

Construction-Defect Case Shifts Midcourse

By **James Carlson**
LAW WEEK COLORADO

DENVER—The Colorado Supreme Court didn't consult Doug Benson when in 2008 it issued a ruling changing the law on how courts award prejudgment interest.

If it had, Benson would have had plenty to say. The managing partner at Benson Kerane Storz & Nelson was at the time three years into negotiations on behalf of a homeowners association trying to get builder D.R. Horton to pay for shoddy construction in a housing development. When the court in

2008 changed the point from when prejudgment interest is calculated, it removed any incentive for Horton to settle.

"We basically had to start over at that point," Benson said.

The case seemed to work out — albeit on a longer time frame — when Benson's team on March 16 received the final portion of a \$6.2 million award through an arbiter. The course to that resolution wasn't easy. It involved nearly seven years of work and multiple starts and stops in the process.

The homeowners of Prairie Ridge at Saddle Rock in Aurora first hired the firm in 2005, and Benson began working on the case in 2006. The homeowners raised multiple concerns about Horton's home construction. Roofs were leaking causing interior damage; decks were leaking into garages; retaining walls were losing stabilizing rocks; and poorly managed drainage systems were affecting the area's concrete.

Lawyers for D.R. Horton from Higgins Hopkins McLain & Roswell didn't return requests for comment.

A knack for the practice

Even before entering the legal field, Benson knew about home construction. Prior to law school, he'd helped build homes. His first job while in law school was with a San Diego lawyer who did construction defect law. He worked in that practice area for six years before moving to Denver 14 years ago.

So Benson was comfortable with the process when he received the case. In 2006, the firm hired experts to begin a preliminary investigation of the issues and then contacted Horton, with which the firm had been working on claims by other homeowners. And as in those other cases, Benson sought to sit down with both sides' counsel and experts to agree on what needed to be fixed.

After a few years of jointly investigating the claims and then meeting off and on, these consultants agreed on a scope of repairs, and, as per the usual, sent that list to a third-party expert to put a price to those fixes.

In short order, two things happened. First, in October 2008, the state's high court ruled on prejudgment interest. Previously, the law had allowed winning plaintiffs in construction defect cases to seek prejudgment interest based on the time from when the problems were first raised and weren't addressed. The court's ruling changed the period when this "wrongful withholding" could be calculated.

The result of this decision?

"It takes away a builder's risk," Benson said.

Just two months after the court's ruling, the third-party's cost-of-repair returned at \$9 million. At that point, Horton, which previously had to consider the possibility of paying more in prejudgment interest if it lost a case, had less incentive to settle, and it pulled out of talks. Benson understood the strategy.

"Why not?" he asked. "It's worth rolling the dice. The ramifications are not only that everything now goes to trial, but it also encourages Horton to do what it did: Fire its experts who have integrity and hire experts who say nothing's wrong."

Horton did something along those lines, Benson said, replacing its experts with consultants who said the cost of repairs wasn't \$9 million, but more like \$500,000.

So the two sides went into a four-week arbitration beginning in June. Benson's experts testified to the repairs needed and their \$9 million estimate, Horton's new experts did the same, asking the arbiter to award \$500,000. The disparity might seem absurd, but it's how the process normally works. Plaintiffs come in with a number, respondents say it's a fraction of that, and the award is usually split down the middle.

It was no different here. The arbiter initially awarded around \$4 million in damages and \$2.2 million in attorneys' fees. Benson's done better in other cases against Horton, and he's done worse. The \$6.2 million total award isn't enough to fix everything, but it will cover the expense of the major problems.

"At least they're much better off than if they would have accepted that \$500,000," he said. •

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