

Court of Appeals upholds contingency component of construction defect repair costs

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In a recent, unreported decision, Division III of the Washington Court of Appeals upheld a trial court's award of damages to a homeowner that included a \$26,000 "contingency" to address unforeseen problems that might be uncovered during the repair work. Although not a reported case, the decision is very instructive and interesting for homeowners who have suffered construction defects because the court discusses contingent damages, stigma damages, and the Consumer Protection Act.

The homeowner in *Khalighi v. Harvey*, 2010 WL 2433125 (Wash.App. Div. 3)) was an air force pilot who bought a spec home from builder Harvey under a standard real estate purchase and sale agreement ("REPSA"). When Mr. Khalighi returned from his overseas posting late and entered the completed house, he immediately noticed a damp, musty odor. He also felt the garage floor move when he jumped on it. He saw problems with the drainage system and observed that water had accumulated beneath the house. Mr. Khalighi notified the builder and obtained a bid from a licensed contractor, Murphy, to repair the defects. When mediation failed, the homeowner filed suit.

At trial, the contractor, Harvey, challenged the 25% "contingency" component of the bid, but the court ruled that the contingency amount was recoverable as part of Khalighi's damages. The contractor appealed, but the Court of Appeals roundly rejected his argument:

While it was uncertain whether additional repairs would be needed, [the repair contractor] Mr. Murphy testified that he would not undertake the work without the contingency payment. To use Mr. Murphy, Mr. Khalighi had to pay that sum in addition to the other expenses detailed in the bid. The cost of the repairs was the damage incurred by Mr. Khalighi. That cost was the \$130,000 Mr. Murphy bid. Whether or not there were additional repairs to come, Mr. Khalighi was still responsible for the contingency sum. The damage was not speculative.

The trial court had not only awarded the homeowner \$130,000 in remediation damages, but also awarded \$147,500 in stigma damages and treble damages of \$10,000 under the Consumer Protection Act. Stigma damages are awarded for the lost value of a home as a result of the "stigma" that results when a house has suffered damage. As an example, if you know that a brand new car has been in an accident, even though it has been repaired to "like new" condition, the fact that it has been in an accident means that you are likely to pay less for that car than for a new car that was never wrecked. That lower value of the wrecked-and-repaired car as compared with the new car represents a "stigma" loss.

The Consumer Protection Act, RCW Ch. 19.86, often referred to simply as the "CPA," creates a claim for "unfair or deceptive acts" in trade or commerce. Although sometimes difficult to prove a CPA claim, it is a useful tool for homeowners because, if you prevail, the CPA allows the court to award "treble damages" – or three times the actual damages caused by the CPA violation – up to \$25,000. (The cap was \$10,000 at the time the *Khalighi* case went to trial.) The CPA also provides for an award of attorney fees incurred in proving the claim.

The trial court in *Khalighi v. Harvey* awarded the homeowner his attorney fees pursuant to the CPA and also under the REPSA, which typically includes an attorney fees clause. The Court

of Appeals added to that the homeowner's attorney fees for defending the contractor's failed appeal. Overall, it was a great result for the homeowner.

If you have questions about this decision or would like to discuss your own legal situation, please feel free to give us a call at 206.626.5444.