CONSTRUCTION DAMAGES IN IOWA

Roger W. Stone[*]

TABLE OF CONTENTS

I. INTRODUCTION

This Article discusses principles and cases applicable to claims for damages on construction projects. Recent cases from the Iowa Supreme Court have generally limited construction claims to contract theories and restricted the availability of tort claims. These cases encourage more careful drafting of construction contracts and remedy provisions. The purpose of the Article is to present an overview of the damage issues and principles that commonly arise in Iowa construction cases, with the hope of providing some guidance to practicing lawyers.

II. GENERAL PRINCIPLES

Damages should restore the person to the same financial position as before the injury.[1] Compensatory damages are limited to the actual loss sustained.[2]

---

[*] Member, Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, Iowa. J.D., with highest distinction, University of Iowa College of Law, 1980. Law Clerk to the Honorable Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit.

1. *See, e.g.*, Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293, 296 (Iowa 1995) ("[T]he goal is to place the injured party in as favorable a position as though no wrong

Construction cases usually involve competing damage claims between owners and contractors.[3] An owner may recover damages for diminution in value, cost of repair or completion of the contract, and lost profits or rentals.[4] Courts may award a combination of these elements to make the injured owner whole,[5] although sometimes, the award of one category may make the injured owner whole.[6]

A contractor should also be compensated for losses[7] including profits expected from the contract.[8] The contractor should recover the balance of the contract price less the cost of remaining performance, adjusted for variable overhead costs.[9] An injured contractor can also recover consequential damages

had occurred.") (citing R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 421 (Iowa 1983)); Metro. Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 535-36 (Iowa 1982) ("'Under Iowa law, when a contract has been breached, the innocent party is generally entitled to be placed in a position he would have occupied had there been performance.'") (quoting Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc., 519 F.2d 634, 639-40 (8th Cir. 1975)); Giese Constr. Co. v. Randa, 524 N.W.2d 427, 432 (Iowa Ct. App. 1994) (same) (quoting R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d at 421).

2. Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 831 (Iowa 1998) (citing AM. JUR. 2D *Damages* § 45 (1988)); R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d at 421; (citing Dealers Hobby, Inc. v. Marie Ann Realty Co., 255 N.W.2d 131, 134 (Iowa 1977); Schiltz v. Cullen-Schiltz & Assocs., Inc., 228 N.W.2d 10, 20 (Iowa 1975)); R.L. Pelshaw Co. v. City Motors, No. 01-795, 2003 WL 1523313, at *3 (Iowa Ct. App. Mar. 26, 2003) (citing Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc., 579 N.W.2d at 831)).

3. *See, e.g.*, Conrad v. Dorweiler, 189 N.W.2d 537, 538 (Iowa 1971) (noting that the contractor sued the owners to foreclose on a mechanic's lien, and the owners counterclaimed for damages for breach of contract).

4. R.E.T Corp. v. Frank Paxton Co., 329 N.W.2d at 421 (citing Conrad v. Dorweiler, 189 N.W.2d at 540-41); Serv. Unlimited, Inc. v. Elder, 542 N.W.2d 855, 857 (Iowa Ct. App. 1995) (citing R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d at 421).

5. R.E.T Corp. v. Frank Paxton Co., 329 N.W.2d at 421 (citing Conrad v. Dorweiler, 189 N.W.2d at 540-41).

6. *See, e.g.*, Busker v. Sokolowski, 203 N.W.2d 301, 304 (Iowa 1972) (allowing only cost of repairs).

7. *See* Hallett Constr. Co. v. Iowa State Highway Comm'n, 154 N.W.2d 71, 75 (Iowa 1967) (holding that the rental value of the construction equipment was the proper measure of damages); Berg v. Kucharo Constr. Co., 21 N.W.2d 561, 569 (Iowa 1946) (upholding a jury's award to a contractor of "the profit he would have made upon the contract had it not been for the defaults of defendants"); Ritam Corp. v. Applied Concepts, Inc., 387 N.W.2d 619, 622 (Iowa Ct. App. 1986) (stating that "contract law only places a party in the position it would have been in had the contract been performed").

8. Ritam Corp. v. Applied Concepts, Inc., 387 N.W.2d at 621 (citing King Features Syndicate v. Courrier, 43 N.W.2d 718, 726 (1950); Juengel Constr. Co. v. Mt. Etna, Inc., 622 S.W.2d 510, 514 (Mo. Ct. App. 1981)).

9. *See id.* ("Overhead, which is a component, but not the equivalent, of cost of performance, can be used to reduce the nonbreaching party's recovery if the overhead costs

resulting from the owner's breach, such as rental cost for equipment due to the owner's delay,[10] damage to equipment,[11] prejudgment interest,[12] cleanup expenses,[13] and extra work.[14]

Damages for breach of contract should be foreseeable.[15] Tort damages are not limited by foreseeability.[16] While the Iowa Supreme Court has labeled this a "clear distinction,"[17] the distinction has made little difference in construction cases.[18] The rule that construction damages may include diminution of value, cost of repair or completion, and loss of profits or rentals applies to both contract

---

would have *increased* due to performance of the contract.") (citing King Features Syndicate v. Courrier, 43 N.W.2d at 726; Juengel Constr. Co. v. Mt. Etna, Inc., 622 S.W.2d at 515).

10. *See* Hallett Constr. Co. v. Iowa State Highway Comm'n, 154 N.W.2d at 75-76 (affirming an award of the rental value of construction equipment for the period of the delay).

11. *See* Berg v. Kucharo Constr. Co., 21 N.W.2d at 566 (affirming an award of damages for the cost to repair damaged saws).

12. *See* Hallett Constr. Co. v. Iowa State Highway Comm'n, 154 N.W.2d at 76 (affirming an award of prejudgment interest).

13. *See* Schiltz v. Cullen-Schiltz & Assocs., Inc., 228 N.W.2d 10, 21 (Iowa 1975) ("Expenses incurred for . . . cleanup operations are an integral part of the direct property damage incurred.").

14. *See* Berg v. Kucharo Constr. Co., 21 N.W.2d at 567 (discussing the circumstances under which a contractor may recover for extra work); Cent. Iowa Grading, Inc. v. UDE Corp., 392 N.W.2d 857, 860 (Iowa Ct. App. 1986) ("The general rule is that recovery can be had for extra work only if it was performed with the knowledge or consent of the adverse party.") (citing 17A C.J.S. *Contracts* § 364 (1963)).

15. *See* Yost v. City of Council Bluffs, 471 N.W.2d 836, 840 (Iowa 1991) ("Foreseeability of the type of damage is the focus of Iowa law. These damages are generally categorized as consequential damages.") (citing Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc., 519 F.2d 634, 640 (8th Cir. 1975)).

16. *See* R.E.T Corp. v. Frank Paxton Co., 329 N.W.2d 416, 420 (Iowa 1983) ("[T]ort damages are not limited by the reasonable contemplations of the parties."). In *Nachazel v. Miraco Manufacturing*, the Iowa Supreme Court stated:

> In negligence cases it is not necessary to a defendant's liability that the wrongdoer should have foreseen the extent of the harm or the manner in which it occurred, so long as the injuries are the natural, though not inevitable, result of the wrong. In a breach of warranty case, however, the buyer who has accepted goods and then discovers their defects must show that the seller had reason to know at the time of contracting of the buyer's possible losses caused by a breach to recover consequential damages. These losses may be foreseeable as a probable result of a breach not only if they follow in the ordinary course of events, but also as a result of special circumstances.

