



BUSINESS LIABILITY AND TAX ISSUES FOR CONTRACTORS

Presented by

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I. INTRODUCTION.

Electrical contractors, like most proprietors, are faced with a myriad of liability and tax issues in the conduct of their businesses. The purpose of this outline is to inform the electrical contractor of the basic elements of laws which affect his or her business, and to make recommendations for the protection against liabilities that may arise under these laws.

Lawsuits against businesses typically sound in either tort or contract. An understanding of each of these areas of the law is the starting point for basic risk management in any business.

II. TORTS.

A. Definition: A “tort” is a wrong for which the law provides a civil, monetary remedy (damages).

B. Compare to a Crime. A “Crime” is a wrong for which the law provides a criminal penalty (e.g., jail, fines).

C. Two Basic Kinds of Torts: Intentional and Negligence

1. If the injury is substantially certain, then it is an “intentional tort.”
2. If the injury is only reasonably foreseeable, then it is “negligence.”

D. Types of Intentional Torts

1. Assault.

- a. Defined: Assault is an intentional act by one person (the “Defendant”) which causes reasonable apprehension of immediate unpermitted contact in another person (the “Plaintiff”).
- b. Fear is not necessary.
- c. Words generally are not sufficient to constitute assault no matter how violent. Words may, however, undo the immediacy.
- d. Physical contact is not required; only “reasonable apprehension” of “unpermitted contact.”

2. Battery.

- a. Defined: Battery is an intentional act which causes harmful or offensive contact to the Plaintiff's person.
- b. Socially acceptable behavior is permitted. (e.g., a tap on the shoulder or catching a falling person)
- c. Unintentional behavior is not actionable. (e.g., a sneeze)
- d. The "Plaintiff's person" includes any object connected to the Plaintiff's body, such as a car.

3. Defenses to Assault and Battery.

- a. Consent: There is no liability if the Plaintiff consents to the act that causes the harm, such as in the case of sports activities (e.g., football).
- b. However, the Plaintiff must have the mental capacity to consent.
- c. Self Defense: A person may use reasonable force to protect himself if he reasonably believes he is being attacked immediately. There is no duty to retreat in tort law, although the modern trend is to require retreat if it is reasonable under the circumstances (unless you are in your own home). Reasonable force may include deadly force.
- d. Defense of Others: In most states, you may use reasonable force to protect others. However in Kentucky, you must be correct about the use of the force. This means that this defense will not be available to a person who uses force against someone who is in fact using self defense.
- e. Defense of Property: A person may use reasonable force to protect one's property. However, one may never use deadly force or force which would cause serious bodily injury to protect property.

4. False Imprisonment.

- a. Defined: False imprisonment is the intentional act of restraint to a bounded area.
- b. A Defendant may have a defense if there is a reasonable means of escape for the Plaintiff.

5. Intentional Infliction of Emotional Distress.

- a. Defined: The tort of intentional infliction of emotional distress (also known as the tort of outrage) requires that the Defendant have engaged in outrageous conduct which transcends all bounds of decency and that the Plaintiff has suffered damages which are proven by clear proof of emotional distress.
- b. The Defendant's conduct must transcend all bounds of decency unless it is (1) continuous, (2) involves a pregnant woman, the elderly, or young children, or (3) is a hotel guest or passenger of a common carrier.

6. Damages.

- a. In an intentional tort case, the Plaintiff can obtain an award of damages against the Defendant no matter how slight the injury. The Plaintiff typically does not even have to prove actual damages.
- b. The Plaintiff is usually entitled to nominal damages. An award of nominal damages is a small amount that is awarded by a jury if liability is found.
- c. Plaintiffs in intentional tort cases may also be awarded punitive damages if the Defendant has acted with malice. Punitive damages are designed to punish the Defendant and deter him and others from engaging in such conduct in the future.

7. The Tort of Defamation.

- a. Three requirements must be met for the tort of defamation to be present:
 - i. A defamatory assertion of fact about the Plaintiff (not merely name calling).
 - ii. Publication of the assertion
 - (1) Means communication to a third party (not just to the Plaintiff).
 - (2) Can be merely negligent (overheard).
 - iii. Injury to reputation of the Plaintiff (presumed if it is slander per se).

