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Claims for Negligent Construction of a Residence

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Assume the following facts: A family builds a home. After some time, they sell the home and move to another state. The new owners move in and love the home . . . until they discover a problem in how the home was built. The new owners face a serious question: Can they sue the builder even though he or she built the house for someone else? This article answers that question.

For many years, only the original owner could bring suit against the builder for defective workmanship because they were the only parties to the original contract. However, in 1983 the Supreme Court of Ohio changed the law. In *McMillan v. Brune-Harpenau-Torback Builders, Inc.*, the Court recognized that:

> A duty is imposed by law upon a builder-vendor of a real property structure to construct the same in a workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, including those inherent in its site. If the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, the vendor is answerable to the vendee for the resulting damages.

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The Court then extended that duty to subsequent owners as well. Notably, however, Ohio courts have maintained a distinction between general contractors and subcontractors. For a negligence action to be brought against a subcontractor, the purchaser must be a party to a contract with the subcontractor or the assignee of rights under the contract. Hence, unlike a general contractor, the subcontractor does not face continuing liability to subsequent owners absent some specific contractual relationship on which such a claim may rest.

In *McMillan*, two homes in a residential development developed landslide problems. The second owners of the homes brought suit against the builder alleging negligence in the placing, grading and compaction of the fill material used to level the property. The builder moved to dismiss the complaint because the second purchasers were not parties to the original building contract. The Supreme Court rejected the builder's argument stating: "[V]endors of real property will be held liable for damages proximately caused by their negligence in constructing, maintaining, or repairing the property sold. ***The duty . . . runs now to all vendees, both original and subsequent***" (emphasis added).

While significant, the Court's ruling does not mean that a builder insures against or becomes strictly liable for all defects. As stated by the Court:

> Today's holding does not render the vendor an insurer for all defects, however remote . . . Rather, vendors of real property will be held liable for damages proximately caused by their negligence in constructing, maintaining, or repairing the property sold . . .
>
> This standard of negligence will require vendees to prove the traditional negligence elements. The vendor is not to be held strictly liable for defects. Our holding establishes only the duty. Vendees still have the burden of proving the breach of that duty, proximate, causation, and damages. As Justice William B. Brown pointed out . . .
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> "Surely, to hold that a subsequent vendee . . . can bring an action in negligence against a builder-vendor is not equivalent to holding that such builder-vendor is an underwriter against economic loss not proximately caused by its negligence."

To successfully assert such a claim then, the property owner must prove that a specific negligent act or omission by the builder proximately caused the specific harm in question. Such proof usually requires expert testimony and can be quite complex. As such, while the potential claim exists, proving the claim can be difficult.

Subsequent purchasers also face other hurdles. First, they must be sure to bring their claims before the expiration of Ohio's four-year statute of limitation applicable to negligence claims. Claims for breach of contract have differing statutes of limitation depending on if the contract is written (fifteen years) or oral (six years). The liability addressed herein sounds in negligence which is governed by the shorter statute of limitation. Determining the starting date for the time period depends on the specific facts presented. Generally, the time period begins to run when the negligent act occurs. But, if the negligence does not immediately cause harm, the statute will not begin to run until it does cause harm. For example *Velotta v. Leo Petronzio Landscaping, Inc.* states: "[W]hen negligence does not immediately result in damages, a cause of action for damages arising from negligent construction does not accrue until actual injury or damage ensues." In still another variation of the theme, the harm may occur when no one realizes it. Such was the case in *Harris v. Liston*, where the court stated that "the four-year statute of limitations...commences to run when it is first discovered, ***or*** through the exercise of reasonable diligence it should have been discovered, that there is damage to the property (emphasis added). Again, this can be a difficult analysis.

Second, subsequent purchasers must also be mindful of Ohio's statute of repose, which bars suits against builders after 10 years regardless of when the defect that caused the harm was, or reasonably should have been, discovered. It states:

> [N]o cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property . . . shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.

"Substantial completion" occurs on the first date the home is used or available for use by the owner. One exception to the 10 year time limit exists: If a defect is discovered less than two years before the ten year period expires, the owner has a full two years to bring suit. Consequently, one has, at most, 10 years to discover a defect and, at most, 12 years to commence suit.

As is evident from the foregoing, determining what potential liability exists on the part of a builder and how to prove it presents a complicated analysis. And, even where a claim for such liability may exist, the property owner must consider carefully the time in which any such claim must be brought. Missing an applicable time limit may well bar the claim entirely regardless of its merit. And, from a builder's perspective, analyzing available defenses also requires a sophisticated analysis. When faced with such issues, the attorneys of Eastman & Smith Ltd. would be happy to help you properly analyze your particular situation and help decide on the best strategy to address it.

Mr. Harper is a member of the Firm. He represents owners, contractors, subcontractors and suppliers in complex, multi-party commercial construction disputes. He also provides representation to parties involved in residential projects as well as clients in disputes involving real estate, land use, and zoning and eminent domain. In addition, Mr. Harper advises clients regarding mechanic's liens.

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