South Dakota

By Paul Tschetter

Insurance

The court in *South Dakota State Cement Plant Commission v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397, 402 (S.D. 2000), stated that "[a]n insurer's duty to defend and its duty to pay on a claim are severable and independent duties." (quoting *State Farm Mutual Auto Ins. Co. v. Wertz*, 540 N.W.2d 636, 638) (citation omitted). An insurer's duty to defend "'is much broader than the duty to pay a judgment rendered against the insured.'" *South Dakota Cement Plant*, 616 N.W.2d at 402 (citing *Wertz*, 540 N.W.2d at 638) (citation omitted). The insurer has the burden of showing that no duty to defend exists. *Id.* (citing *Wertz*, 540 N.W.2d at 638) (citations omitted). The insurer's burden is satisfied by proving that the insured's claim "'*clearly* falls outside of policy coverage.'" *Id.* (citing *Wertz*, 540 N.W.2d at 638) (emphasis original) (citations omitted). In addition, if it "arguably appears from the face of the pleadings in the action that the alleged claim, if true, falls within the policy coverage, the insurer must defend." *Id.* (quoting *Hawkeye-Sec. Ins. Co. v. Clifford*, 366 N.W.2d 489, 491 (S.D. 1985). If, after reviewing the complaint and other appropriate record evidence, "'doubt exists whether the claim against the insured arguably falls within the policy coverage, such doubts must be resolved in favor of the insured.'" *Id.* (quoting *Wertz*, 540 N.W.2d at 638) (citations omitted).

In the underlying case, the South Dakota State Cement Plant was sued by property owners and residents of the Brookhurst Subdivision to recover compensation for damages to properties as a result of the defendant's past and present toxic chemical and other discharges/emissions. The Cement Plant had several general liability polices with Wausau Underwriters Insurance. These polices provided that they had the "right and duty to defend any suit." *Id.* at 400. The policies did contain exclusions in coverage. The exclusion relieved Wausau of liability on the "policies if the bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." *Id.* Based upon this exclusion, Wausau refused to defend. The Cement Plant brought suit against Wausau for breach of duty to defend. The court found no coverage would apply and Wausau did not have a duty to defend because the causes of action in the complaint "all clearly [fell] within the definition of pollution in the pollution exclusion clause." *Id.* at 407.

Corner Construction Company v. United States Fidelity and Guaranty Company, 638 N.W.2d 887 (S.D. 2002), is an action brought by a general contractor against its comprehensive general liability insurer for coverage for liability for property damage to the building as a result of a subcontractor's faulty workmanship. The question before the court was whether Corner Construction was afforded coverage under the broad form property damage endorsement of its comprehensive general liability policy (CGL). The primary issue was whether "a completed operations hazard exclusion in an endorsement to a CGL policy excludes coverage for damage to the final product, caused by the faulty work of subcontractors." 638 N.W.2d at 892. The court agreed with the trial court that the insurance policies issued required the insurer to defend and indemnify Corner to the extent that the subcontractor's defective work resulted in an accident or occurrence that in turn, resulted in property damage to the completed work of the general contractor and subcontractor. The court stated that generally, a CGL policy along with a broad form property damage endorsement exclusion, would not provide coverage for the subcontractor's faulty workmanship, unless it resulted in an accident or occurrence causing damages to the work. However, the court defined "occurrence" as "an 'accident' which is an event that is 'undesigned, sudden, and unexpected." *Id.* at 894 (citing *Taylor v. Imperial Cas.*, 144 N.W.2d 856, 858 (S.D. 1966) (citation omitted). The court in *Corner* found that there was an accident or unintended event resulting in property

damage that was neither expected nor intended by the insured.

In *Alverson v. Northwestern National Casualty*, 559 N.W.2d 234 (S.D. 1997), the insured filed suit against its commercial general liability insurer to establish coverage for the replacement of windows scratched due to the cleaning of dirt and mortar from them by the insured's masonry subcontractor. In this case, Alverson contracted to perform only the masonry work on the house. Here, the loss that was suffered was not due to the contracted masonry work. The policy included the following exclusion: "[t]his insurance does not apply to: …. (6) [t]hat particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it." 559 N.W.2d at 235. The court stated that the work done by Alverson and his employees could have been done without damage to the windows. The windows were not damaged prior to the removal of the mortar. Some of the windows that had been cleaned were done without damage to them. The employees of Alverson did the cleaning incorrectly; therefore, the windows had to be replaced. The court found that the exclusion applied, and therefore, there was no coverage.

Causes of Action

Breach of Contract

A breach of contract claim under South Dakota law is subject to a six year statute of limitations. SDCL §15-2-13. However, SDCL §15-2A-3 allows a suit for various injuries and damages from certain construction claims to be brought within ten years after substantial completion of the construction. Substantial completion is determined by the date when construction is sufficiently completed so that the owner or representative can occupy or use the improvement as intended.

In an action for relief on the grounds of fraud, the cause of action shall not be deemed to have accrued until the aggrieved party discovers, or has actual or constructive notice of, the facts constituting the fraud. SDCL §15-2-3. The statute of limitations ordinarily begins to run when the plaintiff either has actual notice of a cause of action or is charged with notice. Actual notice consists of express information of a fact. SDCL §17-1-2. Constructive notice is notice imputed by the law to a person not having actual notice. SDCL §17-1-3. An individual having actual notice of circumstances sufficient to put a prudent person on inquiry about a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. SDCL §17-1-4. Either actual or constructive notice, therefore, will equally suffice to start the statute of limitations' clock running. *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 852 N.W.2d 434 (S.D. 2014) (citing *Strassburg vs. Citizens State Bank*, 581 N.W.2d 510 (S.D. 1998).

Although South Dakota recognizes a breach of contract claim and negligence claims against contractors and engineers for faulty construction (*see Gettysburg Sch. Distr. 53-1 v. Helms & Assocs.*, 751 N.W.2d 266 (S.D. 2008) (overruled on other grounds), when a contract exists between parties, the contract controls the parties' relationship and no legal duty exists between the parties outside of the contract. *See Sundt Corp. v. South Dakota DOT*, 566 N.W.2d 476, and *Fisher Sand & Gravel Co. v. South Dakota DOT*, 558 N.W.2d 864.

Under the UCC, a cause of action for a breach of any contract for the sale of goods must be commenced within four years after the cause of action has accrued. SDCL §57A-2-725(1). A cause of action under this section accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty claim occurs when the tender of the delivery is made. There is an exception to this rule if a warranty explicitly extends to future performance of the goods. In this case, the discovery of the breach must wait until the time of such performance, and the cause of action accrues when the breach is or should have been discovered. SDCL §57A-2-725(2).