- b. Libel: Libel is defamation in writing.
- c. Slander: Slander is spoken defamation.
 - i. Slander is distinguished from libel by looking at the permanency of the statement.
 - ii. Slander per se: Four kinds.
 - (1) Defamatory statement about a business or profession.
 - (2) Statement regarding a loathsome disease.
 - (3) Statement regarding conviction of a serious crime.
 - (4) Statement about the unchastity of a woman.
- d. Defamation may only be committed against living persons.
- e. Defenses.
 - i. Truth: If a statement is true, an action for defamation will fail.
 - ii. Consent: If a Defendant consents to the statement, the action for defamation will fail.
 - iii. Privilege. There are times when communications are privileged, such as communications between spouses and communications between the three branches of government. Communications regarding a matter of public interest are also sometimes considered privileged. In such cases, the speaker will have a defense to an action for defamation.

8. Fraud.

- a. Five requirements:
 - i. Misrepresentation by a Defendant of a fact the Defendant knows is false at the time of utterance.
 - ii. The Defendant must have intent to induce reliance by the Plaintiff on the false statement.

- iii. There must be justifiable reliance on the part of the Plaintiff.
- iv. The statement must actually cause the Plaintiff to act.
- v. The Plaintiff must sustain actual damages.

9. Trespass to Land.

- a. Defined: Trespass to land is the Defendant's physical invasion of the Plaintiff's real property.
- b. This tort requires the Defendant's intention to enter the Plaintiff's land. There is no requirement that the Defendant specifically intend to trespass (mistake is no defense).
- c. The Plaintiff's land includes a reasonable distance above and below the land and there is no need that the Defendant actually enter the land. For example, shooting a bullet over another's land may constitute trespass.
- d. Generally, owners of land are not liable for injuries to trespassers, subject to the exceptions noted below in Section E.2.c.

E. Negligence.

1. There are four elements to a case for negligence.

- a. Duty.
- b. Breach.
- c. Causation.
- d. Damages.

2. Duty and breach.

- a. Essentially, every person owes every other person a duty not to be careless.
- b. This duty is judged by a reasonable (objective) person standard (e.g., How would a reasonable person act under the circumstances?)

- i. The Defendant's own mental state is not a consideration.
 - ii. Beginners are always held to the same standard as others.
 - iii. Professionals are held to a reasonable professional standard as compared to other professionals in the same or similar community. Specialists in a field are held to an even higher standard.
- c. Duties of Landowners.
- i. Landowners have no duty to unanticipated trespassers.
 - ii. If a landowner has an artificial hazard, such as a mine, on his property, he has a duty to warn anticipated trespassers of these known artificial hazards.
 - iii. The landowner has a duty to warn licensees (guests) of all known hazards located on the property.
 - iv. Landowners must warn business invitees (customers) of all hazards on the property. This imposes on the landowner a duty to inspect the property to make sure it is safe for the customers. This rule applies to land connected with the business as well as churches, museums, and any other land held open to the public.
- d. Negligence *per se*.
- i. If a Defendant violates a statute, the Plaintiff may under certain circumstances conclusively establish duty and breach.
 - ii. Requirements:
 - (1) Existence of statute providing for standard of conduct.
 - (2) Plaintiff is in the class intended to be protected by the statute.
 - (3) The statute was intended to prevent the type of harm that occurred.

- iii. Example: A law requiring that amusement park rides be maintained to protect the safety of the paying customers of the amusement park. If the amusement park operator failed to obey the law, an injured Plaintiff may be able to establish negligence *per se*.

3. Causation.

- a. The Defendant's breach of the duty or standard of care must cause the Plaintiff's injury.
- b. There are two types of causation.
 - i. Actual causation (causation in fact). The Defendant's breach must have actually caused Plaintiff's injury. The most common tests asks if the Plaintiff's injury would have occurred "but for" the Defendant's breach.
 - ii. Proximate causation (legal causation).
 - (1) Proximate causation asks if the Plaintiff's injury was reasonably foreseeable as a result of the Defendants actions.
 - (2) If the Plaintiff's injury was not of a type that could have been foreseen from the Defendant's actions, proximate causation will not be found to exist.

4. Injury/Damages.

- a. The Plaintiff must suffer some injury to recover in an action for negligence.
- b. Compensatory damages are recoverable by a Plaintiff and are designed to reimburse a Plaintiff for actual losses. Compensatory damages include:
 - i. Medical expenses.
 - ii. Loss of wages.
 - iii. Loss of consortium.
 - iv. Emotional distress.

