



STATE OF TENNESSEE CONSTRUCTION LAW COMPENDIUM

Prepared by

Lee Piovarcy

Paul Morris

Andrew Gardella

Martin, Tate, Morrow & Marston, P.C.

6410 Poplar Avenue, Suite 1000

Memphis, TN 38119

(901) 522-9000

www.martintate.com

This outline provides a general overview of Tennessee's construction law. The discussion on any particular topic is not necessarily an indication of the total law related to an area of Tennessee's construction law. Most construction disputes are governed by contract law. With a few variations, the law applicable to construction disputes in Tennessee is similar to that found in other states.

Tennessee is a comparative negligence/fault state. Comparative negligence in Tennessee is negligence on the part of the plaintiff that proximately contributed to his injuries. This negligence on the part of the plaintiff does not bar his recovery from other negligent parties unless plaintiff is found to be 50% or more at fault. Tennessee abolished joint and several liability when it instituted comparative fault. *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992). The jury must apportion fault by percentage among all responsible parties.

I. BREACH OF CONTRACT

Typically a breach of contract claim can be asserted by the purchaser against the general contractor, as well as by the general contractor against its subcontractors. A general breach of contract claim in Tennessee is subject to a six year statute of limitations. T. C. A. § 28-3-109 (1976). However, it is well settled in Tennessee that the three (3) year statute of limitations (Tennessee Code Annotated § 28-3-105) applies to claims for injuries to realty. This is so regardless of whether the causes of actions set forth in the complaint are designated as an action for tort (negligence) or contract. To determine the nature of the cause of action the court will look to the gravamen of the complaint. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006). The three (3) year statute of limitations begins to run when the plaintiff first discovers that he has a cause of action (e.g. that there is a problem with the residence). There is also a four (4) year statute of repose (Tennessee Code Annotated § 28-3-202) which provides that all claims related to improvements to property are barred if brought more than four (4) years after the date of substantial completion, regardless of when the alleged problems were discovered. A breach of contract gives rise to a cause of action by the aggrieved party. The statute of limitations begins to run as of the date of the breach. It is also a well recognized rule that a cause of action arises when the acts and conduct of one party shows an intention to no longer be bound by the contract. *Greene v. THGC, Inc.*, 915 S.W.2d 809, 810 (Tenn. App. 1995).

II. NEGLIGENCE

Generally, an injury incurred due to negligent construction may give rise to an action for breach of a contractor's duty of care, or negligence. An action for negligence in construction could be based upon the contractor's poor workmanship, supervision, or design.

The negligence claim against the general contractor may be limited by the economic loss rule. This rule, in Tennessee, bars a plaintiff from recovering under tort law. "Tennessee has joined those jurisdictions which hold that product liability claims resulting in pure economic loss can be better resolved on theories other than negligence. In Tennessee, the consumer does not have an action in tort for economic damages under strict liability." *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 133 (Tenn. 1995). Rather, "when a product does not perform as expected, the

buyer's remedy should be governed by the rules of contract, which traditionally protect expectation interests.” *Id.*

III. BREACH OF WARRANTY

In construction cases, plaintiffs typically assert causes of action for breach of warranty. The breach of warranty can be based on express warranty provisions contained in the contract between the plaintiff and the general contractor and/or warranties implied by law.

Tenn. Code Ann. §28-3-202 provides that all actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying in connection with, such an improvement within four (4) years after substantial completion of such an improvement. This statute of repose will bar an action four years after substantial completion, regardless of when the plaintiff may have reasonably discovered the injury. The discovery rule, utilized to ascertain when a cause of action has accrued under a statute of limitations, does not toll the statute of repose. *Chrisman v. Hill Home Development, Inc.*, 978 S.W.2d 535, 539 (Tenn. 1998).

Tennessee has an implied warranty of merchantability for goods under Tenn. Code Ann. § 47-2-314. Further, the Court has aligned itself “with those jurisdictions that recognize that the home buying public has a legitimate expectation that the workmanship and materials used by the builder-vendor in the construction of a dwelling will meet the standard of the trade for homes in comparable locations and price range and that such a warranty is implicit in the contract and survives the passing of title to the real estate and the taking of possession, as an exception to the doctrine of caveat emptor.” *Dixon v. Mountain City Const. Co.*, 632 S.W.2d 538, 541 (Tenn. 1982).

IV. MISREPRESENTATION AND FRAUD

Under some circumstances general contractors can be sued by homeowners under the theory of fraud or misrepresentation. Tenn. Code Ann. § 28-3-105 provides that actions for injuries to personal or real property shall be commenced within three years from the accrual of the cause of action. *Northeast Knox Utility Dist. v. Stanford Const. Co.*, 206 S.W.3d 454, 459 (Tenn. Ct. App. 2006). This statute applies if the plaintiff alleges the builder is “guilty of fraud in performing or furnishing the design, planning, supervision, observation of construction, construction of, or land surveying, in connection with such an improvement,” or if the defendant “shall wrongfully conceal any such cause of action.” *Chrisman v. Hill Home Development, Inc.*, 978 S.W.2d 535, 541 (Tenn. 1998).

