Nevada

By David V. Wilson II

Insurance Coverage for Construction Defect Claims

The Nevada Supreme Court has not yet fully addressed many of the myriad coverage questions posed by construction defect litigation. A federal court sitting in Nevada has opined that a commercial liability policy provides no coverage for "a loss caused by breach of contract, breach of warranty, poor workmanship or improper design." *Aetna Casualty and Surety Co. v. McIbs, Inc.*, 684 F.Supp. 246, 249 (D. Nev. 1988), *aff'd*, *Aetna Casualty & Surety Co. v. ARC Metals*, 878 F.2d 385 (9th Cir. 1989). It should be noted, however, that the court in that case also found that, under the facts before it, there was no "property damage". Similarly, another federal court sitting in Nevada has ruled, in an unpublished opinion, that claims of diminution in value resulting from construction defects do not constitute "property damage" in an insurance coverage context. *See Weast v. Travelers Casualty and Surety Company*, no. CV-S-98-496-PMP (RJJ) (D. Nev. March 22, 2000). Another district court has found, however, that loss of use of property caused by construction defects can cause "property damage". *Big-D Constr. Corp. v. Take It for Granite Too*, 2013 U.S. Dist. Lexis 8377 (D. Nev. Jan. 22, 2013).

In contrast, the Nevada Supreme Court addressed coverage for a construction defect claim against a product supplier on a construction project in *United States Fidelity & Guaranty Company v. Nevada Cement Company*, 561 P.2d 1335 (Nev. 1977). There, the general contractor's asserted a claim against the concrete supplier for selling defective concrete which was poured into a hotel building. The claim was then tendered to the supplier's insurance carrier, which denied coverage. In the subsequent lawsuit against the insurer, the supplier prevailed, leading to an appeal to the Nevada Supreme Court. That court found that the claim was covered, because incorporating the defective concrete into the hotel's structure did amount to "destruction of tangible property" and met the definition of "property" damage under the insurance policy. *Id.*

Likewise, in the oft-cited opinion of *McKellar Dev. v. Northern Ins.*, 837 P.2d 858 (Nev. 1992), the Nevada Supreme Court addressed whether a claim for defective construction of an apartment complex was covered by the design builder's CGL insurance policy. The Court determined that because the work in question was performed by subcontractors, there "arguably" was insurance coverage and reversed the trial court ruling that coverage did not exist.

It should be noted that Nevada's rules of construction of insurance policies require a court to broadly interpret clauses providing coverage and generally interpret ambiguous terms in favor of the insured. *See Federated Insurance Company v. American Hardware Mutual Insurance*, 184 P.3d 390, 393 (Nev. 2008).

Significantly for construction defect claims, in *Federated*, the Nevada Supreme Court addressed the certified question from the United States District Court for the District of Nevada, "[w]hether under Nevada law, an additional insured endorsement provides coverage for an injury caused by the sole negligence of the additional insured." *Id.* Applying the broad rules of construing insurance policies in favor of coverage, the Court determined that Nevada law does extend an additional insured coverage to such sole negligence, unless a contrary intent is demonstrated by specific language in the endorsement.

The issue of when coverage is triggered in the context of "continuous injury" claims has not been addressed in the third party liability context in Nevada. In other words, whether Nevada would recognize a "continuous trigger" or a "manifestation doctrine" in third party claims is unresolved. However, it should be noted that in the first party insurance claim context, Nevada's Supreme Court adopted a manifestation analysis in *Jackson v. State Farm Fire & Casualty Co.*, 835 P.2d. 786 (Nev. 1992).

Ultimately, as with any jurisdiction, review of insurance coverage in the context of a construction defect claim in Nevada will depend heavily upon the facts alleged, the type of damage claimed, and a review of the entire policy and its exclusions.

Causes of Action

Contract

Exculpatory Clauses/Limitation of Liability Clauses

Exculpatory clauses are generally valid, but additional standards must be met before they will be interpreted so as to relieve a person from liability that the law would otherwise impose. These standards are: (1) contracts providing for immunity from liability for negligence must be construed strictly since they are not favorite of the law; (2) such contracts must spell out the intention of the party with the greatest particularity and show the intent to release liability beyond doubt by express stipulation and no inference from the words of general import can establish it; (3) such contracts must be construed against the party who seeks immunity from liability; and (4) the burden to establish immunity from liability is upon the party who asserts such immunity. *See Agricultural Aviation Engineering Co. v. The Board of Clark County Commissioners*, 794 P.2d 710 (Nev. 1990).

