Construction Damages under Missouri Law

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A construction lawsuit, with few exceptions, involves damages. This article[1] discusses what damages are recoverable under Missouri law for breach of contract.[2] Mechanics' lien claims are not included.[3]

Level of Proof

Missouri courts require that an "award of [construction] damages must be supported by competent and substantial evidence." *Best Buy Builders, Inc. v. Siegel*, 409 S.W.3d 562, 565 (Mo. Ct. App. 2013). This requires proof of "reasonable certainty" but not "absolute certainty." *Id.* at 565; *Penzel Constr. Co., Inc. v. Jackson R-2 School Dist*., 2017 WL 582663 at 10 (Mo. Ct. App. Feb. 14, 2017); *Harvey v. Timber Resources, Inc*., 37 S.W.3d 814, 819-20 (Mo. Ct. App. 2001).

"The proper measure of damages is a question of law for determination by the trial court." *Business Men's Assurance Co. of America v. Graham*, 891 S.W.2d 438, 449 (Mo. Ct. App. 1994). The plaintiff's evidentiary burden is easier to satisfy when the losses are directly traceable to the alleged breach or defect giving rise to the construction claim. *Penzel*, *supra* at 10. In a bench tried case, the trial court "has the prerogative to make a finding of value within

[1] Several hundred cases, although reviewed and considered, are not cited in this article due to page limitations and other factors. Each case cited is either the best, most relevant or most recent authority for the topic discussed.

[2] Quantum Meruit is a common alternative claim under Missouri law, especially applicable when there clearly is no formal contract. Quantum meruit requires proof that the materials or services provided had reasonable value. *City of Cape Girardeau v. Jokerst, Inc.*, 402 S.W.3d 115, 122 (Mo. Ct. App. 2013). "The principal function of this type of implied contract is the prevention of unjust enrichment." *County Asphalt Paving, Co. v. Mosley Constr., Inc.*, 239 S.W.3d 704, 710 (Mo. Ct. App. 2007), quoting *Bellon Wrecking & Salvage Co. v. Rohlfing*, 81 S.W.3d 703, 711 (Mo. Ct. App. 2002).

[3] Mechanics' lien claims under Mo. Rev. Stat. Chapter 429 largely involve labor, equipment and material costs.

the range of values testified to at trial on the issue of damages." *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co., Inc.*, 171 S.W.3d 81, 95 (Mo. Ct. App. 2005), quoting *Francis v. Richardson*, 978 S.W.2d 70, 74 (Mo. Ct. App. 1998).

Once damages are established, the amount of damage is a matter for the fact finder to decide, be it a jury, judge or arbitrator. Missouri courts require a lesser degree of certainty as to the amount of damages. *Penzel*, *supra* at 10. This allows juries a greater degree of discretion in assessing what the damages are. *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 196 (Mo. Ct. App. 2007); *Gasser v. John Knox Village*, 761 S.W.2d 728, 731 (Mo. Ct. App. 1988).

Direct Costs and Jury Instructions

The primary Missouri jury instruction for breach of a construction contract is M.A.I. 4.01 (2012). It provides recovery for damages that will fairly and justly compensate plaintiff as a direct result of the wrongful action. *Boten v. Brecklein*, 452 S.W.2d 86, 93 (Mo. 1970) (M.A.I. 4.01 is the proper instruction subject to defendants' right to offer a more specific instruction). M.A.I. 4.01 is a direct cost damage instruction.

To recover construction damages for breach of contract based on a claimed unpaid balance, MAI 4.08 (2012) provides that a jury must award plaintiff such sum as the jury believes is the balance due plaintiff under the contract less any sum necessary to correct any variations. This damage recovery is available once "substantial performance" has been achieved. A plaintiff has "substantially performed" when all important parts of the contract have been fulfilled with only slight variations. MAI 16.04 (2012).