Fraudulent misrepresentation requires proof that (1) the defendants made false representation; (2) the plaintiff relied on the misrepresentation; and (3) the plaintiff suffered injury as a result of relying on the misrepresentation. Also a party to a contract has a duty to disclose to the other party any material fact affecting the essence of the subject matter of the contract, unless ordinary

diligence would have revealed the undisclosed fact. *Lonning v. Jim Walter Homes, Inc.*, 725 S.W.2d 682, 685 (Tenn. App. Ct. 1986).

V. INDEMNITY CLAIMS:

A. Express Indemnity:

Express indemnity claims derive from contract provisions in which one party to the contract agrees to pay costs incurred by the other party to the contract as a result of the other party being held liable to a third party or having to defend against a claim filed by a third party. Tennessee has consistently recognized that the right of parties to allocate liability for future damages through indemnity clauses, under most circumstances, is not contrary to public policy. *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 892 (Tenn. 2002). However, Tennessee courts have found indemnity clauses are invalid as to damages caused by gross negligence or willful conduct on the part of the indemnified. *Id.*

The Tennessee legislature has barred indemnity in certain cases involving construction as against public policy. Where a covenant, promise, agreement or understanding in connection with a contract relating to the construction, alteration, repair or maintenance of a building purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property resulting from the sole negligence of the promisee, the promisee's agents or employees, or indemnitee, is against public policy and is void and unenforceable. Tenn. Code. Ann. § 62-6-123 (1997).

If one is to be indemnified for his/her own negligence, the indemnifying agreement must clearly and unequivocally so state. *Summers Hardware and Supply Co., Inc. v. Steele.*, 794 S.W.2d 358, 363 (Tenn. App. Ct. 1990).

In Tennessee it is nearly a “universal rule that there can be no recovery where there was concurrent negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by ‘clear and unequivocal terms;’ and general words will not be read as expressing such an intent.” *Kroger Co. v. Giem*, 215 Tenn. 459, 472 (Tenn.1964).

B. Implied Indemnity:

Implied indemnity is the theory holding there is an implied obligation to indemnify when the obligation is a necessary element of the parties' relationship, or when justice and fairness demand that the burden of paying for the loss be shifted to the party whose fault or responsibility is qualitatively different from the other parties. *Houseboating Corp. v. Marshall*, 553 S.W.2d 588, 589 (Tenn.1977). “The right to indemnity rests upon the principle that everyone is responsible for the consequences of his own wrong, and if another person has been compelled to pay the damages which the wrongdoer should have

paid, the latter becomes liable to the former.” *Southern Coal & Coke Co. v. Beach Grove Mining Co.*, 381 S.W.2d 299, 302 (Tenn. 1963).

Under a theory of implied indemnity a party under the proper circumstances may recover its attorney fees and costs in defending a lawsuit filed against it as a result of the negligence of another party which had supplied goods to it. *Pullman Standard v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985).

The Tennessee Supreme Court has recognized the rule that “even though technically both master and servant are joint tortfeasors if the master's liability is predicated solely on the doctrine of respondeat superior, the master has a cause of action against the servant for the amount the master is compelled to pay a third party.” *Wharton Transport Corp. v. Bridges*, 606 S.W.2d 521, 528 (Tenn. 1980).

However, the rules on indemnity do not apply when there are joint tortfeasors: “the remedy in Tennessee in cases involving joint tort-feasors is restitution by way of contribution.” *Terminal Transport Co., Inc. v. Cliffside Leasing Corp.*, 577 S.W.2d 455, 459 (Tenn. 1979).

C. Comparative Indemnity:

Although some jurisdictions have developed comparative indemnity schemes based on comparative negligence concepts, Tennessee has not apportioned damages this way in a construction litigation case.

D. Third-Party Beneficiary:

Tennessee has clearly established its rule on third-party beneficiaries: “[u]nder the modern rule, third parties may enforce a contract if they are intended beneficiaries of the contract... If, on the other hand, the benefit flowing to the third party is not intended, but is merely incidental, the third party acquires no right to enforce the contract... In order to maintain an action as an intended beneficiary, a third party must show: ‘(1) a valid contract made upon sufficient consideration between the principal parties and (2) the clear intent to have the contract operate for the benefit of a third party...’ the evidence must be clear and direct.” *Owner-Operator Independent Drivers Assoc., Inc., et al. v. Concord EFS, Inc., et al.* 59 S.W.3d 63, 68-69 (Tenn. 2001). The court further stated a test to determine whether a third-party beneficiary of a contract was “entitled to enforce the contract’s terms, if: (1) the parties to the contract have not otherwise agreed; (2) recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and (3) the terms of the contract or the circumstances surrounding performance indicate that either: (a) the performance of the promise will satisfy an obligation or discharge a duty owed by the promise to the beneficiary; or (b) the promise intends to give the beneficiary the benefit of the promised performance.” *Id.* at 70.