Nachazel v. Miraco Mfg., 432 N.W.2d 158, 160 (Iowa 1988) (citations omitted).

17. R.E.T Corp. v. Frank Paxton Co., 329 N.W.2d at 420.

18. *See, e.g., id.* (finding reversal was not warranted notwithstanding the "trial court's error in concluding tort and contract damages were identical").

and tort claims.[19]

The Iowa Supreme Court recently limited recoveries for defective or poor construction to contract theories, and held that tort recoveries in construction cases would require injury to a person or other property or a sudden or accidental occurrence.[20] By eliminating tort claims for defective construction that does not result in personal injury or other property damage, the Iowa Supreme Court overruled a long line of cases,[21] without saying so. Comparative fault should have no place in defective construction cases where there is no personal injury or other property damage.[22] Contract terms regarding safety, property protection, payment certification, supervision, inspection, testing, owner furnished information, warranty disclaimers, third-party beneficiaries, and damage waivers will have greater importance. The new restriction on tort claims should have little effect on the damages recoverable for defective construction, except that arguments about foreseeability will increase.

---

19. *See id.* at 420-21 (noting that such damages are available under contract and tort law); Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293, 296 (Iowa Ct. App. 1995) ("'In defective construction cases, damages may include diminution in value, cost of construction, and completion in accordance with the contract, or loss of rentals.'") (quoting R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d at 421).

20. Determan v. Johnson, 613 N.W.2d 259, 264 (Iowa 2000); *see also* Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 651 (Iowa Ct. App. 1996) (stating that tort recoveries are appropriate for physical injuries and sudden or dangerous occurrences).

21. Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Constr., Inc., 445 N.W.2d 789, 792 (Iowa 1989) (affirming under a negligence action the apportionment of comparative fault between a contractor and an engineering firm for defective wiring); R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d at 420 (holding damages for defective building recoverable under tort and contract theories); Mid-Country Meats, Inc. v. Woodruff-Evans Constr., 334 N.W.2d 332, 335 (Iowa Ct. App. 1983) (holding that negligence claim based on failure to timely and appropriately repair a roof leak should have been submitted to the jury).

22. Flom v. Stahly, 569 N.W.2d 135, 141 (Iowa 1997) (holding that the Iowa Comparative Fault Act "applies only when the breach leads to personal injury or property damage apart from the original damage claimed"); Waterloo Sav. Bank v. Austin, 494 N.W.2d 715, 717 (Iowa 1993) ("By its terms, the purpose of the comparative fault act is to establish 'comparative fault as the basis for liability in relation to claims for damages arising from injury to or death of a person or harm to property. . . .'") (quoting 1984 Iowa Acts ch. 1293); Vasquez v. LeMars Mut. Ins. Co., 477 N.W.2d 404, 409 (Iowa 1991) (holding that the comparative fault statute does not apply to contract claims). Courts have concluded, however, that the only reasonable way to apportion damages among parties may be by some allocation of fault. *See, e.g.*, Eischeid v. Dover Constr., Inc., 265 F. Supp. 2d 1047, 1058 (N.D. Iowa 2003) (discussing how to determine the extent of indemnity without "'sharing of fault' . . . under the Iowa Comparative Fault Act"); Sward v. Nelson Constr., Inc., No. 01-0020, 2003 WL 118206, at *5 (Iowa Ct. App. Jan. 15, 2003) ("[T]he only reasonable way to determine each part[y']s liability under the contract was to permit the jury to assign fault to the parties.").

III. DIMINUTION IN VALUE

The proper measure of damages for diminution in value is the difference between the market value of the property before the injury and the market value of the property after injury.[23] In construction cases, the measure is usually "the difference between the value of the building if the contract had been fully performed and the value of the performance actually received."[24] The Iowa Supreme Court has allowed the calculation of diminution value at the time the building was sold in a distress sale, because the plaintiff felt the impact then, rather than at the time the contractor completed the building.[25]

Where repairs cannot restore property to its predamaged condition, the owner may recover the difference between the reasonable market value of his property before and after the damage.[26] The fact finder may consider the strengths and weaknesses of each witness on the diminution issue "and use part, none, or all of [his or her] testimony."[27] The award will not likely be disturbed on appeal if it is "within the range of the evidence."[28] The fair market value of property may be the replacement value.[29] The replacement value of items not part of a structure but damaged as result of construction may be recoverable as special damages.[30]

---

23. *Cf.* Mel Foster Co. Props., Inc., v. Am. Oil Co. (Amoco), 427 N.W.2d 171, 176 (Iowa 1988) (concluding that "the proper measure of damages in [a] nuisance case is the difference between the market value of [the plaintiff's] property immediately before contamination and the market value of that property after the contamination").

24. Serv. Unlimited, Inc. v. Elder, 542 N.W.2d 855, 858 (Iowa 1995) (citing F.E. Marsh & Co. v. Light Power Co., 195 N.W. 754 (1923)).

25. *See* R.E.T Corp. v. Frank Paxton Co., 329 N.W.2d at 421 (affirming the trial court's calculation of diminution of value at the time the building was sold, rather than at the time it was built).

26. Papenheim v. Lovell, 530 N.W.2d 668, 673 (Iowa 1995).

27. Hawkeye Motors, Inc. v. McDowell, 541 N.W.2d 914, 918 (Iowa Ct. App. 1995) (citing Ballard v. Amana Soc'y, Inc., 526 N.W.2d 558, 561 (Iowa 1995); Mercy Hosp. v. Hansen, Lind & Meyer, P.C., 456 N.W.2d 666, 672 (Iowa 1990)).

28. *See id.* (affirming the trial court's award because it "was within the range of the evidence").

29. *See* Schiltz v. Cullen-Schiltz & Assocs., 228 N.W.2d 10, 19 (Iowa 1975) ("'[T]he principal factors in determining the actual value of a building are usually the original cost, the cost of replacing it, and a proper allowance for depreciation from use, age, and other like causes.'") (quoting Britven v. Occidental Ins. Co., 13 N.W.2d 791, 794 (Iowa 1944)).

30. Bushman v. Cuckler Bldg. Sys., 421 N.W.2d 145, 149 (Iowa Ct. App. 1988) (citing Schiltz v. Cullen-Schiltz & Assocs., Inc., 228 N.W.2d at 20-21).

