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Construction Defect Litigation

By
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I. The Initial Investigation

When a client comes in with a construction defect issue, you should discuss the mechanisms associated with construction defect litigation, the specific construction defects the claimant alleges, and the proof of the construction defects.

At the initial meeting ensure your client brings all documents regarding the construction process. These documents include, but are not limited to, the purchase and sale agreement, marketing materials, plans and specifications, daily job logs, etc. Review these documents for warranties, standards, and other promises associated with the process.

Next, schedule a site visit. Most construction defects become apparent due to water intrusion. During the site visit, watch where water or moisture can enter the structure. Some common moisture sources are:

Outdoor Sources	Indoor Sources	Construction Sources
• Precipitation (roof, windows, etc). • Irrigation • Site Drainage (basements, walls, crawl spaces, etc). • Humidity (attics, venting, etc.)	• Faulty Water Supply • Faulty Waste Lines • Defective Water Heater • Cooking • Laundry • Bathing	• Fresh Concrete • Lightweight Floor Toppings • Green Lumber • Wet-Applied Insulation • Materials wetted during construction

There are some construction defects that are commonplace. These include improper flashing surrounding penetrations in the building envelope (doors, windows, venting), reverse lapped flashing on wall fields, improper installation of roof materials, and defective or improperly installed materials such as siding or trusses.

Once you have identified that construction defects are likely on the project, engage a consulting expert. The expert provides a more thorough evaluation of the defects associated

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with the build process. Bear in mind, however, that the harder an expert looks, the more defects will likely be found. The consulting expert should assist throughout the pre-litigation process.

II. The Pre-Litigation Process

Washington adopted a mandatory pre-litigation claim process in 2002.[1] Claims subject to this process are brought by a homeowner against a "construction professional" for problems in: (1) the new construction of residential dwellings[2] or (2) remodels for which the total cost exceeds fifty percent (50%) of the pre-remodel assessed value of the residence.[3] A "construction professional" is an architect, builder, builder vendor, contractor, subcontractor, engineer, or inspector, a dealer or declarant (for condominiums). Neither commercial construction projects nor third party claims require the pre-litigation process. Note that the construction professional must provide notice that they have a right to cure in the sales contract.[4] A failure to provide this notice to the buyer means that the buyer/claimant may sue without engaging in the pre-litigation claim process.[5]

At least 45 days before a lawsuit is filed, the claimant must serve written notice on the construction professional.[6] The notice must contain (1) a statement that the claimant is asserting a construction defect claim and (2) a description of the claim in, "reasonable detail sufficient to determine the general nature of the defect."[7]

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[1] Chapter 64.50, RCW.
[2] Meaning s ingle-family house, duplex, triplex, quadraplex, or a unit in a multiunit residential structure in which title to each individual unit is transferred to the owner under a condominium or cooperative system, and includes common elements and common areas. RCW 64.50.010(6)
[3] RCW 64.50.010.
[4] RCW 64.50.050.
[5] *Lakemont Ridge Homeowner's Association v. Lakemont Ridge Limited Partnership et al.*, 25 Wn.App. 71, 104 P.3d 22 (2005).
[6] RCW 64.50.020.
[7] RCW 64.50.020(1).

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Practical Tip: The description requirement means that many, if not all, of the claimed defects must be discovered prior to serving this notice. Prudent practice likely requires retention of a qualified expert to perform a thorough inspection of the residence as well as a written report from the expert before serving the notice. Note that this report may be used to support a demand letter to a construction professional's insurer.