Courts have also ruled that “unless the construction contracts involved clearly provide otherwise, prime contractors on construction projects involving multiple prime contractors will be considered to be intended or third party beneficiaries of the contracts between the project’s owner and all the other prime contractors.” *Moore Constr. Co., Inc. v. Clarksville Dep’t of Elec.*, 707 S.W.2d 1, 10 (Tenn. Ct. App. 1985). The court laid out the factors for prime contractor’s claims as third party beneficiaries to be: “(1) the construction contracts contain substantially the same language; (2) all contracts provide that time is of the essence; (3) all contracts provide for prompt performance and completion; (4) each contract recognizes other contractors’ rights to performance; (5) each contract contains a non-interference provision; and (6) each contract obligates the prime contractor to pay for the damage it may cause to the work, materials, or equipment working on the project.” *Id.*

VI. STATUTE OF REPOSE/STATUTE OF LIMITATIONS:

All actions for injury to real or personal property shall have a three year statute of limitations. Tenn. Code Ann. § 28-3-105 (1989). In 1967, Tennessee enacted statutes to limit the period to four years in which actions may be brought against architects, engineers and builders for deficiency in design, planning, supervising, etc. in which there is injury to real or personal property during an improvement to real property. Tenn. Code Ann. § 28-3-202 (1965).

The cause of action against the architect, builder, or engineer begins to accrue at the time of substantial completion of the improvement to the property. Tenn. Code Ann. § 28-3-202 (1965).

Contract claims are subject to a six year statute of limitations. Tenn. Code. Ann. § 28-3-109 (1976).

If there are latent defects not discoverable at first glance due to negligence of the builder or subcontractor then the Court has held “that a subsequent purchaser may maintain a negligence action against those who constructed a residence, if the defects claimed to have caused the injury are latent ones, not known or reasonably discoverable to either the previous owners or occupiers, or the subsequent purchaser...The General Assembly has imposed a four year statute of limitation on maintaining actions against developers. Tenn. Code Ann. §28-3-202. This limitation would apply to claims based on negligence such as that presented in this case.” *Briggs v. Riversound Ltd. Partnership*, 942 S.W.2d 529, 531-32 (Tenn. Ct. App. 1996).

VII. ECONOMIC LOSS DOCTRINE:

The economic loss rule in Tennessee bars a plaintiff from recovering under tort law where there is no damage to any other property than the product itself. Rather this type of claim should be controlled by the laws of contracts. *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 133 (Tenn. 1995).

VIII. RECOVERY FOR INVESTIGATIVE COSTS:

Tennessee appears to allow recovery of investigative costs, but these types of damages have very rarely been given. *Chastain v. Tennessee Water Quality Control Bd.*, 555 S.W.2d 113, 115 (Tenn. 1977).

IX. EMOTIONAL DISTRESS CLAIMS:

In Tennessee a homeowner may be able to recover compensatory damages for emotional distress because of construction defects to their home. For example, the Tennessee Supreme Court has allowed the recovery of emotional injury damages that stemmed from injury to real property where misrepresentations had been made. *See Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2008). The Courts have not had to decide a case of this nature in the context of construction litigation. The elements to prove emotional distress in Tennessee are:

Intentional Infliction:

In Tennessee, there are three essential elements to a claim for intentional infliction of emotional distress: the defendant's conduct must be intentional or reckless; the conduct must be so outrageous as not to be tolerable by civilized society; the conduct must result in serious mental injury. *Arnett v. Domino's Pizza I, L.L.C.* 124 S.W.3d 529, 539 (Tenn.Ct.App. 2003).

Negligent Infliction:

“To resolve this issue, we begin the analysis by reviewing the elements of a claim for negligent infliction of emotional distress. In Tennessee, such a claim requires that the plaintiff establish the elements of a general negligence claim: (1) duty, (2) breach of duty, (3) injury or loss, (4) causation in fact, and (5) proximate causation. In addition, the plaintiff must establish the existence of a serious or severe emotional injury that is supported by expert medical or scientific evidence. *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 52 (Tenn. 2004).