Rescission

SDCL §21-12-1 provides the general grounds for rescission of a contract. The rescission of a written contract may be adjudged on the application of an aggrieved party: (1) in any of the causes mentioned in §53-11-2 (*see* below); (2) where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault; (3) when the public interest will be prejudiced by permitting it to stand. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same condition as if the contract had not been made. SDCL §21-12-

2. *See also Carnicle v. Swann*, 314 N.W.2d 311 (S.D. 1982) (discussing mistake in construction contract).

SDCL §53-11-2 provides the more specific and factual situations when a party to a contract may rescind. A party may rescind: (1) if consent of the party rescinding or of any party jointly contracting with it was given by mistake or obtained through duress, fraud, or undue influence exercised by or with the connivance of the party as to whom it rescinds, or of any other party to the contract jointly interested with such party; (2) if through fault of the party as to whom it rescinds, the consideration for its obligation fails in whole or in part; (3) if the consideration becomes entirely void from any cause; (4) if such consideration before it is rendered to it fails in a material respect from any cause; or (5) by consent of all the other parties.

Quantum Meruit/Unjust Enrichment

The court in *Ahlers Building Supply v. Larsen*, 535 N.W.2d 431, 435 (S.D. 1995), stated that in order for a contractor to recover its contract price, it had the burden of proving substantial performance of its contract. Substantial performance is a question of fact subject to the clearly erroneous rule. The court cites John D. Calamari and Joseph M. Perillo, *The Law of Contracts* §11-18 (3rd ed. 1987), wherein it stated that "[i]f performance was substantial, the contractor is entitled to recover the contract price less deduction for defects in performance." Should the performance not be substantial, the contractor is entitled to the value of the benefit that was conferred upon the owner under a theory of quantum meruit or unjust enrichment. *See also Mathis Implement Co. v. Heath*, 665 N.W.2d 90 (S.D. 2003).

Negligence

The court in *Ehresmann v. Muth*, 757 N.W.2d 402, 406 (S.D. 2008), stated that "[c]laims of negligent construction and breach of implied warranty exist where a builder-vendor fails to construct in a reasonably good and workmanlike manner." (citing *Waggoner v. Midwestern Dev.*, 154 N.W.2d 803, 807 (S.D.1967)). "Liability extends to the sale of newly constructed buildings that are fully completed at the time of sale." 757 N.W.2d at 406 (citing *Waggoner*, 154 N.W.2d at 807–08) (quoting Williston on Contracts, §926A (3d ed. 1963)). In this situation, "a purchaser relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of the house; and that the house will be fit for human dwelling." *Id.* (citing *Waggoner*, 154 N.W.2d at 807) (citation omitted).

The court in *Mid-Western Electric Inc. v. DeWild Grant Reckert & Associates*, 500 N.W.2d 250 (S.D. 1993), discusses the fact that a majority of courts that have looked at professional negligence have upheld a cause of action where there was economic damage that was foreseeable. The court in *Mid-Western Electric* discussed the holdings of multiple jurisdictions on the question of allowing a cause of action against an architect or engineer for economic damages if a party was foreseeably harmed by the professional. South Dakota has recognized a claim against a professional architect. The court found that an architect could be held responsible if a third party is physically injured due to their negligence. 500 N.W.2d at 253–54. *See Duncan v. Pennington Cnty. Hous. Auth.*, 283 N.W.2d 546 (S.D. 1979).

The *Mid-Western* court reasoned that "[t]o deny a plaintiff his day in court would, in effect, be condoning a professional's right to do his or her job negligently with impunity as far as innocent parties who suffer economic loss. We agree the time has come to extend to plaintiffs recovery for economic damage due to professional negligence. We therefore recognize that in South Dakota a cause of action exists for economic damage for professional negligence beyond the strictures of privity of contract." *Id.* at 254.

Negligence Per Se for Violation of Code or Statute

In *Hertz Motel v. Ross Signs*, 698 N.W.2d 532 (S.D. 2005), a hotel owner hired a contractor to remove and reinstall the neon lighting. An action for negligence was brought against the contractor alleging that the contractor's negligence in reinstalling the neon tubes caused the fire at the motel. The court, quoting *Fritz v. Howard Twp.*, 570 N.W.2d 240, 243 (S.D. 1997), stated that "'[a]n unexcused violation of a statute enacted to promote safety constitutes negligence per se.'" 698 N.W.2d at 535. The court went on to discuss the issue of proximate cause. The court stated that even if the defendant's actions constituted negligence per se, liability must depend upon negligence causing the fire and of being the proximate cause of the damages. The sheer violation of a statute

is not sufficient to support an action for damages. *Id.* at 535–38.

Misrepresentation and Deceit

Misrepresentations can form the basis of an action under a theory of negligent misrepresentation, fraudulent misrepresentation, or deceit. Many of the elements for these actions are similar, but the extent of the knowledge or intent required by the defendant varies.

Negligent misrepresentation has a "less exacting knowledge requirement than fraud or deceit…." *Ehresmann*, 757 N.W.2d at 406. This cause of action entails one who in the course of his business, profession, or employment, or in any other transaction in which he or she has a pecuniary interest, supplies false information, fails to exercise care or competence in the information provided, and upon which another justifiably and detrimentally relies. *Fisher v. Kahler*, 641 N.W.2d 122, 125–27 (S.D. 2002) (citing Restatement (Second) of Torts §552 (1977)).

Fraudulent misrepresentation is the act of willfully deceiving another, intending to cause the other person to act to that person's injury or risk. To establish fraudulent misrepresentation, a plaintiff must prove: (1) there was a representation made to a person as a statement of fact; (2) the representation was not true, known to be untrue, or recklessly made; (3) the representation was made with the intent to deceive or induce the person to act; and (4) the person justifiably relied upon the representation to his or her detriment. *Cleveland v. BDL Enterprises, Inc.*, 663 N.W.2d 212, 219–20 (S.D. 2003).

Deception is a broader cause of action than fraudulent misrepresentation. According to SDCL §20-10-1, an individual who willfully deceives another, with intent to induce him or her to alter his or her position to his or her injury or risk, is liable for any damage that he or she thereby suffers. Deceit is defined as any of the following: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts that are likely to mislead because of failure to communicate that fact; or (4) a promise made without any intention of performing. SDCL §20-10-2.

Actual fraud may be the basis of tort actions and contract actions, whereas constructive fraud is a basis for action for avoidance of contracts only. *See* SDCL §20-10-1 and §53-4-6.

Breach of Warranty

Uniform Commercial Code

The Uniform Commercial Code (UCC) provisions generally apply when the primary subject of a contract relates to the sale of moveable goods and where labor and services are only incidentally involved. *See* SDCL §§57A-2-105 to -106; *Jandreau v. Sheesley Pumping & Heating Co.*, 324 N.W.2d 266 (S.D. 1982). In the realm of construction litigation, many of the reported South Dakota UCC decisions arise from where a contractor subcontracts for the manufacture of a product to be incorporated into a structure or project. In this regard, the South Dakota Supreme Court has adopted the Economic Loss Doctrine (*see* "**Defenses: Economic Loss Doctrine**," *infra*).