After receiving the notice, the construction professional has 21 days to serve a written response on the claimant.[8] This response must contain one of the following three responses:

1. A proposal to inspect and/or repair the alleged defects;
2. An offer to compromise and settle the claim; or
3. A statement that the construction professional disputes the claim.[9]

If the construction professional disputes the claim, the claimant can file the lawsuit without further process.[10] If, however, the construction professional responds with a request to inspect and/or repair or an offer to compromise, the claimant has two options: accept or reject the offer. If the claimant rejects the construction professional's response, the claimant must serve notice on the construction professional of the rejection before filing a lawsuit.[11]

If the claimant wishes to entertain the construction professional's offer to inspect/repair, the claimant must allow the construction professional access to inspect.[12] The construction professional has fourteen days following the inspection to: (1) offer to remedy the defect at no cost to the claimant, (2) offer to compromise and settle by monetary payment, or (3) state that the construction professional will not remedy the defect.[13]

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[8] RCW 64.50.020(2).
[9] RCW 64.50.020(2).
[10] RCW 64.50.020(3).
[11] RCW 64.50.020(3)
[12] RCW 64.50.020(4)
[13] RCW 64.50.020(4)

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Again, the claimant may agree with the construction professional's offer, or may dispute it. If the claimant wishes to accept the construction professional's offer, the claimant must serve a written notice of acceptance within a reasonable time period after receipt of the offer, but no later than 30 days after the offer.[14] The claimant must serve a written notice of rejection of the construction professional's response, before filing the lawsuit.[15]

While it would seem that ER 408 would protect these required notices, bear in mind that these proposals may, in fact, be admissible for some other reason.[16] Careful drafting of the notice and responses is warranted.

If the lawsuit is filed before completing the pre-litigation process the lawsuit will be dismissed without prejudice and cannot be re-filed until the process is complete.[17] Note that re-filing following dismissal may warrant the imposition of terms and costs.

III. The Theories

Assuming that the pre-litigation claim process has been followed, and litigation against the construction professional is inevitable, there are a variety of claims that may be asserted. However, some theories are not covered by insurance, and may limit the amount your client can collect, regardless of the verdict or judgment amount.

Breach of Contract

Perhaps the most obvious cause of action is breach of contract. Depending on the nature of the transaction (i.e residential contract, design/build contract, etc.), this claim presents unique issues relating to performance under the terms of the contract. One of the more effective

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[14] RCW 64.50.020(5)
[15] RCW 64.50.020(4)
[16] *See Brothers v. Public School Employees of Washington*, 88 Wn.App. 398, 945 P.2d 208 (1997) (where the Court held that the said settlement negotiations "shed light" on whether defendant repudiated the original contract and were admissible despite ER 408).

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methods to pursue the breach of contract claim is to seek a term providing that the builder will build "in accordance with the plans and specifications."

By state law, the plans and specifications incorporate the Washington State Building Code. Therefore, any violation of the Building Code can arguably be a breach of contract.

Breach of contract claims may be governed by mandatory arbitration provisions, but arbitration provisions have been met with a jaded eye in Washington Courts.

Breach of Express Warranties

A similar claim is breach of express warranties contained in the contract. Another source for these warranties can be in the marketing and/or sales brochures given to the buyer to induce them to buy. Ensure that discovery seeks to locate all marketing materials for the project and have the client review them to determine which marketing materials were, in fact, relied upon in inducing them to purchase the residence.

Breach of Implied Warranty of Habitability

An implied warranty of habitability requires (1) a plaintiff who is the first purchaser of (2) a new home from (3) a defendant whose business is building homes, and (4) defects that render the home unfit for its intended purpose.[18] Whether the implied warranty of habitability accommodates a particular construction defect must is resolved on a case-by-case basis.[19] That is, we follow the general rule that the applicability of an implied warranty to a particular set of facts is a mixed question of law and fact to be determined by the trier of fact.[20]

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[17] RCW 64.50.020(6). *See Lakemont Ridge Homeowner's Association v. Lakemont Ridge Limited Partnership et al.*, 25 Wn.App. 71, 104 P.3d 22 (2005)(Where the Court reversed the trial court's refusal to dismiss without prejudice where no prelitigation process was followed).

[18] *Frickel v. Sunnyside Enters., Inc.*, 106 Wn.2d 714, 717-20, 725 P.2d 422 (1986).

[19] *Atherton Condo. Apartment-Owners' Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 519, 799 P.2d 250 (1990).

[20] *Burbo v. Harley C. Douglass, Inc.*, 125 Wn.App. 684, 694, 106 P.3d 258 (2005).