Pay-if-paid Clauses

Pay-if-paid provisions limit a subcontractor's ability to be paid for work already performed, and impair his or her statutory right to place a mechanic's lien on the construction project. Therefore, pay-if-paid provisions are unenforceable because they violate public policy. *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032 (Nev. 2008).

Rescission

Rescission is an equitable remedy which totally abrogates a contract and seeks to place the parties in the position they occupied prior to executing the contract. *Bergstrom v. Estate of DeVoe*, 854 P.2d 860 (Nev. 1993). The purpose of rescission is to prevent harm to the defendant; the defendant should not sacrifice the benefits of the agreement and at the same time not be restored the benefits he previously conferred upon the plaintiff. *Id.* at 861.

There are two ways in which rescission may be accomplished. The first is called "legal rescission," in which a party, in response to a material breach by the other party or for other valid reasons, unilaterally cancels the contract. The second is known as "equitable rescission," which is where the aggrieved brings suit in a court with equitable jurisdiction and asks the court to nullify the contract. *Great Am. Ins. Co. v. General Builders, Inc.*, 934 P.2d 257 (Nev. 1997).

Quantum Meruit/Unjust Enrichment

A person is unjustly enriched when he or she retains money or property of another against the fundamental principles of justice or equity and good conscience. *Asphalt Products Corp. v. All Star Ready Mix*, 898 P.2d 699 (Nev. 1995). When unjust enrichment or quantum meruit is the theory of recovery, the proper measure of damages is the reasonable value of the services. *Id.* at 701.

Good Faith and Fair Dealing

A duty of good faith and fair dealing is implied in every contract under Nevada law. *A.C. Shaw Construction v. Washoe County*, 784 P.2d 9 (Nev. 1989). However, a party must have a "special relationship," such as that of a fiduciary, to be liable for tortious breach of the covenant of good faith and fair dealing. *Insurance Co. of the West v. Gibson Tile*, 134 P.3d 698 (Nev. 2006).

Tort

Negligent construction

The Restatement, Torts, Sec. 385, comment a (1934) has recognized that contractors are bound by general principles of negligence. Justice Cardozo once pondered the question, "whether a defendant owed a duty of care and vigilance to anyone but the immediate purchaser?" He determined that such a duty existed, and the Supreme Court of Nevada agrees. *Cosgriff Neon Co. v. Mattheus*, 371 P.2d 819 (Nev. 1962). The Court has also stated that when the result of a contractor's work is harm to third parties, which is foreseeable, his liability is not terminated by the acceptance of his work by the contractee. *Dixon v. Simpson*, 332 P.2d 656 (Nev. 1958).

A claim for negligent construction accrues at the time of substantial completion of the construction,

not at the time the injury is discovered. *Lotter v. Clark County*, 793 P.2d 1320 (Nev. 1990).

Negligence Per Se for Violation of Code or Statute

Violation of a statute may only constitute negligence per se if the injured party belongs to the class of persons that the statute was intended to protect, and the injury is of the type that the statute was intended to prevent. *Sagebrush, Ltd. v. Carson City*, 660 P.2d 1013 (Nev. 1983).

Additionally, the plaintiff must show that the defendant's actions were a proximate cause of the injury. Proximate cause must be proved as a matter of fact regardless of whether the negligence arose by violation of statute or by ordinary negligence. *Mahan v. Hafen*, 351 P.2d 617 (Nev. 1960).

Joint and Several Liability

If recovery is allowed against more than one defendant, each defendant is severally liable to the plaintiff for the portion of the judgment which represents the percentage of negligence attributable to him. Nev. Rev. Stat. Ann. §41.141. As a result, the doctrines of "last clear chance" and "assumption of risk" (with a single exception of an express assumption of risk) were rendered inappropriate.

Section 41.141 does not affect the joint and several liability, if any, of the defendants in an action based upon: (1) strict liability, (2) an intentional tort, (3) the emission, disposal, or spillage of a toxic or hazardous substance, (4) the concerted acts of the defendants, or (5) an injury to any person resulting from a product which is manufactured, distributed, sold, or used in the state of Nevada.