A breach of an express warranty claim for goods and services accrues under the Uniform Commercial Code (UCC) provisions located in SDCL §57A-2-313. When an express warranty is provided for a period longer than ten years incident to an improvement of property, he or she will not be able to bar the action under the statute of repose for construction deficiencies. SDCL §15-2A-8 (*see* "**Defenses: Statute of Repose**," *infra*).

A breach of an implied warranty accrues under SDCL §57A-2-314. Under South Dakota law, warranty of merchantability generally provides that goods will conform to ordinary standards and that they are of average grade, quality, and value of like goods that are generally sold in the stream of commerce. SDCL §57A-2-314(2)(c). An implied warranty can also be imputed when at the time of contracting the seller has reason to know of the particular purpose for which the goods are required and that the buyer will be relying on the seller's skill or judgment in selecting suitable goods. SDCL §57A-2-315. *See also Virchow v. Univ. Homes, Inc.*, 699 N.W.2d 499, 505–06 (S.D. 2005).

The implied warranty of merchantability can accompany the sale of used goods. In *Crandell v. Larkin and Jones Appliance Company*, 334 N.W.2d 31 (S.D. 1983), the South Dakota Supreme Court stated that those merchants who sell used products, which are rebuilt or reconditioned, are subject to the strict

liability doctrine. The court believed that application of this doctrine to the sale of these used products would help protect the reasonable expectations of consumers.

Implied Warranty of Workmanship and Habitability

The seminal South Dakota case on the warranty of workmanship and habitability is *Waggoner v. Midwestern Development, Inc.*, 154 N.W.2d 803 (S.D. 1967). The court stated that such "warranties are either express or implied. Implied warranties arise under certain circumstances, by operation of law, and are intended to hold vendors to a course of fair dealing." 154 N.W.2d at 807. Additionally, "where a person holds himself out as especially qualified to perform work of a particular character there is an implied warranty that the work shall be done in a reasonably good and workmanlike manner that the completed product or structure shall be reasonably fit for its intended purpose." *Id.* (citing 17 C.J.A. Contracts §329). The court concluded that where in the sale of a new house the vendor is also a builder of houses for sale, there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed. However, the builder is not required to construct a perfect house and in determining whether a house is defective, the test is reasonableness. *Id.* at 809 (citing *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965)). The duration of liability is likewise determined by the standard of reasonableness. *Id.* This reasonableness standard and may be extended to include periods of time in which the property was leased prior to sale. *Ehresmann*, 757 N.W.2d. at 407 (citing *Waggoner*, 154 N.W.2d at 809). However, the implied warranty should never be extended to subsequent purchasers. *Id.*

The court in *Bunkers v. Jacobson* cited a very important principle in construction disputes that the contractor is liable only to the extent his or her work was actually negligent:

> [A] construction contractor who has followed plans or specifications furnished by the contractee, his architect, or engineer, and which have proved to be defective or insufficient, will not be responsible to the contractee for loss or damage which results… solely from the defective or insufficient plans or specifications, in the absence of any negligence on the contractor's part, or any express warranty by him as to their being sufficient or free from defects.

653 N.W.2d 732 (S.D. 2002).

In *Border States Paving, Inc. v. South Dakota Department of Transportation*, 574 N.W.2d 898 (S.D. 1998), the court examined the issue of change orders. In this case, the contractor attempted to escape liability for road surface defects due to paving during cold temperatures. The court found that when a contractor agrees to an unambiguous change order, wherein the contractor agrees to assume the risk of defects, he or she is bound to the terms of the contract and will bear any such risk or defect. The court also held that where a party agrees to perform for a fixed sum, they will not be excused or become entitled to additional compensation due to unforeseen difficulties that are encountered. Finally, the court discussed its holding in *Mooney's Inc. v. South Dakota Department of Transportation*, 482 N.W. 2d 43 (S.D. 1992), where it held that in determining the allocation of risk, the government will not be liable to a contractor for breach of implied warranty, unless there are misrepresentations of material facts through the concealment of false statements on the part of the government.

Strict Liability

In *Engberg v. Ford Motor Company*, 205 N.W.2d 104 (S.D. 1973) (disapproved on other grounds by *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979)), the court adopted strict liability as expressed in Restatement (Second) of Torts §402A. The plaintiff must prove by a preponderance that: (1) the product was in a defective condition that made it unreasonably dangerous to the plaintiff user; (2) the defect existed at the time it left the control of the defendant; (3) the product was expected to and did reach the plaintiff user without a substantial unforeseeable change in the condition the product was in when it left the control of the defendant; and, (4) the defective condition was a legal cause of the injuries. South Dakota Pattern Jury Instructions: Civil §20-120-10 (2015 ed.).

A defense to strict liability under South Dakota law is recognized where the defendant contends that there was a substantial unforeseeable change in the use of a product or the use of manner in which it is used. *Smith v. Smith*, 278 N.W.2d 155, 160–61 (S.D. 1979). Additionally, there is a well-established defense under assumption of risk where the user is

aware of the defect in the product, but nonetheless choses to make use of the product. *Wangsness v. Builders Cashway, Inc.*, 779 N.W.2d 136 (S.D. 2010) (citing *Smith*, 278 N.W.2d at 161). Other defenses are also recognized; however, the contributory negligence of the plaintiff is not a defense in South Dakota to a plaintiff's strict liability claim. *Smith*, 278 N.W.2d at 159–60.

The issue of the availability of contributory or comparative negligence as a defense in a breach of warranty action has not been addressed specifically by the South Dakota Supreme Court; however, the court stated in dictum that "many courts have ruled that contributory negligence is not a defense to breach of warranty actions." *Fredrick v. Dreyer*, 257 N.W.2d 835 (S.D. 1977); *see also Southern Illinois Stone Co. v. Universal Engineering Corp.*, 592 F.2d 446 (8th Cir. 1979).

According to SDCL §20-9-9, product dealers and sellers are immune from strict liability except for manufacturers and for those who knew of the defect. There is no cause of action based on the doctrine of strict liability in tort against any distributor, wholesaler, dealer, or retail seller of a product that is alleged to contain or possess a latent defective condition, which is unreasonably dangerous to the buyer, user, or consumer, unless they are also the manufacturer, assembler, or the maker of a component part of the final product, or unless they knew, or in the exercise of ordinary care, should have known of the defective condition of the final product. In *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909 (S.D. 1987), the court held that knowledge of defective condition will not be imputed to a nonmanufacturing middleman, as would otherwise be the case under a strict liability theory.

