

GEORGIA CONSTRUCTION LAW COMPENDIUM

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

Georgia enacted sweeping tort reform legislation in 2005. While this legislation does not contain provisions that apply exclusively to construction cases, the effects are far reaching. Changes generally favorable to defendants have been made to venue provisions. Joint and several liability has been abolished such that verdicts for future causes of action will reflect a precise amount recovered against each individual liable party. Georgia now has a provision for offers of judgment which can result in a shift of liability for attorneys' fees. The "junk science" provision of the new legislation makes Georgia's law concerning expert qualifications similar to federal law resulting in much greater scrutiny by the courts with respect to admissibility of potential expert witnesses.

For negligence-based claims, Georgia is a modified comparative negligence state. In order for a defendant to be liable in tort, the defendant(s) must have been more negligent than the plaintiff. This means that in cases where the plaintiff's negligence is equal to or greater than the combined negligence of the defendants, the plaintiff may not recover.

As noted above, Georgia passed a comprehensive tort reform statute in 2005 which changed the rules on joint and several liability. For cases arising on or prior to February 16, 2005,

Georgia law distinguished between two different scenarios: (1) if the plaintiff was not at fault, liability among multiple defendants was joint and several, and (2) if the plaintiff was, to some degree, at fault for causing his injuries, liability among multiple defendants was several, not joint. Scenario number one was, and still is, controlled by [O.C.G.A. section 51-12-31](#), while scenario number two is controlled by [O.C.G.A. section 51-12-33](#).

Jason Crawford et al., [Trial Practice and Procedure](#), 57 Mercer L. Rev. 381, 384 (2005). For cases arising on or after February 17, 2005, Georgia has abolished joint and several liability. From that point forward, defendants are only responsible for their own proportion of negligence, with no right of contribution. However, it is currently debated that even after tort reform, under § 51-12-31, joint tortfeasors are still subject to joint and several liability for indivisible injuries. *Id.* Under § 51-12-33, liability remains several in comparative negligence situations, but the liability of all parties – including nonparties – must be considered before the court apportions liability to each defendant. *Id.* No case law has yet settled the debate.

I. BREACH OF CONTRACT/WARRANTY

Typically, a construction project involves many parties. Even the simplest projects involve a property owner, a general contractor, and one or more subcontractors. The parties are tied together by a complex web of contracts, each containing conditions regarding the method or materials to be used in construction. The contracts will generally also contain express warranties promising that the materials and workmanship will be free from defect for a specific, limited period of time. Failing to perform renders one susceptible to a breach of contract and/or a breach of warranty claim. In either case, privity of contract must exist (subject to the exception noted below). O.C.G.A. §§ 9-2-20, 51-1-11(a) (2010). A claim sounding in breach of contract or breach of warranty is generally subject to a six (6) year statute of limitations. [Wilks v. Overall Constr., Inc.](#), No. A08A2077, 2009 Ga. App. LEXIS 32, at *1, 674 S.E.2d 320 (Ga. Ct. App. Jan. 13, 2009); O.C.G.A. § 9-3-24 (2010).

While a party not in privity of contract with another typically cannot maintain an action for breach of the contract, O.C.G.A. § 9-2-20(b) provides a third-party beneficiary a right of action against the promisor on the contract. O.C.G.A. § 9-2-20(b) (2010). In this regard, O.C.G.A. § 9-2-20(b) states that “[t]he beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract.” *Id.* In the construction context, an owner/developer may try to assert standing as a third-party beneficiary to a written contract between the general contractor and a subcontractor on a project where the owner/developer is not a named party to the subcontract, did not sign the subcontract, and did not become obligated in any way under the subcontract. In order to do so, the subcontract must clearly show that it was intended for the owner/developer’s benefit. The mere fact that an owner/developer might incidentally benefit from a subcontractor’s performance of any particular provision of the subcontract will not suffice to entitle the owner to claim the right to secure enforcement of that provision as a third-party beneficiary. There instead must be a promise by the promisor to the promisee to render some performance to a third person, *and* it must appear that both the promisor and the promisee intended that the third person should be the beneficiary. To determine whether such a promise has been made to benefit to the owner, the court will look to the terms of the contract. Vaughn v. Van Horn Constr., 254 Ga. App. 693, 694, 563 S.E.2d 548, 549 (2002).

II. NEGLIGENCE

Builders who perform defective construction work may be liable in tort under Georgia law. “[N]o privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract.” O.C.G.A. § 51-1-11 (2010). However, Georgia does recognize an independent tort duty to design and/or construct property in a workmanlike manner, so privity of contract is not necessary to maintain a negligent construction claim. Stancliff v. Brown & Webb Builders, 254 Ga. App. 224, 226, 561 S.E.2d 438, 449 (2002). Note that a construction company’s corporate officers can be held personally liable for negligent construction where that person took part in the negligent act, specifically directed the act to be done, or participated in its commission. Dave Lucas Co. v. Lewis, 293 Ga. App. 288, 292, 666 S.E.2d 576, 580 (2008).

To assert a claim for negligent construction, one must demonstrate that the builder or designer breached the applicable standard of care. The standard of care for contractors in Georgia is defined as “that degree of care and skill as is ordinarily employed by other contractors under similar conditions and like circumstances.” Rentz v. Brown, 219 Ga. App. 187, 188, 464 S.E.2d 617, 619 (1995). While expert testimony is utilized during litigation to establish whether the contractor’s performance on the project met the standard of care, an expert affidavit does not have to be filed along with the complaint. O.C.G.A. § 9-11-9.1(a) (2010). An expert affidavit must be filed along with the complaint, when the construction defect claim is asserted against certain design professionals such as architects, professional engineers, and land surveyors who are being sued in the individual capacity. O.C.G.A. § 9-11-9.1(a) (2010). O.C.G.A. § 9-11-9.1(a) provides that “in any actions alleging professional malpractice against a professional licensed by the state of Georgia and listed in subsection (f) of this code section... the plaintiff shall be required to file with the complaint an affidavit of an expert...which...set[s] forth specifically at least one negligent act or omission...and the factual basis for each such claim.” Contractors are not professionals to which O.C.G.A. § 9-11-9.1(a) applies.

A claim of negligent construction is an action for damage to realty, and thus, the claim should be brought within four (4) years after the right of action accrues. O.C.G.A. §§ 9-3-30, 9-3-31 (2010); Colormatch Exteriors, Inc. v. Hickey, 275 Ga. 249, 251, 569 S.E.2d 497, 499 (2002); Howard v. McFarland, 237 Ga. App. 483, 486, 515 S.E.2d 629, 632 (1999). A discussion as to when the right of action accrues follows below.

III. ACCRUAL OF THE RIGHT OF ACTION

In order to determine when the statute of limitations expires, it is necessary to know when the cause of action first ripened. This is known as the date of accrual of the right of action. The general rule for determining the time a cause of action accrues is to ascertain the time when the plaintiff could first have maintained the action to a successful result. Colormatch Exteriors v. Hickey, 275 Ga. at 251. Damages must be present before the right of action accrues. Id. “In situations where a plaintiff owns property being improved by a contractor, damage to the property arising out of faulty construction is considered to occur at the time of substantial completion..., because such damage normally is ascertainable to the plaintiff at that time.” Scully v. First Magnolia Homes, 279 Ga. 336, 338, 614 S.E.2d 43, 46 (2005). However, “in cases where it is alleged that a new house was defectively constructed by an owner/builder for the purpose of sale...and the property actually is sold, the applicable period of limitations for claims of damage to realty does not begin to run until the sale of the improved property [i.e., the date of purchase], regardless of the date of ‘substantial completion.’” Id. at 338-39.

“Substantial completion” means the date when construction was sufficiently completed, in accordance with the contract as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended. O.C.G.A. § 9-3-50(2) (2010). The court in Colormatch recognized, “[s]ubstantial completion’...does not require that the improvement can be occupied ‘legally,’ but simply applies in instances where ‘the owner [could] occupy the project for the use for which it was intended.’” Colormatch Exteriors, Inc., 275 Ga. 249, 254, 569 S.E.2d 495, 498 (2002).