The typical example is a contractor or subcontractor seeking recovery for a balance due pursuant to a fixed price contract. In *American Builders & Contractors Supply Co., Inc. v. G.S.R. Contracting, Inc.*, 429 S.W.3d 485 (Mo. Ct. App. 2014), the Missouri Court of Appeals,

Eastern District affirmed on appeal a judgment for breach of contract based on a contract balance due of $147,424.18 in a three-paragraph opinion.

In *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370, 376 (Mo. 1958), the Missouri Supreme Court noted: "[b]y agreement the jury was instructed to deduct from any amount it awarded plaintiff, the sum of $64,347.98 which plaintiff admittedly owed defendant as the balance of the total contract price of the steel." Such claims are essentially akin to an account stated per MAI 26.04 (2012), which merely requires proof that plaintiff and defendant agreed to an amount being owed and that defendant failed or refused to make payment.

Claims for the balance due are claims for a direct cost. While extremely common, they generally are one part of a larger construction dispute; thus playing a small role in appellate decisions, given the ease with which such damages can be assessed and generally the lack of dispute between the parties about the amount left unpaid.

Total Cost Method (TCM) and Modified TCM

In a case of first impression, the Missouri Court of Appeals for the Eastern District in February, 2017 discussed an alternative theory to recover damages known in the construction industry primarily through federal litigation as the total cost method ("TCM") and the modified total cost method ("modified TCM"). The case is *Penzel Constr. Co., Inc. v. Jackson R-2 School Dist.*, 2017 WL 582663 (Mo. Ct. App. Feb. 14, 2017). This approach pertains to claims based on the *Spearin* doctrine.

The *Spearin* doctrine is that when a government entity includes detailed specifications in its contract, the governmental entity impliedly warrants that if the contractor follows those specifications, the finished product will not be defective or unsafe. If the end product proves to be defective or unsafe, the contractor is not liable for its consequences and also may be able to

recover for damages. *See Caddell Constr. Co. v. United States*, 78 Fed. Cl. 406, 410 (2007); *Hercules Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994), *aff'd*, 516 U.S. 417, 116 S. Ct. 981, 134 L.Ed.2d 47 (1996).

In *Penzel*, the general contractor brought a breach of contract action against a school district (a governmental entity) based on a breach of implied warranty for furnishing deficient and inadequate plans and specifications. The Missouri Court of Appeals, Eastern District recognized that this put the *Spearin* doctrine—a doctrine not previously officially adopted in Missouri—into play. The *Spearin* doctrine is akin to established Missouri precedent articulated in *Ideker, Inc. v. Missouri State Highway Comm'n*, 654 S.W.2d 617 (Mo. Ct. App. 1983).

In general, the TCM allows the contractor to calculate damages by subtracting the construction bid (or in some instances, the "contract price") from the total cost incurred to perform the contractual obligations. *Penzel*, *supra* at 11. This approach is premised upon the breaching party being the sole and exclusive cause for any additional damages incurred by the plaintiff. The potential weakness to this approach is that it dismisses other potential factors which may have caused or contributed to cause part or all of the damage.

The TCM requires proof of each of the following elements: (1) the nature of the particular losses make it impossible or highly impractical to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs are reasonable; and (4) it was not responsible for the added expenses. *Id*. at 13. The *Penzel* court concluded that the "TCM is incompatible with Missouri contract law and should be avoided." *Id*. at 13.

Instead, the *Penzel* court embraced as legally viable a modified TCM. A modified TCM considers the elements of the TCM but also accommodates adjustments to (1) the original contract price (the amount of the contractor's accepted bid); (2) the total cost of performance; or

(3) both. *Id*. at 13. This allows for calculations to be tailored to more accurately reflect the amount of damages caused by the breaching party's errors and thus more accurately reflect what actual damages occurred. "Regarding the modified TCM, we merely conclude its framework—or a similar framework—should not be avoided as a matter of law." *Id*. According to the *Penzel* court, this "is precisely our State's goal when awarding damages in breach of contract actions." *Id.; See Dubinsky v. United States Elevator Corp*., 22 S.W.3d 747, 752 (Mo. Ct. App 2000).

