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WHAT IS A PATENT DEFECT - AND WHY CARE?

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The length of the statute of limitations in construction defect cases in most states varies depending on whether an alleged defect is "patent" (known or obvious) or "latent" (hidden). While common sense would seem to decide this issue, the California Court of Appeal has just weighed in with its decision in Creekside Townhome Owners Association, Inc. v. C. Scott Whitten, (2009) 177 Cal.App. 4th 251.

In Creekside, the Homeowner's Association of a townhome development sued a roofer, an inspector and a roofing supplier based on the re-roofing of 11 buildings involving 61 units. The Defendants argued that Creekside failed to file suit prior to the expiration of the four-year patent defect statute of limitations (C.C.P. section 337.1). Defendants brought a Motion for Summary Judgment based on the statute of limitations, arguing that a letter sent by one homeowner to the Association's

board of directors concerning a water intrusion problem inside one of the unit's bedrooms, and reporting several broken roof tiles, which was then discussed at a board meeting, evidenced a patent defect. The Complaint was filed more than four years from the date of the meeting, which is the statute of limitations for suing on a patent defect.

The trial court granted Defendants' Motion for Summary Judgment, relying largely on the prior Court of Appeal decision in Landale-Cameron Court, Inc. v. Ahonen, (2007) 155 Cal. App. 4th 1401, wherein another Court of Appeal granted a Motion for Summary Judgment on a similar basis.

Court of Appeal Reverses

But the Court of Appeal reversed the trial court, finding that one reported leak by one of 61 homeowners and some broken roof tiles is insufficient to result in a finding that the roof defects were patent and not latent as a matter of law. The Court also noted what it described as a "sharp distinction" between the facts of the instant case, and those in Landale.

Specifically, Landale concerns an eight-unit townhome development. There were roof leaks reported in three of them, and roof repairs were attempted. Basically, the Court of Appeal found that three leaking roofs out of eight is more likely to put a Homeowner's Association on notice of the existence of possible construction defects than one roof leak out of sixty-one.

Why Should A Builder Care?

The definition of a patent defect pursuant to California Code of Civil Procedure section 337.1 is whether the average consumer, during the course of a reasonable inspection, would discover the defect. *Geertz v. Ausonio*, (1992) 4 Cal. App. 4th 1363. This definition of “patent” defect is similar in most states. Other examples of defects found to be patent include *Tomko Woll Group Architects v. Superior Court*, (1996) 46 Cal. App. 4th 1326 (cracked concrete causing a person to trip and fall is a patent defect) and *Preston v. Goldman*, (1986) 42 Cal. 3d 108 (backyard pond built with a one foot wall causing toddler to fall in is a patent defect).

While this may all seem like more legal mumbo-jumbo, a ruling like this one can have profound effect on the length of time that construction companies and developers must fear construction defect cases. Based on the ruling in *Creekside*, incidents of water intrusion, problems with mechanical systems and other maladies which are obvious to anyone will not create a patent defect unless there are numerous and pervasive instances of trouble which are known, or reasonably should be known, to the property owner. While in the past defense lawyers have been successful in getting many such cases thrown out of court, thereby saving money for their construction company and developer clients, courts will now be remiss to put their judgment ahead of a potential jury, and grant motions to dismiss. So this decision can result in:

1. Longer statute of limitations, even for obvious issues;
2. Cases will be litigated longer;
3. Cases will be more expensive to litigate;
4. The potential for a rogue jury increases;
5. More expensive and harder to obtain insurance coverage.

This case is another example of the legal system making contractors’ lives tougher. But we will continue to move the pendulum the other way wherever possible.