X. STIGMA DAMAGES/DIMINUTION IN VALUE:

In cases where the diminution in value is greatly exceeded by the cost of repair or completion, the courts have held that the appropriate damages should equal the diminution in value. Tennessee courts have “uniformly held that the measure of damages for injury to real estate is the difference between the reasonable market value of the premises immediately prior to and immediately after injury but if the reasonable cost of repairing the injury is less than the depreciation in value, the cost of repair is the lawful measure of damages.” *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551, 560 (Tenn. Ct. App. 1985).

XI. ECONOMIC WASTE:

As a general rule, the measure of damages is the cost of correcting the defects or completing the omissions. *GSB Contractors, Inc. v. Hess*. 179 S.W.3d 535, 542 (Tenn.Ct.App.2005). However, in a case where this award would result in economic waste “the courts generally adhere to the view that if a builder or contractor has not fully performed the terms of the construction agreement, but to repair the defects or omissions would require a substantial tearing down and rebuilding of the structure, the measure of damages is the difference in value between the work if it had been performed in accordance with the contract and that which was actually done, or (as it is sometimes said) the difference between the value of the defective structure and that of the structure if properly completed.” *GSB Contractors, Inc. v. Hess*. 179 S.W.3d 535, 542 (Tenn.Ct.App.2005).

“Despite this latter rule, however, there is some authority to the effect that damages for a contractor's breach of a contract to construct a dwelling, where it is not constructed in accordance with the plans and specifications, are the amount required to reconstruct it to make it conform to such plans and specifications, rather than the difference in loan or market value on the finished dwelling, since unlike a commercial structure, a dwelling has an aesthetic value and must be constructed as the owner wants it, even though the finished dwelling may be just as good.” *Id.*

XII. DELAY DAMAGES:

Delay damages in Tennessee are generally recoverable. The Courts have ruled “that a contractor whose performance is delayed through no fault of its own has two types of relief available under the standard contract prepared by the American Institute of Architects. It first has the right to an extension of the time available for performance. In addition to a time extension, a contractor may have the right to be compensated for the increased costs it has incurred as a result of this delay.” *Moore Const. Co., Inc. v. Clarksville Dept. of Electricity*, 707 S.W.2d 1, 13 (Tenn. Ct. App. 1985).

“No damages for delay” clauses are commonly used in the construction industry. The clauses are meant to further the protection of the public interest and are “aimed generally against the contractor ... with a view of limiting the cost of an improvement to the sum agreed upon and such additional sums as are specially provided for...Courts normally interpret such clauses according to their plain and ordinary meaning. *Thomas & Associates, Inc. v. Metropolitan Government of Nashville*, 2003 WL 21302974, 13 (Tenn. Ct. App. June 6, 2003).

XIII. RECOVERABLE DAMAGES:

A. Direct Damages:

Tennessee has held that “as a general rule, the measure of damages for defects and omissions in the performance of a construction contract is the reasonable cost of the required repairs. This is especially true when the structure involved is the owner's home. However, in the event that the cost of repairs is disproportionate when compared with the difference in value of the structure actually constructed and the one contracted for, the

diminution value may be used instead as the measure of damages.” *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 543 (Tenn. Ct. App. 2005).

“It seems to us that when an owner contracts to have a dwelling constructed he wants a particular structure, not just any structure that could be built for the same price. We, therefore, think that the trial court was correct in awarding damages equal to the amount required to reconstruct the dwelling so as to make it conform to the specifications, rather than adopting the difference in loan value on the dwelling as the measure of damages, as contended by appellant.” *Id.* at 542.

B. Stigma

There are no cases on point in Tennessee as to whether stigma damages are recoverable in construction cases. Tennessee does allow damages for diminution in value (see above section on diminution in value damages).

C. Loss of Use:

The Tennessee authorities appear to limit the recovery for loss of use to those instances where damages are measured by the repair rule and not by the diminution in value rule. However, that issue has never been conclusively decided by any Tennessee court and there is considerable logic to the contrary. In fact, the Court of Appeals has recognized the logic of a recovery of loss of use until a commercial vehicle can be replaced while rejecting the recovery when there was “no evidence that plaintiff could not have bought a new car promptly after the accident....” Permitting the recovery for loss of use during a period necessary to replace an injured or destroyed chattel would be consistent with Tennessee decisions in contract cases involving loss of use. *Tire Shredders, Inc. v. ERM-North Central, Inc.* 15 S.W.3d 849, 856 (Tenn. Ct. App. 1999).

The courts have further ruled that “[t]he measure of damages for loss of use is reasonable compensation to the plaintiff for being deprived of the use of the property during the time reasonably necessary for a reasonably prudent person *to replace* the property.” *Tire Shredders, Inc. v. ERM-North Central, Inc.* 15 S.W.3d 849, 857 (Tenn. Ct. App. 1999).