IV. COST OF COMPLETION AND REPAIR

Courts admit evidence of the cost of repairs to show damages.[31] Generally, courts measure damages for repairs or replacement as the fair and reasonable cost of repair or replacement, not to exceed the value of the property immediately prior to the loss or damage.[32]

The concept of economic waste limits the recovery for repair costs.[33] If repair costs grossly exceed the benefit to the property or if repair would result in "unreasonable destruction of the builder's work, the proper measure of damage is the reduced value of the building."[34] Thus, an owner "may recover the replacement cost if it does not exceed the value of the property prior to injury."[35]

If the evidence cannot establish a market value for the property, courts limit repair costs to the actual or real value before the repairs.[36] "'In determining the actual or intrinsic value of property which does not have a market value, or its value to the owner, it has been held proper to admit evidence showing the original cost, the cost of restoration or replacement, the age of the property, its use and utility, and its condition.'"[37]

Courts also limit an owner's recovery for repairs to cases of substantial breach by the contractor.[38] "[A]n owner is not allowed to nitpick until the

31. State v. Urbanek, 177 N.W.2d 14, 16 (Iowa 1970) ("While the reasonable cost of repairs is always admissible on the question of damages, yet as the repairs may render the damaged property more valuable than it was before the injury, he who causes the injury is not required to bear the full expenditure for the repairs, but is only liable for the difference in the market price of the article before and after the injury.") (citing Robson v. Zumstein Taxicab Co., 248 S.W. 872, 873 (Ky. Ct. App. 1923)).

32. *See, e.g.*, *id.* at 18 (holding that the measure of damages is the cost of repairs, unless such costs equal or exceed the value of the property before the injury, in which case, the measure of damages is the value of the property before the injury) (citing Bd. of Jackson County Rd. Comm'rs v. O'Leary, 40 N.W.2d 729, 732 (Mich. 1950)).

33. Serv. Unlimited, Inc. v. Elder, 542 N.W.2d 855, 858 (Iowa 1995) (citing Busker v. Sokolowski, 203 N.W.2d 301, 304 (Iowa 1972)).

34. *Id.* (citing Busker v. Sokolowski, 203 N.W.2d at 304).

35. Hendricks v. Great Plains Supply Co., 609 N.W.2d 486, 495 (Iowa 2000) (citing State v. Urbanek, 177 N.W.2d at 16).

36. State v. Urbanek, 177 N.W.2d at 16-17 (citations omitted).

37. *Id.* at 18 (quoting 25 C.J.S. *Damages* § 85, at 931); *see* Schiltz v. Cullen-Schlitz & Assocs., Inc., 228 N.W.2d 10, 19 (Iowa 1975) ("'[I]n determining actual values of buildings[,] . . . [i]t is proper to bring to the aid of the jury all facts and circumstances which fairly tend to prove actual value, such as the size and dimensions of the building, the kind and quality of materials of which it is constructed, its age, the amount of wear and tear to which it has been subjected, its state of repair and all other pertinent matters.'").

38. *See, e.g.*, Carson v. Roediger, 513 N.W.2d 713, 716-17 (Iowa 1994) ("A deduction is to be allowed only where a breach is 'substantial.'") (citing Cent. Iowa Grading,

[contract] balance due is depleted," and the owner's "petty dissatisfactions" may not be compensable.[39] Money wasted on attempted repairs that prove unsuccessful, however, may be recovered.[40]

An owner can recover for defects in the builder's work and items needed to complete the contract.[41] For example, in *Service Unlimited, Inc. v. Elder*,[42] an owner recovered the cost of installing a new insulated roof over an improperly constructed roof, notwithstanding the builder's argument that a larger air conditioner and allowance for annual operating cost would fix the problem.[43] The owner testified that the existing roof created a substantial reduction in the value of the building.[44]

V. RECOVERY OF LOST PROFITS OR RENTALS

Parties may recover lost rentals[45] or profits for breach of a construction contract, "so long as the profits are not based on conjecture and speculation."[46] Courts should not deny lost profits because the amount is difficult to determine if the fact of damages is evident.[47] Courts do not require mathematical precision, but plaintiffs must establish the amount of claimed damages with some reasonable degree of certainty.[48] Courts will not deny lost profits just because a

---

Inc. v. UDE Corp., 392 N.W.2d 857, 859 (Iowa Ct. App. 1986)).

39. *Id.* at 716.

40. *See* Mercy Hosp. v. Hansen, Lind & Meyer, P.C., 456 N.W.2d 666, 672 (Iowa 1990) (allowing the owner to recover for money wasted attempting to recaulk defective additions).

41. Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402, 407 (Iowa Ct. App. 1994) (citing S. Hanson Lumber Co. v. De Moss, 111 N.W.2d 681, 686 (Iowa 1961)).

42. Serv. Unlimited, Inc. v. Elder, 542 N.W.2d 855 (Iowa 1972).

43. *Id.* at 858.

44. *Id.*

45. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 421 (Iowa 1983) (citing Conrad v. Dorweiler, 189 N.W.2d 537, 540-41 (Iowa 1971)).

46. Mid-Country Meats, Inc. v. Woodruff-Evans Constr., 334 N.W.2d 332, 337 (Iowa 1983) (citing Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 284-86 (Iowa 1979)).

47. Metro. Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 538 (Iowa Ct. App. 1982) (citing Palmer v. Albert, 310 N.W.2d 169, 174 (Iowa 1981)).

48. Data Documents, Inc. v. Pottawattamie County, 604 N.W.2d 611, 616-17 (Iowa 2000) (citations omitted); Bushman v. Cuckler Bldg. Sys., 421 N.W.2d 145, 148 (Iowa 1988) (citing Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 747 (Iowa 1977)); R.L. Pelshaw Co. v. City Motors, No. 01-0795, 2003 WL 1523313, at *4 (Iowa Ct. App. Mar. 26, 2003) (citing Data Documents, Inc. v. Pottawattamie County, 604 N.W.2d at 617). The Iowa Supreme Court has stated: "If factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the jury." Harsha v. State Sav. Bank, 346 N.W.2d 791, 798 (Iowa 1994) (citations omitted).

business had not earned a profit previously.[49] A nonprofitable business can show a reduction in gross profits and need not show that the company had previously earned a net profit.[50] Courts will not preclude new businesses from recovering lost profits where evidence demonstrates the feasibility of profits.[51]

Additionally, parties can recover expenditures made in reliance on the proper performance of a contract as consequential damages.[52] Even if future profits are too uncertain for recovery, the plaintiff may recover expenditures it made in preparation and part performance as an alternative measure of recovery.[53] For example, an owner can recover for labor expended to clean up debris and remove tar and cement as a result of a construction project.[54] The performance of the labor by a family member for no charge does not enure to the benefit of the breaching party.[55] Even though no money changed hands for the work performed, the injured party can recover.[56] The furnishing of labor or other work from a third party does not relieve the breaching contractor of its obligation to pay for the reasonable expense of the services performed.[57] A party may recover the "sweat equity" contributed to construction of the premises, because the breaching party cannot expect another to "expend considerable time and personal labor in order to reduce the replacement cost."[58]

49. *See* Bushman v. Cuckler Bldg. Co., 421 N.W.2d at 148 (affirming an award for lost profits despite the fact that the plaintiff's business was not shown to be profitable).

50. *See id.* ("While [the plaintiff's] . . . operation may not have turned a net profit during the years in question, it is, we think, beyond cavil that the [effects of the breach] resulted in a reduction of [the plaintiff's] gross profits.").

51. Mid-Country Meats, Inc. v. Woodruff-Evans Constr., 334 N.W.2d at 337 (citing Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgmt., Inc., 519 F.2d 634, 640 (8th Cir. 1975)).