When components that are integral and essential to the structure are at issue, there is some authority to support an argument that the limitations period commences at an earlier date than that of substantial completion of the building. Under such circumstances, the date of accrual is, arguably, the date of substantial completion of the component in question. See, Hanna v. McWilliams, 213 Ga. App. 648, 446 S.E.2d 741 (1994).

Georgia does not apply a “discovery rule” for lawsuits involving pure property damage. Mitchell v. Contractors Specialty Supply, Inc., 247 Ga. App. 628, 629, 544 S.E.2d 533, 535 (2001). With regard to causes of action related to the “manufacture of or the negligent design or installation of synthetic exterior siding,” which includes synthetic stucco (EIFS), the cause of action “shall accrue when the damage to the dwelling is discovered or, in the exercise of reasonable diligence, should have been discovered, whichever first occurs.” O.C.G.A. § 9-3-30(b)(1) (2010).

Furthermore, O.C.G.A. § 9-3-51 provides an eight (8) year statute of ultimate repose for construction defect claims. This does not alter the applicable statute of limitations, but establishes the outermost time in which any action for construction defect can be asserted. O.C.G.A. §§ 9-3-30, 9-3-53. The Georgia Court of Appeals recently ruled that the statute of repose does not apply to claims for contractual indemnification where the indemnification provision does not require a showing of negligence. Nat’l Serv. Indus. v. Ga. Power Co., 294 Ga. App. 810, 813 (2008). However, a party also “should not be allowed to skirt the statute of repose in O.C.G.A. § 9-3-51 by bringing indemnification or defense claims that are essentially claims for deficient construction.” Facility Constr. Mgmt. v. Ahrens Concrete Floors, Inc., NO. 1:08-cv-01600-JOF, 2010 U.S. Dist. LEXIS 29242, at *23 (N.D. Ga. Mar. 24, 2010).

IV. FRAUD

In the case of latent defects where a contractor makes false representations concerning the construction or intentionally conceals a material fact, fraud may exist. See, Ramey v. Leisure, Ltd., 205 Ga. App. 128, 129-30, 421 S.E.2d 555, 557 (1992). The five elements of fraud are (1) False representations; (2) made with knowledge of the falsity of the representation; (3) made with the intent to induce the plaintiff to act or to refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damages proximately caused by such reliance in the representation. Bowen & Bowen Constr. Co. v. Fowler, 265 Ga. App. 274, 276, 593 S.E.2d 668, 671 (2004). However,

actionable fraud cannot be predicated upon promises to perform some act in the future, nor does actionable fraud result from a mere failure to perform promises made. Otherwise, any breach of a contract would amount to fraud. An exception to the general rule exists where a promise as to future events is made with a present intent not to perform or where the promisor knows that the future event will not take place.

Ins. Indus. Consultants, LLC v. Alford, 294 Ga. App. 747, 753, 669 S.E.2d 724, 730 (2008). Fraud claims are subject to a four (4) year statute of limitations. O.C.G.A. § 9-3-30. Where reasonable diligence has been exercised, actual fraud involving moral turpitude tolls the limitations period until plaintiff's discovery of the fraud. O.C.G.A. § 9-3-96; Gantt v. Bennett, 231 Ga. App. 238, 244, 499 S.E.2d 75, 81 (1998).

Like other actions related to property damage, the limitations period associated with fraud begins to run when the right of action accrues, not when the act or omission occurs. Colormatch Exteriors, Inc. 275 Ga. 249, 250, 569 S.E.2d 495, 497 (2002).

V. IMPLIED WARRANTIES AND STRICT LIABILITY

Implied in every contract by building contractors is the obligation to perform in a fit and workmanlike manner. This contract duty is breached "when the builder fails to exercise a reasonable degree of care, skill, and ability under similar conditions and like surrounding circumstances as is ordinarily employed by others in the same profession." Schofield Interior Contrs. Inc. v. Std. Bldg. Co., 293 Ga. App. 812, 814, 668 S.E.2d 316, 318 (2008).

VI. MITIGATION OF DAMAGES

Generally, when one is injured by the negligence of another, the injured party is obligated to minimize the damages to the fullest extent practicable through the use of ordinary care and diligence, except in the case of positive and continuous torts. O.C.G.A. § 51-12-11 (2010). In breach of contract actions, one is also obligated to minimize the damages to the fullest extent practicable through the use of ordinary care and diligence. O.C.G.A. § 13-6-5 (2010); Boone v. Atlantan Independent School System, 235 Ga. App. 131, 619 SE.2d 708 (2008). This rule, however, is only applicable where the damages can be lessened by reasonable efforts and expense. See Reid v. Whisenant, 161 Ga. 503, 131 S.E. 904 (1926) (finding no requirement to mitigate damages by paying off security deed to prevent foreclosure). Mitigation of damages is not a principle to apply in every case and Georgia courts have held that the general requirement to mitigate damages does not apply, for example, where there is a breach of an absolute promise to pay. See J.C. Penney Cas. Ins. Co. v. Woodard, 190 Ga. App. 727, 380 S.E.2d 282 (1989) (finding failure of insured to take advantage of other insurance coverage cannot be used by defendant insurer to escape its obligation to otherwise provide

coverage); E.g., Wachovia Bank of Ga., N.A. v. Namik, 275 Ga. App. 229, 233, 620 S.E.2d 470, 474 (2005).

In the case of negligent construction, Piedmont Builders, Inc. v. Fullerton held that a homeowner has no duty to mitigate his damages since the measure of damages in cases of this sort is the difference in value of the house as finished and the value of the house as it should have been finished. 157 Ga. App. 126, 276 S.E.2d 277 (1981). Piedmont Builders, although not treated negatively, has not been cited for this proposition in subsequent negligent construction cases and appears limited to instances where the injured party only seeks recovery of the difference in value of the house as finished and the value of the house as it should have been finished. Id. at 127. As Wachovia Bank of Ga., N.A. v. Namik explains,

The only exception to the duty to mitigate tort damages in Georgia is where “positive and continuous torts” occur...Georgia courts have defined three types of “positive and continuous torts”: (1) fraud; (2) ongoing violations of property rights; and (3) intentional torts such as assault and battery

275 Ga. App. at 232. Although one is only required to expend reasonable efforts and expenses to mitigate damages, recovery for lost profits is not available where appropriate mitigation steps have not been taken. Smith v. A. A. Wood & Son Co., 103 Ga. App. 802, 810, 120 S.E.2d 800, 805 (1961). The party raising the defense of failure to mitigate must support the contention with sufficient evidence from which a jury could reasonably estimate the amount by which damages could have been mitigated. Considine Co. v. Turner Comm. Corp., 155 Ga. App. 911, 914, 273 S.E.2d 652, 656 (1980).

VII. INDEMNITY CLAIMS

The purpose of an indemnification clause is to allocate risks among parties. Many types of contracts contain an indemnification clause, including those used in the construction industry. The general rule under Georgia common law is that indemnity clauses are enforceable as written, including those that indemnify a party from their own negligence. Batson-Cook v. Georgia Marble Setting Co., 112 Ga. App. 226, 144 S.E.2d 547 (1965). Generally allowing parties freedom to contract must, however, be limited by disallowing contracts in contravention of public policy. Under Georgia construction law, contracts related to the construction or maintenance of a building that indemnify a party for that party’s sole negligence are void as against public policy. Watson v. Union Camp Corp., 861 F. Supp. 1086 (S.D.Ga. 1994). This prevents contractors or owners from contracting away all liability for accidents caused solely by their own negligence. Lanier at McEver, L.P. v. Planners & Eng'rs Collaborative, Inc., 284 Ga. 204, 206 (2008). Imprecise phrases such as “all claims” and “any cause whatsoever” include claims for the indemnitee’s sole negligence. Frazer v. Albany, 245 Ga. 399, 402 (1980). Therefore, indemnitees are put in the precarious position of crafting indemnity language that is broad enough to cover a wide range of possible claims while remaining specific enough to avoid nullification as against public policy. An easier and more effective means of shifting risks is to include an insurance provision in the construction contract, which in most cases moots the indemnity predicament by allocating risks to an insurer.