Comparative Fault

Nevada does not permit recovery by a plaintiff if a jury finds that the plaintiff is more than 50 percent at fault. *GMC v. Eighth Judicial Dist. Court of Nev.*, 134 P.3d 111 (Nev. 2006).

Fraud/Misrepresentation/Concealment

Nevada law provides causes of action for common law fraud and negligent misrepresentation. Fraud must be proven by clear and convincing evidence as to each of the following elements: (1) a false representation made by the defendant, (2) defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation), (3) defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation, (4) plaintiff's justifiable reliance upon the misrepresentation, and (5) damage to the plaintiff resulting from such reliance. *Albert H. Wohlers & Co. v. Bartgis*, 969 P.2d 949 (Nev. 1998).

In Nevada, it is an unfair business practice and cause for disciplinary action to say that replacement parts, equipment or repairs, or service is needed when they are in fact not needed. Nev. Rev. Stat. Ann. §624.30165(1).

It is also an unfair business practice and cause for disciplinary action when a contractor makes a false or misleading statement or representation of material fact. The misrepresentation must be intended, directly or indirectly, to induce another person to use the services of the contractor or to enter into any contract with the contractor or any obligation relating to such a contract. Nev. Rev. Stat. Ann. §624.30165(2).

Warranty/Strict Liability

Express

Nevada Revised Statutes Annotated, Section 104.2313 provides that express warranties by the seller can be created in one of the three following ways: (1) any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise; (2) any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description; and (3) any sample or model which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the sample or model.

Additionally, Section 104.2313 states that the seller does not have to use formal words such as "warrant" or "guarantee" to create an express warranty, nor does he need to have specific intent to make a warranty. However, merely an affirmation of the value of the goods, or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Actual reliance on an express warranty is not a prerequisite for breach of warranty, so long as

the express warranty involved became part of the bargain. *Allied Fidelity Ins. Co. v. Pico*, 656 P.2d 849 (Nev. 1983). If, however, the resulting bargain does not rest at all on the representations of the seller, those representations cannot be considered as becoming any part of the "basis of the bargain" within the meaning of NRS 104.2313. *Id.* at 850.

Implied

The Nevada Supreme Court recognizes the implied warranty of habitability because it reflects a naturally expected and sound public policy. *Radaker v. Scott*, 855 P.2d 1037 (Nev. 1993). The implied warranty of habitability was first adopted in the English courts under the rationale that builders knew that buyers intended to live in the houses that were being marketed so the builders impliedly warranted to the purchasers of unfinished houses that they would be habitable. *Id.* at 1041.

Strict Liability

Strict liability has been extended to hold builder/vendors strictly liable to new home purchasers and subsequent purchasers for defects in a newly constructed home. *Calloway v. City of Reno*, 939 P.2d 1020 (Nev. 1997).

Implied Warranty of Workmanlike Construction

Common law imposes an implied warranty of workmanlike manner, which has been defined as a duty to perform to a reasonably skillful standard, which is similar to what would a reasonable contractor do under the circumstances. *Olson v. Richard*, 89 P.3d 31 (Nev. 2004).

Workers' Compensation as an Exclusive Remedy

Worker's compensation insurance is the exclusive remedy for employees injured in the course and scope of employment as to their employer. Nev. Rev. Stat. Ann. §616A.020.

This immunity also applies to a partnership, which becomes immune from liability for the tortuous acts of a partner who, by virtue of worker's compensation coverage, is immune from liability. Likewise, if an employer has paid premiums for workmen's compensation to protect itself against loss, the benefit of the protection also accrues to the joint venturers of the employer. *Haertel v. Sonshine Carpet Co.*, 757 P.2d 364 (Nev. 1988).

"Green Building" Regulation in Construction

In July of 2007, Nevada created a "Green Building Rating System" designed to encourage builders to build "greener" structures in the hopes that they may see a partial abatement of certain property taxes. Nev. Rev. Stat. Ann. §701A.100. The rating system includes standards and ratings equivalent to the standards and ratings provided pursuant to the Leadership in Energy and Environmental Design (LEED) Green Building Rating System.