- v. Pain and suffering.
- c. Punitive damages are generally not available in negligence cases.

5. Defenses to Negligence.

- a. Assumption of the risk: If the Plaintiff knows of the risk and voluntarily assumes it, he may be barred from recovering damages in an action for negligence.
- b. Contributory Negligence.
 - i. The doctrine of contributory negligence holds that if a Plaintiff is also negligent in the event which causes him injury, he is barred from recovering damages against the Defendant.
 - ii. This is the rule in a minority of the states.
- c. Comparative Negligence (2 types).
 - i. The doctrine of comparative negligence provides that cases where both the Plaintiff and Defendant have been negligent, the jury may allocate fault on a percentage basis to the parties and the Plaintiff's recovery is reduced accordingly.
 - ii. In a "true" comparative negligence state, Plaintiff may recover even if he is 90 percent at fault.
 - iii. In a modified comparative negligence state, Plaintiff may only recover if he is less negligent than the Defendant.

F. Vicarious Liability: The Doctrine of Respondeat Superior.

- 1. Under the doctrine of respondeat superior, an employer may be liable for the torts committed by his or her employee within the scope of his or her employment.
- 2. Under this doctrine, an employer will be held liable for an employee's torts if:
 - a. an employment or other agency relationship exists; and
 - b. a tort is committed within the scope of the employment.

3. "Scope of Employment" tests:
 - a. At issue in these cases is whether the conduct was of the same general nature, or incident to, that which the employee was employed to perform.
 - b. Whether the conduct was substantially removed from the authorized time and space limits of the employment depends on whether the employee makes a major versus minor deviation outside the scope of employment.
 - c. Intentional torts are almost always considered to be outside the scope of employment since the employer generally did not hire an employee to commit (torts or crimes). Exceptions do, however, exist. If the employer has authorized force or intentional actions to promote his business, the employer can be found liable, such as in the case of a night club owner who hires a bouncer.

G. Strict Liability Torts.

1. Strict liability torts are torts under which a Defendant will be liable to the Plaintiff regardless of his degree of fault. Under the strict liability torts, there is an absolute duty on the Defendant to make Plaintiff safe.
2. Strict Liability Tort cases usually center around two types of liabilities: liability for wild animals and liability for ultra hazardous activities.
 - (a) Owners of wild animals are strictly liable for injuries to persons caused by the wild animals.
 - (b) Persons engaging in ultra hazardous activities, such as blasting with dynamite or the handling of hazardous chemicals or other materials, are strictly liable to persons who are injured from those activities.

III. CONTRACT LAW.

A. THE FORMATION OF CONTRACTS

1. The Objective Theory of Contracts.

- a. The formation and construction of contracts is governed by the objective theory of contracts. Under the objective theory of contracts, a persons individual subjective intentions are not

considered. A court will objectively look at the actions of the parties to determine if a contract has been formed using the “reasonable person standard.”

- b. The court will generally consider the following factors:
 - i. what the parties communicated to one another;
 - ii. how the parties acted or appeared; and
 - iii. the other circumstances surrounding the transaction.

2. Consideration.

- a. A mere promise is not enforceable. In order for a contract to be enforceable, each party to the contract must give up something of value.
- b. Consideration cannot be illusory (e.g., “I’ll sell you my car for \$200.00, if I feel like it.”)
- c. Consideration must involve some “legal detriment.”
- d. Past performance is not consideration.

3. Bilateral Versus Unilateral Contracts.

- a. A bilateral contract is a promise for a promise.
- b. A unilateral contract is a promise for a performance.

4. Offer and Acceptance: must have both to create a contract.

5. The Three Requirements of the Offer.

- a. Serious intention to make offer.
 - i. The court will use the objective theory of contracts to determine if there was an intent to make an offer.
 - ii. Advertisements and offers made in jest will not create contracts.
- b. Definite terms (e.g., nature of work and price in a construction contract).

- c. Communication to an identified offeree.