Prior to *Penzel*, numerous federal courts and construction arbitration panels around the country had recognized and applied the TCM and modified TCM. The *Penzel* decision promises to open the door to additional appellate decisions in Missouri on the scope and application of these two methods. New case law likely will expand to include private contract disputes as well.

Indirect Costs—Consequential Damages

In a breach of contract lawsuit, in addition to recovering direct costs relating to the benefit of the bargain, "a plaintiff may also recover for damages naturally and proximately caused by the commission of the breach and for those that could have been reasonably contemplated by the defendant at the time of the agreement." *Crank v. Firestone Tire & Rubber Co.*, 692 S.W.2d 397, 402 (Mo. Ct. App. 1985).[4] To recover, such damages must have been reasonably foreseeable at the time the parties entered into the contract. *Birdsong v. Bydalek*, 953 S.W.2d 103, 116 (Mo. Ct. App. 1997), citing Restatement (Second) of Contracts §351 (1981).

In *Gill Const., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699 (Mo. Ct. App. W.D. 2005), the court found that there was sufficient evidence to support a jury finding in favor of a contractor and against the City of Kansas City and its development authority for consequential damages. *Id*. at 718. Consequential damages were "reasonably foreseeable" at contract inception.

Examples of recoverable consequential damages include:

[4] The court noted that M.A.I. 4.01 needs to be modified to cover consequential or "special" damages.

- **Bond Costs**

Many construction projects including virtually all government-related construction projects involve payment and performance bonds. The contractors and subcontractors must obtain appropriate bonds and pay a premium for coverage. Increased bond costs due to a defendant's breach of contract can be recoverable under Missouri law. For example, in *Gill*, *supra*, the Western District held that a general contractor could recover damages for increased bond premiums of three percent. *Id*. at 718. Recovery also may be possible when bonding companies have denied a contractor's request for additional bonding because the financial documents provided in support of the request "showed an account receivable that was unpaid for a long period of time." *Id*.

- **Lost Profits**

The *Gill* court recognized that consequential damages can include lost profits. *Id*. at 717. "The proper measure of damages in a case where an owner breaches a construction contract by preventing the contractor from performing the work is the contract price less the amount it would have cost the contractor to perform the contract." *Forney v. Missouri Bridge and Concrete, Inc.*, 112 S.W.3d 471, 474 (Mo. Ct. App. 2003). "This amount, which constitutes lost profits, must be shown with reasonable certainty by proof of facts from which anticipated profits can rationally be estimated." *Juengel Constr. Co., Inc. v. Mt. Etna, Inc.*, 622 S.W.2d 510, 514 (Mo. Ct. App. 1981). It is incumbent upon the plaintiff contractor to demonstrate what actual costs would have gone into completion of the work and then to subtract that amount from the total original contract balance, netting the difference as a lost profit. Failure to do so will preclude the recovery of lost profits.

Contractors need to be careful to present evidence on the cost to complete given a breach of contract. Lost profits do not automatically equal the remaining contract balance. A judgment

based solely on the unpaid contract price assumes that plaintiff would have spent no additional money to complete the contract. There almost always are additional costs that would have been incurred for contract completion. *See Fort Zumwalt Sch. Dist. v. Recklein*, 708 S.W.2d 754, 756 (Mo. Ct. App. 1986).

An alternative way to recover lost profits is shown in *Statler Mfg., Inc. v. Brown*, 691 S.W.2d 445, 451 (Mo. Ct. App. S.D. 1985). The court recognized that when an owner breaches a construction contract by preventing the contractor from doing its work, the contractor's measure of damages is usually stated to be the contract price minus the amount it would have cost the contractor to complete the performance of the contract. The court found that if unusual circumstances exist—in this case, the property could not be properly delivered to complete construction due to an easement dispute—the contractor was entitled to its lost profit plus various expenses incurred up to the time of termination minus the contract down payment. There was no evidence at the trial court level as to what it would have cost the contractor to complete the contract because "under the peculiar circumstances, such completion would not have been possible." *Id*. at 451.

