work was performed or material was furnished in connection with a lien for oil or gas well facilities. R.C. 1311.06(B)(2)
    c. 75 days from the date on which the last labor or work was performed or material was furnished if not described in (1) or (2). R.C. 1311.06(B)(3)

iv. **Bonding Over** – A lien is void and a claim on public funds released if the principal contractor or any subcontractor or interested party acting in his name gives notice to commence suit and files with the court (or public authority in the case of a public project) a bond in the statutory amount in favor of the claimant, executed by sufficient surety, approved in writing by the court or public authority, and conditioned upon the payment of any judgment upon the claim, plus costs. R.C. Ch. 1311.

D. **Final payment not a waiver** – A provision of a contract waiving any pending or asserted claim on the basis of final payment is void and unenforceable as against public policy. See R.C. 4113.62(B). This does not prevent parties from entering into a subsequent settlement agreement. *Id.*