A. O.C.G.A. § 13-8-2(b): Anti-Indemnification Statute

Many states, including Georgia, have passed anti-indemnification statutes in response to public policy concerns in the construction arena. These statutes provide an exception to the general common law rule discussed above. Georgia’s version of an anti-indemnification

statute, O.C.G.A. § 13-8-2(b), prohibits indemnification clauses where the indemnitee (or promisee) is indemnified for acts caused solely by its own negligence in contracts involving construction or the maintenance of a building structure:

A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.

O.C.G.A. § 13-8-2(b) (2010).

Because O.C.G.A. § 13-8-2 changes the common-law rule *allowing* a party to protect himself by contract from liability for the consequences of his own negligent acts, one would think that the courts would strictly construe the statute. See, e.g. Smith v. Seaboard Coast Line R.R., 639 F.2d 1235 (5th Cir. 1981); Rey Coliman Contrs., Inc. v. PCL Constr. Servs., 2009 Ga. App. LEXIS 344 (Ct. App. Mar. 24, 2009) (explaining that it is well settled that statutes in derogation to the common law are strictly construed). However, the Georgia courts have instead applied the statute very liberally. See Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F. Supp. 2d 1361, 1370 (N.D. Ga. 1999).

There are two threshold issues which Georgia courts examine in determining whether this statute is applicable to a particular contract. The first is whether the agreement pertains to the “construction, alteration, repair, or maintenance” of a “building structure, appurtenance or appliance.” The second is whether the indemnity clause attempts to indemnify against the indemnitee’s own, sole negligence. National Candy Wholesalers v. Chipurnoi, Inc. 180 Ga. App. 664, 350 S.E.2d 303 (1986); Smith v. Seaboard Coast Line R.R., 639 F.2d 1235 (5th Cir. 1981).

It is difficult to state with certainty when a court will deem a contract to involve the “construction, alteration, repair or maintenance” of a “building structure, appurtenance, or appliance,” except to say that the statute has been applied liberally. See World Championship Wrestling, Inc. v. City of Macon, 229 Ga. App. 248, 493 S.E.2d 629 (1997) (applying § 13-8-2(b) to lease of arena for wrestling event); Terrace Shopping Center Joint Venture v. Oxford Group, Inc., 192 Ga. App. 346, 384 S.E.2d 679 (1989) (applying § 13-8-2(b) to management agreement between shopping center owner and managing company); National Candy Wholesalers, Inc. v. Chipurnoi, Inc., 180 Ga. App. 664, 350 S.E.2d 303 (1986) (applying § 13-8-2(b) to space lease agreement); and Big Canoe Corp. v. Moore & Groover, Inc., 171 Ga. App. 654, 320 S.E.2d 564 (1984) (applying § 13-8-2(b) to rental and maintenance agreement between resort owner and maintenance company). Moreover, the Georgia courts have applied § 13-8-2(b) to contracts for repair and maintenance within an existing commercial structure. See, Tuxedo Plumbing & Heating Co. v. Lie-Nielsen, 245 Ga. 27, 262 S.E.2d 794 (1980)

(applying § 13-8-2(b) precursor statute to contract for plumbing work performed on existing apartment complex); Georgia State Telephone Co. v. Scarboro, 148 Ga. App. 390, 251 S.E.2d 309 (1978) (applying § 13-8-2(b) precursor statute to contract for laying telephone wire and manhole covers); and Watson v. Union Camp Corp., 861 F. Supp. 1086 (S.D.Ga.1994) (applying § 13-8-2(b) to contract for installation of vent collection system at plant).

As for the second inquiry, Georgia statute prohibits indemnity clauses which seek to indemnify a party from their own *sole* negligence. However, the statute does *not* prohibit indemnification for joint and several liability. Therefore, if a party is partly (but not solely) negligent, he can receive indemnity for his portion of the negligence that resulted in the loss.

Georgia courts have determined that the obligation of the indemnitor to indemnify does *not* turn on whether the indemnitor was somewhat negligent. It instead hinges on whether the indemnitee was solely negligent. Stafford Enterprises v. American Cyanamid Co., 164 Ga. App. 646, 297 S.E.2d 307 (1982); Nat'l Gypsum of Ga. v. Ploof Carriers Corp., 266 Ga. App. 565, 569, 597 S.E.2d 597, 600 (2004). Georgia courts have thus rejected arguments asserted by indemnitors that they did not owe a duty to indemnify because the evidence failed to show they were negligent. *Id.* Stated another way, an indemnitee need only show that some other entity was negligent – even if that other entity is not a defendant in the case. Binswanger Glass Co. v. Beers Constr., 141 Ga. App. 715, 719, 234 S.E.2d 363 (1977).

The next pertinent question which has developed into a complex area under Georgia law is what types of clauses are considered to incorporate an indemnification for the sole negligence of the indemnitee. Indemnity clauses are typically written in the broadest possible terms, so that claims from all possible sources are indemnified. However, when used in construction contracts subject to the anti-indemnification statute, O.C.G.A. § 13-8-2(b), this broad language usually runs afoul of the statute. For example, the phrase “any claim” will be construed as intending to include claims for the indemnitee’s sole negligence, even though the agreement does not expressly do so, and thereby void the indemnity as contrary to public policy. See, Frazer v. Albany, 245 Ga. 399, 265 S.E.2d 581 (1980); Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F. Supp. 2d 1361, (N.D. Ga. 1999); Watson v. Union Camp Corp., 861 F. Supp. 1086, 1091 (S.D. Ga. 1994); National Candy Wholesalers, Inc. v. Chipurnoi, Inc., 180 Ga. App. 664 (1986); World Championship Wrestling, Inc. v. City of Macon, 229 Ga. App. 248, 493 S.E.2d 629 (1997); Kemira, Inc. v. A-C Compressor Corp., 755 F. Supp. 1059 (S.D. Ga. 1991). An interpretation of the “all-claims” language to include the combined negligence of the parties, which would take the indemnity clause out of the statute, has been flatly rejected. Federal Paper Bd. Co., 53 F. Supp. 2d at 1371. This effectively means that this type of indemnification clause is void irrespective of whether the indemnitee is solely or jointly responsible for the damages. National Candy Wholesalers v. Chipurnoi, Inc., 180 Ga. App. 664, 350 S.E.2d 303 (1986). One solution to this problem is “severability.” In cases where contracts include severable indemnity provisions, some of which do not offend the statute, the non-offending provisions are enforceable. See Hartline-Thomas, Inc. v. Arthur Pew Constr. Co., 151 Ga. App. 598, 260 S.E.2d 744 (Ct. App. 1979); Frazer v. Albany, 245 Ga. 399, 265 S.E.2d 581 (1980).

In contracts *not* subject to O.C.G.A. § 13-8-2(b), Georgia courts have held that the same broad language does *not* include claims arising out of the sole negligence of the indemnitee. See Batson-Cook Co. v. Ga. Marble Setting Co., 112 Ga. App. 226, 144 S.E.2d 547 (1965); Georgia In State Tel. Co. v. Scarboro, 148 Ga. App. 390, 251 S.E.2d 309 (1978); Allstate Ins. Co. v. City of Atlanta, 202 Ga. App. 692, 415 S.E.2d 308 (1992); Reliance Ins. Co. of Ill. v. Richfield Hospitality Servs., 92 F. Supp. 2d 1329 (2000). In order for the indemnitee to be

indemnified for claims arising out of its own negligence, there must be explicit language in the contract expressing this intention. Id.

Despite these seeming inconsistencies, the two rules of construction really serve the same purpose and achieve the same end. That is, they limit the ability of a party to transfer responsibility for his/her own negligence to another party. In the construction context, the court is looking for ways to include the case within the reach of the statute since the statute outlaws the attempted transfer of liability. Therefore, the "all claims" language is deemed to include the party's own negligence, with the result that the clause is unenforceable and there is no transfer of liability. In those contracts not subject to the statute, although the court construes the same language differently, the same result is reached. That is, liability for a party's own negligence is *not* transferred. Of course, the one overriding distinction between the two scenarios is that in those contracts not subject to the act, the simple inclusion of the requisite language will effectively transfer the indemnitee's risk.