Under South Dakota law, a plaintiff may recover under a theory of strict liability against a seller of used goods by proving that not only did the seller rebuild or recondition the good, but also, that the seller knew, or in the exercise of ordinary care should have known of the defect. *See Wynia v. Richard-Ewing Equip. Co.*, 17 F.3d 1084 (8th Cir. 1994); *Crandell v. Larkin and Jones Appliance Co.*, 334 N.W.2d 31 (S.D. 1983).

Worker's Compensation as Exclusive Remedy

SDCL §62-3 covers employer's responsibilities and employees' rights under South Dakota law. SDCL §62-3-2 provides for the rights and remedies granted to an employee based upon personal injury or death arising out of and in the course of employment. This statute excludes all other rights and remedies of the employee, the employee's personal representatives, dependents, or next of kin based upon injury or death against the employer or any employee, partner, officer, or director of the employer, except rights and remedies arising from an intentional tort. SDCL §62-3-10 addresses liability to subcontractor's employees:

> [a] principal, intermediate, or subcontractor is liable for compensation to any employee injured while in the employ of any subcontractor and engaged upon the subject matter of the contract, to the same extent as the immediate employer. Any principal, intermediate, or subcontractor who pays compensation under this statute may recover the amount paid from any person, who, independently of this section, would have been liable to pay compensation to the injured employee. Each claim for compensation under this statute shall, in the first instance, be instituted against the immediate employer, but such proceeding does not constitute a waiver of the employee's rights to recover compensation under this title from the principal or intermediate contractor. However, the collection of full compensation from one employer bars recovery by the employee against any others. The employee may not collect from all [persons] a total compensation in excess of the amount for which any contractor is liable. This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or that are otherwise under the contractor's control or management.

Under South Dakota's compensation for injury or death laws, "[i]f an injury for which compensation is payable under this title has been sustained under circumstances creating[,] in some other person other than the employer[,] a legal liability to pay damages in respect thereto, the injured employee may, at the employee's option, either claim compensation or proceed at law against such other person to recover the damages or proceed against both the employer and such other person." Should the injured employee recover "any like damages from such other person, the recovered damages shall be offset against any workers' compensation that the employee would otherwise have been entitled to receive." SDCL §62-4-38.

In *Thompson v. Mehlhaff*, 698 N.W.2d 512 (S.D. 2005), the widow of a general contractor's employee brought a wrongful death action against a subcontractor to recover after the death of her husband, who was an employee of the general contractor. Workers' compensation benefits were received by Thompson's estate as a result of his death from his employer. Thompson sued the subcontractor on a theory of vicarious liability for the wrongful death of her husband. Before trial, defendant filed for summary judgment on the theory that Thompson was limited to the exclusive remedy of workers' compensation. The motion was denied. Defendant then sought to have the court adopt the minority rule of "common employment theory," wherein a general contractor's employee could not sue the subcontractor for his or her employees actions, because they were in the same employment or doing the same work, and therefore, the only remedy for the employee would be workers' compensation of the general contractor. The court declined to do so, and adopted the majority rule, that an employee of a general contractor may collect workers' compensation benefits from the general contractor as well as the subcontractor for the negligence of an employee of the subcontractor. The suit was subject to the employer's right to subrogation for the workers' compensation paid to the employee. The court later explained that according to the majority rule, liability for benefits runs only "up the ladder, not down." *Id.* at 518. Immunity is given to the general contractor because it is the backup provider of workers' compensation coverage, the opposite is not true. "The quid pro quo for the employer's assumption of liability for workers' compensation is immunity from suit by the employee" meaning that workers' compensation is the exclusive remedy for on-the-job injuries to workers, except those injuries intentionally inflicted by the employer. *Id.* Mehlhaff did not pay and was not liable to pay workers' compensation benefits to Thompson and, therefore, was not permitted to claim the quid pro quo of immunity.

An independent contractor, as defined under SDCL Chapter 61-1, who is not an employer or general contractor, may sign an affidavit stating that he or she is not an employee and is exempt from the workers' compensation coverage of the employer. This affidavit will create a rebuttable presumption that the affiant is not an employee and that the holder of the affidavit will not be liable for a worker's compensation claim by the affiant or any subcontractor of the affiant. The form and contents of the notarized affidavit will be prescribed by the Division of Insurance and shall include statements of understanding by the affiant and a statement of facts supporting their exempt status as an independent contractor. However, no employer or general contractor is required to accept an affidavit of exempt status as a substitute for a certificate of workers' compensation coverage.

Time is of the Essence

SDCL §53-10-2 specifies that if time of performance of a contract is not specified, then a reasonable time is allowed. If the act to be performed is one that can be done instantly, then it should be performed immediately. Under South Dakota law, time is never considered to be of the essence in a contract, unless by its terms it is so expressly provided. SDCL §53-10-3. In *Pederson v. McGuire*, 333 N.W.2d 823 (S.D. 1983), the court stated that a determination of whether time is of the essence depends upon the intention of the parties, instead of the printed contract clauses claiming that time is of the essence. The court in *Pederson*, also cited *West Town Site v. Lamro Town Site Co.*, wherein, it held that "[i]t is a question of construction, and, unless it plainly appears that the object and purpose of the contract depends upon its being performed by a given date, time will never be construed to be of the essence of a contract." *Pederson*, 333 N.W.2d at 826 n.2 (citing *West Town Site*, 139 N.W.777, 779 (S.D. 1913).

A time of the essence provision or conditions involving performance of a contract can be waived orally notwithstanding the statute of frauds. A party who waives the time for performance must give notice of any withdrawal of the waiver and give the other party a reasonable time to complete the contract. *Johnson v. Sellers*, 798 N.W.2d 690, 695 (S.D. 2011) (citing *Endres v. Warriner*, 307 N.W.2d 146, 150 (S.D. 1981).

Act of God

In *Brasel v. City of Pierre*, 229 N.W.2d 569 (S.D. 1975), the court defined an act of God to be "any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented." (quoting *Nw.*

Bell Tel. Co. v. Henry Carlson Co., 165 N.W.2d 346 (S.D. 1969)). The court went on to say that the act of God must be the one and only proximate cause of damage, without coexisting negligent participation of the defendant before the defendant can be entitled to a verdict. The burden is on the defendant to prove that such act took place by a preponderance of the evidence.

Prompt Payment Act

South Dakota laws relating to the Prompt Payment Act can be found under S.D. Codified Laws Ch. 5-26. SDCL §5-26-2 provides for the deadlines for payments owing by a public agency. Those agencies that acquire property or services pursuant to a contract with a business shall pay for each complete delivered item of property or service on the date required by the contract between the business and the agency. If no date for payment is provided or specified by the contract, then payment is to be made within forty-five days after receipt and written acceptance of property or services and receipt of the invoice covering the delivered items or services. For those payments that become overdue, SDCL §5-26-3 states that proper invoices that are not paid within forty-five days shall accrue interest, beginning on the thirtieth day after receipt of property or services and receipt of the invoice covering the delivered items or service. For payments to subcontractors and supplies, SDCL §5-26-6 governs. According to SDCL §5-26-6, upon payment by an agency, for a business that has acquired property or services under contract and in connection with its contract with the agency from a subcontractor or supplier, the business shall make payment to the subcontractor or supplier payment within thirty days after receiving payment from the agency, unless the contract provides otherwise. Otherwise, interest will begin to accrue on the thirty-first day. Payment shall be due when the subcontractor or material suppliers have satisfied the terms of their contract or material delivery agreement.