6. Termination of Offer.

- a. Generally, an offer can be revoked at anytime prior to acceptance.
- b. Exceptions to this rule:
 - i. An Option Contract;
 - ii. A Firm Offer by a “merchant” under the Uniform Commercial Code (“UCC”);
 - iii. Promissory Estoppel. Under this theory an offeror cannot withdraw an offer if it is reasonable to expect that the offeree will rely on the offer. This is a very important rule for subcontractors such as electrical contractors who submit bids relied upon by general contractors in calculating bids submitted to owners.
- c. An offer is also terminated if it is rejected or a counteroffer is made.

7. The Acceptance.

- a. Acceptance is assent or agreement by the identified offeree by words or conduct.
- b. Acceptance must occur in the same or faster means as the offer is conveyed.

8. The Accord and Satisfaction.

- a. An “accord” is an agreement to accept a lesser amount as a result of a dispute.
- b. A “satisfaction” is the payment of the agreed upon lesser amount.
- c. An accord and satisfaction is enforceable under Kentucky law, and can occur when “payment in full” or “PIF” is written on a check.

9. Statute of Frauds.

- a. Verbal contracts are generally enforceable. However, the statute of frauds requires certain types of contracts to be in writing in order for them to be enforceable.
- b. Contracts involving land.
 - i. contracts for the sale of land.
 - ii. mortgages.
 - iii. leases for more than one year.
 - iv. easements for more than one year.
 - v. contracts relating to timber, minerals, or fixtures in or attached to land.
- c. Contracts which cannot be fully performed within one year.
- d. Contracts relating to marriage. (prenuptials, postnuptials, etc.)
- e. Suretyship contracts. (contracts to answer for another person's debt).
- f. Contracts for the sale of goods of \$500.00 or more.
- g. Important exception to the statute of frauds: Promissory Estoppel.
- h. Sufficiency of the writing: Any writing will suffice if it contains the essential terms of the contract, such as:
 - (i) The identity of the parties.
 - (ii) The subject matter of the contract.
 - (iii) The consideration to be exchanged.
 - (iv) The signatures of the parties.
 - (v) Other terms that are not required, but that are strongly recommended for construction contracts include provisions relating to forum selection, recovery of attorney's fees,

insurance, rights upon default, change orders, and payment terms. See Exhibit B, attached.

10. Discharge (Termination) of Contractual Duties.

- a. “Discharge” means termination of a party’s contractual obligations under the contract.
- b. This can occur in many ways, including:
 - i. by performance;
 - ii. conduct of the parties; or
 - iii. operation of law.
- c. Performance: Performance can be “tendered.”
 - i. e.g., A seller of goods can tender them to the buyer by delivery, and then demand payment.
 - ii. In construction contracts, complete performance is not required if the deviation is minor. This is known as the “doctrine of substantial performance.”

IV. TRADITIONAL BUSINESS ENTITIES

A. THE SOLE PROPRIETORSHIP

- 1. A sole proprietorship is created by the mere will of its owner.
- 2. Its biggest advantage is that it is a very simple form.
- 3. However, its biggest drawback is that it has no limited liability. Limited liability protects the personal assets of the owners of a business from the liabilities of the business. Therefore, the assets of an owner of a sole proprietorship are at risk for liabilities of his or her business.
- 4. The duration of a sole proprietorship is the lifetime of its owner.
- 5. The structure of the management of the business is in the absolute discretion of the owner.
- 6. Owners of sole proprietorships are taxed individually on all income of the business whether or not the owner takes the income out of the business.

7. Another advantage of the sole proprietorship is that there is no formality or fees as to the creation of the business.

B. GENERAL PARTNERSHIP

1. A general partnership is created by two or more parties who, as co-owners, operate a business for profit.
2. A partnership can be created by default (inadvertent partnerships) without specific intent to form a partnership. The parties need only the intent to carry on a business for profit.
3. General partnerships are governed by the Uniform Partnership Act unless the partners have agreed otherwise in a written partnership agreement.
4. There is no limited liability for the partners of a partnership. Each partner is liable for the tort or contract liability of the partnership.
5. A partnership is dissolved under state law upon the death or withdrawal of a partner, but the remaining partners may elect to continue the partnership.
6. Each partner has an equal say so in the management of a partnership (regardless of the amount of ownership interest owned by the partner) unless the partners have specifically agreed otherwise in a written partnership agreement.
7. Each partner is taxed on his or her pro rata share of the income of the partnership whether or not it is taken out of the business. The partnership is required to file IRS Form 1065 each year. (an informational return)
8. A partner is not permitted to freely transfer his or her interest in the partnership.

