

## Homeowner Can Sue More Than Five Years After Learning of Problem

by

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In a recent case that may affect liability in many existing construction contracts, Missouri's appellate court in St. Louis decided that an owner could sue the City of O'Fallon more than five years after completion of a project and after first noticing construction defects. The case is *Evelyn Loeffler v. City of O'Fallon*, No. ED 79314 (Mo. App. Lexis 284 2002), decided February 19.

This decision stretches the five-year period of time when a contractor and developer may be liable for allegedly poor workmanship in cases where they agreed by contract to correct any problems. Contractors should rethink open-ended offers and agreements to remedy construction defects.

The case is particularly noteworthy because the homeowner's appeal brief did not comply with various Missouri rules. On this basis alone, the appellate court could have declined (something it does frequently) to consider further the appeal.

Instead, the appellate court decided the appeal on the merits since it could "glean" from Loeffler's arguments the issues at hand. Then, the appellate court overturned a trial judge's decision, yet another unusual result; few cases are reversed on appeal.

Missouri statutes limit the time when various actions can be brought in court (commonly called statutes of limitation). If someone waits too long, the lawsuit cannot be pursued. This keeps potential liability from existing forever.

Loeffler, the homeowner, had sued the City of O'Fallon for breach of contract, an action that must be brought within five years of when the damage resulting from the City's work is "sustained and capable of ascertainment." This is not a precise standard and allows courts room for interpretation on what it takes to start the five-year clock.

While the record is not precisely clear, it appears that the City was doing some construction work and needed a temporary construction easement

to allow it access to the homeowner's property. The City and Loeffler agreed by written contract dated May 24, 1991 that the City would promptly correct any problems resulting from its work.

The contract included handwritten "special conditions" that provided the City would protect a flower bed by building a wood barricade before construction, connect the owner's roof drain to the storm drainage system during construction, and be responsible for and promptly correct any water backup or other problems due to construction.

Further, the City's responsibilities did not expire upon completion of the project. This was key to the final outcome.

The City completed the project in May 1992. Thereafter, the homeowner noticed grading changes, and from the fall of 1992 through the spring of 1993, poor drainage. In 1993, she notified the City that her yard was sinking. This was more than five years before she eventually sued.

During the next two years, Loeffler's property sustained damage due to poor drainage and "excess lateral hydrostatic pressure on walls, causing fractures and moisture intrusion in the basement." In March 1994, she obtained and sent to the City a bid from a grading contractor to correct the drainage problem.

A few months later, in August 1994, the City's insurance company sent Loeffler a response denying liability but adding that it would re-evaluate if Loeffler produced documents to support her claim. Two years later, the City's Administrator sent a letter to Loeffler stating that the City had considered her request for compensation and declined to pay.

Loeffler filed her lawsuit in June 1999. This was more than five years after obtaining the bid for corrective work but less than five years from first hearing that the City through its insurance company denied liability.

The City convinced the trial court that Loeffler had waited too long to sue. The court granted a summary judgement in the City's favor. The City argued that Loeffler's property clearly had damage that she knew about in 1993 and certainly by May 1994. Thus, a lawsuit filed in June 1999 was not timely. On its surface, this position seemed to have merit.

The appellate decided otherwise, however, since the City had contractually agreed to fix any defects after construction, and had not limited the period of time to do so. The court further concluded that Loeffler was required to offer the City an opportunity to correct any defects before filing the lawsuit. Thus, the statute of limitations did not

begin to run until the City first refused to be responsible for problems resulting from its work.

In reaching this result, the appellate court recognized a “line of cases which stand for the proposition that, in certain instances, a plaintiff need not give a defendant an opportunity to correct defects.” The court did not believe it had to follow them because they contained contract provisions different from the one between the City and Loeffler.

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