Spoila-what?
Making Repairs During a Potential Construction Defect Claim.

Association Board members and property managers work hard to keep our Associations running smoothly and have a lot of responsibility on their shoulders. Unfortunately, a recent Court of Appeals decision in Minnesota just made their job even harder.

The Minnesota Court of Appeals recently upheld a District Court decision which had dismissed a construction defect case because the contractors were not given an opportunity to observe the defective condition before it was corrected. Even though the contractors **had been given notice** of the problem, the Court ruled that the notice was insufficient because the contractors were not able to observe the defective condition when that condition was exposed during the repair process.

In this case, the homeowner had taken the following actions before correcting the defective work:

1. Notified the contractors of a potential construction defect issue.
2. Invited the contractors to inspect the condition in question.
3. Met with the contractors and pointed out evidence of the damage.
4. Invited the contractors to investigate if not satisfied by what they had seen.
5. Documented the defective work by taking photos during the repair process.

The contractors even looked at a hole in the wall created by the owner to observe the mold and moisture intrusion before the corrective work was undertaken. However, much of the damage was not observable because of the stucco exterior. As is often true, the condition causing the problem remained concealed until exposed during the course of repair.

When the contractors did not make any offer to repair, the homeowner authorized the repair work. After a substantial amount of repair work had been completed, the homeowner notified the contractors that he was in the process of repairing the defective conditions. At this point, the evidence had been destroyed, and the contractors no longer had the ability to view the evidence.

The majority opinion by the Court of Appeals determined that the homeowner was guilty of conduct constituting spoliation of evidence. Black's Law Dictionary defines spoliation as "the intentional destruction, mutilation, alteration, or

concealment of evidence". Put in a Footnote (Black's Law Dictionary, 8th ed., Thomson West 2004).

The Court of Appeal upheld the District Court decision to dismiss the homeowner's suit as a sanction for spoliation of evidence. The majority found that evidence of the defect was destroyed before the contractor had an adequate opportunity to inspect it. Evidence in a construction defect claim **is** the building itself and the materials that make up the construction.[1]

So where did the homeowner go wrong? The Court emphasized that the homeowner failed to:

1. Make it sufficiently clear that the contractor was being held responsible for the problem before correcting it.
2. Give the contractor **specific notice** of when the repair work would be done.
3. Give the contractor the opportunity to document the condition for himself because photos of the condition were not an adequate substitute for inspection.

One dissenting judge argued that the notice given by the homeowner was sufficient, and that in any event dismissal of the suit was not warranted as a sanction. However, his opinion was not persuasive and the matter has gone to the Minnesota Supreme Court. While we await the decision of the Supreme Court, Associations can take action to preserve their rights.

Most importantly, written notice of the problem should be given to all known potentially responsible parties as soon as possible. The following simple steps should be taken to avoid dismissal of your case:

1. Describe the problem fully.
2. Give the contractor written notice that a claim is going to be made against him.
3. Give the contractor specific notice that the homeowner or Association intends to make repairs on or after a specific date without further notice to the contractor.
4. Invite the contractor to investigate the condition prior to the specified date and to document the condition before that date.

What does this mean for Association managers? Association managers need to caution a Board not to initiate repairs of defective work without giving notice to all potentially responsible parties. Since the lesson of this case is that exactly what is

[1] Miller v. Lankow, 2009 Minn.App. LEXIS 220. This case is presently on appeal to the Minnesota Supreme Court.

required to satisfy this notice obligation isn't always clear, managers should recommend that Boards consult with counsel to obtain guidance on how to satisfy notice requirements for the specific condition in question.

If repairs are required right away, tread carefully. Even if you don't think a claim will ultimately be made, repairing a condition can have serious consequences. Circumstances can change, problems can become more severe and rights must be protected. Any attempt to repair without giving an adverse party both reasonable notice **and** an opportunity to inspect the conditions, could result in a dismissal of your case on the grounds you have "spoliated" the evidence.

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