Many construction projects are not based on a fixed price or lump sum, but rather on a cost of work plus a specified percentage for profit and overhead (sometimes referred to as a cost-plus percentage fee contract). Missouri courts enforce damage claims based on a cost-plus percentage fee contract. *J.E. Hartman, Inc. v. Sigma Alpha Epsilon Club of Columbia, Mo.*, 491 S.W.2d 261, 266 (Mo. 1973). Cost plus fixed fee contracts also are enforceable. *Id.*; *Kalen v. Steele*, 341 S.W.2d 343, 346, (Mo. Ct. App. 1960).

In *Juengel Constr., supra*, the Eastern District held that when an owner breaches a cost-plus construction contract, the contractor may be entitled to profit of 6% of the cost of work and that such profit may include overhead. *Id*. at 515. A contractor's "inability to differentiate

between overhead and profit, however, does not automatically preclude it from recovering the total amount . . . ." *Id.* "The rationale supporting this conclusion is that if the contract had not been breached, fixed business expenses would have been paid from profits remaining after payment of costs directly related to performance of the contract." *Id*.

- **Overhead**

In *Groppel Co., Inc. v. United States Gypsum Co.*, 616 S.W.2d 49, 65 (Mo. Ct. App. 1981) the contractor could recover a 10% estimate for overhead but not another 10% for lost profits. The evidence showed the contractor actually would have lost money if allowed to complete. As noted above, a contractor's damages for overhead and profit are sometimes intertwined or so linked that it is not possible to separate them through evidence. This is not an automatic barrier to recovery. *See Juengel*, *supra*.

Requests for recovery of overhead often occur when a contractor claims a delay in completion. Even though a percentage of a fixed overhead could be properly allocated to a specific job during the period of delay, any amount so allocated does not represent a loss or damage unless plaintiff would have, "but for the delay, obtained other work (which it did not have or which it did not in fact obtain) sufficient in amount to have absorbed the allocated portion of general overhead." *Kansas City Bridge Co. v. Kansas City Structural Steel Co.*, 317 S.W.2d 370, 377 (Mo. 1958).

The court held there was "no evidence supporting a reasonable inference that plaintiff did in fact forego bidding on a job or jobs during the delay period, or, if so, the probability of plaintiff obtaining such job or jobs, or whether they would have been of sufficient stature to have absorbed the overhead allocated to [this particular project] during the period of delay, or that their reason for not so bidding was because of their lack of ability (resources) to accomplish such due to the tie-up of the equipment and personnel on the [project in question]." *Id*. at 378.

- Contractor Delay Damages

Missouri recognizes damages to owners and contractors for delay caused by the other.

The Missouri Supreme Court in *Spitcaufsky v. State Highway Comm'n. of Mo.*, 349 Mo. 117, 127 (1941), held, consistent with references to various federal cases at the time, "that if the delay here was caused wholly by unwarranted action of the Commission (a government body), Sec. 48, Art. IV of the State Constitution and Sec. 8764, *supra*, of our statutes do not bar recovery of compensatory damages by [contractor]." A subcontractor generally has the same opportunity to recover delay damages against a contractor as a contractor has against the owner.

In *Missouri Dep't. of Transp. ex rel. PR Developers, Inc. v. Safeco Ins. Co. of America*, 97 S.W.3d 21, 35 (Mo. Ct. App. E.D. 2002), the court noted it

> is the general rule that when a party in a contract charges itself with a duty possible to [be] performed, it must perform it, unless the performance is made impossible by the act of God, by the law, or the other party . . . . If a party wishes to be excused from performance in the case of various contingencies arising, it is the party's duty to provide this excuse in the contract.

Id., citing *County Asphalt Paving Co., Inc. v. 1861 Group, Ltd*., 851 S.W.2d 577, 580 (Mo. Ct. App. 1993). If an owner or contractor has a duty to perform an obligation that is not performed and it results in damage to a contractor or subcontractor, that contractor or subcontractor has a viable claim for delay damages. *Id*.