Both federal and Georgia state courts have held that a claim for the enforcement of a contractual indemnification obligation can not be maintained where the indemnitee had a complete defense to the underlying action. Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F. Supp. 2d 1361, 1366 (N.D. Ga. 1999) (citing Foster v. Nix, 173 Ga. App. 720, 727, 327 S.E.2d 833 (Ct. App. 1985)). The courts reasoned that "in the absence of a legal compulsion to suffer a loss, there is no right to sue a third party for indemnification for that loss." GAF Corp. v. Tolar Constr. Co., 246 Ga. 411, 271 S.E.2d 811 (1980). The term "complete defense" had been defined to mean *defense as a matter of law*. Id. at 1376-79. This approach was criticized in City of Albany v. Pippin, 269 Ga. App. 22, 602 S.E.2d 911 (2004). The court rejected the argument that a contribution defendant should only be able to raise against contribution claims defenses which are defenses as a matter of law. Although the issue in the Pippin case was contribution and not indemnity, the ruling tells us that any defense showing the lack of a legal compulsion to pay would be sufficient to defeat a claim based on an indemnification provision. Id.

B. Insured Contract and Additional Insureds

The "additional insured" clause requires one party to purchase insurance for the benefit of the other party. Much uncertainty is avoidable in *most* cases subject to the anti-indemnification statute, O.C.G.A. § 13-8-2(b), through use of what is known as the "insurance clause," providing that the risk associated with the negligence of either party is agreed to be shifted to the insurer of one or both parties. Where there is an additional insured clause in the contract, the parties agree to look solely to insurance in the event of a loss and not to the liability of one of the parties. See, Tuxedo Plumbing & Heating Co., Inc. v. Lie-Nielsen, 245 Ga. 27, 262 S.E.2d 794 (1980); McAbee Constr. Co. v. Ga. Kraft Co., 178 Ga. App. 496, 498, 343 S.E.2d 513 (1986); Vasche v. Habersham Marina, 209 Ga. App. 263, 433 S.E.2d 671 (1993). Clauses such as this shift the risk of the loss to the insurance company regardless of fault.

The result is that the indemnity provision will be enforced as written in contracts containing an insurance clause in conjunction with an indemnity clause. Tuxedo Plumbing & Heating Company, Inc. et al v. Lie-Nielsen, 245 Ga. 27, 262 S.E.2d 794 (1980). Even in contracts where there is not a mandatory insurance clause, if the court can glean from other provisions of the contract that the parties intended to shift the loss to an insurer, the indemnity provision will be enforced. See Glazer v. Crescent Wall Coverings, Inc., 215 Ga. App. 492, 451 S.E.2d 509 (1994) (upholding waiver of subrogation clauses which waived recovery for losses arising out of "any cause insured against under the standard form of fire insurance policy"). A clause requiring that one party insure a stated loss will also be enforced even where the indemnitor fails to retain the proper insurance. See, Myers v. Texaco Refining & Co., 205 Ga. App. 292, 422 S.E.2d 216 (1992); Everett v. Everett, 256 Ga. 632, 633, 352 S.E.2d 370

(1987) (failure to obtain agreed-upon insurance coverage renders one a self-insurer). See also Great Atl. & Pac. Tea Co. v. F.S. Assocs., 257 Ga. App. 534, 537 (2002) (failure to require proof of insurance does not infer a waiver of such requirement). However, the Georgia Court of Appeals has pointed out that the presence in a construction contract of a “requirement that insurance be purchased is not automatically a panacea for the dangers proscribed by the enactment of O.C.G.A. § 13-8-2 (b).” Federated Dep’t Stores v. Superior Drywall & Acoustical, 264 Ga. App. 857, 862 (2003). The type of insurance and the intent of the parties in mandating the purchase of insurance plays a part in the analysis. Id.

Currently, contracting parties in a construction project have two options with regard to obtaining insurance coverage for an indemnification provision. The first is to require that the indemnitor (party providing the indemnity promise) provide liability insurance for their own negligence, and the indemnitee seek coverage under the “insured contract” provisions found in most commercial general liability policies. This will generally provide coverage for indemnification contingent on certain policy conditions being met. The other and preferred option, however, is to require the indemnitor to list the indemnitee as an “additional insured” on their policy. There are many advantages that additional insured status provides which cause it to be the preferred method of insuring the indemnity obligation found in most construction contracts.

VIII. PRE-LITIGATION PROCEDURES IN RESIDENTIAL CONSTRUCTION DEFECT CASES

In an effort to reduce litigation and to promote alternative methods for resolving construction disputes, the Georgia Legislature passed the Right to Repair Act in 2004.(O.C.G.A. § 8-2-35, *et seq.*). The Act requires that prior to bringing an action, a claimant alleging construction defects must provide the contractor responsible for the defect with a written notice of a claim and allow the contractor the opportunity to resolve the claim without litigation.

As the Right to Repair Act is primarily designed to assist in resolving legitimate disputes without the need for litigation, it does not altogether bar claims where the Act’s procedures have not been followed. Rather, the Act simply requires the court or arbitrator to stay the action until the claimant has complied with the requirements of the Act. To the extent that the action includes a claim for personal injury or death, such claims are permitted to proceed without being subject to a stay. O.C.G.A. § 8-2-37 (2010). The requirements and timelines in the Act will not revive any limitation period which expired before filing the notice of claim or extend any applicable statute of repose. O.C.G.A. § 8-2-38(o). Accordingly, if filing suit prior to compliance with the Act’s provisions is necessary to preserve a claim from being time barred, a claimant may do so and the action will be stayed while the claimant satisfies the Act’s requirements. Id.

If after sending the necessary notice the claimant refuses to allow the contractor to repair the defect or to otherwise settle the claim, the Act allows the action to proceed, but it limits the claimant’s maximum recovery to the amount of the settlement offer or the actual cost of the repairs. § 8-2-38(l). In addition, the Act prohibits an award of attorney’s fees incurred after the claimant has rejected the contractor’s reasonable offer to repair or settle. Id.

Although the Right to Repair Act is not intended to impose severe penalties upon claimants who fail to follow the pre-suit procedures, it is still an effective means of protecting contractors from litigation that they could easily avoid if given the opportunity. However, the Act can be a two-edged sword, as the failure of a contractor to remedy a defective condition when given the opportunity could potentially serve as the basis for bad-faith claims or other arguments for which additional damages could be awarded to a claimant. As such, it is imperative that contractors respond to notices of claims in a timely manner and that they

either make a good-faith effort to correct the alleged defect, or else articulate very clearly in their rejection letter their good-faith grounds for refusing to address the claimant's concerns.

A. NOTICE OF CLAIM

At least ninety (90) days prior to bringing an action for construction defect, the Right to Repair Act requires claimants to serve a written notice of claim upon the contractor(s) they believe are responsible for the defective condition. It does not matter whether the contractor is a general contractor or a subcontractor; if the person or entity is required to be licensed under Georgia law, a claimant cannot file suit without first having satisfied the Act's requirements. O.C.G.A. § 8-2-38(a).

The written notice of claim has several basic requirements. First, it must indicate that it is a notice of claim served pursuant to the Right to Repair Act. O.C.G.A. § 8-2-38(a) Second, it must describe the alleged defects with sufficient detail to explain the nature of the defects and the results of the defects. Id. Third, the notice must provide to the contractor any evidence that depicts the nature and cause of the construction defect, including expert reports, photographs, and videotapes. Id.

B. CONTRACTOR'S OPTIONS

Each contractor who has been served a notice of claim has thirty (30) days to provide a written response to the claimant and to any other contractors/subcontractors who were also served the notice of claim. O.C.G.A. § 8-2-38(b). The contractor's written response can take one of three forms: (1) The contractor may reject the claimant's demands; (2) the contractor may offer to repair the defect(s), settle the claim, or a combination of the two; or (3) the contractor may request to inspect the property to further assess the alleged defect before deciding the manner in which he or she will respond to the claim. Id.

It is imperative for the contractor to respond to the notice of claim within the time permitted, as a contractor who fails to provide a written response within the time permitted may not allege deficiencies in the notice of claim, such as insufficient detail, lack of evidence showing the defect, and so forth. O.C.G.A. § 8-2-38(c). In addition, if a contractor fails to respond to a notice of claim, the claimant may immediately bring an action against the contractor and will likely seek to use the contractor's lack of response against the contractor at trial. Id.