D. Punitive Damages:

Further, because punitive damages are to be awarded only in the most egregious of cases, a plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by clear and convincing evidence. This higher standard of proof is appropriate given the twin purposes of punishment and deterrence: fairness requires that a defendant's wrong be clearly established before punishment, as such, is imposed; awarding punitive damages only in clearly appropriate cases better effects deterrence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). Cases in which punitive damages are sought shall be bifurcated, judging the liability for compensatory damages in the first phase and liability for punitive damages in the second.

The determine the amount of punitive damages the court will weigh the following elements: (1) The defendant's financial affairs, financial condition, and net worth; (2) The nature and reprehensibility of defendant's wrongdoing; (3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm; (4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct; (5) The expense plaintiff has borne in the attempt to recover the losses; (6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior; (7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; (8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and (9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award. *Id.* at 901-902.

E. Emotional Distress:

The Tennessee Practice Series Contract Law and Practice states that “damages for emotional distress generally are disallowed in breach of contract case.” Steven W. Feldman, *Tennessee Practice Series Contract Law and Practice* § 12:14 (2008 Ed.). However, the footnote states that courts have made “damages permitted when breach caused serious bodily injury or the contract or breach is of a kind that serious emotional disturbance was a particularly likely result.” *Id.*

The Tennessee Supreme Court follows the modern trend to “allow damages for mental anguish where it is clearly [foreseeable] within the terms of the contract or transaction and was negligently or wantonly caused by the defendant.” *Southeastern Greyhound Lines v. Freels*, 144 S.W.2d 743, 745 (Tenn. 1940); see also *Whaley v. Perkins*, 197 S.W.3d at 670. (“Where the act occasioning the injury to the property is inspired by fraud, malice, or like natures, mental suffering is a proper element of damage.”)

F. Attorney’s Fees:

Tennessee follows the “American Rule” that “in the absence of a contract, statute, or recognized ground of equity so providing there is no right to have attorneys' fees paid by an opposing party in civil litigation. *Whitelaw v. Brooks*, 138 S.W.3d 890, 893 (Tenn. Ct. App. 2003). In cases of malicious harassment or frivolous appeals, a plaintiff may recover attorney’s fees. Tenn. Code. Ann. §4-21-701 (1996), §27-1-122 (1975).

However, as the Tennessee Supreme Court has recognized that one who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.” *Pullman Standard, Inc. v. ABEX, Corp.*, 693 S.W.2d 336, 340 (Tenn.1985).

G. Expert Fees and Costs:

According to the Tennessee Rules of Civil Procedure, “costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs. Tenn. R. Civ. P. 54.04 (2).

XIV. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

In Tennessee, it has been well established that the duty to defend an insured is more extensive than the duty to indemnify the insured. *Travelers Indem. Co. of America v. Moore & Associates, Inc.*, 216 S.W.3d 302, 305 (Tenn. 2007). Tennessee courts have held that “whether a duty to defend arises depends solely on the allegations contained in the underlying complaint. Accordingly, the insurer has a duty to defend when the underlying complaint alleges damages that are within the risk covered by the insurance contract and for which there is a potential basis for recovery. The duty to defend arises if even one of the allegations is covered by the policy. The duty to defend is broader than the duty to indemnify because the duty to defend is based on the facts alleged, while the duty to indemnify is based upon the facts found by the trier of fact. Any doubt as to whether the claimant has stated a cause of action within the coverage of the policy is resolved in favor of the insured. *Id.*

There is a duty to defend when a complaint alleges any type of damages against the insured which are covered by the insurance contract. If there is even one allegation that is covered by the policy, then the insurer has the duty to defend based on the insurance contract.

A. Occurrences that trigger Coverage:

In Tennessee, the most important consideration in analyzing coverage is the time of the occurrence, followed by when such occurrences are covered based on the insurance contract language. “An ‘occurrence policy’ is a policy in which the coverage is effective if the negligent act or omitted act occurs within the policy period, regardless of the date of discovery.” *See State of Tennessee ex rel. McReynolds v. United Physicians Ins. Risk Retention Group*, 921 S.W.2d 176, 177 n. 1 (Tenn. 1996). If a policy is ambiguous as to when an injury must occur to be covered, then “Tennessee law requires that ambiguities of this nature must be resolved in favor of the insured.” *Am. Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 815 (Tenn. 2000). The definition of occurrence is normally found within the insurance contract.

In a recent case involving a tree which fell onto an apartment building killing a girl, the Sixth Circuit Court of Appeals held that even though the tree fell three months after the owner had cancelled the insurance contract and sold the apartment building, the occurrence of negligence, not the injury, occurred during the coverage period. This

decision was based on ambiguous language of the contract which covered “bodily injury ...caused by an occurrence which takes place...during the policy period.” *State Farm Fire and Cas. Co. v. McGowan*, 421 F.3d 433, 438 (6th Cir. 2005) (applying Tennessee law).