- **No Damage for Delay Clauses**

Many construction contracts include a "no damage for delay" clause designed to preclude the contractor from recovering for damages, even if the delay was the fault of the owner. The court in *Roy A. Elam Masonry, Inc. v. Fru-Con Constr. Corp.*, 922 S.W. 2d 783, 789 (Mo. Ct. App. 1996) noted that cases from other jurisdictions generally have enforced "no damage for delay" clauses. These opinions are split, however, on enforceability if the delay was not contemplated by the parties when they entered into the contract.

The *Roy A. Elam Masonry* court did not reach a definitive conclusion on enforceability. The clause in question was not an absolute bar to a subcontractor's claim for delay damages against a contractor. Instead, it premised such damages upon the contractor recovering delay damages against the owner. "Missouri courts have not squarely ruled on the validity of no-damages-for-delay clauses like this one, but a state appellate court has suggested that Missouri—like other jurisdictions—would enforce them as written. *Roy A. Elam Masonry, Inc. v Fru-Con Constr. Corp.*, 922 S.W.2d 783, 788-89 (Mo. Ct. App. 1996)." *St. Louis Housing Auth. ex rel. Jamison Elec., LLC v. Hawkins Constr. Co.*, 2014 WL 7408944 at 10 (E.D. Mo. Dec. 31, 2014).

In *State ex rel. MWE Services, Inc. v. Sircal-Cozeny-Wagner*, 2009 WL 482378 at 5-6 (W.D. Mo. Feb. 23, 2009), the court cited *Roy A. Elam Masonry* with approval. The court upheld a clause restricting delay damages that provided that a contractor is only liable for a subcontractor's delay damages to the extent the owner was obligated to pay the contractor for such damages. While Mo. Rev. Stat. §34.058 (2017) makes unenforceable in public works contracts no damage for delay clauses, this section does not apply to private contracts between a contractor and a subcontractor. *St. Louis Housing Auth. ex rel. Jamison Elec., LLC v. Hawkins Constr. Co.*, 2013 WL 6592754 at 4 (E.D. Mo. 2013).

- **Owner Delay Claims – Liquidated Damages**

Owners frequently have delay claims against contractors and contractors frequently have delay claims against subcontractors. The large preponderance of such claims for delays are covered by a liquidated damage provision contained within the contract. A liquidated damage clause sets a specific amount to be paid (for example, a specified dollar amount for each day of delay) or some formula to calculate an amount as the payment for delay damages in lieu of proof of actual damages. Five hundred dollars per day for delay, per one Missouri Supreme Court case, was enforceable. *Intertherm, Inc. v. Structural Systems, Inc.*, 504 S.W.2d 64 (Mo. 1974).

Liquidated damages clauses cannot be a penalty. *Gillioz v. State Highway Comm'n.*, 348 Mo. 211, 224 (Mo. 1941). "Missouri has adopted the Restatement of Contracts rules to aid in determining whether a damages clause is an enforceable liquidated damages clause or an unenforceable penalty provision." *Star Dev. Corp. v. Urgent Care Assoc., Inc.*, 429 S.W.3d 487, 491-92 (Mo. Ct. App. 2014). To be enforceable, the amount fixed as damages must be a reasonable forecast for the harm caused by the breach and the harm must be of a kind difficult to accurately estimate. *Id*.; *Paragon Group, Inc. v. Ampleman,* 878 S.W.2d 878, 881 (Mo. Ct. App. 1994), citing Restatement (Second) of Contracts §356 (1979). If these two elements cannot be shown, the courts generally construe a liquidated damage clause to be an unenforceable penalty.

In determining whether a clause is a penalty or an enforceable provision, the courts look to the intention of the parties as ascertained from the contract as a whole. *Wilt v. Waterfield*, 273 S.W.2d 290, 295 (Mo. 1954). "By its nature, a liquidated damages clause may operate to provide the non-breaching party more or less than his actual damages." *Burst v. R.W. Beal & Co*., 771 S.W.2d 87, 91-92 (Mo. Ct. App. 1989). Thus, the clause "must not be unreasonably disproportionate to the amount of harm anticipated when the contract was made." *Paragon, supra* at 881, quoting *Burst*, *supra*.