1. Contractor Rejects Claimant's Demand

If the contractor fails to respond or otherwise rejects the claimant's demand, the claimant has satisfied the requirements under the Right to Repair Act and is free to file an action against the contractor. Id. The claimant must still follow any legal requirements dictating the manner in which an action is brought. For example, if the claimant and contractor had entered into a construction contract containing an arbitration clause, the claimant would still be required to arbitrate the matter pursuant to the contract.

2. Contractor Offers to Repair the Defect(s) or Settle the Claim

If the contractor has offered to repair the defect, settle the claim, or any combination of the two, the claimant may either accept or reject the offer. The written offer and a written acceptance create a rebuttable presumption of a contractually binding settlement agreement that can be enforced at a future date, if necessary. Special rules apply to both options.

a. Acceptance of Contractor's Offer

Where a claimant chooses to accept the contractor's offer to repair the defect(s), or where the claimant fails to respond within thirty (30) days (whereby the acceptance is automatic), the claimant must provide the contractor with access necessary to perform the repairs. O.C.G.A. § 8-2-38(m) to (n). In addition, the claimant must allow the contractor a reasonable amount of time in which to complete the repairs. If the contractor fails to repair the defect(s) as

promised or fails to complete the repair within the agreed timetable, the claimant is free to sue as if the contractor had refused to repair the defect. O.C.G.A. § 8-2-38(g).

b. Rejection of Contractor's Offer

Should the claimant be dissatisfied with the contractor's offer, the claimant must provide the contractor (and the contractor's attorney, if applicable) with a written notice of rejection within thirty (30) days of receiving the offer. O.C.G.A. § 8-2-38(d). The notice of rejection must set forth the reasons for rejecting the offer. Specifically, the claimant must set forth in detail any items of the claim that were not addressed in the contractor's offer, as well as any items set forth in the contractor's offer that the claimant believes are unreasonable. *Id.*

This notice of rejection is intended to further assist the contractor in avoiding unnecessary litigation by providing the contractor an opportunity to submit a supplemental offer that is agreeable to the claimant. The contractor has fifteen (15) days from receipt of the claimant's notice of rejection in which to provide the claimant with a supplemental offer. O.C.G.A. § 8-2-38(j).

It is important to note that the Right to Repair Act sets forth penalties against a claimant who brings an action against a contractor after rejecting a reasonable offer. If a claimant files suit after having rejected what the fact finder (judge, arbitrator, or jury) deems to be a reasonable offer, the claimant's recovery is limited to the actual cost of making the repairs or the value of the settlement offer. In addition, the claimant may not receive compensation for any attorney's fees incurred after the claimant had rejected the reasonable offer. O.C.G.A. § 8-2-38(l).

c. Contractor Requests to Inspect the Alleged Defect(s)

If the contractor requests to inspect the alleged defect(s), the claimant has thirty (30) days in which to provide the contractor reasonable access to perform the inspection. In addition, the claimant must allow the contractor to perform all tests necessary for determining the nature, extent, and cause of the claimed defects, as well as the nature and extent of any needed repairs. O.C.G.A. § 8-2-38(e). The contractor may engage in both destructive and non-destructive testing, but where destructive testing is required, the contractor must give the claimant advanced notice and must restore the property to its pre-test condition once the testing is completed. *Id.* In addition, where the structure at issue includes individual units with separate owners, such as condominium complexes, the claimant (usually the association) must allow the contractor to inspect each unit that appears to be affected by the alleged defect. *Id.*

The contractor is required to complete all testing within thirty (30) days of providing the claimant with a written request to inspect the defect(s). If circumstances make it unreasonable to require the contractor to complete the necessary testing within thirty (30) days, the Act allows the contractor whatever time is reasonably necessary to complete the tests. *Id.*

Within fourteen (14) days of completing an inspection of the alleged defect(s), the contractor must provide the claimant with a definitive, written response to the notice of claim. O.C.G.A. § 8-2-38(f). As when the contractor first received the notice of claim, the contractor has a few options. The contractor may offer to repair the defect, detailing the specific work to be done. The contractor may also offer to settle the claim or propose a combination of repairs and settlement. Lastly, the contractor may refuse to make any repairs, detailing the reasons for the refusal. As discussed above, where the contractor offers to repair the defect(s) and the claimant accepts the offer, the contractor must complete the repairs within the timetable that is agreed upon by parties, or else the claimant is free to bring an action against the contractor.

C. CONTRACTOR'S OBLIGATIONS

Although the Right to Repair Act is intended to assist contractors in avoiding unnecessary litigation costs, in order to benefit from the Act's provisions contractors must satisfy notice requirements of their own. Specifically, they must have previously put the claimant on notice that certain obligations may have to be satisfied before the claimant may bring an action against them. O.C.G.A. § 8-2-41(a). To ensure that contractors provide the necessary notice and receive the protections afforded to them under the Right to Repair Act, it is strongly advised that every contractor include in each of his or her construction contracts the following sample contract clause (See O.C.G.A. § 8-2-41(b)), printed in all-caps exactly as it appears below:

GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED, IMPROVED, OR REPAIRED YOUR HOME. NINETY DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS OR BOTH. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

D. SPECIAL RULES FOR CONDOMINIUMS

In 2006, the Georgia legislature amended the Right to Repair Act, primarily as to how the Act applies to condominiums. The 2006 Amendment singles out condominium complexes and provides additional criteria applicable to defect claims arising out of the design, construction, alteration, and/or repair of those structures.

Under the 2006 Amendment, in order for an association to bring an action against a contractor to recover damages resulting from construction defects in the common area of a common interest community (condominium), the association must first overcome three procedural hurdles. First, the members of the association must vote on the matter and must approve the proposal to commence an action against the contractor by at least two-thirds of the votes. O.C.G.A. § 8-2-42(e)(1). In addition, the 2006 Amendment to the Right to Repair Act requires that at least three (3) business days in advance of the meeting at which the association members vote or at the time a statutory written ballot is circulated to the members, the association must provide each owner a copy of the notice of claim provided to the contractor and an additional written description of claims and the reasons the board of the association is recommending consideration of the litigation. O.C.G.A. § 8-2-42(f).

Second, the board of directors of the association must meet the contractor in person and engage in a good faith attempt to resolve the association's claim. O.C.G.A. § 8-2-42(e)(2). This requirement is satisfied where the directors have attempted to meet with the contractor and the contractor has definitively declined or ignored the requests to meet with the board of directors of the association. *Id.* Third, the association must satisfy all of the Right to Repair Act's other pre-suit requirements as discussed in detail above. O.C.G.A. § 8-2-42(e)(3).

Finally, to further protect contractors and condominium owners from fly-by-night inspectors seeking to encourage litigation or who might themselves create property damage, the Act provides that an association or an attorney for an association may not employ a person to perform destructive tests to determine any damage or injury to a dwelling or common area

caused by a construction defect unless: (1) The person is licensed as a contractor pursuant to law; (2) the association has obtained the prior written approval of each owner whose dwelling will be directly affected by such testing; (3) the association or the person so employed obtains all permits required to conduct such tests and to repair any damage resulting from such tests; and (4) reasonable prior notice and opportunity to observe the tests is given to the contractor against whom an action may be brought as a result of the tests. O.C.G.A. § 8-2-42(g).

IX. STATUTE OF REPOSE / STATUTE OF LIMITATION

See, Sections II and III, above.

X. ECONOMIC LOSS DOCTRINE

Georgia law applies the economic loss doctrine, which bars recovery in tort when a product defect has resulted in loss of value or use of the thing itself, or the cost to repair it. Vulcan Materials, Inc. v. Driltech, Inc., 251 Ga. 383, 306 S.E.2d 253 (1983). Under such circumstances, the duty breached is generally a contractual one and the plaintiff is merely suing for the benefit of his bargain. Id. Georgia's statutory product liability law, O.C.G.A. § 51-1-11 provides that no recovery in tort is allowed when damage is to a product only, unless there is personal injury or damage to "other property." Busbee v. Chrysler Corp., 240 Ga. App. 664, 666, 524 S.E.2d 539 (1999). Recovery in tort is barred because the duty to not cause physical injury or harm to others generally arises independent of the contract. Id. The economic loss doctrine also applies to negligent misrepresentations relied on by the purchaser. Robert & Co. Assoc. v. Rhodes-Haverty Partnership, 250 Ga. 680, 681, 300 S.E.2d 503, 504 (1983).