The amount of the partial abatement is determined by the level achieved during the building process. The potential levels are "silver," "gold," and "platinum," which are determined by how many points are earned for energy conservation. If a silver level is attained, the abatement equals 25 percent of the portion of the taxes imposed pursuant to Nev. Rev. Stat. Chapter 361, while the gold and platinum levels receive 30 percent and 35 percent abatements, respectively. Nev. Rev. Stat. Ann. §701A.110(4).

However, there are some restrictions. The abatement of taxes does not include taxes imposed for public education, and it does not apply if the owner of the building or other structure is receiving another abatement pursuant to Nev. Rev. Stat. Chapter 361. Additionally, the abatement may only last for a period of 10 years, and will be terminated upon any determination that the building or other structure has ceased to meet the equivalent of the silver level or higher. Nev. Rev. Stat. Ann. §701A.110(4)(c).

Delay

Time is of the Essence

A fundamental principle of contract law is that time for performance under a contract is not considered of the essence unless the contract expressly so provides or the circumstances of the contract so imply. *Mayfield v. Koroghil*, 184 P.3d 362 (Nev. 2008). When a contract does not make the time for a party's performance of the essence, either party can make it so by setting a reasonable time for performance and notifying the other party of an intention to abandon the contract of it is not performed within that time. *Id.* at 366.

Act of God

Acts of God, in order to benefit the defendant, must be such a providential occurrence or extraordinary manifestation of the forces of nature that it could not reasonably have been foreseen and avoided by the exercise of reasonable prudence, diligence, and care. *Alamo Airways v. Benum*, 374 P.2d 684 (Nev. 1962).

Prompt Pay

If an owner of real property enters into a written or oral agreement with a prime contractor for the performance of work or the provision of materials or equipment by the prime contractor, the owner must either: (1) pay the prime contractor on or before the date a payment is due pursuant to a schedule for payments established in a writing, or (2) if no such schedule is established or if the agreement is oral, pay the prime contractor within 21 days after the date the prime contractor submits a request for payment. Nev. Rev. Stat. Ann. §624.609(1).

Construction/Materialman's Lien

Notice Requirements

When a subcontractor or materials supplier has no contract with the property owner, a "pre-lien" notice must be sent no later than the thirty-first (31st) day of the date materials or labor were first supplied. *See* Nev. Rev. Stat. Ann. Sec. 108.245. The notice must be sent by registered or certified mail, or must be personally served upon the property owner. *See* Nev. Rev. Stat. Ann. Sec. 108.22148. In addition, to perfect such a lien, a Notice of Claim of Mechanic's Lien must be filed with the County Recorder within ninety (90) days after the later of: completion of the work, the day the last material was delivered, or the day the last labor was supplied. *See* Nev. Rev. Stat. Ann. Sec. 108.226.

Duration

A lien must not bind property subject to the lien for a period longer than 6 months after the date on which the notice of the lien was recorded unless one of the following occurs: (1) proceedings are commenced in a proper court within that time to enforce the same; or (2) the time to commence the action is extended by a written instrument signed by the lien claimant and a person or persons in interest in the property subject to the lien. Nev. Rev. Stat. Ann. §108.233(1). Any extension must be in writing, recorded in the county recorder's office in which the notice of lien is recorded, and it must be recorded within the 6-month period.

Statute of Limitations

Any action may be commenced within the extended time only against the persons signing the extension agreement and only as to their interests in the property are affected. Nev. Rev. Stat. Ann. §108.233(1)(b). After lapse of the specified time in the extension agreement, an action may not be commenced, nor may a second extension be given. *Id*.

An extension must not be given for a period in excess of one year beyond the date which the notice of the lien is recorded. Nev. Rev. Stat. Ann. §108.233(2).

Enforcement of Lien

A notice of lien may be enforced by an action in any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located. The complaint must set out the particulars of the demand and have a description of the property to be charged with the lien. Nev. Rev. Stat. Ann. §108.239(1).

Anyone holding or claiming a notice of lien may join a lien claimant's action by filing a statement of facts within a reasonable time after publication of the notice of foreclosure or receiving notice of the foreclosure, whichever occurs later. Nev. Rev. Stat. Ann. §108.239(3). Once the statements have been filed, the lien claimant and other parties adversely interested must be allowed 20 days to answer the statements. *Id*.