The Missouri Supreme Court noted in *Gill*, *supra*, that absent unusual circumstances or precise contract language, liquidated damages generally are not apportioned between the parties even when they are mutually responsible for delays. *Id*. This decision comports with the present-day practice that if there are multiple delays that can be defined and ascribed to particular parties, one party may be assessed liquidated damages for its share of the delay while another party may be entitled to recover under a different theory for delay—such as extended general conditions and other related costs. This leads to a mathematical calculation to net out offsets between different party delays.

To enforce a liquidated damage cause, the non-breaching party must show "some actual harm." *Goldberg v. Charlie's Chevrolet, Inc*., 672 S.W.2d 177, 179 (Mo. Ct. App. 1984). "While this need not be a precise dollar amount, it nevertheless must be shown that some harm or damage, in fact, occurred." *Id*.

Liquidated damages clauses tend to be strictly construed. For example, in *J.H. Berra Constr. Co., Inc. v. City of Washington*, 510 S.W.3d 871, 873 (Mo. Ct. App. E.D. 2017), the court held that a contract provision assessing liquidated damages for each "working day" was to be construed against the drafter—the owner—and thus liquidated damages could not be assessed for days when work was not possible due to weather. However, in *Obermiller Constr. Services, Inc. v. Public Water Supply Dist. No. 5 of Cass County*, 319 S.W.3d 545, 546 (Mo. Ct. App. W.D. 2010), the court affirmed a court award of $125,000.00 in liquidated damages against the contractor hired to construct water lines for a county water supply district relating to removal of rock.

In a contractor's claim against a homeowner (who is generally considered under Missouri law to be a "consumer"), a liquidated damage clause will not be enforced where it is unduly harsh and unconscionable. *Repair Masters Constr., Inc. v. Gray*, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009). Ambiguity also precludes enforcement. Fifteen percent of an unknown contract price is not sufficiently definite to provide enforceability. *Id*. at 859.

Missouri's Prompt Payment Acts—Public and Private

Missouri has two prompt payment acts—one public and one private; namely, Mo. Rev. Stat. §34.057 (2017) (Public Prompt Payment Act) and Mo. Rev. Stat. §431.180 (2017) (Private Prompt Payment Act). Both have big teeth. Essentially, they both provide as follows: if a scheduled payment is not made on time, the finder of fact may award in addition to any other damages, interest from the date payment was due at a rate of up to 18%—at the fact finder's

discretion—and reasonable attorney fees—also at the fact finder's discretion. The provisions have exceptions, but generally speaking are a sword to prod those responsible for payments to make them timely. If a scheduled contractual payment is not made, it cannot be overstated how much leverage and ultimately potential damage recovery this provides to the contractor.

- **Public Prompt Payment Act**

This Act applies to public projects. "Efforts to legislatively address the problem of abusive practices led to the adoption in 1990 of Section 34.057." *Mays-Maune & Assoc., Inc. v. Werner Brothers, Inc.*, 139 S.W.3d 201, 209 (Mo. Ct. App. 2004). "The drafters of this legislation intended to allow courts to impose the interest penalty whenever bad faith is found." *Id*.

In *Systemaire, Inc. v. St. Charles County*, 432 S.W.3d 783 (Mo. Ct. App. E.D. 2014), the court noted that a public owner under the public Missouri Prompt Payment Act must make final payment of all monies owed to the contractor within 30 days of the due date. *Id*. at 786. "However, the final payment due date does not arrive until the project is complete or when the proper authority certifies that the project is complete and upon filing with the public owner of all documentation and certifications required by the contract in complete and acceptable form." *Id*.

For untimely payments, interest can accrue unless payment was withheld in good faith for reasonable cause. If a contractor lacks sufficient manpower and this delays project completion in a timely manner, the trial court may decide not to award the 18% otherwise provided in Section 34.057. *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co., Inc.*, 171 S.W.3d 81, 90 (Mo. Ct. App. 2005).