XI. RECOVERY FOR INVESTIGATIVE COSTS

There are no reported cases in Georgia specifically addressing whether investigative costs are recoverable in a construction defect case.

XII. ECONOMIC WASTE

Georgia law recognizes the cost of repair and diminution in value as alternative, although often interchangeable, measures of damage in negligent construction and breach of contract cases. An injured party may choose to present his case using either or both methods of measuring damages, depending on his particular circumstances. John Thurmond & Assocs. v. Kennedy, 284 Ga. 469, 471-472 (2008). To constitute an appropriate measure of damages, the cost to repair or restore the real property must not be an "absurd undertaking." Georgia Northeastern R.R. v. Lusk, 277 Ga. 245, 247 (2003) (citations omitted). Rather, "the cost of repair must be reasonable and bear some proportion to the injury sustained." Id. (quoting Empire Mills Co. v. Burrell Eng. & Co., 18 Ga. App. 253, 256 (1916)).

The fair market value of the real property is one factor the jury may use to measure the reasonableness and proportionality of claimed damages; however fair market value is not a necessary element of a claim for damages. John Thurmond & Assocs., 284 Ga. at 471-72. Courts have held that repair costs are an appropriate measure of damages even though the repair costs exceed the diminution in value of the property caused by the defect. Georgia Northeastern R.R., 277 Ga. at 247 (citing NEDA Constr. Co. v. Jenkins, 137 Ga. App. 344 (1976)). However, the cost of restoration may not be disproportionate to the diminution in the property's value. The defendant has the burden of presenting any contradictory evidence challenging the reasonableness or proportionality of those damages and, where appropriate, evidence of an alternative measure of damages for the jury's consideration. John Thurmond

& Assocs., 284 Ga. at 471-72. Whether the repair constitutes an “absurd undertaking” is a question of fact for the jury. *Id.* See American Pest Control v. Pritchett, 201 Ga. App. 808, 810 (1991); Corbin on Contracts, § 60.1 (2005).

XIII. RECOVERABLE DAMAGES

In Georgia, the general rule for recovery of damages for breach of contract is as follows:

§ 13-6-2. Measure of damages -- Generally

Damages recoverable for a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of its breach. O.C.G.A. § 13-6-2 (2010).

A. Direct Damages

As a general rule, damages for defective construction, whether those damages are the result of a breach of contract or negligence of the contractor, are determined by measuring the cost of repairing the defect or restoring the property, unless the cost of repair is disproportionate to the property’s probable loss of value. John Thurmond & Associates, Inc. v. Kennedy, 284 Ga. 469, 469. Where demanded by the facts of a case, courts also have determined damages by measuring the diminution in value of the property after the injury occurred. See Ryland Group v. Daley, 245 Ga. App. 496, 537 S.E.2d 732 (2000) (damages measured by diminution in value where defects are permanent). Frequently, both measures of damage are in evidence and are complementary to the other, inasmuch as proof of the cost of repair because of the defective construction is illustrative of the difference in value claimed as damages, and is more likely to represent the true damage suffered from the failure of a contractor to complete his contract than would the opinion of an expert as to the difference in values. Williams Tile, etc., Co. v. Ra-Lin & Assoc., 206 Ga. App. 750, 752, 426 S.E.2d 598 (1992).

Thus, under Georgia law, cost of repair and diminution in value are alternative, although often interchangeable, measures of damage in negligent construction and breach of contract cases. John Thurmond & Associates, Inc. v. Kennedy, 284 Ga. 469, 668 S.E.2d 666 (2008). An injured party may use either or both methods of measuring damages, depending on his particular circumstances. The burden to produce evidence supporting a claim for damages under either method rests, of course, on the injured party and this must be done by evidence which will furnish the jury data sufficient to enable them to estimate with reasonable certainty the amount of damages. David Enterprises v. Kingston Atlanta Partners, 211 Ga. App. 108, 111, 438 S.E.2d 90 (1993). In response, the defendant has the burden to present any contradictory evidence challenging the reasonableness or proportionality of those damages and where appropriate, evidence of an alternative measure of damages for the jury’s consideration. See, American Pest Control v. Pritchett, 201 Ga. App. 808, 412 S.E.2d 590 (1991).

B. Stigma Damages

In Georgia, stigma damages to realty, meaning those alleged damages stemming from the perception of an additional diminution of value even after repairs are made, are considered too remote and speculative to be recoverable. Hammond v. City of Warner Robins, 224 Ga. App. 684, 690 (1997); Ryland Group v. Daley, 245 Ga. App. 496, 503-504 (2000).

C. Delay Damages

Pursuant to O.C.G.A. § 13-2-2(9), time is generally not of the essence of a contract; but by express stipulation or reasonable construction, it may become so. However, in the usual construction case, the parties will draft contractual provisions to expressly delineate the

parties' respective obligations for timely completion of the project, notice provisions for others' failure to complete their portion of the project and/or "no-damages-for-delays" clauses. In such instances, contractual terms are construed according to their "usual and common signification," and in construing contracts the rules of grammatical construction usually govern, but to effectuate the intention of the parties they may be disregarded. L&B Constr. Co. v. Regan Enter., Inc., 267 Ga. 809, 812-813 (1997); O.C.G.A. § 13-2-2 (2010).

D. Loss of Use

Georgia courts will allow a claimant to recover as an element of damages his or her loss of use of the real property in a construction defect case. "(F)or delay in the performance of a contract, damages usually are for loss of the use of the property involved, for which the injured party may recover damages based on interest on the value of the property." Sanders v. Robertson, 196 Ga. App. 739, 739 (1990).

E. Punitive Damages

Generally speaking, punitive damages are not allowed in pure breach of contract cases. However, if there is fraud involved, there may be a claim for punitive damages in a construction defect case. Bowden & Bowden Constr. Co. v. Fowler, 265 Ga. App. 274, 277 (2004). Under O.C.G.A. § 51-12-5.1(b), punitive damages may be awarded in a tort action if the plaintiff proves by clear and convincing evidence that "the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." *Id.* (When applicable, such damages are capped at \$250,000.00. See, O.C.G.A. § 51-12-5.1 (g)). Under the standard set forth in O.C.G.A. § 51-12-5, "[n]egligence, even gross negligence, is insufficient to support [an award of punitive damages]." Durben v. American Materials, Inc., 232 Ga. App. 750, 753, 503 S.E.2d 618, 620 (1998).

F. Emotional Distress

Negligent conduct, without more, will not support a recovery for emotional distress. H.J. Russell & Co. v. Jones, 250 Ga. App. 28, 550 S.E.2d 450 (2001). Damages are generally not available for mental pain, suffering or emotional distress unless accompanied by physical or pecuniary loss, or as the result of malicious, willful, and wanton action directed at the complainant. *Id.* Damages may be awarded on claims for emotional distress: (1) attendant upon personal injury under Georgia's "impact rule," requiring the plaintiff to show an impact to their person resulting in physical injury; and (2) those in consequence of injury to property where plaintiff shows pecuniary loss resulting from mental injury to the plaintiff caused by a tort. Shores v. Modern Transp. Servs., 262 Ga. App. 293, 295, 585 S.E.2d 664, 665 (2003). First, regarding the impact rule,

in Kuhr Bros., this court held that in cases where mere negligence is relied on, before damages for mental pain and suffering are allowable, there must also be an actual physical injury to the person, or a pecuniary loss resulting from an injury to the person which is not physical; such an injury to a person's reputation, or the mental pain and suffering must cause a physical injury to the person.