C. THE LIMITED PARTNERSHIP

1. A limited partnership is an entity with two or more persons with one or more general partners and one or more limited partners.
2. A limited partnership is formed by filing a Certificate of Limited Partnership with the Kentucky Secretary of State pursuant to KRS Chapter 362.
3. In a limited partnership, limited partners have limited liability, and general partners have unlimited liability.

4. In a limited partnership, the general partners manage the partnership's day-to-day activities. Limited partners have limited managerial powers. The rights and powers of the general partners and limited partners are generally found in a written limited partnership agreement.
5. General partners are taxed on their pro rata share of the income of the limited partnership. Limited partners are taxed on distributions from the limited partnership.
6. A limited partnership terminates and dissolves when the last general partner dies or withdraws.
7. Limited partners must not: (1) use their name in the business name; (2) participate in management or control. If limited partners breach these requirements, they may be subject to unlimited liability such as that of the general partners.

D. CORPORATIONS

1. Corporations are created by filing articles of incorporation with the Kentucky Secretary of State under KRS Chapter 271B. See Exhibit A, attached.
2. A corporation is a separate legal entity from its shareholders (owners). Therefore, its shareholders enjoy limited liability from the risks of the business.
3. A corporation has a very formal and structured management, usually outlined in the statutes of its state of incorporation.
4. Management of a corporation is generally centralized in a board of directors, the members of which are elected by the corporation's shareholders. In addition, the board of directors will elect officers (president, secretary, etc.) who run the day-to-day affairs of the corporation.
5. The duration of a corporation is perpetual. A corporation can, however, be dissolved by its shareholders.
6. Corporations are said to be subject to "double taxation." Income of a corporation is taxed first when it is earned by the corporation and then again when it is distributed to its shareholders in the form of a dividend. There is an exception to this rule for shareholders who file a special election to have their corporation taxed under Subchapter S of the Internal Revenue Code. Such corporations are generally known as "S"

corporations. However, in Kentucky, the General Assembly has now passed legislation that imposes an “entity-level” tax on business entities such as “S” corporations.

7. Ownership interest in corporations (shares of stock) are generally freely transferable from person to person. However, shareholders of small corporations sometimes enter into stock restriction agreements to limit transferability of corporate stock.

E. THE LIMITED LIABILITY COMPANY

1. The limited liability company (“LLC”) is a hybrid entity possessing characteristics of both the corporation and the partnership.
 - a. Like a corporation, the LLC provides limited liability for its owner (members).
 - b. The LLC also possesses flow through taxation like a partnership. The LLC also allows its members the flexibility of creating a customized management structure as in the case of a partnership.
2. In Kentucky, LLCs are governed by KRS Chapter 275. However, members of LLCs generally adopt a written “operating agreement” to govern the management and operation of the LLC.
3. The duration of an LLC can be perpetual like in a corporation or it can dissolve upon a certain event described in the operating agreement as in the case of a partnership.
4. An LLC may be informally managed by its members in a manner akin to a partnership. Alternatively, an LLC’s operating agreement may create a more formal, centralized structure of management akin to a corporation.
5. Membership interest of an LLC may be free or restricted, depending on the LLC’s operating agreement.
6. LLCs are taxed as partnerships by default. LLCs may, however, file special elections with the IRS to be taxed as a “C” corporation or an “S” corporation. LLCs are also now subject to the “entity-level” tax, for Kentucky tax purposes, just as “S” corporation, in light of new legislation passed by the Kentucky General Assembly.

ARTICLES OF INCORPORATION
OF

Comes the undersigned as incorporator and submits the following Articles of Incorporation, pursuant to KRS 271B.2-020.

ARTICLE ONE

The name of the Corporation shall be: _____.

ARTICLE TWO

The Corporation shall be authorized to issue 1000 shares of common stock, which stock shall be without par value.

ARTICLE THREE

The duration of this Corporation shall be perpetual.

ARTICLE FOUR

The street address of the Corporation's initial registered office shall be _____
_____. The name of its initial registered agent at the aforesaid street
address is _____.

ARTICLE FIVE

The mailing address of the Corporation's principal office shall be _____
_____.

ARTICLE SIX

The name of the incorporator is Theodore S. Hutchins, and his mailing address is
555 Jefferson Street, Suite 301, P.O. Box 929, Paducah, Kentucky 42002-0929.

