

**Homeowners Association Recovers
\$987,940 from Developer and Trustee**

The Twin Chimneys Homeowners Association will keep the \$987,940.00 it received from a jury verdict against J.E. Jones Construction Company and Jones Company Custom Homes, Inc., the developer of the Twin Chimneys subdivision, and one of the subdivision's trustees, Howard Chilcutt, according to a recent decision from the Eastern District Court of Appeals in Missouri. The case is *Twin Chimneys Homeowners Association v. J.E. Jones Construction Co.*, No. ED 82976, decided April 12, 2005.

The jury found that both the developer and Chilcutt, one of the original trustees of the subdivision, breached their fiduciary duties to the Association by not maintaining and repairing the subdivision's lakes, designated as common areas. The lakes are muddy and under-excavated, contrary to the homeowners' expectations when they purchased properties in the development.

In achieving this result, the Association overcame several difficult legal obstacles. The outcome offers considerable hope to future homeowners who face similar hurdles.

The appellate court's decision may have the greatest impact on the issue of how long a homeowner and its association can wait before suing a developer for construction-related problems.

The homeowner's advisory board notified the developer and trustee that the lakes were muddy in 1990, shortly after their completion. They waited nine years, however, until 1999 before filing their lawsuit.

Missouri's applicable statute of limitations specifies that a lawsuit of this type must be brought within five years from when the damages are first sustained and capable of ascertainment. If there is more than one item of damage, then the action must be brought within five years of the last item of damage, "so that all resulting damage may be recovered, and full and complete relief obtained."

This statutory language has generated literally thousands of motions in trial courts over the years and hundreds of appeals over when a damage is sustained; when a damage can be determined; and what compounding of damages can extend the time period to the last item. A lawsuit's viability, as well as the economic future for the parties involved, often hangs in the balance.

How did the Association overcome early evidence of mud? The appellate court decided that even though muddy lake conditions were known to exist many years ago, the last item of damage did not occur until the Association received an expert report on March 30, 1998, stating that one of the lakes was under-excavated by up to eight feet. Thus, the lawsuit was timely.

The appellate court characterized the failure to maintain the common areas as a “continuing wrong.” The court then found that each day continued or repeated the wrong and created a separate cause of action, triggering a new, daily period of five years to sue for that wrong. The court concluded that all damages sustained within five years of filing the lawsuit were recoverable.

The appellate court noted that the developer trustees continually promised through 1996 that the common areas would be remedied, and stated it was best to wait until the subdivision was complete before effecting repairs. It was not until 1996 or later that the homeowners knew that the developer trustees were not going to make the repairs. It was then that the Association’s damages were “recoverably certain.”

The developer also argued that the jury’s verdict was too high and included damages, contrary to the jury instructions, for a period greater than the five years before the lawsuit was filed. Rejecting this position, the appellate court found that the \$987,940.00 was far less than the \$2,500,000.00 that one expert testified it would cost in 2003 to correct the lake problems. There also was expert testimony that excavating the lakes was the only solution to the mud problems.

The jury found Chilcutt, the only trustee left in the case as a defendant due to various legal reasons, to be personally liable for the \$987,940.00. To keep him in the case, the Association had to overcome a provision in the indenture of trust that provided that the trustees cannot be held personally responsible for their own wrongful acts, “and no Trustee shall be responsible for the wrongful acts of others.”

The court noted that contracts like this one that exonerate someone from future acts of negligence are to be strictly construed against that person and require clear and explicit language. The court concluded: “We do not believe the above clause clearly and explicitly releases the trustees, including Chilcutt, from their own breaches of fiduciary duty.”

The court also noted that Chilcutt admitted that as an owner and an officer of the developer, any money spent by the developer to fix the problem would have affected him personally. The court cited this as a conflict of interest that was not exonerated by the indenture of trust.

The court also rejected the developer's argument that the measure of damage should have been the diminution in the value of the lakes, since this is the general rule in Missouri. The appellate court found that the trial court correctly instructed the jury to award damages based on the cost to repair the lakes because Missouri recognizes an exception when the land (or in this case lakes) is not generally bought and sold on the open market.

The subdivision's common ground fits this description. In such a case, the cost to repair is the proper measure of damage.

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