Nationwide Mut. Fire Ins. Co. v. Lam, 248 Ga. App. 134, 137, 546 S.E.2d 283, 285 (2001) (emphasis omitted). Stated differently, non-physical injury to the person that causes

pecuniary loss, such as injury to a person's reputation or a physical manifestation of mental injury, is enough to allow damages for emotional distress. *Id.* Second, a plaintiff may recover damages for emotional distress based upon an injury to property that results in pecuniary loss if injury to the person is also present, even if that injury is not physical. *Shores v. Modern Transp. Servs.*, 262 Ga. App. 293, 295, 585 S.E.2d 664, 665. Stated another way, recovery for emotional distress may also be allowed where pecuniary injury to property causes injury to the person, even if the injury to the person is only mental. See *Nationwide Mut. Fire Ins. Co. v. Lam*, 248 Ga. App. 134, 137 (2001) (explaining "a plaintiff could claim damages for mental suffering caused by dynamite explosions on the plaintiff's property, because a trespass upon real property can impose liability upon the tortfeasor when it causes damage "to property and person, including mental and physical injury of the owner and his family.").

G. Attorney's Fees, Expert Fees and Costs

Georgia follows the American Rule. As such, attorney's fees and costs of litigation are generally not recoverable as damages. O.C.G.A. § 13-6-11; *Friedrich v. Fidelity Nat'l Bank*, 247 Ga. App. 704, 705 (2001). However, even in construction defect cases, a plaintiff is entitled to recover attorney fees and costs under O.C.G.A. § 13-6-11 if it can be established that the defendant has acted in bad faith in the underlying transaction, has been stubbornly litigious or has caused the plaintiff unnecessary trouble and expense. *Morrison Homes of Florida v. Wade*, 266 Ga. App. 598, 600 (2004).

The element of bad faith relates to the defendant's conduct in entering into the contract or pertains to the transaction and dealings out of which the cause of action arose, not to the defendant's conduct after the cause of action arose. *Id.* (citations omitted).

As a matter of law, stubborn litigiousness justifying an award of attorney fees cannot exist if there is a genuine dispute between the parties; and, when the evidence shows the existence of a genuine factual dispute or legal dispute as to liability, the amount of damages, or any comparable issue, then attorney fees are not authorized. *Brito v. Gomez Law Group, LLC.*, 289 Ga. App. 625, 658 S.E.2d 178 (2008). In other words, if there is a *bona fide* controversy, there can be no stubborn litigiousness as a matter of law. *Steel Magnolias Realty, LLC v. Bleakley*, 276 Ga. App. 155, 622 S.E.2d 481 (2005). Similarly, the concept of "causing the plaintiff unnecessary trouble and expense," refers to forcing the plaintiff to sue where no *bona fide* controversy exists. *D & H Const. Co. v. City of Woodstock*, 284 Ga. App. 314, 318, 643 S.E.2d 826, 830 (2007).

XIV. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

A. Interpretation of Insurance Policies

In Georgia, an insurance contract is governed by the ordinary rules of contract construction. *Controlled Blasting Inc. v. Ranger Ins. Co.*, 225 Ga. App. 373, 374 (1997). The parties to an insurance policy are bound by its plain and unambiguous terms. *Sapp v. State Farm Fire and Casualty Co.*, 226 Ga. App. 200, 201 (1997). Generally, courts interpret any ambiguity in policies in favor of the insured, consistent with the insured's reasonable expectations. *Id.*; *Tifton Machine Works Inc. v. Colony Insurance Co.*, 224 Ga. App. 19, 20 (1996). Genuine ambiguities arise "whenever the phrasing of an insurance policy is so confusing that an average person could not make out the boundaries of the coverage." *Id.* All exclusions from coverage sought to be invoked must be strictly construed. *Id.* The insurer bears the burden of proof and persuasion to show that an exclusion applies. *Id.* Exceptions, limitations and exclusions to insurance agreements require a narrow construction on the theory that the

insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms. Alley v. Great Am. Ins. Co., 160 Ga. App. 597, 600 (1981).

B. Duties to Defend and Indemnify

An insurer's duty to defend and its duty to indemnify are separate and independent obligations. Atlanta v. St. Paul Fire & Marine Ins., 231 Ga. App. 206, 209 (1998). Subject to the terms of the insurance contract, an insurer's duty to defend its insured is triggered if the complaint asserts a claim which is arguably covered by the policy. Bituminous Casualty Corp. v. N. Ins. Co. of New York, 249 Ga. App. 532, 533 (2001). This is commonly referred to as the "8 Corners Rule," as an insurer's duty to defend arises out of the four corners of the complaint when compared to the four corners of the policy. Thus, the issue is not whether the insured is actually liable to the plaintiffs in the underlying action, but whether a claim has been asserted which falls within the policy coverage and which the insurer has a duty to defend. Id. Accordingly, an insurer's duty to defend is typically broader than its duty to indemnify. See Shafe v. Am. States Ins. Co., 288 Ga. App. 315 (2007). Where the underlying complaint asserts both covered and non-covered claims, the insurer will generally be obligated to defend the entire suit, regardless of the presence of non-covered claims.

Generally, a CGL policy provides that an insurer has a duty to indemnify the insured for sums it becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applies on covered territory during the policy period. Nationwide Mut. Fire Ins. Co. v. Somers, 264 Ga. App. 421, 425-26 (2003). As noted above, where the policy language is ambiguous as to whether coverage exists for a particular claim, the courts generally resolve the ambiguity in favor of the insured, consistent with the insured's reasonable expectations. Sapp v. State Farm Fire and Casualty Co., 226 Ga. App. 200, 201 (1997); Tifton Machine Works Inc. v. Colony Ins. Co., 224 Ga. App. 19, 20 (1996).

C. Coverage

The typical CGL policy provides that the insurer has a duty to pay any sums the insured becomes legally obligated to pay as the result of "property damage" or "bodily injury" to which the insurance applies. The "property damage" must be caused by an "occurrence." "Property damage" is typically defined as physical injury to tangible property including all resulting loss of use of that property, or loss of use of tangible property that is not physically injured. Glens Falls Ins. Co. v. Donmac Golf Shaping Co. Inc., 203 Ga. App. 508, 510 (1992). "Bodily injury" is generally defined as an injury, sickness or disease sustained by any person during the policy period, including death, at any time resulting there from. Wilmington Island Constr. Co., Inc. v. Cincinnati Ins. Co., 179 Ga. App. 477, 478 (1986). An "occurrence" is generally defined as an accident including continuous or repeated exposure to conditions which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Gary L. Shaw Builders, Inc. v. State Automobile Mutual Ins. Co., 182 Ga. App. 220, 222 (1987).

Breach of contract claims are generally not covered under a CGL policy. The contractor typically bears its own risk to replace or repair its own defective work and make it conform to the agreed contractual requirements. Glens Falls Ins. Co., 203 Ga. App. at 511. This is based on the court's interpretation of the definition of the policy term "occurrence" or "property damage" (as well as the business risk exclusions which are discussed below). However, where faulty workmanship causes damage to *other property*, there may be an "occurrence" or "property damage" within the policy meaning, which could create an issue of fact. Custom Planning & Dev. Inc. v. Am. Nat. Fire Ins. Co., 270 Ga. App. 8, 10 (2004).

D. Coverage Triggers

If there is a length of time between construction on the property and the damage claimed by the plaintiff, it may be difficult to determine the time of the “occurrence” for purposes of coverage. Georgia state courts and the legislature have declined to directly address the issue of coverage triggers in any context, including construction. Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340, 1345 (N.D. Ga. 2001). There are five basic trigger theories which have developed in other states. These include an exposure trigger, injury in fact trigger, manifestation trigger, continuous trigger, and multiple trigger.