ARTICLE SEVEN

The purpose of this Corporation shall be the transaction of any and all lawful
business for which corporations may be incorporated under the Kentucky Revised Statutes.

ARTICLE EIGHT

The business of the Corporation shall be managed by a Board of Directors, the number of which shall be from time to time established in the bylaws adopted by the shareholders of the Corporation.

ARTICLE NINE

A shareholder of the Corporation shall not be personally liable for the acts or debts of the Corporation except that a shareholder may become personally liable by reason of his or her own acts or conduct.

ARTICLE TEN

_____ will serve as the initial director of the Corporation, and he/she shall serve until his/her successors have been duly elected and qualified.

ARTICLE ELEVEN

The officers of the Corporation who are to manage the affairs of the Corporation shall be established by the bylaws of the Corporation.

Theodore S. Hutchins, Incorporator

STATE OF KENTUCKY)

COUNTY OF McCracken)

Subscribed, sworn to, and acknowledged before me this _____ day of _____, _____, by Theodore S. Hutchins.

My commission expires _____.

Notary Public, State at Large

STATEMENT OF INITIAL REGISTERED AGENT

Comes the undersigned, _____, and hereby consents to serve as the initial registered agent for _____, a corporation organized under the laws of the Commonwealth of Kentucky.

This instrument prepared by:

DENTON & KEULER, LLP
P. O. Box 929
Paducah, KY 42002-0929

CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT made and executed on this ____ day of _____, _____, by and between XYZ CONTRUCTION COMPANY, INC., a Kentucky corporation, whose principal are located in Paducah, Kentucky, 42001, hereinafter referred to as "Contractor," and _____, whose address is _____, hereinafter referred to as "Owner";

WHEREAS, Contractor engages in the business of a contractor for construction projects; and

WHEREAS, Owner desires to contract with Contractor for the construction of a project as hereinafter described; and

WHEREAS, Contractor is agreeable to constructing said project, subject to the terms and conditions as herein set forth, which terms and conditions are acceptable to Owner.

NOW, THEREFORE, in consideration of the foregoing premises, and for other valuable consideration, the legal adequacy and sufficiency of which is hereby acknowledged by all parties hereto, the parties do covenant and agree as follows:

1. **Scope of the Work.** The Contractor, as an independent contractor, shall have the complete and exclusive responsibility of constructing the project, all as depicted and described in Attachment "A" and made a part hereof ("Project"). Contractor shall perform all work which is necessary to effectuate and complete the project. In such regard, Contractor shall supply all labor, equipment, and tools necessary to effectuate and complete the project.

Construction shall be in accordance with all applicable law and in accordance with all applicable subdivision restrictions and set back lines.

Contractor may employ necessary subcontractors and employees to assist Contractor in performing its work activities. Contractor shall at all times control, direct, and supervise the subcontractors and employees employed by the Contractor. Contractor shall have the exclusive right to direct the construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work under the contract.

Owner shall be obligated to provide to Contractor full access to the Project site. Owner shall be responsive to Contractor at all times to any inquiries made by the Contractor regarding the Project during the construction period.

2. **Time for Performance.** Contractor shall commence the performance of its work as soon as reasonably possible. Contractor shall complete its work to be performed as rapidly as good building practice dictates. Contractor shall use its good faith efforts to complete the work within _____ (____) months/days following the date of the execution of this Agreement. However, it is understood and agreed by Owner that delays may be incurred by reason of the following: failure of the issuance of all necessary building permits, funding of loans, disbursement of funds, acts of neglect or omission of Owner, delays caused by the failure of subcontractors to perform, inclement weather, acts of God, strikes, lockouts, boycott, or other labor union activities, change orders, inability to secure materials, failure of Owner to make payments when due, or delays caused by inspection or changes ordered by the inspectors of authorized government bodies, and any other causes beyond Contractor's reasonable control. It is agreed and understood that Owner shall have no claim for any damages associated with any such delay.

3. **Compensation.** For and in consideration of construction of the project, Owner shall pay to Contractor the total sum of \$_____. This sum shall be paid as follows:

4. **Change Orders.** It is agreed and understood by Owner that Contractor has agreed to perform the construction of the project at the compensation referenced above predicated on Contractor's inspection of the construction site. In the event Contractor subsequently discovers latent physical conditions at the site or unknown physical conditions or characteristics differing from those ordinarily encountered, Contractor shall be entitled to recover from Owner additional compensation as determined herein.