52. *Id.* (noting that "[t]hese expenditures have been awarded as an element of consequential damages") (citing C.C. Hauff Hardware, Inc. v. Long Mfg. Co., 148 N.W.2d 425, 428 (Iowa 1967)).

53. C.C. Hauff Hardware, Inc. v. Long Mfg. Co., 148 N.W.2d at 428 (citations omitted).

54. *See* Conley v. Warne, 236 N.W.2d 682, 688 (Iowa 1975) (allowing damages for such expenses).

55. *See id.* (holding that the fact that services were performed by the plaintiff's husband would not affect the amount of damages).

56. *See id.* (awarding the value of the services performed by the plaintiff's husband at no charge).

57. *See id.* (awarding the value of the services performed by the plaintiff's husband at no charge).

58. Hendricks v. Great Plains Supply Co., 609 N.W.2d 486, 495 (Iowa 2000).

VI. RECOVERY OF INTEREST

In construction cases, a nonbreaching party may recover interest payments to third parties if "reasonably foreseeable and proximately caused by the defaulting party's breach."[59] In a commercial setting, the court may take judicial notice that a party would foreseeably have to incur interest charges to complete construction.[60] Courts will not allow interest on financing the original purchase price if the breach did not cause the expense.[61] Courts may award interest expense incurred due to the delay of the construction contract,[62] for example, where delay in construction results in finance charges for inventory acquisition, start up expenses, or other interest incurred in reliance on timely performance of the contract.

Contractors may recover interest on an open account under Iowa Code section 535.11,[63] which provides:

> Except where the parties have agreed in writing for the payment of a different finance charge or rate of interest, a creditor may charge a finance charge on the unpaid balances of an account receivable at a rate not exceeding that permitted by subsection 3 or 4 of this section if the creditor gives notice as required by subsection 2 of this section.[64]

Subsection 4 governs open accounts and states that "the creditor may impose a finance charge not exceeding that permitted by section 537.2202, subsection 2."[65] Section 537.2202(2) provides:

---

59. Metro. Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 536 (Iowa Ct. App. 1982).

60. *See id.* (concluding that "it [wa]s foreseeable that plaintiff would have to borrow the money and would incur interest charges" despite the lack of a trial court finding on the issue).

61. Nachazel v. Miraco Mfg., 432 N.W.2d 158, 162 (Iowa 1988) ("Other jurisdictions have refused to allow damages for interest or finance expenses incurred in purchasing merchandise on the basis that the expense was not caused by the breach.") (citations omitted).

62. *See id.* at 164 ("[D]amages for purchase money interest should be allowable in cases where the buyer has sought recision of the contract or has rejected the goods and sought damages under Iowa Code section 554.2711.").

63. Todd's Ltd. v. Nairne, No. 0-036, 2000 WL 1288672, at *4-5 (Iowa Ct. App. Sept. 13, 2000) (citing IOWA CODE § 535.11 (2000)).

64. IOWA CODE § 535.11(1) (2003).

65. *Id.* § 535.11(4).

> For each billing cycle, a charge may be made which is a percentage of an amount not exceeding the greatest of the following:
>
> a. The average daily balance of the open end account in the billing cycle for which the charge is made, which is the sum of the amount unpaid each day during that cycle, divided by the number of days in that cycle. The amount unpaid on a day is determined by adding to the balance, if any, unpaid as of the beginning of that day all purchases and other debits and deducting all payments and other credits made or received as of that day.
>
> b. The balance of the open end account at the beginning of the first day of the billing cycle, after deducting all payments and credits made in the cycle except credits attributable to purchases charged to the account during the cycle.
>
> c. The median amount within a specified range including the balance of the open end account not exceeding that permitted by paragraph "*a*" or "*b*". A charge may be made pursuant to this paragraph only if the creditor, subject to classifications and differentiations the creditor may reasonably establish, makes the same charge on all balances within the specified range and if the percentage when applied to the median amount within the range does not produce a charge exceeding the charge resulting from applying that percentage to the lowest amount within the range by more than eight percent of the charge on the median amount.[66]

This statute permits a finance charge not to exceed 1.65% per month or 19.8% per annum, without a written agreement for a different rate.[67] A creditor may impose a finance charge without a written agreement by giving notice of the imposition of a finance charge.[68] The notice of the finance charge must appear on an invoice, disclose the rate of the finance charge, and state the date before which payment must be received to avoid the finance charge.[69] To charge an amount in excess of the statutory maximum, the parties must have a written agreement.[70] To determine whether the parties have such an agreement, the court should consider the clear language on invoices, whether the debtor signed the invoices, the creditor's pattern of billing in keeping with the invoices, and

66. *Id.* § 537.2202(2).

67. Todd's Ltd. v. Nairne, No. 0-036, 2000 WL 1288672, at *5. [Just leave for now until he answers the pink sticky. The *id.* below refers to the Iowa Code, not to the case. Just leave that pending resolution of the pink sticky.]

68. *Id.* § 535.11(1).

69. *Id.* § 535.11(2).

70. *Id.* § 535.11(1).

whether the debtor continues to deal with the creditor.[71] In such circumstances, the court may find an agreement for payment in excess of the statutory maximum.[72]

Where interest is charged in excess of the maximum rate allowed by statute, the usury penalty is severe.[73] The usury statute requires a penalty of eight percent of the unpaid principal, disallows any court costs to the creditor, precludes a judgment in excess of the principal amount, [74] and disallows attorney fees.[75]

Prior to the 1997 amendments to Iowa Code section 535.3, the successful party in construction cases could recover interest on the total amount of the judgment from the date the suit was filed.[76] Even if the expenditures for repair were made after the filing of the lawsuit, the interest on the consequential damages could run from the date of the filing of the claim.[77] Even interest on a judgment for lost profits that were a consequence of the damage to the building could earn interest from the date of the filing of the petition.[78] In comparative fault cases, future damages earn interest from the date of the entry of the judgment.[79]

VII. LIQUIDATED DAMAGES

Liquidated awards predetermined before the breach.[80] Courts will not

71. Power Equip., Inc. v. Tschiggfrie, 460 N.W.2d 861, 863 (Iowa 1990).

72. *See id.* (stating that such "circumstances . . . tend to confirm that defendant did agree in writing to pay a specified finance charge").

73. *See* IOWA CODE § 535.5 (governing the penalty for usury).

74. *Id.*

75. *See* Muchmore Equip., Inc. v. Grover, 315 N.W.2d 92, 100 (Iowa 1982) (holding that by virtue of section 535.5, the construction contractor could not recover attorney fees).

76. Mercy Hosp. v. Hansen, Lind & Meyer, P.C., 456 N.W.2d 666, 673 (Iowa 1990) (citing IOWA CODE § 535.3). While prior to the 1997 amendments, section 535.3 stated that "interest shall accrue from the date of the commencement of the action," *see* IOWA CODE § 535.3 (1996), this language has been deleted and does not appear in the current version of the code, *see id.* (2003).

77. *See* Mercy Hosp. v. Hansen, Lind & Meyer, P.C., 456 N.W.2d. at 673-74 (allowing prejudgment interest on expenses incurred after the filing because, *inter alia*, "the injury to the additions was complete before that time").