The exposure trigger focuses on the date the “injury-producing agent” first makes contact with the property. *Id.* The injury in fact trigger sets coverage when the actual injury first occurs. *Id.* at 1345-46. Where the manifestation trigger is applied, coverage is triggered when the damage occurs and is discovered, or when it “‘manifests’ itself as readily obvious,” within the policy period. *Id.* at 1346. With a continuous trigger, “All liability policies in effect from the exposure to manifestation provide coverage and are responsible for the loss.” *Id.* While the same analysis is used under the multiple trigger, the multiple trigger views all the other trigger tests (exposure, manifestation, injury in fact) as a single test, and not as individual tests. *Id.* Neither the Georgia Legislature nor the Supreme Court of Georgia have adopted any one standard “trigger” test, and each test is applied on a case-by-case basis. The Georgia federal courts have addressed the issue of what triggers coverage in limited circumstances. The Middle District court has ruled in an environmental clean-up costs case that where the CGL policy at issue stated that it would pay for bodily injury and property damage caused by an “occurrence,” this language did not specifically require that any property damage be discovered in the policy period. The court thus found that the “exposure” trigger of coverage was applicable. Briggs & Stratton Corp. v. Royal Globe Ins. Co., 64 F. Supp. 2d 1346, 1350 (M.D. Ga. 1999) (holding that toxic chemical release occurring during policy period was “property damage” triggering coverage, regardless of whether the damage was discovered during the policy period.).

The Northern District court has adopted the continuous trigger theory and specifically rejected a manifestation trigger theory. The court noted that absent a specific provision in the insurance contract saying that an “occurrence” requires discovery or manifestation, the court must conclude that such a trigger does not apply. Furthermore, where a contract defines an “occurrence” as including “continuous or repeated exposure,” as was the case, the court must conclude that the appropriate trigger is a continuous one, giving rise to coverage under all policies in effect from exposure to manifestation. Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001).

E. The Business Risk Exclusions and Faulty Workmanship

For a construction contractor, property damage claims are often a normal part of doing business. In this setting, the construction contractor’s main protection under the CGL coverage is to shield it from liability resulting from property damage or bodily injury caused by the contractor’s work (or, in some cases, product). However, the insurer typically does not want coverage under the CGL policy to extend to replacement or repair of the contractor’s own work (or product). Through the “Business Risk Exclusions,” insurers limit exposure for these types of claims. Even though the CGL policy generally excludes coverage for a contractor’s “business risks,” it nonetheless continues to protect contractors against consequential damages to other areas of the project or property caused by their defective work or product. It is important to note that the business risk exclusions are not applicable to additional insureds, a situation often found in the construction context.

1. Faulty Workmanship Exclusions

Claims for defective and faulty workmanship are typically excluded by two clauses in the CGL policy. *Pinkerton & Law, Inc. v. Royal Ins. Co.*, 227 F. Supp. 2d 1348, 1356 (N.D. Ga. 2002). These exclusions seek to exclude liabilities arising out of damage from the insured's own "workmanship." *Id.* In a typical CGL policy, exclusion (j), subsections (5) and (6) to the CGL, have particular relevance to construction contractors and subcontractors. *Id.* Subsection (j)(5) excludes coverage for, "*That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations.*" *Id.* This exclusion only applies to property damage while the insured is working on the property. *Id.* Based on this exclusion, the only property damage excluded is the exact portion of the real property on which the work is performed. *Id.* Other parts, including other parts on which the contractor previously worked, are not covered by the exclusion. *Id.*

The next exclusion generally lumped together as one of the faulty workmanship exclusions is section (j)(6), which excludes coverage for, "*That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.*" *Pinkerton & Law, Inc.*, 227 F. Supp. 2d at 1356. This exclusion does not apply to "property damage" included in the "products-completed operations hazard." *Id.* As with j(5), the only property damage excluded by j(6) is that "particular part" of the real property that must be "repaired or replaced" because the work was defective. *Id.* This means that only the defective "component" of the work is covered by the endorsement, and other portions of the contractor's work are not. *Id.*

The Georgia experience with these exclusions has not been illuminating. Georgia courts have enforced these exclusions in favor of construction contractors but have not given much explanation in the process. See e.g. *Bituminous Cas. Corp. v. N. Ins. Co. of N.Y.*, 249 Ga. App. 532, 548 S.E.2d 495 (2001); *Sapp v. State Farm Fire & Cas. Co.*, 226 Ga. App. 200, 486 S.E.2d 71 (1997); *Saw Horse, Inc. v. S. Guar. Ins. Co.*, 269 Ga. App. 493, 604 S.E.2d 541 (2004).

2. "Own Product" Exclusion

The next exclusion, typically considered one of the Business Risk Exclusions, is exclusion (k). Under paragraph (k) of Exclusions, the CGL policy excludes coverage for *[p]roperty damage to 'your product' arising out of it or any part of it.* This is sometimes referred to as the Own Product exclusion. The term Your Product is further defined to mean not only the goods manufactured, sold and handled by the insured, but also any warranties or representations as to the fitness, quality, durability, performance (and so on) of the product. In Georgia, case law has made it clear that the term "product" does not include a building or component unless it is a moveable piece of personal property. *Stratton & Co. v. Argonaut Ins. Co.*, 220 Ga. App. 654, 656, 469 S.E.2d 545, 548 (1996).

3. "Own Work" Exclusion

The most commonly cited Business Risk Exclusion is the so-called "own work" exclusion (also sometimes known as the "your work" exclusion). This exclusion is found at paragraph "1" of "Exclusions," and excludes coverage for "*'property damage' to 'your work' arising out of it or any part of it and included in the 'products completed operations hazard.'*" Importantly, this exclusion does not apply if the damaged work or the work out of which the damage arose was performed by a subcontractor since the terms "you" and "your" are defined under the policy as only the named insured. As such, the exclusion also does not apply to additional insureds.

Georgia seems to favor application of these exclusions, at least in the contractor cases. In several cases, Georgia courts have used the "own work" exclusion to avoid coverage. See *Gary Shaw Builders v. State Mut. Auto. Ins. Co.*, 182 Ga. App. 220, 355 S.E.2d 130 (1987)

(holding that the claims by a homeowner against an insured contractor based on theories of breach of warranty, fraud, and negligence were avoided by the “own work” and “own product” exclusions); Reliance Ins. Co. v. Povia-Ballantine Corp., 738 F.Supp. 523, 527 (S.D. Ga. 1990) (applying the own product exclusion to avoid claims for the damaged buildings, including the tort claims). In several other cases, the “own product” and “own work” exclusions have been lumped together with other Business Risk Exclusions and have either been held to apply because the claim was “clearly” a business risk (Sapp v. State Farm Fire & Cas. Co., 226 Ga. App. 200, 486 S.E.2d 71 (1997)), or have been held not to apply because the damage was to other property and was thus not solely for faulty workmanship. Canal Indem. Co. v. Blackshear Farmers Tobacco Warehouse, 227 Ga. App. 637, 490 S.E.2d 129 (1997); Glens Falls Ins. Co. v. Donmac Golf Shaping Co., 203 Ga. App. 508, 417 S.E.2d 197 (1992); Saw Horse, Inc. v. Southern Guar. Ins. Co., 269 Ga. App. 493, 604 S.E.2d 541 (2004).

4. Impaired Property Exclusion

The “impaired property” exclusion (m), excludes liability insurance coverage where the insured’s “defective, deficient, inadequate, or dangerous” work is incorporated into another product, thus impairing or destroying the usefulness of the overall product. For the exclusion to apply, the “impaired property” of the third-party must also be capable of restoration by the “repair, replacement, adjustment or removal” of the insured’s product. The purpose of this exclusion is to exclude coverage when the cause of the loss is within the insured’s control, such as the quality and conformity of the product.

The “Business Risk Exclusions” in a CGL policy are designed to exclude coverage for damages to a construction project caused by the insured’s defective workmanship. Canal Indem. Co. v. Blackshear Farmers Tobacco Warehouse, 227 Ga. App. 637, 490 S.E.2d 129 (1997). A CGL policy generally does not cover damages to work product caused by defective workmanship. Gary L. Shaw Builders, Inc. v. State Auto. Mut. Ins. Co., 182 Ga. App. 220, 221 (1987). Rather, a policy typically covers consequential damages to other aspects of the project or property which are caused by the construction defect. Canal Indemnity Co., 227 Ga. App. at 639. Accordingly, although the contractor typically bears its own risk to replace or repair defective work and make it conform to the agreed contractual requirements, the insurance carrier typically bears the risk that the insured’s defective or faulty workmanship will cause injury to people or damage to other property. See Glens Falls Ins. Co. v. Donmac Golf Shaping Co., 203 Ga. App. 508, 511, 417 S.E.2d 197, 200 (1992).

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