The Court went on to say that “even though an injury must manifest itself in order to trigger State Farm's obligation to defend McGowan, the policy requires only that the *occurrence* must take place during the policy period, not the *resulting injury*. *Id.*

B. Bodily Injury:

CGL policies typically define “bodily injury” as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” *American Indem. Co. v. Foy Trailer Rentals, Inc.*, No. W2000-00397-COA-R3-CV 2000 WL 1839131 at 3 (Tenn. Ct. App. Nov 28, 2000). That court went further to state that “[t]he word “disease,” *unrestricted by anything in the context*, includes disease of the mind as well as disease of the body.” *Id.* at 4.

C. Property Damage:

Property damage is typically defined in CGL policies as “Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. *Charles Hampton's A-1 Signs, Inc. v. American States Ins. Co.*, No. M2005-01720-COA-R3-CV, 2006 WL 3827319 at 3 (Tenn. Ct. App. December 28, 2006).

The Tennessee Code Annotated defines tangible property as: “Tangible personal property means and includes personal property, that may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses.” Tenn. Code Ann. 67-6-102 (45)(A) (2006).

D. Defective Workmanship:

The Tennessee Supreme Court has held that in general “the standard comprehensive general liability policy does not provide coverage to an insured-contractor for a breach of contract action grounded upon faulty workmanship or materials, where the damages claimed are the cost of correcting the work itself. *Vernon Williams & Son Const., Inc. v. Continental Ins. Co.*, 591 S.W.2d 760, 765 (Tenn. 1979).

XV. MECHANICS’ AND MATERIALMEN’S LIENS

A. Introduction and Threshold Requirements

The current statutory requirements for obtaining mechanics’ and materialmen’s liens (collectively, “mechanics’ liens”) are set forth under Tennessee Code § 66-11-101 *et seq.*

As a threshold matter, the statute states that mechanics' liens are available "on any lot or tract of real property upon which an improvement has been made by a prime contractor and any remote contractor. The lien shall secure the contract price." T.C.A. § 66-11-102(a).

The statute defines "real property" broadly to include "real estate, lands, tenements and hereditaments, corporeal and incorporeal, and fixtures and improvements thereon." T.C.A. § 66-11-101(13).

The statute also provides a detailed definition of the term "improvement" under T.C.A. 66-11-101(5). To make an "improvement," the statute basically requires the claimant to furnish materials or labor and make a permanent change to the real property. *See generally* T.C.A. § 66-11-105(5).

B. Attachment of the Mechanics' Lien

Under the statute, mechanics' liens "shall attach and take effect from the time of the visible commencement of operations, excluding, however, demolition, surveying, excavating, clearing, filling or grading, placement of sewer or drainage lines, or other underground utility lines or work preparatory therefor, erection of temporary security fencing and the delivery of materials therefor." T.C.A. § 66-11-104(a).

If, however, "there is a cessation of all operations at the site of the improvement for more than ninety (90) days and a subsequent visible resumption of operations, any lien for labor performed or for materials furnished after the visible resumption of operations shall attach and take effect only from the visible resumption of operations." T.C.A. § 66-11-104(b).

C. Prime Contractor vs. Remote Contractor

After determining whether an "improvement" has been made to "real property" and that a lien has "attached," the next factor to consider is whether the individual and/or entity claiming the lien is a prime contractor or a remote contractor. The distinction is important not only because remote contractors have to undertake additional steps to perfect the mechanics' lien, but also because the statute limits the type of property subject to a remote contractor's lien.

Under the statute, a prime contractor is a "person . . . in direct privity of contract with an owner" and can include "any person . . . who supervises or performs work or labor or who furnishes material, services, equipment, or machinery in furtherance of an improvement."

On the contrary, a remote contractor is a "person . . . who provides work or labor or who furnishes material services, equipment or machinery in furtherance of any improvement under a contract with a person other than an owner." T.C.A. § 66-11-101(14). A remote contractor cannot obtain a lien on "contracts to improve residential property." T.C.A. §

66-11-146(a)(2). Residential property is defined under the statute as being property “consisting of one (1) dwelling unit intended as the principal place of residence of a person or family.” T.C.A. § 66-11-146(b)(1)(A). If, however, a prime contractor is the owner of the residential property, the subcontractors and suppliers who contract with the prime contractor are entitled to obtain mechanics’ liens on the property. T.C.A. § 66-11-146(a)(2).

D. Priority and Enforcement – Prime Contractors

1. Perfection of a Prime Contractor’s Lien

A prime contractor technically does not have to serve or record any notice regarding the lien under the statute. However, a prime contractor should still record the lien to place subsequent purchasers and/or encumbrancers for value on notice of the lien. *See* T.C.A. § 66-11-111.