Indemnity/Contribution

Traditionally, there have been no statutory limits to contractual risk transfer provisions in Nevada. Therefore, indemnity agreements were typically enforced. However, in 2015, the legislature amended Chapter 40 of the Nevada Revised Statutes to bar broad form indemnity in residential construction contracts. In other words, a subcontractor cannot be required, as a matter of public policy, to indemnify a homebuilder and/or developer on a residential project for those parties' own negligence. Likewise, Chapter 40 now requires that homebuilders and

developers only pursue claims for defense and assert their status as additional insureds under a residential subcontractor's insurance policy when the subcontractor's own negligence is implicated, and they have pursued other available means of recovery.

In commercial construction contracts, in order for the scope of indemnity to apply to a general contractor's own partial negligence, the indemnity clause must explicitly state that the scope of the indemnity applies to the contractor's own negligence. *See Reyburn Lawn Designers v. Plasters Dev. Co.*, 255 P.3d 268 (Nev. 2011). *See also George L. Brown Ins. Agency v. Star Ins. Co.*, 237 P.3d 92 (Nev. 2010) (indemnity clause covering "any and all loss" does not apply to indemnified parties own negligence.)

Surety/Bond

Performance Bonds/Payment Bonds

A surety, by the terms of its bond, expressly undertakes the obligations of the general contractor in all respects. If the contractor fails to perform, the surety has promised performance. It has thus promised that it will pay the subcontractors on the project. Therefore, the subcontractor is a third party beneficiary of the surety's promise. *Acoustics, Inc. v. American Sur. Co. of N.Y.*, 320 P.2d 626 (Nev., 1958). However, a surety cannot be liable for the tortious breach of the covenant of good faith and fair dealing. *Insurance Co. of the West v. Gibson Tile*, 134 P.3d 698 (Nev. 2006).

Defenses

Statute of Limitations

The statute of limitations in Nevada for personal injury is two years. Nev. Rev. Stat. Ann. §11.190. Actions brought based on contracts or deceptive trade practices must be brought within four years.

Prosecutions of violations of Nev. Rev. Stat. Ann. Chapter 624 must be brought within two years after the commission of the offense. To beat the statute of limitations, an indictment must be found or an information or complaint must be filed within the two-year period.

A general notice of construction defect claims provided to a general contractor is sufficient to toll the statute of limitations for claims against a third-party subcontractor even if the subcontractor is not involved in the initial proceedings against the general contractor. *Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court*, 97 P.3d 607 (Nev. 2004). Such tolling can now only last for one year. Nev. Rev. Stat. Ann. §40.695.

Statute of Repose

In Nevada, beginning in 2015, there is now a 6-year statute of repose covering all actions to recover damages for any deficiency as a result of performing or furnishing the design, planning, supervision, observation of construction or the construction of an improvement to real property, injury to real or personal property caused by any such deficiency, or for injury to the or wrongful death of a person caused by such deficiency. Nev. Rev. Stat. Ann. §11.203(1). The statute will begin to run after substantial completion of such an improvement.

This is a change from the prior 10-year statute of repose and eliminates different periods of repose for known versus latent defects, or defects arising from willful misconduct. The new statute applies retroactively under certain circumstances, but includes a one year grace period during which a person may commence an action, if the action accrued before the effective date of the new statute.

For cases governed by the old statute, the Nevada Supreme Court has made a distinction between improvements and maintenance for purposes of this statute, by saying that statues of repose bar only those actions arising out of design and construction-related negligence, but not negligent maintenance. *Davenport v. Comstock Hills-Reno*, 46 P.3d 62 (Nev. 2002).

> A review of the plain language of the statutes of repose as well as their fundamental purpose presses the conclusion that the legislature intended to shield those involved in creating improvements from actions grounded in design or construction defect, but not from actions asserting negligent maintenance. Turning first to the language, we note that the statutes specifically protect the "owner" and "occupier" of the property but the statutes also contain a broad catchall category that includes "any person performing or furnishing the design, planning, supervision or observation of construction or the construction of an improvement to real property." The phrasing of this catchall category indicates the legislature's intent to qualify the functions that the

> statutes are concerned with, namely, functions that have to do with designing, planning, and constructing or observing the same, in a word—creating—the improvement. Nothing in the statutes' language indicates that their protection extends to functions performed after the improvement in question has been completed, such as maintenance.

