

IN THE COURT OF PENNSYLVANIA UTILITY COMMISSION OF ALLEGHENY  
COUNTY, PENNSYLVANIA

KELLY MARIAN

Plaintiff,

v.

Case No. C-2019-3011595

Pennsylvania American Water Company

Defendant

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGEMENT ON THE PLEADINGS**

NOW COMES the Plaintiff, Kelly Marian submitting the following Brief:

**I. BRIEF STATEMENT OF THE CASE**

1. Pennsylvania American Water Company replaced water lines on Cress Street as a result their project which entailed hiring a contractor ultimately paved leaders of Cress Street closed. PAWC water line replacement caused structural damage to Plaintiff's house.
2. PAWC is responsible for repairing the Plaintiff's foundation walls, cellar door, water drainage issues, and leaders.
3. PAWC negligence claiming no knowledge of engineer authorizing the rising of the elevation of Cress Street.
4. PAWC negligence claiming no knowledge of elevation of the street.
5. Workorder (PAWC, CCSI, Scott Twp.) negligence omitting level of street prior to and completion of work.
6. PAWC ambiguity regarding Inspections of completed work on Cress Street even after sending contractor back to do repairs.
7. Not all documentation pertaining to the work completed by PAWC and CCSE on Cress Street were submitted in SRTK inquiry.

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## II. STATEMENT OF THE ISSUES INVOLVED

### Breach of Contract

In Pennsylvania, as elsewhere, agreements for the construction of a home, **public utilities**, private commercial structures, excavation, sewers, roadways and the like are typically memorialized in a contract between the purchaser and the builder. Pennsylvania contract law encompasses general, basic rules of contract construction. (1)

Ordinarily, the specifications of a construction contract will clearly denote the “kinds, quality, and quantity of work to be done, the details, time and manner of construction, without which the contract would be incomplete and ineffective.” (2)

A violation of one of these numerous provisions could give rise to a breach of contract action against the builder because when performance under a contract is due, any nonperformance is a breach. (3) The likelihood that the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

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(1) *Cober v Corle*, 610 A.2d 1036 (PA. Super. 1992).

(2) *Z & L Lumber Co of Atlasburg v. Nordquist*, 502 A.2d 697, 701 (PA Super. 1985); *see also Knelly v. Horwath*, 57 A 957 (PA. 1904).

(3) *Widemer Eng'g, Inc. v. Dufalla*, 837 A.2d 459, 468 (Pa. Super. 2003); See also Restatement (Second) of Contracts §235(2) (1981)

## NEGLIGENCE

1. Duty - The defendant owes a legal duty to the plaintiff under the circumstances;
2. Breach - The defendant breached that legal duty by acting or failing to act in a certain way;
3. Causation - It was the defendant's actions (or inaction) are what actually caused the plaintiff's damage to house and
4. Damages - The plaintiff was structurally damaged as a result of the defendant's actions.

Defective construction cases include negligence claims. Such cases include allegations that, the builder breached the duties of reasonable care, reasonable workmanship and/or violated any of the various obligations imposed by law. (4)

**To establish a cause of action in common law negligence under Pennsylvania law, a plaintiff must demonstrate that the defendant owed the plaintiff a duty, that the duty was breached, that the breach caused the plaintiff's injury, and that the plaintiff suffered damages. (5)**

Previously, the Pennsylvania Superior Court has articulated the following factors in determining the existence of a duty: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of **imposing a duty upon the actor.** and (5) the overall public interest in the proposed solution.

## **BREACH OF EXPRESS AND IMPLIED WARRANTY CLAIMS**

Under the implied warranty of workmanship, a person working on a construction project under a construction contract or subcontract impliedly warrants that: 1) **he will do his work in a good and workmanlike manner according to existing standards of construction in the area** in which the building is erected. (6) A basement continually leaks. (7)

## **STANDARD FORM CONSTRUCTION CONTRACTS**

**“Common law” indemnity is derived from a special relationship between the parties.** This special relationship dictates that indemnity will be available to a person, who, without active fault, has been legally compelled to pay damages actually caused by another’s negligence. (8) **a property owner could recover from a contractor who failed to perform specified duties** and thereby caused an injury to another; or a municipality with a duty to ensure that property owners maintain sidewalks may be indemnified by a property owner who failed to maintain a sidewalk that caused an injury to a passerby. (9)

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(5) Harris v. Merchant, 2010 U.S. Dist. LEXIS 100776, 2010 WL 3734107, at \*21 (E.D.Pa. Sept. 23, 2010) (citing Merlini ex rel. Merlini v. Gallitzin Water Auth., 602 Pa. 346, 980 A.2d 502, 506 (2009)); also see S72 \*642 McCandless v. Edwards, 908 A.2d 900, 903 (Pa.Super.2006).

. 926 F. Supp. 2d 634 (W.D. Pa. 2013).