A prime contractor has two methods available to record the lien, thus ensuring priority. First, the statute provides that “[w]here the lienor’s contract is in writing, and has been acknowledged, or in lieu of acknowledgement is sworn to by the prime contractor as to its execution by the owner, it may be recorded in the lien book in the register of deeds of the county where the real property, or any part of the affected real property, lies.” T.C.A. § 66-11-111. Second, the lienor who has not recorded the contract under T.C.A. § 66-11-111 “is required to record in the office of the register of deeds of the county where the real property, or any part affected lies, a sworn statement of the amount for, and a reasonably certain description of the real property on, which the lien is claimed.” T.C.A. § 66-11-112(a). The lienor opting to record under 66-11-112(a) must record “no later than ninety (90) days after the date the improvement is complete or is abandoned.” The statute provides a form “Notice of Lien” that a lienor can use under T.C.A. § 66-11-112(d). A copy of the statutory form “Notice of Lien” is also attached as **Appendix A**.

2. Enforcement of a Prime Contractor’s Lien

In order to enforce the lien, a prime contractor must file a verified complaint in a court of law or equity or in a court of general sessions setting seeking issuance of an attachment. T.C.A. § 66-11-126. The clerk of the court will require the “plaintiff or the plaintiff’s attorney to execute a bond with a sufficient surety payable to the defendant or defendants in the amount of one thousand dollars (\$1,000) or the amount of the lien claimed, whichever is less.” T.C.A. § 66-11-126.

A prime contractor must enforce the lien in a court of competent jurisdiction within the applicable period of time, which is one (1) year of the completion of the work. The statute, however, does not require attachment to be issued by a Court within the one (1) year time period. *See* T.C.A. § 66-11-126(3) (stating that “an action . . . is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period.”); *see also* T.C.A. § 66-11-106 (stating that the applicable period of time to enforce a prime

contractor's lien is "one (1) year after the date the improvement is complete or is abandoned.")

E. Priority and Enforcement – Remote Contractors

1. Perfection of a Remote Contractor's Lien – Notice of Non-Payment

To perfect a lien, "[e]very remote contractor with respect to an improvement, except one-family, two-family, three-family and four-family residential units, shall serve, within ninety (90) days of the last day of each month in which work or labor was provided or materials, services, equipment or machinery furnished and for which the remote contractor intends to claim a lien . . . a notice of nonpayment . . . to the owner and prime contractor in contractual privity with the remote contractor if its account is, in fact, unpaid." T.C.A. § 66-11-145(a). The statute outlines the necessary information required in the notice and also provides a form "Notice of Non-Payment" under T.C.A. § 66-11-145(d). A copy of the statutory "Notice of Non-Payment" form is also attached as **Appendix B**. A remote contractor who fails to provide notice under 66-11-145(a) loses the right to claim a lien for the month in question. T.C.A. § 66-11-145(b).

2. Perfection of a Remote Contractor's Lien – Notice of Lien and Recording of Notice of Lien

Additionally, the remote contractor must serve a Notice of Lien in writing on the owner of the property on which the remote contractor made improvements within ninety (90) days after the date of improvement is complete or is abandoned. T.C.A. § 66-11-115(a)(2) (citing T.C.A. § 66-11-112(a)). The notice of the lien can be in substantially the same form as set forth in T.C.A. § 66-11-112(d), a copy of which is attached as **Appendix A**.

Like the prime contractor, the remote contractor must also record the Notice of Lien pursuant to the requirements set forth under T.C.A. § 66-11-112(a) to preserve priority: "the lienor . . . is required to record in the office of the register of deeds of the county where the real property, or any part affected, lies, a sworn statement of the amount for, and a reasonably certain description of the real property on, which the lien is claimed Recordation is required to be done no later than ninety (90) days after the date of improvement is complete or is abandoned." T.C.A. § 66-11-112(a).

3. Enforcement of Remote Contractor Lien

Like prime contractors, remote contractors must file a verified complaint in a court of law or equity or in a court of general sessions setting seeking issuance of an attachment to enforce the lien. T.C.A. § 66-11-126. The clerk of the court will require the "plaintiff or the plaintiff's attorney to execute a bond with a sufficient surety payable to the defendant or defendants in the amount of one thousand dollars (\$1,000) or the amount of the lien claimed, whichever is less." T.C.A. § 66-11-126 (3)

A remote contractor must enforce the lien in a court of competent jurisdiction within the applicable period of time, which is ninety (90) days from the date of service of notice in favor of the remote contractor. The statute, however, does not require attachment to be issued by a court within the ninety (90) day time period. *See* T.C.A. § 66-11-126(3) (stating that “an action . . . is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period.”); *see also* T.C.A. § 66-11-115(b) (stating that “the lien shall continue for the period of ninety (90) days from the date of service of notice in favor of the remote contractor, and until the final termination of any suit for its enforcement properly brought . . . within that period.”)