With regard to *latent* deficiencies, the statute of repose was 8 years under the now-repealed statute, with a two-year statute of limitations for injuries that occur in the eighth year after the substantial completion of such an improvement. In any event, no action resulting from a latent deficiency may be commenced more than 10 years after substantial completion of the improvement. "Latent deficiency" means a deficiency which is not apparent by reasonable inspection. Nev. Rev. Stat. Ann. §11.204.

For *patent* deficiencies, the old statute of repose was 6 years, with a two-year statute of limitations for injuries that occur in the sixth year after the substantial completion of such an improvement. In any event, no action resulting from a latent deficiency may be commenced more than eight years after substantial completion of the improvement. "Patent deficiency" means a deficiency which is apparent by reasonable inspection. Nev. Rev. Stat. Ann. §11.205.

Under the old law, for deficiencies, no matter what the kind, that are the result of willful misconduct or which have been fraudulently concealed, an action could be commenced at any time to recover damages for injury to real or personal property or injury to or the wrongful death of a person caused by any such deficiency. Nev. Rev. Stat. Ann. §11.202. It should be noted that section 11.202 now provides that the 6 year repose period applies even if defects were fraudulently concealed or were the result of willful misconduct.

Contributory and Comparative Negligence

The comparative negligence statute in Nevada permits a plaintiff to recover as long as his or her comparative negligence is not greater than that of the defendant or defendants. Nev. Rev. Stat. Ann. §41.141; *see also Woosley v. State Farm Ins. Co.*, 18 P.3d 317 (Nev. 2001).

Comparative negligence is a defense appropriately raised when the homeowner participates in the planning and design of the residence that is the subject of the constructional defect action. *Skender v. Brunson-built Constr. & Dev. Co.*, 171 P.3d 745 (Nev. 2007).

Waiver

A homebuyer can stipulate to a waiver of any potential claims for construction defects under Nev. Rev. Stat. Ann., Chapter 40 if the defect is disclosed to the buyer in clear language before the purchase of the residence. Nev. Rev. Stat. Ann. §40.640(5); *see also Westpark Owners' Association v. Eighth Judicial Dist. Court*, 167 P.3d 421 (Nev. 2007).

Estoppel

Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct. *Teriano v. Nev. State Bank*, 112 P.3d 1058 (Nev. 2005). The four elements of equitable estoppels are: (1) the party to be stopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting estoppels must be ignorant of the true state of facts; and (4) he must have relied to his detriment on the conduct of the party to be estopped. *Id.* at 1062.

Contractual Limitations ("No Damages for Delay" Clauses)

A "no damages for delay" clause in a construction contract is valid and enforceable in Nevada. *J.A. Jones Construction Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009 (Nev. 2004). However, there are some exceptions to the application of a contract's "no damages for delay" clause. The following exceptions relate directly to the covenant of good faith and fair dealing: (1) willful concealment of foreseeable circumstances that impact timely performance, (2) delays so unreasonable in length as to amount to project abandonment, (3) delays caused by the other party's bad faith or fraud, and (4) delays caused by the other party's active interference. *Id.* at 1015.

Intervening and Superseding Causes

In Nevada, an intervening cause acts to negate a defendant's liability in a negligence action, and is defined as a superseding cause which is the natural and logical cause of the harm, not a concurrent or

contributing cause. *Thomas v. Bokelman*, 462 P.2d 1020 (Nev. 1970). However, not every intervening cause, or even every negligent intervening cause, acts as a superseding cause absolving the prior negligence. *Drummond v. Mid-West Growers Coop. Corp.*, 542 P.2d 198 (Nev. 1975).

Failure to Mitigate

As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts. *Conner v. Southern Nev. Paving*, 741 P.2d 800 (Nev. 1987). This rule of mitigation begins when the breach is discovered. *Id.* at 801.

The burden of proving failure to mitigate is on the party whose wrongful act caused the damages. *Silver State Disposal Co. v. Shelley*, 774 P.2d 1044 (Nev. 1989).