Indemnity Claims

Indemnity claims in South Dakota are controlled by Title 56 of the South Dakota Codified Laws. Indemnity for future wrongful acts is void. SDCL §56-3-2. An agreement to indemnify against past wrongful acts is valid, even though the act was known to be wrongful, unless it was a felony. SDCL §56-3-3. Indemnity can be extended to the acts of agents. Under SDCL §56-3-4, an agreement to indemnity against the acts of a certain person, applies not only to his or her acts and their consequences, but also to those of his or her agents. Unless a contrary intention appears in the agreement, an agreement to indemnify several persons applies to each. SDCL §56-3-5. Under South Dakota law, a person who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately liable to every person injured by such act. SDCL §56-3-6.

South Dakota specifically addresses indemnification of architects and engineers in construction contracts under SDCL §56-3-16. Under this statute, construction contracts, plans, and specifications that contain indemnification provisions shall include the following provision:

> The obligations of the contractor shall not extend to the liability of the architect or engineer, his agents or employees arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the architect, or engineer, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage.

Any indemnification provision in a construction contract in conflict with SDCL §53-3-16, shall be unlawful and unenforceable. SDCL §56-3-17. Furthermore, a construction contract which purports to indemnify the promisee against liability and damages caused by or resulting from the negligence of the promisee, his agents, or employees, relative is void, unenforceable and against the policy of the law. SDCL §56-3-18.

The court stated in *Schull Construction Co. v. Koenig*, 121 N.W.2d 559, 562 (S.D. 1963), that "[t]he trial court found that there was no provision in the contract between the contractor and subcontractor, express or implied, making the subcontractor liable for the damage that occurred and that the subcontractor did not either expressly or impliedly assume the indemnifying and holdharmless [sic] agreement of the contractor with the owner." The court therefore, affirmed the trial court's decision. The court went on to state that "[c]ontracts of indemnity are strictly construed in favor of a subcontractor

as against the contractor and unless the language employed clearly and definitely shows an intention to indemnify courts do not read into a written contract indemnity provisions not expressly set forth therein. Such contracts are subject to close scrutiny as to whether such intent was present when the contract was executed." *See also PCL Constr. Servs v. George Fischer, Inc.*, No. 11-4035-KES, 2013 WL 1866922, at *5–6 (D.S.D. 2013).

In *Parker v. Stetson-Ross Machine Co.*, 427 F. Supp. 249, 251 (D.S.D. 1977), the court stated that "[i]n South Dakota, indemnity is an 'all-or-nothing' proposition." (quoting *Highway Constr. Co. v. Moses*, 483 F.2d 812, 817 (8th Cir. 1973)). To be entitled to indemnity, one must show "a proportionate absence of contributing fault." 427 F. Supp. at 251 (quoting *Degen v. Bayman*, 200 N.W.2d 134, 137 (S.D. 1972) (overruled on other grounds)). The result of such a showing is to shift the entire liability to the party against whom indemnity is sought. *Id.* (citing *Degen*, 200 N.W.2d at 136). Thus, "indemnity is not a means by which a portion of liability, comparative with the proportion of fault can be shifted to another party." *Id.*

The Supreme Court of South Dakota stated in *Ebert v. Fort Pierre Moose Lodge No. 1813*, 312 N.W.2d 119 (S.D. 1981), that "[a] joint tort feasor may recover indemnity where he has only an imputed or vicarious liability for damage caused by the other tort feasor." *Degen*, 200 N.W.2d at 137 (S.D. 1972). The court went on to say that in *Degen*, the court adopted the viewpoint of the Minnesota Supreme Court as espoused in *Hendrickson v. Minnesota Power & Light Co.*, 104 N.W.2d 843 (Minn. 1960). The court in *Hendrickson* held that although indemnity is not necessarily precluded per se among joint tort-feasors, the situations in which indemnity is allowed are exceptional and limited, such as: (1) derivative or vicarious liability; (2) action at direction of, and for, another; (3) breach of duty to indemnify; (4) failure to discover negligence of another; and, (5) express contract. *Ebert*, 312 N.W.2d at 123 (citing *Henrickson*, 104 N.W.2d at 848).

A party to a joint or joint and several obligation, who satisfies more than its share of the claim against all, may seek contribution from all the parties joined with it. SDCL §20-1-6.

Defenses

Statute of Repose

According to SDCL §15-2A-3:

> [n]o action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection, and observation of construction, or construction, of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of such an improvement more than ten years after substantial completion of such construction. The date of substantial competition shall be determined by the date when construction is sufficiently completed so that the owner or its representative can occupy or use the improvement for the use it was intended. For injuries to a person or property occurring during the tenth year after substantial completion, an action may be brought within one year after the date on which the injury occurred, but in no event should an action be brought more than eleven years after the substantial date of completion.

Limitations of SDCL §15-2A-3

A statute of repose is an affirmative defense and the burden of proof to establish an affirmative defense is on the party who seeks to rely on it. *Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406, 413 (S.D. 2008) (citations omitted).

The restrictions placed on claims under SDCL §15-2A-3 may not be asserted by way of defense by any person in actual possession and control as owner, tenant, or otherwise, of the improvement, if the deficiency is the proximate cause of the injury or death. SDCL §15-2A-4. Additionally, the statute of repose may not be asserted as a defense by any person who is guilty of fraud, fraudulent concealment, fraudulent misrepresentation, or willful or wanton misconduct, in furnishing the design, planning, supervision, inspection, and observation of construction, or construction, or of improvements to real property. SDCL §15-2A-7. *See also Klinker v. Beach*, 547 N.W.2d 572 (S.D. 1996).

When an express warranty is provided for a period longer than ten years to an improvement of property, he or she will not be able to bar the action under the statute of repose for construction deficiencies. SDCL §15-2A-8.

Contributory Negligence and Assumption of the Risk

South Dakota is one of the last, if not the last remaining contributory negligence state. Contributory negligence in South Dakota is defined as negligence on the part of a plaintiff that, when combined with the negligence of a defendant, contributes as a legal cause in bringing about the injury to the plaintiff. SDCL §20-9-1. In all actions brought to recover damages for injuries to a person or that person's property, the fact that the plaintiff was negligent does not bar his or her recovery, unless plaintiff's negligence was more than "slight" in comparison to that of defendants. When plaintiff's negligence is slight, his or her damages will be proportionately reduced. SDCL §20-9-2.