78. *See id*. at 674 (affirming an award of prejudgment interest on the portion of the award attributable to lost profits).

79. IOWA CODE § 668.13(4) (2003).

80. *See* Am. Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Bd., 586 N.W.2d 325, 333 (Iowa 1998) (stating that parties include liquidated damage provisions in a contract to provide a ready calculation of damages for breach) (citing

enforce a liquidated damage provision that amounts to a penalty.[81] The amount of liquidated damages should have a reasonable relation to the actual damages incurred.[82] Generally, Iowa courts will look at two factors to determine the reasonableness of liquidated damages: (1) the anticipated or actual loss caused by the breach and (2) whether proof of that loss is difficult.[83] If the amount of liquidated damages approximates the actual loss that resulted or approximates the loss anticipated at the time of making the contract, the first factor is satisfied.[84] If the parties have difficulty proving the loss, more "'latitude is allowed in the approximation of anticipated or actual harm.'"[85] If the amount of liquidated damages "appears to be unreasonably large and goes far beyond the anticipated loss caused by delay in performance of the contract," the damage amount may constitute an unenforceable penalty.[86]

VIII. ATTORNEY FEES

Generally, parties may recover attorney fees only under a statute or contract.[87] "[Iowa] courts have recognized a rare exception to th[e] general rule . . . 'when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[88] For an award of attorney fees under this common law exception, the offending party's conduct "must rise to the level of oppression or connivance to harass or injure another."[89]

RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a, at 157 (1981)); Golden Sun Feeds, Inc. v. Clark, 140 N.W.2d 158, 161 (Iowa 1966) (defining liquidated damages as sums agreed upon by the parties in the agreement) (citing 22 AM. JUR. 2D *Damages* § 212, at 297).

81. *See, e.g.*, Rohlin Constr. Co. v. City of Hinton, 476 N.W.2d 78, 81 (Iowa 1991) ("'Liquidated damages must compensate for loss rather than punish for breach . . . .'") (quoting Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16, 18 (1st Cir. 1991)).

82. *See id.* at 80 ("'The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches.'") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 356(1) cmt. b).

83. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 356(1) cmt. b).

84. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 356(1) cmt. b).

85. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 356(1) cmt. b).

86. *Id.* at 81.

87. Costello v. McFadden, 553 N.W.2d 607, 613 (Iowa 1996) (citing Humiston Grain Co. v. Rowley Interstate Transp. Co., 512 N.W.2d 573, 576 (Iowa 1994)); Ward v. Loomis Bros., Inc., 532 N.W.2d 807, 813 (Iowa 1995) (citing Tucker v. Nason, 87 N.W.2d 547, 549-50 (1958)); Suss v. Chammel, 375 N.W.2d 252, 256 (Iowa 1985) (citing Lickteig v. Iowa Dep't of Transp., 356 N.W.2d 205, 212 (Iowa 1984)).

88. Remer v. Bd. of Med. Exam'rs, 576 N.W.2d 598, 603 (Iowa 1998) (quoting Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153, 158 (Iowa 1993)).

89. Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d at

The Iowa mechanic's lien statute provides contractors a means to recover attorney fees.[90] The statute does not "limit attorney fees to those incurred in the district court."[91] The mechanic's lien statute does not limit or exclude attorney fees incurred for the preparation or arbitration of a claim.[92] The Iowa Supreme

---

159-60.

90. IOWA CODE § 572.32 (2003). Section 572.32(1) provides: "In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, a prevailing plaintiff may be awarded reasonable attorney fees." *Id.* § 571.32(1). Subcontractors cannot recover under this statute. *See* W.P. Barber Lumber Co. v. Celania, 647 N.W.2d 62, 68 (Iowa) (holding that the word "directly" in section 572.32 requires privity of contract and that subcontractors therefore may not receive attorney fees under that section).

91. Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d 11, 23 (Iowa 2001).

92. *See id.* at 24 ("'[T]he district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case.'") (quoting Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990)). Other states' courts have ruled that contractors could recover attorney fees incurred in an arbitration of its claims in a subsequent mechanic's lien foreclosure action. *See, e.g.*, Stiglich Constr., Inc. v. Larson, 621 N.W.2d 801, 803 (Minn. Ct. App. 2001) ("As part of the lienor's costs and disbursements, the court may award a reasonable attorney fee.") (citing Obraske v. Woody, 199 N.W.2d 429, 431 (Minn. 1972)); Harris v. Dyer, 637 P.2d 918, 921 (Or. 1981) (en banc) ("[T]he contract between the parties reserves to the prevailing party in a lien foreclosure suit the full 'reasonable' attorney fees available in such a suit . . . ."); Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 338 S.E.2d 631, 636 (S.C. 1995) ("[W]here a contract providing for arbitration includes a reservation of rights and the lienor must bring a foreclosure action to enforce an arbitration award, an award of attorney's fees is proper . . . .") Each of the three cases involved American Institute of Architects Contracts and identical arbitration provisions. *See* Stiglich Constr., Inc. v. Larson, 621 N.W.2d at 803 (noting that the court in *Sentry* was construing AIA provisions). The Minnesota court also expressly noted that the AIA Contract General Condition 4.5.1 does not require the arbitration of attorney fees and that the reservation of rights provision, General Condition 13.4.1, allowed the contractor to reserve that issue for the final phase of the foreclosure action. *Id.* at 802-03. The court stated:

> We believe that a reasonable construction of the AIA contract, one that harmonizes the provisions at issue, mandates arbitration for contractual claims but allows the contractor to reserve statutory lien rights to secure payment. The right to attorney fees, found only in the statutes, is a component of the statutory rights the contractor may reserve for district court determination.

Id. at 803.

The Minnesota court found persuasive the construction by an Oregon court of identical provisions:

> It does not seem the most likely reading of this reservation of rights that it meant to sacrifice attorney fees which the law allows when all of the phases of the foreclosure remedy are litigated in court. Rather, it seems more consonant with the apparent objective of including a reservation rights . . . as disavowing such a limitation on the otherwise available right to attorney fees.

Court has identified the appropriate factors for the district court to consider in awarding attorney fees: "the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and the results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service."[93] The court added: "Additionally, '[t]he district court must look at the whole picture and, using independent judgment with benefit of hindsight, decide on a total fee appropriate for handling the complete case.'"[94] The amount of time spent is a relevant factor.[95] Courts may award paralegal fees as part of an attorney fee award.[96] The amount of the attorney fees may be affected by the difficulty of the issues and the importance to the parties.[97] The

Id. (quoting Harris v. Dyer, 637 P.2d at 921).

In *Sentry Engineering & Construction, Inc. v. Mariner's Cay Development Corp*., the court held under identical AIA Contract language that the contractor could seek its arbitration and litigation attorney fees in the mechanic's lien foreclosure action. Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 338 S.E.2d 631, 636 (S.C. 1985). The court noted that the contract expressly reserved all rights and remedies available by law to the parties, and the mechanic's lien foreclosure action and recovery of attorney fees had to be one of the remedies contemplated. *Id.* The court also perceived a legislative intent to promote arbitration of contract disputes and stated that to deny fees when liability is arbitrated would discourage arbitration. *Id.* The court ruled that an award of attorney fees for the arbitration was proper. *Id*.

