

April 15, 2011

Spoilation of Evidence Defenses: Homeowners Must Not Destroy Evidence Through Repairs

Spoilation of evidence, or more commonly understood destruction of evidence, can result in the dismissal of a homeowner's claims against a negligent builder, subcontractor, architect, engineer or other party responsible for a new home's defects. The obvious question is how would spoilation of evidence occur?

The answer is that it could occur quite innocently. Whenever a homeowner takes it upon him or herself to repair problems, there is the possibility that evidence will be destroyed. Perhaps more accurately, it is possible that the negligent defendant will assert a defense of spoilation of evidence purely as a tactical matter. In fact, this defense is preached by the construction defense bar knowing full well that many homeowners will take action to repair or fix their most valuable asset rather than standing idle waiting for the contractor to fix the problem.

Many times, homeowners meet with delay after delay in addressing their problems with contractors or builders. Their grievances are routinely ignored. And why not, if the homeowner finally and predictably takes action on the problem, the contractor now has one more line of defense against a construction defect lawsuit.

To avoid the possibility or suggestion of spoilation of evidence claims, the homeowner should contact the builder or contractor immediately in writing with a detailed description of each and every defect. The injured homeowner must give the defendant notice of any intended repairs. Finally, the plaintiff must give the contractor, builder or other defendant the opportunity to inspect the defects themselves prior to any such repairs by the homeowner.

Once notice of repairs and opportunity to inspect is provided, the homeowner should document both the original defects and the repairs very carefully. As one might expect, the contractor or builder is likely to have a very different view of what happened partly due to their own self-interested documentation of the problems and the fixes. It is safe to say that these problems and repairs can never be over documented, but they most certainly can be under documented.

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Once again, failure to provide notice and opportunity and to carefully document the defects and the subsequent repairs will undoubtedly lead to the spoliation of evidence defense. Careful attention and documentation should cut off this defense. Failure to provide notice and opportunity to inspect can and does lead to a dismissal of the claims.

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