Assumption of risk, can act to bar Plaintiff's claim. In *Gerlach v. Ethan Coop Lumber Association*, the court barred recovery by a building owner against a co-op who constructed a hog confinement for them after owner failed to clear snow from building's roof which led to its collapse. 478 N.W.2d 828 (S.D. 1991) (evidence supported giving of assumption of risk instruction).

Waiver

In *A-G-E Corporation v. South Dakota*, 719 N.W.2d 780 (S.D. 2006), the contractor under a road construction contract with the Department of Transportation (DOT) brought an action, alleging waiver and estoppel against the DOT after the DOT sought to require the contractor to perform work to bring the contractor's work within the specification of the contract. The court defined waiver of a contractual right as "'where one in possession of any [contractual] right… and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it[.]'" *Id.* at 787 (quoting *Western Cas. and Sur. Co. v. Am. Nat. Fire Ins. Co.*, 318 N.W.2d 126, 128 (S.D. 1982) (citations omitted)). The court noted that there could be no waiver because there was no evidence that the DOT was aware that the roadway was not in compliance, and therefore, was not aware of the "material facts" needed to constitute a waiver. *Id.* at 789.

Estoppel

In *A-G-E Corporation*, 719 N.W.2d 780 (S.D. 2006), the court also discussed the issue of estoppel. The court, again quoting *Western Casualty Co.*, 318 N.W.2d at 128, stated that in order to create an estoppel:

> there must have been to be some act or conduct upon the part of the party to be estopped, which has in some manner misled the party in whose favor the estoppel is sought and caused the party to part with something of value or do some other act relying upon the conduct of the party to be estopped, thus creating a condition that would make it inequitable to allow the guilty party to claim what would otherwise be [its] legal right.

A-G-E Corp., 719 N.W.2d at 789.

The court went on to say that "estoppel will be applied against a party who by their words or conduct take positions inconsistent with their rights, unfairly misleading others into detrimental reliance." *Id.* (citing *Harms v. Northland Ford Dealers*, 602 N.W.2d 58 (S.D. 1999) (citation omitted.) The court stated that "it requires concealment, misrepresentation, or conduct at odds with known facts." *Id.* at 789–90 (citing *Action Mech., Inc. v. Deadwood Historic Pres. Com'n*, 652 N.W.2d 742, 751 (S.D. 2002)).

Intervening and Superseding Causes

In *Braun v. New Hope Township*, 646 N.W.2d 737 (S.D. 2002), the court recognized the common law rule that intervening/superseding causes may relieve a negligent individual from his or her antecedent negligence. The court, quoting *Schmeling v. Jorgensen*, 84 N.W. 2d 558, 564 (S.D. 1957), said "[w]hen the natural and continuous sequence of causal connection between the negligent conduct and the injury is *interrupted by a new and independent cause*, which itself produces the injury, that *intervening* cause operates to relieve the original wrongdoer of liability." 646 N.W.2d at 740 (emphasis original). The court went on to say that the intervening cause must be a superseding cause and not all intervening causes relieve an individual of liability. Reference is made to the differences between intervening

and superseding causes. According to the Restatement (Second) of Torts, "[a]n intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." *Id.* at 740–41 (quoting §441(1) (1984)). For something to be the superseding cause, the "act or operation of an intervening force prevents the original actor's antecedent negligence from becoming a legal cause in bringing about the harm to another…." *Id.* at 741 (quoting §441(2) (1984)).

Exculpatory Clauses

In *Morris, Inc. v. South Dakota*, 598 N.W.2d 520 (S.D. 1999), the plaintiff appealed on the issue of whether a genuine issue of material fact existed supporting its claim that the Department of Transportation, by concealment or false statements, or by misrepresenting material facts regarding the availability of materials for the project so as to give rise to an implied warranty. The court discusses the issue of exculpatory clauses. The court, citing *Midwest Dredging Co v. McAninch Corp.*, 424 N.W.2d 216, 222 (Iowa 1988), stated "general exculpatory clauses which disclaim any responsibility for the accuracy of that data have been held to be of no effect when the positive specifications made by the government were obviously intended to be used by the bidding contractors in formulating their bids." Disclaimers that are general in nature will not release a defendant for positive and material representations upon which the contractor had a right to rely. *Morris, Inc.*, 598 N.W.2d at 523.

Failure to Mitigate

Northwestern Engineering Co. v. Ellerman, 23 N.W.2d 273 (S.D. 1946), is a case involving an action by Northwestern against to recover damages for the failure of the defendants to comply with a contract relating to construction on an air base. Northwestern sought damages in the amount of the difference between the amount agreed upon by the defendants to perform the work under the original contract and the amount the plaintiff had to pay another company to complete the original contract work. This is the general measure of damages when there is a total failure of performance of a contract. 23 N.W.2d at 275. On the issue of mitigation, the court stated that the general principal is for those actions seeking damages arising out of a breach of contract, in which the plaintiff has proven its damages, the burden of proving that those damages would have been lessened by reasonable diligence on the part of the claimant is on the party whose wrongful act caused the damages. *See also Arrowhead Ridge I, LLC v. Cold Stone Cremery, Inc.*, 800 N.W.2d 730 (S.D. 2011). In order to recover the expense of an attempt to avoid a loss, the plaintiff must establish the fact of payment. The burden is then on the defendant to introduce evidence that the means employed and the expense thereof were unnecessary or unreasonable. A plaintiff must take the proper steps to avoid consequences or loss. If it fails to do so, it cannot recover the entire expense resulting from failure to take the appropriate step to mitigate its damages.

Economic Loss Doctrine

The seminal case in South Dakota on the Economic Loss Doctrine is *City of Lennox v. Mitek Industries, Inc.*, 519 N.W.2d 330, 333 (S.D. 1994), wherein the court affirmed summary judgment against the City of Lennox and adopted the doctrine. The City of Lennox had brought a suit against a subcontractor. The subcontractor supplied roofing trusses for a municipal building as well as a supplier of component parts of the trusses. The City of Lennox claimed breach of contract, breach of implied warranties, and negligence after the trusses failed. The court applied a two-step process in determining the economic loss rule. The court held that the U.C.C. applied since the main purpose of the transaction was a sales transaction. Under South Dakota law, the term "goods" is defined by SDCL §57A-2-105(1). The court stated the general rule is that economic losses are not recoverable under tort theories. Economic losses are limited to commercial theories found in the U.C.C. *See also Braun v. E.I. du Pont De Nemours & Co.*, No. 04-1007, 2006 WL 290552, *2–3 (D.S.D. 2006). The court adopted this general rule with its two recognized exceptions. One exception to the general rule is when personal injury is involved. *Mitek Indus.*, 519 N.W.2d at 333 (citation omitted). The second exception may apply when the damage is to "other property" as opposed to the specific goods that were part of the transaction. *Id.* "Other property has been defined as damage to property collateral to the product itself." *Id.* (citation omitted). This means that once a "good" has been incorporated into a structure or project, any damages to the whole structure are not considered "other property." *See also PCL Const. Servs., Inc.*

v. George Fischer, Inc., No. 11-4035-KES, 2013 WL 1866922 (D.S.D. 2013). The court defined economic loss as "that loss resulting from the failure of the product to perform to the level expected by the buyer and *the consequential losses* resulting from the buyer's inability to make sure of the ineffective products, such as lost profits." *Id.* (emphasis original). Finally, the court found that the damages claimed by the City of Lennox were "in reality repair costs that fall under consequential damages." *Id.* at 333–34. The damages were, therefore, not recoverable under the tort theory of negligence, but instead were governed by the U.C.C.

