

Oregon court affirms additional defect claims by building owners

Two recent cases decided by the Oregon Court of Appeals have held that an owner of a building with construction defects can successfully recover damages from the contractor that constructed the building – even if the owner did not have a contract with the contractor.

Together, the decisions are an important development in Oregon construction law because the rulings – unless reversed or overruled by the state Supreme Court – enhance the likelihood that building owners in Oregon can recover the cost of correcting construction defects in their buildings.

Before the Court of Appeals decisions, it was often argued in Oregon legal disputes that a building owner who discovers construction defects could not recover from the contractor that built the building unless the owner had contracted with the contractor. In this view, if the contractor was out of business, bankrupt or otherwise financially insolvent at the time the owner discovered the defects, the owner was believed to be legally barred from pursuing claims against the contractor's subcontractors. Those who held this view similarly believed that, if the owner had purchased the building from a prior owner for whom the contractor had constructed the building, the owner was legally prevented from seeking a recovery from the contractor.

Under the rule established in the two new Court of Appeals deci-

sions, these beliefs are no longer well-founded.

In *Harris v. Suniga*, issued Dec. 6, 2006, an apartment building owner that had discovered significant dry rot in the building brought a negligent construction



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suit against the contractor that had constructed the building. The owner was not the original owner of the building and had no contractual relationship with the contractor. The contractor defended against the suit by asserting that the current owner could not assert the claim because there had been no contract between the current owner and the contractor.

The contractor's argument was based on the "economic loss doctrine," a legal concept long applied, albeit with many and varying exceptions, by Oregon and other U.S. courts. In essence, the economic loss doctrine provides that a claim for economic loss – as opposed to a claim for personal injury or property damage – cannot be asserted unless the claimant had a contractual or other special relationship with the party being sued. After analyzing the economic loss doctrine as applied by Oregon's courts, however, the Court of Appeals held that the doctrine

did not apply in the *Harris* case because the claim was for property damage rather than for economic loss. On that basis, the Court of Appeals held that the plaintiff could assert its claim for negligent construction against the contractor even though the contractor had constructed the building under a contract with the prior owner.

A second Court of Appeals opinion, *Bunnell v. Dalton Construction Inc.*, issued Dec. 27, was similar. In that case, plaintiffs asserted a claim for negligent construction against the contractor that had built their home – even though the contractor had constructed the home under a contract with the home's prior owners that had sold the home to the plaintiffs. The suit was to recover the cost of repairing water damage caused by defectively installed exterior siding. As in the *Harris* case, the contractor invoked the economic loss doctrine to argue the plaintiffs could not assert their negligence claim in the absence of a contractual relationship with the contractor. And, as in the *Harris* case, the Court of Appeals held that the economic loss doctrine did not apply because the recovery sought was for property damage rather than for economic loss.

The *Bunnell* case included another issue that the *Harris* case did not, however. In *Bunnell*, the plaintiffs were aware of the defectively installed

siding at the time they bought their house and negotiated a \$2,500 discount in the sale price based on cost estimates for repairing the problem. After buying the house, the plaintiffs discovered that the damage was much more extensive than they had anticipated. The contractor argued on appeal that the plaintiffs should not be allowed to recover from the prior owners' contractor for damages the plaintiffs knew existed when they bought the house. In response, the Court of Appeals held that the contractor's argument could be asserted at trial in an effort to reduce the amount of the plaintiffs' recovery, based on the plaintiffs being partly at fault or failing to act to reduce their damages when they had the opportunity. Still, the court held that the contractor's argument was not the basis for an absolute bar to a recovery by the plaintiffs.

The rule established by the *Harris* and *Bunnell* decisions of the Oregon Court of Appeals, if upheld by the state Supreme Court, will give homeowners, condominium owners and owners of other buildings greater opportunities to recover from the contractors and subcontractors responsible the cost of repairing construction defects discovered in the buildings.

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