F. Other Considerations

1. Bond to Discharge the Lien

If a lien is recorded as provided by the statute, “any person may record a bond to indemnify against the lien.” T.C.A. § 66-11-142(a). Alternatively, a prime contractor can post and record a payment bond. T.C.A. § 66-11-142(b)(1). Filing a bond operates as a discharge of the lien. T.C.A. § 66-11-142(a) and (b).

If the owner records a payment bond totaling one hundred percent (100%) of the prime contractor’s contract price, attachment of the real property is unnecessary and the lien is enforced by acting on the bond. T.C.A. § 66-11-124; T.C.A. § 66-11-126(5).

2. Notice of Completion

In order to protect the owner or purchaser of improved real property against unrecorded liens, the statute allows the owner to record a Notice of Completion in the office of the register of deeds in the county where the real property or any affected part of the real property is located. T.C.A. § 66-11-143. The statute provides a form “Notice of Completion” under T.C.A. § 66-11-143(g). A copy of the form “Notice of Completion” provided under the statute is also attached as **Appendix C**.

The owner is required to serve a copy of the Notice of Completion on the prime contractor, except such notice is not required when the owner acts as general contractor. T.C.A. § 66-11-143(a). The owner is also required to serve a copy of the Notice of Completion on any remote contractor that has served a Notice of Non-Payment. T.C.A. § 66-11-143(d).

3. Release of Lien

“If a lienor whose lien has been forfeited, expired, satisfied or adjudged against the lienor in an action on the lien, fails to cause the lien provided by this chapter to be released within thirty (30) days after service of written notice demanding release, the lienor shall be liable to the owner for all damages arising therefrom, and costs, including reasonable attorneys' fees, incurred by the owner.” T.C.A. § 66-11-135(a).

APPENDIX A

NOTICE OF LIEN

State of _____
County of _____

_____ being first duly sworn, says that _____, the Lien Claimant, furnished certain material or performed certain work or labor in furtherance of improvements to the real property hereinafter described, in pursuance of a certain contract, with _____, [the owner, prime contractor, remote contractor, or other person, as the case may be]. The first of the work or labor was performed or the first of the material, services, equipment, or machinery was furnished on the _____ day of _____, ____ (year). The last of the work or labor was performed or the last of the material, services, equipment, or machinery was furnished on the _____ day of _____, _____ (year), and there is justly and truly due Lien Claimant therefor from _____, [the owner, prime contractor, remote contractor, or other person, as the case may be] over and above all legal setoffs, the sum of _____ dollars, for which amount Lien Claimant claims a lien under [T.C.A. §§ 66-11-101, et seq.](#) on the real property, of which _____ is or was the owner, which is described as follows:

Lienor

[Notary Acknowledgment]

T.C.A. § 66-11-112(d)

APPENDIX B

NOTICE OF NON-PAYMENT

TO: _____ [Contractor _____ [Owner]

_____ Contracting _____
_____ w/ Owner] _____

Pursuant to Tennessee Code Annotated, § 66-11-145, notice is hereby given that _____ [Lienor] has not been paid for certain labor, materials, services, equipment, or machinery it supplied in the _____ [description of work] of the _____ [description of project], located at _____ [description of property].

The amount presently due and owing is \$_____. The last date labor, materials, services, equipment, or machinery were provided in connection with the improvements was _____[date].

You may send any communications regarding this matter to the following name and address:

_____.

Lienor
Dated: _____

T.C.A. § 66-11-145(d).

APPENDIX C

This Instrument prepared by:

Name _____

Address _____

NOTICE OF COMPLETION

Legal name of owner or owners of the real property:

Names of all applicable prime contractors:

The location and description of the real property:

Date of completion of the entire improvement:

A transfer of ownership of all or part of the real property or an interest therein and encumbrance thereon or a settlement of the claims of parties entitled to the benefits of Title 66, Chapter 11 of the Tennessee Code Annotated will take place not less than ten (10) days after the date of the recording of this Notice of Completion; provided, that the ten-day expiration for lien claimants shall only apply to contracts for improvements to or on real property for one-family, two-family, three-family, and four-family residential units. On all other contracts for improvement to or on real property, the expiration time for lien claimants shall be thirty (30) days after the date of the recording of this Notice of Completion. The name and address of the person, firm, or organization on which parties entitled to the benefits of Title 66, Chapter 11, may serve notice is as follows:

Name:

Street Address:

City:

State:

Zip Code:

Dated this the _____ day of _____, 20____

Signature

(Check One)

_____, Owner

_____, Purchaser

_____, Prime Contractor

T.C.A. § 66-11-143(g)

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