(6) F.D.P. ex re Pontiere v. James Dinert, Inc, 627 A.2d 1204 (Pa. Super. 1993). I. S.M.P. v. Ferrara, 804 A.2d 1221, 1231 (Pa.Super.2002).

(7) Ecksel v. Orleans Const. Co., 519 A.2d 1021 (Pa. Super. 1987) Sirianni v. Nugent Bros., Inc., 506 A.2d 868, 870-871 (Pa. 1986).

(8) Walton v. Avco Corp., 610 A.2d 454, 460 (Pa. 1992).

(9) Builders Supply Co. v. McCabe, 77 A.2d 368 (Pa. 1951).

## RECOVERABLE DAMAGES

Direct Damages The measure of damages for injury to real property is "the cost of repairs where that injury is reparable unless such cost is equal to or exceeds the value of the injured property."

(10) If the cost of repair exceeds the value of the property, "the cost of damages becomes the value of the property." Kirkbride, 560 A.2d at 812. If the injury to the property is permanent,

**"the measure of the damages becomes the decrease in the fair market value of the property."** (11) The measure of damages for total loss of personal property is its reasonable

value at the time of loss, giving due consideration to the purchase price, the condition of the property at the time of loss, an appropriate depreciation factor and the salvage value of the

property. (12) The measure of damages for repairable damage to personal property is, at the

election of plaintiff, the difference between the 21 Revised 2015 pre-injury and post-injury value of the property, or the reasonable cost of repair, with allowance for the difference between the

pre-injury and post-injury value, and the loss of use. (13) Loss of Use Compensation for loss of use sustained due to the repairable damage to real property is appropriate.

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(10) Kirkbride v. Lisbon Contractors, Inc., 560 A.2d 809, 812 (Pa. Super. 1989). See also Matakitis v. Woodmansee, 667 A.2d 228 (Pa. Super. 1995)

(11) Matakitis, supra; Gloviak v. Tucci Const. Co., Inc., 608 A.2d 557 (Pa. Super. 1992).

(12) Denby v. North Side Carpet Cleaning Co., 390 A.2d 252, 259 (Pa. Super. 1978). See also Daughen v. Fox, 539 A.2d 858 (Pa. Super. 1988), alloc. denied, 553 A.2d 967.

(13) Kintner v. Claverack Rural Electric Co-operative, Inc., 478 A.2d 858 (Pa.1984)

Kincade v. Laurel Courts, Inc., 644 A.2d 1268 (Pa. Super. 1994).

## **INSURANCE COVERAGE FOR CONSTRUCTION CONTRACTS**

It is well settled that the interpretation of an insurance contract is a matter of law for the court to decide. **The Pennsylvania Supreme Court has held that where a first party property policy provision covers “damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building,” the policy provides coverage for the imminent collapse of a building. 401 Fourth Street v. Investors Ins. Group, 879 A.2d 166 (Pa. 2005). The Court declined to define the precise meaning of “collapse,” but stated that the entire phrase must be considered, and the policy language covering the “risks” “involving” collapse is ambiguous and as such provides broader coverage, covering either the actual collapse or imminent falling down of a building or part of a building. Id. at 174.** The modern trend around the U.S. is to look at the particular facts of a case, examining whether property damage is present, and whether there was indeed an “occurrence.” (14)

Pennsylvania trial courts seem to have rejected a “black and white” analysis of coverage for contract-based claims, choosing instead to focus on whether the facts show property damage (injury to or loss of use of tangible property) caused by an “occurrence” (accidental or unintended). (15)

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(14) *Vandenberg v. Superior Court*, 982 A.2d 229 (Cal. 1999) (commercial liability insurance policy can provide coverage for liability arising out of a contractual relationship).

(15) *Nitterhouse Concrete Products v. PMA Ins. Co.*, 67 Pa. D.&C.4th 225 (Franklin County 2004)

## **UNIFORM CONSTRUCTION CODE**

**Pennsylvania has adopted a Uniform Construction Code (UCC), found at 34 Pa. Code §§ 401-405. The UCC's provisions provide permit and inspection procedures that apply to commercial and residential construction projects. The UCC requirements for commercial structures, including industrial structures, are found at §§ 403.21 through 403.48. The UCC requirements for residential structures are located in §§ 403.61 to 403.66. The requirements of the UCC pertaining to elevators and other lifting devices are in §§ 405.1 to 405.42.**

### III. Conclusion

The res ipsa loquitur doctrine states that if a defendant acted negligently, even without other proof of misconduct. In order for this doctrine to apply, the plaintiff must prove that the event that occurred usually does not happen in the absence of negligence and that the defendant had exclusive control of the instrument that caused injury.

If the work was done correctly, my home, which has been family owned for over a hundred years would not have been affected.

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Respectfully Submitted,

By: Kelly Marian

Kelly Marian

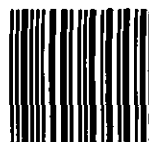
Plaintiff

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