Spearin *Doctrine*

South Dakota courts have cited to the Spearin Doctrine on rare occasions. In *Morris, Inc. v. State of South Dakota*, 598 N.W.2d 520 (S.D. 1999), the plaintiff appealed on the issue of whether a genuine issue of material fact existed supporting its claim that the Department of Transportation, by concealment or false statements, misrepresented material facts regarding materials available to the DOT and relied upon in the bidding process so as to give rise to an implied warranty of accuracy. The court cites to *Mooney's, Inc. v. South Dakota Department of Transportation*, 482 N.W.2d 43 (S.D. 1992), where it provided the general rule as to a claim against the government for an implied warranty of accuracy. This is also the first case cited for reference to the Spearin Doctrine. The court stated that generally the government is not liable to a contractor for breach of implied warranty "unless it misrepresented material facts through concealment or false statements." *Id.*, 598 N.W.2d at 523 (citing *Mooney's, Inc.*, 482 N.W.2d at 46). In other words, there is no implied warranty when the government, in good faith, provides all of the information it has to the contractor. The government is, therefore, liable when it makes a positive statement of material facts regarding the nature of the work to be performed and those facts are false. *Spearin*, as decided by the U.S. Supreme Court, is found at *United States v. Spearin*, 248 U.S. 132 (1918).

Pre Suit Notice of Claim or Opportunity To Cure

Under South Dakota's statute, there is a notice and opportunity to remedy requirement for residential construction defects. Under SDCL §21-1-16, before commencing an action against the construction professional for a construction defect, a home owner shall (1) serve on the construction professional a written notice describing the alleged construction defect, and (2) allow the construction professional, within thirty days after service of the notice, to inspect the alleged construction defect and serve on the home owner a written offer to repair the construction defect or to compensate the owner by monetary payment. An action against the construction professional may not be commenced until thirty days after the notice is served on the construction professional or such time when the construction professional refuses to remedy the alleged construction defect, whichever occurs first.

Arbitration/ADR

SDCL §21-25A-1 states that a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives. However, arbitration required by an insurance contract is not enforceable. SDCL §21-25A-3. SDCL §21-25A-5 addresses the issue of compelling arbitrations. Should a party have an agreement as described in SDCL §21-25A-1 and an opposing party refuses to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed to determine the issue so raised.

In *Flandreau Public School District No. 50-3 v. G.A. Johnson Construction*, 701 N.W.2d 430 (S.D. 2005), the parties entered into an agreement for the construction of an elementary school. The contract provided that should a dispute arise "[a]ny claim arising out of or related to the Contract, *except claims relating to aesthetic effect*… shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party." 701 N.W. at 432 (emphasis original). The school district was dissatisfied with the appearance of the masonry walls within the school. The court discussed the process for determining whether an issue should be compelled to arbitration. First, arbi-

tration is a matter of contract and a party can not be required to participate in arbitration of any dispute to which he or she had not agreed. There is a general presumption of arbitrability if there is an arbitration agreement. The court stated that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 435 (quoting *AT&T Tech. Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 650 (1986)). However, this presumption is not valid if there is an express provision excluding a particular grievance or claim from arbitration. Second, the question of who initially determines if a dispute should be arbitrated is governed by the principles of contract. Whether an agreement creates a duty to arbitrate a particular grievance is a question of judicial determination, unless the parties "clearly and unmistakably provided otherwise." *Id.* at 436 (citing *AT&T*, 475 U.S. at 649).

Measure and Types of Damages

Consequential Damages

In addition to awarding general damages, consequential damages may be awarded if it is found that the consequential damages were the natural and probable consequence of the act or omission of the defendant, but such damages must be clearly ascertainable in both nature and origin. SDCL §21-2-1.

Measure of Damages to Real Property

In determining the amount of reasonable compensation for damage to a plaintiff's real property it must first be determined whether the injury to the property is permanent or temporary. A permanent injury is one in which the damaged real property cannot be reasonably restored to its former condition or when the damage is to continue indefinitely. A temporary injury is when the property can be restored or repaired. When the injury is found to be permanent, the measure of damages is the difference between the fair market value of the property immediately before the injury and its fair market value immediately after the injury (in its unrestored/unrepaired state). Should the injury be found to be temporary, the measure of damages is the reasonable cost to restore/repair the property, and the difference, if any, between the fair market value of the real property immediately before the injury and its fair market value after the restoration/repair. An award for temporary damages cannot be greater than the plaintiff could recover for a permanent injury. South Dakota Pattern Jury Instructions: Civil §50-20-80 (2015).

The reasonable compensation for damage to a plaintiff's property is determined by the lesser of two measures: the difference between the fair market value of the property immediately before the occurrence and immediately after the occurrence; or, the reasonable expense of making any necessary repairs to the damaged property, plus the difference, if any, in the fair market value of the property, immediately before the occurrence and its fair market value immediately after repair. South Dakota Pattern Jury Instructions: Civil §50-20-10 (2015).

The Court in *Casper Lodging, LLC v. Akers*, 871 N.W.2d 477, 492 (S.D. 2015), stated that "'[a]n injured party may choose to present his [or her] case using either or both methods of measuring damages[.]'" (citations omitted).

Attorneys' Fees

In *Gettysburg School District 53-1 v. Helms and Associates*, 751 N.W.2d 266 (S.D. 2008) (overruled on other grounds), the court addressed the issue of whether the trial court erred in awarding attorneys' fees and expert witness costs. The court stated that it is well settled law that awarding attorneys' fees and expert witness costs are allowed when it is expressly agreed to by the parties. 751 N.W.2d at 276. In this particular contract, if the work was found to defective, the defendant would be responsible for all costs and disbursements, including attorneys' fees spent by the plaintiff in bringing a civil action. The court stated that due to the fact that the contract provisions expressly provided for the award of attorneys' fees and other costs, plaintiff only had to establish, by a preponderance of the evidence, the basis for such an award.