In *Stanley Smith & Sons, Inc. v. Dumas*, the South Carolina Supreme Court followed *Sentry* and held that the contractor properly sought attorney fees for both the arbitration and the enforcement of the award in court in the foreclosure action. Stanley Smith & Sons, Inc. v. Dumas, 431 S.E.2d 595, 596 (S.C. 1993) (per curiam). A different result would discourage arbitration and disadvantage those contractors who pursue arbitration in favor of those who pursue mechanic's lien foreclosure actions. *See* Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 338 S.E. 2d at 636 ("To deny fees where liability is arbitrated would discourage arbitration.").

93. Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d at 24 (quoting Landals v. George A. Rolfes Co., 454 N.W.2d at 897).

94. *Id.* (quoting Landals v. George A. Rolfes Co., 454 N.W.2d at 897); *see also* Sitzes v. First Ave. Ramp, L.C., No. 99-1891, 2000 WL 1422760, at *2 (Iowa Ct. App. Sept. 27, 2000) (holding that the results of the appeal, in addition to the results of the trial, should have been a consideration in determining attorney fees).

95. Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d at 24 (citing Landals v. George A. Rolfes Co., 454 N.W.2d at 897); *see* Baumhoefener Nursery, Inc. v. A&D P'ship, II, 618 N.W.2d 363, 368 (Iowa 2000) (considering the amount of time spent in determining whether a fee award was proper).

96. *See* Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d at 23 ("Legal assistant fees are included in the concept of 'reasonable attorney fees.'") (citing Landals v. George A. Rolfes Co., 454 N.W.2d at 818).

97. Landals v. George A. Rolfes Co., 454 N.W.2d at 897.

court may consider the factor of whether a settlement offer was made.[98]

IX. CONTRACTORS' RECOVERY

Iowa has few appellate cases discussing contractors' claims. Generally, a contractor can recover the contract price for its work,[99] consequential damages resulting from the owner's breach of contract or delay,[100] and extra work authorized by the owner.[101] A contractor wrongly prevented from completing its contract "is entitled to recover profits from the breach equal to the net pecuniary gain," which is usually represented by the contract price less the cost of performance adjusted for variable overhead expenses that may be increased due to performance of the contract.[102] A contractor is entitled to receive the agreed price for work it performs, and is not required to prove the fairness and reasonableness of the charges.[103] The contractor may recover consequential damages resulting from unreasonable delay, including rental value of equipment on standby.[104]

The contractor's recovery on its contract requires it to show substantial performance.[105] A substantial performance is defined as follows:

---

98. *See* Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1406 (9th Cir. 1996) (listing as a factor to consider "whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving that result").

99. *See* Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 194 (Iowa Ct. App. 1987) ("'[W]hen the contractor has substantially complied with his contract he is entitled to recover the contract price with deductions for any defects or incompletions.'") (quoting S. Hanson Lumber Co. v. De Moss, 111 N.W.2d 681, 684 (Iowa 1961)).

100. *See* Hallett Constr. Co. v. Iowa State Highway Comm'n, 154 N.W.2d 71, 76 (Iowa 1967) ("'The building contractor's claim for damages may be based in part on losses due to the owner's causing unreasonable delay in completion.'") (quoting 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1094, at 513-14).

101. Freese v. Town of Alburnett, 125 N.W.2d 790, 794-95 (Iowa 1964) (holding that the contractor's recovery for extra work done outside of the contract was proper).

102. *See* Ritam Corp. v. Applied Concepts, Inc., 387 N.W.2d 619, 621 (Iowa 1986) ("Overhead, which is a component, but not the equivalent, of cost of performance, can be used to reduce the nonbreaching party's recovery if the overhead costs would have *increased* due to performance of the contract.") (citing King Features Syndicate v. Courrier, 43 N.W.2d 718, 726 (Iowa 1950); Juengel Constr. Co. v. Mt. Etna, Inc., 622 S.W.2d 510, 515 (Mo. Ct. App. 1981)).

103. *See* Frank Millard & Co. v. Housewright Lumber Co., 588 N.W.2d 440, 442 (Iowa 1999) (holding that claims for breach of express contract, as opposed to quantum meruit, do not require a showing that the contractor's rates were reasonable).

104. Hallett Constr. Co. v. Iowa State Highway Comm'n, 154 N.W.2d at 76 (citing 5 CORBIN, *supra* note 99, at 513-14).

105. Clark v. Rodish, No. 02-0012, 2003 WL 289240, at *2 (Iowa Ct. App. Feb. 12, 2003) (citing Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 194 (Iowa Ct.

> Substantial performance allows only the omissions or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to the other portions of the building, and may be compensated for through deductions from the contract price.[106]

A contractor who substantially performs its contract may sue on the contract, but its recovery is decreased by the cost of defects for which it is responsible.[107] A contractor who fails to establish substantial performance cannot recover on its contract or mechanic's lien claim.[108] Substantial performance is a prerequisite to a contractor's recovery, but not a defense for the contractor in a suit for damages suffered by the owner, and the owner may seek damages for defects even if the contractor shows it substantially performed.[109]

Similarly, an owner who materially breaches the contract may not recover from a contractor.[110] Iowa law provides that a party's failure to make specific payment is a breach of contract that precludes the breaching the party's recovery on the contract.[111] Iowa law also requires that tender of money be absolute and unconditional to constitute payment.[112] Readiness to pay does not equal active

App. 1987)); B & R Concrete Constr. Co. v. Johanningmeier, No. 0-265, 2000 WL 1288969, at *2 (Iowa Ct. App. Sept. 13, 2000) (citing Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d at 193).

106. Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d at 193 (citing Littell v. Webster County, 131 N.W. 691, 694 (Iowa 1911)).

107. *Id*. at 194 (citing S. Hanson Lumber Company v. De Moss, 111 N.W.2d 681, 684 (Iowa 1961)); Clark v. Rodish, 2003 WL 289240, at *3 (citing Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d at 194).

108. *See* Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402, 406-07 (Iowa 1994) (holding that because the contractor failed to prove he substantially performed, he could not enforce his mechanic's lien); Miller v. Gray, 217 N.W. 228, 230 (Iowa 1928) (holding the contractor must prove substantial performance to recover for breach of contract).

109. Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293, 296 (Iowa 1995) (citing Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d at 195). The owner has the burden to prove the contractor's breach of contract. Clark v. Rodish, 2003 WL 289240, at *2 (citing Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 195 (Iowa Ct. App. 1984)). The burden is on the owner to prove the elements of its counterclaims by a preponderance of the evidence. Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d 11, 20 (Iowa 2001) (citing IOWA R. APP. P. 14(f)(5)).

110. *See* Baysden v. Hitchcock, 553 N.W.2d 901, 903-04 (Iowa Ct. App. 1996) (holding that a party's failure to pay on an agreed date was a material breach precluding recovery of damages).

111. *See id.* at 903 (holding that a failure to make a specific payment when due is a material breach).