Contractor understands and agrees that Owner shall have the right to request any reasonable change order to the plans and specifications of the project. All change orders made by Owner shall be subject to the terms and conditions as provided hereunder.

In the event of latent physical conditions, unknown physical conditions, or any other item which would constitute a change order hereunder, Contractor shall provide to the Owner an estimate of any additional charge which relates to said item. The additional charge shall be in an amount equal to the increase of costs plus an amount equal to _____ percent (_____%) of such costs. In the event of any additional compensation to be paid to

Contractor hereunder, Owner shall pay such compensation to Contractor within ten (10) days following the completion of the work to effectuate the change order.

5. **Asbestos and Hazardous Waste.** Unless the contract specifically calls for the removal, disturbance, or transportation of asbestos or other hazardous substances, the parties acknowledge that such work requires special procedures, precautions, and/or licenses. Therefore, unless the contract specifically calls for same, if Contractor encounters such substances, Contractor shall immediately stop work and allow the Owner to obtain a duly-qualified asbestos and/or hazardous material contractor to perform the work or do the work at the Contractor's option. Owner shall be responsible for payment of any costs and expenses regarding same.

6. **Builder's Risk Insurance.** As a condition to this contract, Owner shall procure at Owner's expense before the commencement of the work hereunder an "all risk" insurance policy with course of construction, theft, vandalism, and malicious mischief endorsements attached, with coverage to be in the sum at least equal to the contract price. The insurance shall name the Contractor and any subcontractor as additional insureds, and will be written to protect the Owner, Contractor, and subcontractors as their interests may exist. Should Owner fail to procure such insurance, Contractor shall have the right, at its sole option, to procure such insurance, in which event Owner shall reimburse Contractor for the cost of such insurance immediately upon the demand of Contractor. Owner shall waive rights of subrogation against Contractor to the extent that any loss is covered by such insurance. If the project is destroyed or damaged by accident, disaster, or calamity such as fire, storm, flood, landslide, or earthquake, any work done by Contractor in building or restoring the project shall be paid for by

Owner as extra work. In no circumstance shall Contractor be liable to Owner for any liability which would be covered under the aforementioned “all risk” insurance.

7. **Indemnification–Insurance.** The Contractor shall indemnify and hold harmless the Owner from and against all claims, damages, losses, or expenses for personal injury, death, or destruction of property which arise out of or result from the performance of the work by reason of any negligent act or omission of Contractor, or anyone directly or indirectly employed by Contractor, except as to any claims, damages, losses, and expenses which are covered or would have been covered under the aforementioned “all risk” policy.

Contractor shall procure and maintain workers’ compensation insurance, comprehensive general liability insurance, and automobile insurance for vehicles used in the work. Owner shall be named in the aforesaid insurance policies in such manner as to protect Owner’s interests.

8. **Owner’s Default.** In the event Owner fails to pay to Contractor any payment of compensation due hereunder at the time as scheduled hereunder, or in the event Owner fails to otherwise fully comply with and satisfy Owner’s obligations hereunder, Contractor shall have the right to declare Owner in default of this agreement, and in such event, Contractor shall have the following rights:

- a. Contractor shall have the absolute and unconditional right to stop work, and to keep the project idle until Owner has paid unto Contractor all of the compensation then due Contractor or has otherwise complied with Owner’s obligations and responsibilities hereunder;

- b. Contractor shall have the right to file a mechanic lien against the real property of Owner to the full extent of all sums due Contractor hereunder;
- c. Contractor shall have the right to make immediate demand upon Owner for all compensation due Contractor under this Agreement;
- d. Contractor shall have the right to recover from Owner any and all of its costs and expenses incurred by reason of Owner's default, including reimbursement of its reasonable attorneys' fees; and
- e. Contractor shall be entitled to recover from Owner its loss of profit under this Agreement, and additionally, shall have the right of all other rights and remedies as provided under Kentucky law.

