

## Contractor Does Not Have to Pay When Repair Costs Too Expensive

by

James R. Keller

This article appeared in *St. Louis Construction News and Review*, p. 20-21, November-December, 2013.

The Southern District recently affirmed a trial judge's decision to award nothing to homeowners where the costs to repair an improperly poured concrete driveway were so expensive as to "involve unreasonable economic waste." The repair costs were \$117,160 to \$127,150.

The case is *Kelley v. Widener Concrete Construction, LLC*, 2013 WL 2489926, decided June 11.

Instead, the homeowners could recover damages for the diminution in the value of their property. Since the only evidence of this came from the concrete contractor—who testified the property did not decrease in value—the homeowners could not recover.

Paul and Connie Kelley (the homeowners) had a written contract with Widener Concrete Construction, LLC (the contractor) to pour approximately 7,000 square feet of concrete at their home at 1909 Sherry Lea Drive in Neosho, Newton County, Missouri. The four-inch thick concrete was for a driveway, patio and sidewalk to be stamped, colored and sealed for \$29,540. The homeowners chose a random pattern.

Widener guaranteed and warranted its work would be completed in a "substantial workmanlike manner." The Kelleys testified that they "just wanted a nice driveway to go in front of a nice home."

After the job was completed, random cracks about eight to twelve feet apart started to appear throughout the driveway, patio and sidewalk. At first they were about an eighth of an inch thick, but they continued to widen.

Within six months, the concrete started chipping off with some spots as large as two inches by four inches. The concrete continued to deteriorate and change in color.

The Kelleys used two experts at trial, one a professional engineer and the other the owner of a construction company, both of whom inspected the home prior to their testimony.

The expert general contractor testified that the random cracking and spalling was due to the lack of construction joints. He testified that construction joints are important in stamp concrete as well as other types of pours to control where the concrete will crack. He also testified that the cracks, chips and spalling could not be repaired. He stated that in his opinion the only option was to remove and re-pour the concrete which would cost \$117,160.

The homeowners' other expert—a professional engineer—also testified that there were no expansion joints or saw-cut construction joints which is standard practice to relieve shrinkage and cracking. He testified that the cost to remove and replace the existing concrete would be \$127,150.

The owner of Widener Concrete testified that the Kelleys made the decision to not use expansion joints. He admitted that such joints would have helped to eliminate cracking, but added that concrete is going to crack no matter what. He acknowledged the concrete was not “a good looking job.”

Widener offered at trial a real estate broker in the Neosho area, who testified that he had owned or operated a real estate office for 30 years, built more than 300 homes in the area including six subdivisions, and close to 500 housing units. In his opinion, the condition of Kelleys' driveway did not affect the market value of the house. The expense involved in removing and replacing the concrete was not justified, he testified.

Paul Kelley estimated that the current value of his home was approximately \$600,000. He did not give a specific figure for what the home was worth after installation of the faulty concrete.

The trial judge decided that the homeowners had not instructed Widener not to use expansion joints. The court concluded that even though the cracks and chips may continue to deteriorate, the concrete did not need to be replaced.

The court found that tearing out or replacing the concrete was not the only way to repair or address the problems. The Southern District on appeal noted that no other method had been presented in evidence.

The trial court found compelling the fact that the Kelleys did not offer any evidence as to the diminution in value of the residence before the concrete and the value of the property after the concrete. By contrast, Widener had provided evidence that there was no real change in the property's value.

The question on appeal was whether the diminution in value of the property was the correct measure of damage. The appellate court agreed that the costs to repair were so excessive as to be an unreasonable measure in light of the overall value of the property. Therefore, the correct measure of damage was

the diminution in the value of the property as a result of the faulty workmanship.

James R. Keller is a partner at Herzog Crebs LLP where he concentrates his practice on construction law, complex business disputes, real estate and ADR. He also is an arbitrator and a mediator.