Economic Loss Doctrine

"Economic loss" is the loss of the benefit of the user's bargain, including pecuniary damage for inadequate value, the cost of repair and replacement of a defective product, or consequent loss of profits, without any claim of personal injury or damage to other property. *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 206 P.3d 81 (Nev. 2009). The economic loss doctrine bars professional negligence claims against design professionals who provided services in the process of developing or improving commercial property when the plaintiffs' damages are purely financial. *Id.* at 83. This result was extended to negligent misrepresentation claims against design professionals in *Halcrow, Inc. v. Dist. Ct.*, 128 Nev. Adv. Op. (June 2013) (Nevada Supreme Court strictly applying the "economic loss" rule to bar claims other than breach of contract against non-residential design professionals).

The primary purpose of the rule is to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable. *Calloway v. City of Reno*, 939 P.2d 1020 (Nev. 1997).

The court in *Calloway* also ruled that subcontractors are not protected by the shield of the economic loss doctrine for damage caused by negligently performed work. However, this relief is limited to construction defect cases in which relief is sought by purchasers of newly constructed homes who cannot pursue traditional contract remedies against a developer or contractor. *Id.* at 1026. The plaintiff must be able to present a good faith reason why relief cannot be sought in the traditional fashion from a developer or contractor. Examples of such reasons include; the developer or contractor no longer exists, is bankrupt, or was dismissed from the lawsuit.

Nevada also recognizes some exceptions to the economic loss doctrine, such as negligent misrepresentation, and professional negligence actions against attorneys, accountants, real estate professionals, and insurance brokers. *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 206 P.3d 81 (Nev. 2009).

Spearin *Doctrine*

Generally, when a contractor makes an absolute and unqualified contract to construct a building or perform a given undertaking, he assumes the risks attending the performance of the contract, and must repair and make any injury or defect which occurs or develops before the completed work has been delivered to the other party. *Home Furniture v. Brunzell Construction Co.*, 440 P.2d 398 (Nev. 1968).

However, where a contractor contracts to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. *Id.* at 402. In those circumstances, it is the owner who impliedly warrants the adequacy of the plans and specifications. This is known as the Spearin Doctrine, which has been recognized in Nevada, and states the following;

> When a contractor has followed plans and specifications furnished by the owner and his architect, he will not be responsible to the owner, at least after the work is completed, for any loss or damage which results solely from the defects or insufficient plans or specifications, in the absence of any negligence on the part of the contractor or any express warranty by him as to their being sufficient or free from defects. *Id.* at 401.

The Nevada Supreme Court reaffirmed its embrace of the Spearin Doctrine in a 2013 case. *See Halcrow, Inc. v. Dist. Ct.*, 128 Nev. Adv. Op. (June 2013).

Pre-suit Notice of Claim for Duty to Cure: Chapter 40

The Nevada legislature intended to provide contractors with an opportunity to repair constructional defects in order to avoid litigation. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court of Nev.*, 168 P.3d 731 (Nev. 2007). Based in part upon arguments that the building industry had not been protected by the prior version of Chapter 40, it was substantially amended in February, 2015.

Before a claimant brings an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier, or design professional, the claimant must give the party in breach notice. Nev. Rev. Stat. Ann. §40.645. The notice must specify in "specific detail" the defects, any known causes, and the defects' exact locations. The owner of the residence must now verify that each listed defect, damage and injury exists in the residential property. Once notice has been sent by the claimant, the party receiving the notice has 90 days to send the claimant a written response indicating whether or not the defect will be repaired, and if liability is disclaimed, the response must state the reasons for such a disclaimer. Nev. Rev. Stat. Ann. §40.6472.

Significantly, one notice on behalf of similarly situated homeowners in a subdivision with common defects is no longer sufficient. Likewise, homeowner's associations are now precluded from bringing claims for defects in property other than common areas of the subdivision. In addition, the new version of the statute does not authorize an award of the claimant's attorney's fees, as was the case with the prior statute. Moreover, a claimant is no longer authorized to pursue residential construction defect claims under Chapter 40 without exhausting claims for the defects under the homeowner's warranty.

If a contractor, subcontractor, supplier, or design professional fails to comply with the provisions of N.R.S. 40.6472, make an offer of settlement, make a good faith response to the claim asserting no liability, agree to a mediator or accept the appointment of a mediator, or participate in mediation, the limitations on damages and defenses to liability do not apply and the claimant may commence an action or amend a complaint to add a cause of action for a constructional defect without satisfying any other requirement. Nev. Rev. Stat. Ann. §40.650(2).

