

## Contractor and its Owners Liable for Damages and Attorney Fees

by

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The Missouri Court of Appeals for the Southern District has upheld a trial court's judgment in favor of a homeowner and against a contractor and its owners for damages and attorney fees.

The case is *Rogers v. Superior Metal, Inc.*, SD 33696, 2016 WL 442773 (S.D. Mo. Feb. 4, 2016). This decision may open new personal liability against owners of construction companies.

Superior Metal, Inc. is a construction company that installs metal buildings, roofing, siding and windows. In 2013, Harley Rogers decided he wanted to build a shed on his property for storage. He discussed the project with Randy Mueller, one of the owners of Superior Metal. Mueller told him that "it would be a stand up product" and that "the building would be straight, free of defects, and would be good lumber."

Rogers and Superior Metal entered into a written agreement for \$13,500.00 for Superior Metal to build a pole barn on Rogers' property.

During construction, Rogers noticed defects and mentioned his concerns to Jonathan Holtzman, co-owner of Superior Metal.

Once completed, according to the appellate court opinion, the building had numerous construction defects. Rogers demanded his money back. Superior Metal refused to issue a refund.

Rogers sued for breach of contract, unjust enrichment, fraudulent misrepresentation, negligence, and violations of the Missouri Merchandising Practices Act (MMPA). Rogers also sued Mueller and Holtzman individually based on an allegation of fraudulent misrepresentation.

The trial was in front of a judge instead of a jury. The trial court found for Rogers on all counts, awarding \$23,500.00 in damages, \$10,000.00 in attorney fees, and \$1.00 for punitive damages. The appellate opinion offers no explanation why the award was \$23,500.00 when the original contract price was \$13,500.00.

The contractor's first challenge on appeal was that the owner did not present any evidence as to how the alleged construction defects diminished the value of his property. In Missouri, there are two measures of damages regarding defective performance of a building contract.

One is the cost-to-repair method, and the other is the diminished-value method. The cost-to-repair method measures damages by the cost of repairing the defective work. The diminished value method measures the difference between the value of the property before and after the defective work.

The Southern District noted that the cost method is the preferred method to recover damages and that the diminished-value measure should be used when the cost to repair method would cause "unreasonable economic waste." In other words, if the cost to repair far exceeds the diminished value of the property, then the diminished value of the property is the proper measure of damage.

In this case, once the landowner presented evidence on the cost to repair, the contractor has the burden to establish that the cost to repair is disproportionately high when compared to the diminution in value of the property.

The contractor presented evidence through an expert that it would cost only \$445.00 to repair the defects in the building. But the contractor presented no evidence regarding the diminution in the value of the property and thus the Southern District on appeal affirmed the trial court's decision that the damages for faulty construction were \$23,500.00.

The appellate court also decided that owners Mueller and Holtzman were individually liable given the trial court's finding of fraudulent misrepresentation. Their communications with Rogers, according to the court, were "affirmative participation in the actionable wrong and so justify imposition of individual liability." Their personal liability stemmed from fraud, not just breach of contract. This result will trouble construction company owners.

Regarding attorney fees, the Missouri Merchandising Practices Act allows a trial court to award attorney fees based on the amount of time reasonably expended as well as punitive damages. Defendants contended that there was no evidence to itemize any attorney fee time and thus no support for attorney fees.

The Southern District concluded that it is well within a trial court's discretion, as an expert on attorney fees, as well as having familiarity with the case at hand, to decide what attorney fees are proper.

The Southern District also decided that on remand the trial court could determine what attorney fees should be assessed for the appeal since Missouri law allows that the award of attorney fees can include those attorney fees incurred on appeal.

There is no mention of the \$1.00 assessed in punitive damages. The trial court's decision was affirmed on appeal. It appears this award stood as well. A \$1.00 punitive damage award usually reflects a statement of disapproval with defendant conduct and is not intended to reflect plaintiff's actual damages.

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