

## NEWSLETTERS

### Double Damages? Ohio Court Allows Additional Recovery For Failure To Comply With Code

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A recent ruling by an Ohio appellate court re-affirms the necessity for all general contractors to conform their work to requirements imposed by codes and ordinances, along with contractual requirements. In *Davis v. Hawley General Contracting, Inc.*, 2015-Ohio-3798 (6th Dist.), the appellate court for the Toledo, Ohio, area ruled that a homeowner could recover statutory damages and attorney fees from the general contractor and individually from the owner of the general contractor for misrepresentations concerning work that failed to conform to statutory requirements. These damages were in addition to breach of contract damages awarded to fix the defects at issue.

The case concerned work performed on a lakefront vacation home. The home was built on top of a crawl space, which was wet and in which the joints had dry rotted. The homeowners contracted with Hawley General Contracting (HGC) through HGC's owner, Joel Hawley, to fix the problems with the crawl space and to create a walk-out basement, giving the home more space. The work required excavating the foundation, re-pouring the footing of the foundation and bracing and supporting the home on top of newly-built basement walls. The permit for the work required compliance with homeowners' association ordinances, building codes and state laws. In total, the work cost \$60,000. HGC used a subcontractor for much of the work.

Soon after completion, a horizontal crack appeared in the walls. The homeowners notified Hawley, who twice had the wall re-grouted. This did not fix the problem, and HGC and Hawley never repaired the crack. Using x-ray technology, the homeowners learned that the north and south walls of the basement did not have rebar or grouting all the way to the top. Homeowners filed a complaint which included counts for breach of contract/warranty, violation of the Consumer Sales Practices Act (CSPA), negligent or reckless damage to real property and violation of the home construction service suppliers act. Following a bench trial, a judge found that HGC had breached its contract with homeowners and awarded damages of \$30,400 for breach of contract, for the cost to rebuild the walls. The judge did not award damages against HGC under any other theory, and did not award any damages against Hawley individually.

Testimony at trial established that Ohio's residential building codes require vertical reinforcement of walls, by installing rebar from the top of the footer to the top of the wall, anchoring the sill plates to the top of the foundation walls and anchoring the floor joists to the sill plates. There was

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no dispute that HGC had not done so. The parties did dispute whether or not the walls were structure sound and whether or not the crack would continue to grow. The homeowners presented evidence that the crack was still growing and testimony that the walls were not structurally sound. HGC countered by arguing that the walls were structurally sound, by presenting testimony that it was not feasible to install rebar to the sill plates with an existing house on top of the foundation. Instead, HGC maintained that it was common to “slop” the unreinforced blocks with grout, and that in this instance the wall was purposely flared out. Hawley testified that he had built 40 basements in this same manner. Hawley did admit that the current size of the crack in the wall was greater than the built-in flare of the wall.

In this bench trial, the judge made the factual findings. The judge found that HGC’s work was not done in a workmanlike manner under the building code. The court further determined that the failure to install sufficient rebar in the walls was the cause of the cracking in the walls. Lastly, the court determined that the walls would need to be replaced, and found that \$30,400 would be the cost to do so. The judge rejected the homeowners’ arguments that HGC acted recklessly, misrepresented the quality of its work and acted unfairly or deceptively. As a result, the judge did not award any additional damages, including punitive damages or attorney fee.

Following the trial court’s ruling, the homeowners appealed. The homeowners argued that the failure to perform the work in a workmanlike manner violated CSPA, that Hawley was personally liable because he failed to disclose his status as an agent of HGC, and that HGC and Hawley were reckless, and therefore were liable to homeowners for attorney fees. The appellate court found for the homeowners on all three issues.

As to CSPA liability, CSPA prohibits “unfair or deceptive” sales practices, which is defined as misleading consumers about the nature of the product they are receiving. It also prohibits unconscionable acts, or misleading a consumer’s understanding of the nature of the transaction at issue. The appellate court noted that not every failure to perform work in a workmanlike manner, nor every breach of contract, would violate CSPA. However, under Ohio law, a knowing breach is likely also an unfair or deceptive act. The testimony demonstrated that here, under the applicable codes and ordinances, Hawley used rebar that was too small, spaced it too far apart, and did not extend it to the sill plate. It was also unclear whether anchor bolts were used to anchor the basement walls to the sill plates, as was required. There was also evidence that Hawley represented to the homeowners went all the way to the top. Hawley also repeatedly assured homeowners that he would fix the problem, but only had the walls re-grouted twice and never attempted to fix the problem in any other way. The court found that, taken together, these instances established a CSPA violation.

As to Hawley’s personal liability, the homeowners argued that Hawley should be held liable under CSPA because he failed to disclose that he was acting in an agency capacity. Homeowners argued that Hawley only signed the contract as an individual, such as above the words “Builder-Hawley General Contracting,” and never disclosed that he was signing as an agent of HGC. The appellate court sidestepped this issue, and stated that whether or not Hawley sufficiently disclosed his status as an agent of

HGC, he could nonetheless be held liable because he participated in the activities that violated CSPA through his misrepresentations to the homeowners.

Under Ohio law, when the supplier has knowingly violated CSPA, the court may award reasonable attorney fees as damages. This requires only intentionally engaging in conduct that violates CSPA, and does not require that knowledge that the conduct violates CSPA. Here, Hawley testified that it was his standard practice to construct basements in this manner, so the appellate court found that his actions were intentional, and thus that homeowners could recover reasonable attorney fees from Hawley.

This case contains at least four important lessons. First, be clear about the context in which you are signing the contract. Though the court sidestepped the issue here, anyone signing on behalf of a general contract needs to make it explicitly clear they are signing in a corporate capacity. Second, be careful what you say. Here, HGC should have verified that the rebar went to the top before it saying it did. Third, do not get complacent. Hawley claimed he used this method up to 40 times previously, but could not articulate the specific code and ordinance requirements. Always check to make sure that your methods conform to all applicable codes and ordinances, no matter how long you've been doing things that way. Fourth, fix your mistakes. Had HGC fixed this issue on its own, as it and Hawley had promised, it would have not faced the additional damages awarded by the court.

For more information about this topic and the issues in this article, please contact David Dirisamer in our Columbus office at (614) 628-1451 or [david.dirisamer@btlaw.com](mailto:david.dirisamer@btlaw.com).

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