- **Private Prompt Payment Act**

This Act applies to private projects. The Missouri Supreme Court has held that a contractor can put Missouri's Private Prompt Payment Act into play by expressly pleading a

violation of the Act and stating: (1) the parties entered into a private construction contract; and (2) one or more payments were not made pursuant to the contract. *Lucas Stucco & Eifs Design, LLC v. Landau*, 324 S.W.3d 444, 446 (Mo. 2010). Unlike the Public Prompt Payment Act, payment under the Private Prompt Payment Act cannot be withheld in good faith for reasonable cause. *Vance Brothers, Inc. v. Obermiller Constr. Services, Inc.*, 181 S.W.3d 562, 565 at fn. 5 (Mo. 2006).

The parties may submit the issue of recovery under the Private Prompt Payment Act to the court rather than the jury. *Walton Constr. Co. v. MGM Masonry, Inc.*, 199 S.W.3d 799, 807 (Mo. Ct. App. 2006). Section 431.180 does not mandate application of an interest rate up to 18% but rather provides that the fact finder "may" award such interest within the fact finder's discretion. *Fru-Con/Fluor Daniel Joint Venture v. Corrigan Brothers, Inc.*, 154 S.W.3d 330, 339 (Mo. Ct. App. 2004).

Attorney Fees

Missouri follows the "American rule" which provides that each party pays for its own attorney fees. The exceptions are where a statute specifically authorizes recovery or when the contract provides that attorney fees can be awarded to the prevailing party. *Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 732 (Mo. Ct. App. 2014). Attorney fees are special damages that must be pled specifically. *Id.*; *Bailey v. Hawthorne Bank*, 382 S.W.3d 84, 107 (Mo. Ct. App. 2012). If the contract provides for attorney fees, they clearly may be recoverable. A contractor may not be entitled to an award of attorney fees, however, if the contractor materially breached the contract, even though the contractor may otherwise recover on its mechanic's lien action. *Matt Miller Co., Inc. v. Taylor-Martin Holdings, LLC*, 393 S.W.3d 68, 88 (Mo. Ct. App. 2012).

Owner Recovery for Defective Work

If a contractor's work is defective, the measure of damages available to an owner is "cost to repair" or "diminution in value." *Business Men's Assurance,* 891 S.W.2d 438, at 449. The general rule in Missouri for damages to real property is the diminution in value test. This test calculates the difference between the fair market value of real property before and after the action that caused damage. *Id*.; *Tull v. Housing Auth. of the City of Columbia*, 691 S.W.2d 940, 942 (Mo. Ct. App. 1985).

In defective construction cases, the "cost to repair" test is favored by the courts. This approach requires proof as to the cost of correcting the defects. *Kelley v. Widener Concrete Constr. LLC,* 401 S.W.3d 531, 540 (Mo. Ct. App. 2013). If the cost to repair and complete the construction contract involves unreasonable economic waste, the diminution in value approach should be used. *White River Dev. Co. v. Meco Systems, Inc.*, 806 S.W.2d 735, 741 (Mo. Ct. App. 1991). The diminution in value test also should be used when the cost to repair method would result in destruction of usable property or would be grossly disproportionate to the results attained. *Kelley, supra* at 540.

Once the owner presents evidence of the cost of reconstruction or repair, the burden then shifts to the contractor to present evidence that the cost of reconstruction is unfair economic waste such that the diminished value rule should apply. If the contractor presents no evidence of the value of the building as actually constructed, the trial court does not err in applying the cost to repair measure of damages. *Rogers v. Superior Metal, Inc.*, 480 S.W.3d 480, 483 (Mo. Ct. App. 2016). Under either method of proof, MAI 4.01 (2012) is the proper damage jury instruction. *Ince v. Money's Bldg. & Dev., Inc*., 135 S.W.3d 475, 479 (Mo. Ct. App. 2004).