Interest

Under SDCL §21-1-13.1, any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim or third party claim, is entitled to recover interest thereon from the day that the loss or damage occurred to the date of the verdict or judgment, except during such time as the debtor is prevented by law, or by act of the creditor, from

paying the debt. Prejudgment interest is not recoverable on all types of damages such as future damages or those that are intangible. The interest applied is the amount agreed to in the contract, otherwise, it shall accrue at the rate of 10 percent percent per year. SDCL §54-3-16.

In *Gettysburg*, 751 N.W.2d 266 (S.D. 2008) (overruled by *Casper Lodging*, *infra*), the school district sued for breach of contract and negligence against the construction contractor and engineer for faulty construction of an outdoor track. The contractor claimed that the award of prejudgment interest was erroneous. The court had previously stated that prejudgment interest is mandatory, not discretionary in an action for recovery. 751 N.W.2d at 275 (citing *Setliff v. Stewart*, 694 N.W.2d 859 (S.D. 2005)). The passing of SDCL §21-1-13.1 in 1990 abolished the rule that prejudgment interest could not be obtained if damages remain uncertain until determined by a court. *Id.* (citation omitted).The present rule of S.D. Codified Laws §21-1-13.1 allows prejudgment interest from the day the loss or damage occurred, regardless of whether the damages are certain. *Id.* (citation omitted).

In October of 2015, the South Dakota Supreme Court in *Casper Lodging, LLC v. Akers*, 871 N.W.2d 477 (S.D. 2015), overruled the *Gettysburg* decision for its rule that prejudgment interest relates back to the date of the breach. In *Casper Lodging*, a contractor built a "turn-key" hotel that later experienced issues with moisture and soundproofing. Although the hotel fixed minor issues, the hotel did not make "substantial repairs" until several years after the hotel was delivered to the owner. The hotel owner later brought a breach of contract claim against the contractor for the defects. After a jury found the contractor breached the contact, the lower court applied the rule in *Gettysburg School District* and awarded prejudgment interest back to the time the hotel was delivered to its owner. However, the Supreme Court reversed and found that because the hotel owner did not expend money to fix the extensive repairs until several years after delivery of the hotel, the hotel owner "did not suffer any loss of return on its original investment until it incurred costs of repair." *Casper Lodging*, 871 N.W.2d at 500.

Punitive Damages

In addition to actual damages, a plaintiff may be awarded punitive damages if it is proven that the plaintiff suffered injury to person or property as a result of oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct of the defendant. Punitive damages are generally not recoverable under contract. SDCL §21-3-2. *See also McKie v. Huntley*, 620 N.W.2d 599, 602 (S.D. 2000) (punitive damages denied under contract and implied breach of good faith).

In *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003), the court stated it has previously indicated that, in order to overturn a jury's award of punitive damages, "the damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly shows the jury to have been actuated by passion, partiality, prejudice or corruption." 667 N.W.2d at 662 (citing *Stormo v. Strong*, 469 N.W.2d 816, 826 (S.D. 1991) (quoting *Schuler v. Mobridge*, 184 N.W. 281, 283 (S.D. 1921).

Courts may impose punitive damages, but they must adhere to constitutional concerns, specifically due process concerns. *Id.* at 665. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* (citations omitted) To stand, punitive damages must be reasonable. *Id.* In reviewing punitive damage awards, the appellate standard is de novo. *Id.* (citations omitted).The *Roth* court followed the guidance given by the Supreme Court to determine if punitive damages are reasonable, a three prong analysis:

1) the degree of reprehensibility of the defendant's misconduct;
2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award; and,
3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 665–66 (citing *State Farm v. Campbell*, 538 U.S. 408 (S.D. 2003)).

The *Roth* court incorporated the three-prong analysis given by the Supreme Court in *Campbell*, with the five factors previously used to determine whether punitive damages are reasonable. *Id.* at 666. The five factors are "the amount allowed in compensatory damages, the nature and enormity of the wrong, the intent of the wrongdoer, the wrongdoer's financial

condition, and all of the circumstances attendant to the wrongdoer's actions." *Id.*

Stigma Damages

In Subsurfco, Inc. v. B-Y Water District, 337 N.W.2d 448, 445 (S.D. 1983), the court set forth the appropriate measure of recovery, stating: "[W]here the defects cannot be remedied without reconstruction of a substantial portion of the work, the measure of damage is the difference in value between what it would have been if built according to contract and what was actually built." (citing *Northern Farm Supply, Inc. v. Sprecher*, 307 N.W.2d 870, 873 (S.D. 1981). *See also* discussion in *Casper Lodging*, 871 N.W.2d 477 (S.D. 2015).

Contract Damages

Under a theory of implied contract, which requires defendant to pay for services and materials, a plaintiff may be awarded the reasonable value of such services and materials at the customary rate of pay for such work or materials in the community at the time the services were performed or the materials were furnished. *See Carnicle v. Swann*, 314 N.W. 2d 311, 313 (S.D. 1982).

Other Issues

State Bidding, Building, and Improvements

Contractors with state projects should review Chapter 5 of the South Dakota Code for state-related provisions. The codified provisions for Public Buildings and Improvements are located in Chapter 5-15 of the Code, and public agency procurement and bidding rules are located in the South Dakota Code, Chapters 5-18A and 5-18B.

State and Municipal Bonds

The law of South Dakota divides bond requirements between those for use in general "public improvement" contracts and those required for bids in county highway systems.

For public improvement contracts under SDCL Chapter 5-21, a performance bond is required for an amount not less than the contract price, as well as a labor and materials bond. SDCL §5-21-1. However, the requirement of a performance bond may be waived by public corporations when the bid does not exceed twenty-five thousand dollars. SDCL §5-21-1.1. The state shall also waive this requirement on state projects when the awarded contract does not exceed fifty thousand dollars. SDCL §5-21-1.2. In the event that a public corporation fails to require a performance bond, the public corporation shall be come liable for performed labor and furnished materials provided that an action is commenced within ninety days from the acceptance of work for which the value is claimed. SDCL §5-21-2. Any person who furnishes labor or materials in a public improvement for which no payment has been made has the ability to intervene against any action on behalf of the municipal corporation. SDCL §5-21-5. But in the case where no action is taken by the public corporation after 6 months from completion, a laborer or materialman shall be authorized to take action in the name of the public corporation within one year after against the surety. SDCL §5-21-6.

The provisions for bonds in the context of county highway systems are located at SDCL §31-12-15, which requires the person receiving the contract to furnish a performance bond in an amount that the county bond considers sufficient.

AUTHOR

Paul Tschetter | Boyce Law Firm LLP | 605.336.2424 | pwtschetter@boycelaw.com

An earlier version of this document was drafted by Margo Northrup of Riter, Rogers, Wattier & Northrup, LLP of Pierre, South Dakota.