9. **Contractor's Default.** In the event Contractor fails to comply with its obligations assumed hereunder by Contractor, Owner shall provide written notice to Contractor which shall define Contractor's failure to perform, and Contractor shall have a period of thirty (30) days within which to cure and remedy such deficiency. In the event Contractor fails to do so, Owner shall have the right to cause a third-party contractor to complete the construction of the project, and in such event, the Contractor shall be liable to Owner for any additional costs and expense over and above the price contained herein incurred by Owner in completion of the project.

10. **Contractor's Warranty.** Contractor hereby warrants to Owner that all work and material provided under this contract shall be free of defects and deficiencies in workmanship or material in accordance with generally accepted construction practices, which warranty shall be for a period of one (1) year following the completion of the project, provided, however, that such warranty shall not apply to the following:

- a. To any material which is warranted by the manufacturer; and
- b. To any work or material which is warranted by a subcontractor.

In the event Owner discovers any defect or deficiency which is subject to Contractor's warranty hereunder, within the warranty term, Owner shall provide to Contractor written notice which defines such defects or deficiencies. Upon receipt of such written notice, Contractor shall cure and remedy such defects or deficiencies within a reasonable time following such receipt of such notice. Any costs and expenses in curing such defects or deficiencies shall be the responsibility of Contractor.

EXCEPT FOR THE EXPRESS WARRANTIES AS PROVIDED ABOVE, CONTRACTOR DISCLAIMS ANY AND ALL OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

11. **Waiver.** No delay or omission to exercise any right, power, or remedy accruing to any party on any breach or default by the other party under this Agreement will impair any such right, power, or remedy of such party, nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of any similar breach or default thereafter occurring, nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default.

12. **Governing Law and Venue.** It is agreed that this Agreement shall be governed by, construed, and enforced in accordance with the laws of the Commonwealth of Kentucky. Venue for any dispute arising under this Agreement or the performance hereunder shall be only in the courts of McCracken County, Kentucky.

13. **Joint and Several Liability.** The Owner shall be jointly and severally liable for all of the Owner's duties and obligations under this Agreement.

14. **Miscellaneous Provisions.** This Agreement represents the entire agreement by and between the parties regarding the matters as contained herein, and all prior promises, statements, representations, and agreements are merged herein by reference. This Agreement may only be amended by the parties by written instrument duly executed by both of the parties. This Agreement shall be binding upon the parties hereto, their heirs, successors, and assigns.

WITNESS our signatures on the date first above written.

OWNER:

CONTRACTOR:

By _____

Title _____

Ted Hutchins, Partner



Ted's experience at Denton & Keuler spans a broad spectrum of business law and taxation, including purchases, mergers, acquisitions, and business planning. His skill has been invaluable to clients arranging multi-million dollar mergers as well as to those planning for closely held businesses. Ted also concentrates his practice in estate planning for clients with needs ranging from basic wills to more complex estate and gift tax planning.

We are pleased that Ted finds time to work, from both legal and a volunteer perspective, with a number of nonprofit agencies and civic institutions in the community. He currently serves on the board of directors of the River Heritage Museum, Inc. and as liaison to the Paducah Film Society.

In addition, Ted has served as legal counsel for the Community Foundation of West Kentucky, the United Way of Paducah-McCracken County and the Lourdes Foundation. Beyond that, he has provided counsel to the Paducah Public Library Foundation and many other 501 (c) (3) entities.

Born: St. Louis, MO, September 23, 1968

He is married to Monica Hutchins. They have two sons, Kyler and Reese, and a daughter, Ally.

Education:

Southeast Missouri State University, B.S., 1990

University of Kentucky, J.D., 1993

Admitted to Practice:

Kentucky, 1993

Illinois, 1994

U.S. District Court, Western District of Kentucky, 1993

U.S. District Court, Southern District of Illinois, 1994

6th Circuit Court of Appeals, 1999

Professional Associations:

Kentucky Bar Association

Illinois Bar Association

McCracken County Bar Association

Professional/Personal Achievements:

2005 Graduate of Leadership Kentucky Class

President, McCracken County Bar Association, 2006

Board of Directors of United Way of Paducah-McCracken County, Inc., 1995-2002, 2005-present

Secretary, 2001-2002

Vice President, 2005

President Elect, 2006

1996 Volunteer of the Year for the United Way of Paducah-McCracken County, Inc.

Board of Directors of River Heritage Museum, Inc., 1999-present

Secretary, 2005-present

Adjunct Professor of Business Law, West Kentucky Community and Technical College, 1997-2000, 2004

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