Other

A contractor is liable for damages caused by any of his acts or omissions or the acts or omissions of his agents, employees, or subcontractors, but is not liable for the following: (1) the acts or omissions of a person other than the contractor, his agent, employee, or subcontractor; (2) the failure of a person other than the contractor, his agent, employee, or subcontractor to take reasonable actions to reduce the damages or maintain the residence; (3) normal wear, tear, or deterioration; (4) normal shrinkage, swelling, expansion, or settlement; or (5) any constructional defect disclosed to an owner before his purchase of the residence, provided that the disclosure is in language that is understandable and was written in underlined and boldfaced type with capital letters. Nev. Rev. Stat. Ann. §40.640.

Arbitration/ADR

Enforcement of Contract Clause

Nevada's version of the Uniform Arbitration Act clearly favors arbitration. Nev. Rev. Stat. Ann. §38.206 to 38.248. Courts are to liberally construe arbitration clauses in favor of arbitration. *See Phillips v. Parker*, 794 P.2d 716, 718 (Nev. 1990).

Procedures

Historically, parties had relatively liberal rights to challenge arbitration award longer the case. Courts may vacate arbitration awards based upon the merits only when an arbitrator manifestly disregards the law. *See Wichinsky v. Mosa*, 847 P.2d 727, 731 (Nev. 1993).

Measure and Types of Damages

Economic Loss

In Nevada, it is a well established common law rule that absent privity of contract or an injury to person or property, a plaintiff may not recover in negligence for economic loss. *Local Joint Executive Board, et al v. Martin Stern, Jr., et al*, 651 P.2d 637 (Nev. 1982). However, purely economic loss may be recovered under a breach of warranty theory. *Central Bit Supply v. Waldrop Drilling & Pump*, 717 P.2d 35 (Nev. 1986).

Consequential Damages

A claimant may recover the damages of any reasonable cost of any repairs made that were necessary to cure any constructional defect that the constructor failed to cure and the reasonable expenses of temporary housing reasonable necessary during the repair, to the extent the damages are proximately caused by a constructional defect. Nev. Rev. Stat. Ann. §40.655(1)(b).

Section 40.655(1) also allows a claimant to recover damages for the following, provided that they are proximately caused by the construction defect: the loss of the use of all or any part of the residence, reduction in market value of the residence, the reasonable value of any other property damages by the constructional defect, and any additional costs reasonably incurred by the claimant.

Delay and Disruption Damages

Delay damages may be awarded to compensate a plaintiff for losses sustained as a result of delays attributable to the defendant. In most situations in which delay damages are awarded, the defendant has caused the time of the plaintiff's performance to be extended. *Colorado Environment, Inc. v. Valley Grading Corp.*, 779 P.2d 80 (Nev. 1989).

Attorney Fees

By statute, the court may also make an allowance of attorney's fees to a prevailing party in two situations. The first situation is where the prevailing party has not recovered more than $20,000. The second situation in which a prevailing party may be awarded attorney's fees by the court does not depend on the recovery sought. In this instance, the court may award attorney's fees when it finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. Nev. Rev. Stat. Ann. §18.010(2).

In cases where a contract is otherwise enforceable, a contract may authorize an award of attorney fees, and serve as the basis for a motion to award fees after a judgment is entered under Nevada law.

Interest

Interest shall be allowed on all money from the time it becomes due, upon contracts, express or implied, other than book accounts. The interest rate, if there is no contract fixing a different rate of interest, shall be allowed at 8 percent per annum. Nev. Rev. Stat. Ann. §99.040(1). *See also Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 642 P.2d 1086 (Nev. 1982).

Punitive Damages

Punitive damages are not allowed for a breach of contract claims. If the punitive damage award is not based upon a cause of action sounding in tort, the award must be stricken on appeal. *Sprouse v. Wentz*, 781 P.2d 1136 (Nev. 1989).

Contract Damages

Contract damages are recoverable by a plaintiff for breach of the implied covenant of good faith and fair dealing in a commercial contract. *A.C. Shaw Construction v. Washoe County*, 784 P.2d 9 (Nev. 1989).

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