112. Farmers Trust & Sav. Bank v. Manning, 311 N.W.2d 285, 288 (Iowa 1981) (citing Lyon v. Willie, 288 N.W.2d 884, 894 (Iowa 1980)).

tender; rather, the party must have the money present, ready, and produced to constitute a valid tender of payment.[113] The failure to make a progress payment generally entitles the contractor to stop work and await payment before returning to work.[114]

A general rule is that courts will deny recovery if the delay is concurrent and if there is no proof of a clear apportionment of the delay and expense attributable to each party.[115] When the owner and contractor concurrently delay the work, the contractor is not liable for damages.[116] The Iowa Supreme Court has stated:

> It is the general rule that where a delay is due partly to the acts of the owner, the builder is not relieved from his contract, but the owner cannot recover for delays which have been caused by himself or by those for whose conduct he was responsible. The parties are taken to have understood that the contractor's time limit was prolonged by the extent of such delays. . . . "Where a contract calls for completion of the work by a certain day, acts done by the employer which delay the contractor constitute an excuse for noncompletion on the day specified."[117]

Iowa courts generally enforce claims deadlines and written change order requirements.[118] Iowa law recognizes an exception when parties waive a notice or written change order requirement by a course of dealing or express waiver of

---

113. St. George's Soc'y v. Sawyer, 214 N.W. 877, 878 (Iowa 1927) (citations omitted).

114. *See, e.g.*, Aerostatic Eng'g Corp. v. Szczawinski, 294 N.E.2d 521, 524 (Mass. App. Ct. 1973) (stating that a missed payment entitles the contractor to stop work); Hart & Sons Hauling, Inc. v. MacHaffie, 706 S.W.2d 586, 588 (Mo. Ct. App. 1986) ("When a progress payment is due and not made, a builder is entitled to suspend his performance and await either assurances of payment or actual payment.").

115. *See* William F. Klingensmith, Inc. v. United States, 731 F.2d 805, 809 (Fed. Cir. 1984) ("The geneneral rule is that '[w]here both parties contribute to the delay neither can recover damage[s], unless there is in the proof a clear apportionment of the delay and expenses attributeable to each party.'") (citing Blinderman Constr. Co. v. United States, 695 F.2d 552, 559 (Fed. Cir. 1982) (quoting Coath & Goss, Inc. v. United States, 101 Ct. Cl. 702, 714-15 (1944))).

116. V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., 595 S.W.2d 474, 484 (Tenn. 1980) (holding that neither party could recover liquidated damages due to delay "where both parties have mutually caused the delay") (citations omitted).

117. Kaltoft v. Nielsen, 106 N.W.2d 597, 602 (Iowa 1960) (quoting 12 AM. JUR. 2D section *Contracts* § 351, at 915).

118. *See, e.g.*, Ida Grove Roofing & Improvement, Inc. v. City of Storm Lake, 378 N.W.2d 313, 315 (Iowa Ct. App. 1985) (holding that "without plaintiff's compliance with the change order" required by the contract, the contractor was barred from recovery of additional compensation).

the requirement.[119] An owner can waive a written change order or notice provision "by the owner's knowledge of, agreement to, or acquiescence in such extra work, a course of dealing which repeatedly disregards the requirement, and a promise to pay for extra work, orally requested by the owner and performed [by the contractor] in reliance [on the promise]."[120] Still, a contractor gets paid for the extra work only if performed with the knowledge or consent of the party who is to pay.[121] In addition to waiver, courts have avoided the harsh effects of such contract conditions on theories of independent contract, modification, rescission, and estoppel.[122]

X. IMPLIED WARRANTIES

Recent cases enhance the importance of the contract terms in construction cases.[123] Nevertheless, there remain important implied warranties and implied conditions of construction contracts. A construction contract contains an implied warranty of fitness for a particular purpose.[124] Construction contracts and contracts for sale of a new home contain an implied warranty that the contractor did the work "in a reasonably good and workmanlike manner and that [the structure] will be reasonably fit for its intended purposes."[125] Iowa law implies a

119. Cent. Iowa Grading, Inc. v. UDE Corp., 392 N.W.2d 857, 860 (Iowa Ct. App. 1986).

120. *Id.* (citing Berg v. Kucharo Constr. Co., 21 N.W.2d 561, 567 (Iowa 1946)).

121. *See id.* (requiring "knowledge of, agreement to, or acquiescence in [the] extra work") (citing Berg v. Kucharo Constr. Co., 21 N.W.2d at 567).

122. Hetherington Letter Co. v. O.F. Paulson Constr. Co., 171 N.W.2d 264, 267 (Iowa 1969) (citing 13 AM. JUR. 2D *Building and Constructions Contracts* § 24, at 26).

123. *See* Determan v. Johnson, 613 N.W.2d 259, 264 (Iowa 2000) ("'When a buyer loses the benefit of his bargain because the goods are defective . . . he has his contract to look to for remedies. Tort law need not, and should not, enter the picture.'") (quoting Nelson v. Todd's Ltd., 426 N.W.2d 120, 124 (Iowa 1988)); Flom v. Stahly, 569 N.W.2d 135, 139, 142-43 (Iowa 1997) (relying on statements in the written contractual materials to find a breach of express warranty and declining to apply the theory of implied waranty); Shepherd Components v. Brice Petrides-Donohue & Assocs., 473 N.W.2d 612, 615-16 (Iowa 1991) (stating that an examination of the contract entered into by the parties is helpful to determine liability).

124. *See* Semler v. Knowling, 325 N.W.2d 395, 397 (Iowa 1982) ("'Where a contractor agrees to build a structure to be used for a particular purpose, there is an implied agreement on his part that the structure when completed will be serviceable for the purpose intended. . . .'") (quoting 17A C.J.S. *Contracts* § 494(2)(a), at 715-16 (1963)).

125. Kirk v. Ridgway, 373 N.W.2d 491, 496 (Iowa 1985); *see* R. L. Pelshaw Co. v. City Motors, No. 01-0795, 2003 WL 1523313, at *3 (Iowa Ct. App. Mar. 26, 2003) ("In construction contracts, there is an implied warranty that the building to be erected will be built in a reasonably good and workmanlike manner and that it will be reasonably fit for its intended purpose.") (citing Kirk v. Ridgway, 373 N.W.2d at 493).

contract term of a reasonable time for completion of work when the parties have not agreed on a completion date.[126] "[T]he law implies a promise to pay a reasonable compensation" if the parties have no express agreement on payment terms.[127] Under limited circumstances, an owner may impliedly warrant the adequacy and accuracy of its specifications and that the contractor can perform the specified work.[128] A contractor may also have impliedly agreed that its work would accomplish a certain result.[129] A party who undertakes to perform a task on a construction site may voluntarily assume a duty it would not have under its contract, the breach of which subjects it to pay damages.[130] An owner of property has an implied and non-delegable duty to keep the premises in a reasonably safe condition for business invitees.[131]

When a party suffers only economic loss or defective construction, and no personal injury or other property damage, it will recover only on contract and warranty theories.[132] The principles of comparative fault will not apply to claims involving only economic loss or defective construction.[133] When the implied

126. *See* I.G.L. Racquet Club v. Midstate Builders, Inc., 323 N.W.2d 214, 216 (Iowa 1982) ("[W]here no time for performance is fixed in a contract, the law supplies a requirement that performance be within a reasonable time.") (citing Andreas & Son v. Hempy, 276 N.W. 791, 794-95 (Iowa 1937); Ingram v. Dailey, 98 N.W. 627, 627-28 (Iowa 1904); C.C. Marvel, Annotation, *Admissibility of Oral Agreement as to Specific Time for Performance Where Written Contract Is Silent*, 85 A.L.R.2d 1269, 1279 (1962)).

127. Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 192 (Iowa Ct. App. 1984) (citing Olberding Constr. Co. v. Ruden, 243 N.W.2d 872, 875 (Iowa 1976)).

128. *See* Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d 216, 222 (Iowa 1988) (affirming the trial court's conclusion that the owner impliedly "warranted the accuracy of its plans and specifications through its representation that [the contractor's task] was feasible").

129. McIntire v. Muller, 522 N.W.2d 329, 332 (Iowa Ct. App. 1994) (citing Semler v. Knowling, 325 N.W.2d 395, 397 (Iowa 1982)).

130. *See* Soike v. Evan Matthews & Co., 302 N.W.2d 841, 842-44 (Iowa 1981) (affirming the trial court's finding that the contractor assumed a "gratuitous duty").

131. Kragel v. Wal-Mart Stores, Inc., 537 N.W.2d 699, 703 (Iowa 1995) (citations omitted); Blow v. Martin Bros. Co., No. 00-0817, 2001 WL 803759, at *2 (Iowa Ct. App. July 18, 2001) (citing Kragel v. Wal-Mart Stores, Inc., 573 N.W.2d at 703-04).

132. *See* Flom v. Stahly, 569 N.W.2d 135, 141 (Iowa 1997) ("[I]n Iowa, a plaintiff can recover for purely economic loss only in contract and not in tort law.") (citing Ethyl Corp. v. BP Performance Polymers, Inc., 33 F.3d 23, 25 (8th Cir. 1994); Nelson v. Todd's Ltd., 426 N.W.2d 120, 123-25 (Iowa 1988); Peterson v. Bendix Home Sys., Inc., 318 N.W.2d 50, 54-55 (Minn. 1982)).

133. *See id.* (holding that the comparative fault defense does not apply in cases "involving economic loss rather than personal injury or property damage claims"); Determan v. Johnson, 613 N.W.2d 259, 264 (Iowa 2000) ("'When a buyer loses the benefit of his bargain because the goods are defective . . . he has his contract to look to for remedies. Tort law need not, and should not, enter the picture.'") (quoting Nelson v. Todd's Ltd., 426

warranties arise from a written contract, the breach of the implied warranty, just as with the breach of a written contract term or express warranty, should have a ten rather than a five year statute of limitations, but the Iowa Supreme Court has not yet reached the issue.[134]

The law also implies a duty to use "'reasonable diligence'" to mitigate damages.[135] However, "'a lack of sufficient funds will excuse an absence of effort to lessen damages.'"[136]

XI. CONCLUSION

The purpose of this Article was to describe Iowa law on the measure of damages in construction cases. Recent Iowa Supreme Court decisions show that contract language, rather than tort principles, will control the issues of entitlement and amount of damages for construction claims. As drafters of contracts take advantage of this opportunity, restrictions on consequential damages, third-party beneficiaries, implied warranties, and remedies will become more common. Lawyers who represent clients at the contract drafting stage have an opportunity to greatly shape the outcome of disputes that may develop and protect their clients from many risks. The increased importance of contract theories in construction litigation will encourage owners, designers, and contractors to pay far more attention to the damage and remedy provisions of construction contracts.

Harsh results will challenge the courts to consider whether disclaimers of implied warranties are enforceable.[137] Courts sometimes struggle to identify

N.W.2d at 124).

134. The Iowa Supreme Court has expressly ruled that implied warranty claims are subject to a five-year limitations period. Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 652 (Iowa 1996) (citing Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990)). In a recent footnote, the Iowa Court of Appeals recognized that there is an issue as to whether claims arising out of a written contract, even though not for breach of the written contract, should be subject to a longer period of limitations than five years. Kelly v. Englehart Corp., No. 1-241, 2001 WL 855600, at *3 n.5 (Iowa Ct. App. July 31, 2001). For a discussion of claims arising out of written contracts, *see generally* Burrows v. Bidigare/Bublys, Inc., 404 N.W.2d 650 (Mich. Ct. App. 1987).

135. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 422 (Iowa 1983) (quoting Whewell v. Dobson, 227 N.W.2d 115, 120 (Iowa 1975)); *see* Corcoran v. City of Des Moines, 215 N.W. 948, 949 (Iowa 1927) (stating that a plaintiff is "required to exercise reasonable care to save himself from further loss").

136. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d at 422 (quoting 22 AM. JUR. 2D *Damages* § 32, at 55 (1965)).

137. *See, e.g.*, Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d 216, 221-22 (Iowa 1988) (discussing the effectiveness of contract language aimed at undoing the implied warranty of the owner's specifications).

whether an implied warranty claim arises from contract or tort.[138] In the reality of the construction industry, many contracts get signed and the work started without careful negotiation of the risks.[139] Iowa Courts will probably soon face circumstances under which the harsh results of eliminating tort remedies in construction defect cases prove no more palatable than did long discarded rules on privity of contract[140] and contributory negligence.[141] Currently, however, the Iowa Supreme Court has swung the pendulum in favor of contracts determining the relationship between parties who have disappointed expectations about a building project. Whether tort law regains any influence in construction disputes beyond claims for sudden and accidental injuries, personal injuries, or damage to property other than the work itself is an unanswered question. Meanwhile, drafters will load construction contracts with damage limitations, and construction litigators will focus almost entirely on contract terms.

---

138. *See, e.g.*, Flom v. Stahly, 569 N.W.2d 135, 140-41 (Iowa 1997) (discussing the applicability of comparative fault in a breach of warranty claim). The Iowa Supreme Court has expressly recognized that an action for breach of warranty may "'sound sometimes in tort and sometimes in contract.'" *Id.* at 141 (quoting UNIF. COMPARATIVE FAULT ACT § 1(b) cmt., 12 U.L.A. 128 (1996)). In *Flom v. Stahly*, the court stated:

> "There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims."

Id. (quoting UNIF. COMPARATIVE FAULT ACT § 1(b) cmt).

139. *C.f.* Metro. Fed. Bank v. A.J. Allen Mech. Contractors, Inc., 477 N.W.2d 668, 672-74 (Iowa 1991) (discussing that written lien waivers are not necessarily enforced as written without further proof of specific intent of the signers).

140. Evans v. Howard R. Green Co., 231 N.W.2d 907, 913 (Iowa 1975) ("'[T]he modern view is that privity of contract is not a prerequisite to liability.'") (quoting 5 AM. JUR. 2D *Architects* § 25, at 688).

141. *See* Goetzman v. Wichern, 327 N.W.2d 742, 753 (Iowa 1982) (stating that comparative negligence is "demonstrably superior in theory and practice to the absolute contributory negligence defense").