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Negligent Misrepresentation

A plaintiff may also recover for injuries proximately caused by a defendant's negligent misrepresentation. The Restatement of Torts § 552 standard applies in Washington Courts.[21]

Liability for negligent misrepresentation is limited to cases where (1) the defendant has knowledge of the specific injured party's reliance; or (2) the plaintiff is a member of a group that the defendant seeks to influence; or (3) the defendant has special reason to know that some member of a limited group will rely on the information.[22]

Fraudulent Concealment

Another claim similar to fraud is fraudulent concealment. To prevail on this claim, the plaintiff must show (1) there was a concealed defect in the residential building; (2) the builder knew of the defect, (3) the defect is dangerous to the purchaser's property, health, or life, (4) the purchaser was unaware of the defect and a reasonable inspection would not have disclosed the defect, and (5) the defect substantially reduces the property's value or defeats the transaction's purpose.[23]

Negligent Construction

A common claim raised is negligent construction, but this ignores that it is not a valid theory in Washington.[24] However, negligence is a viable claim where the construction defect caused personal injuries. One example is mold growth caused by water damage due to improper flashing of the residence. Mold is traditionally considered a tort, separate from the construction defect lawsuit. However, mold claims seem to be increasing in popularity.

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[21] *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994)

[22] *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995) *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987).

[23] *Norris v. Church & Co., Inc.*, 115 Wn.App. 511, 514, 63 P.3d 153 (2002), *citing Atherton Condominium Apartment Owner's Assoc. v. Blume Dev. Co.*, 115 Wn.2d 506, 524, 799 P.2d 250 (1990).

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Violation of the Consumer Protection Act

The CPA makes it unlawful to engage in unfair or deceptive acts or practices in trade or commerce,[25] to protect the public and foster honest competition.[26] To prevail on a CPA claim the plaintiff must show: (1) an unfair or deceptive act or practice, that (2) occurred in trade or commerce, (3) impacted a public interest, (4) injured the Class' business or property, and (5) was causally related to the injury.[27]

To prove an unfair or deceptive act, the plaintiff must show, at a minimum, that the alleged act had the capacity to deceive a substantial portion of the public.[28] Whether an act gives rise to a CPA violation is reviewed as a question of law.[29] There is a general duty on the part of a seller to disclose facts material to a transaction when the facts are known to the seller but not easily discoverable by the buyer.[30]

IV. The Defenses

Aside from challenging the claims directly (i.e. no negligent misrepresentation occurred, etc), there are several procedural defenses that should be analyzed.

Statute of Limitations

Construction cases involve a variety of limitations statutes. Breach of a written contract has a six year limitations period.[31] While other, tort based theories and breach of an oral

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[24] *Stuart v. Coldwell Banker*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987).
[25] RCW 19.86.020
[26] RCW 19.86.920
[27] *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).
[28] *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997)
[29] *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997),
[30] *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn.App. 39, 51, 554 P.2d 349 (1976). *McRae v. Bolstad*, 101 Wn.2d 161, 162-65, 676 P.2d 496 (1984).
[31] RCW 4.16.040.

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contract have a three year limitations period.[32] Note that Condominium claims also have a separate 4 year limitations period for breach of statutory warranties.[33]

Statute of Repose

In addition to the limitations statute, the Statute of Repose impacts the ability to bring a claim. The Statute of Repose was adopted to protect architects, contractors, engineers, surveyors, and others from extended potential tort and contract liability.[34]

> **RCW § 4.16.300. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property**
>
> RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.
>
> **RCW § 4.16.310. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property -- Accrual and limitations of actions or claims.**
>
> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought

[32] RCW 4.16.080.
[33] RCW 64.34.452
[34] *Hudesman v. Meriwether Leachman Associates, Inc.* 35 Wn.App. 318, 666 P.2d 937 (1983).

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in the name or for the benefit of the state which are made or commenced after June 11, 1986.

If a written notice is filed under RCW 64.50.020 within the time prescribed for the filing of an action under this chapter, the period of time during which the filing of an action is barred under RCW 64.50.020 plus sixty days shall not be a part of the period limited for the commencement of an action, nor for the application of this section.

RCW 4.16.320. Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property -- Construction.

Nothing in RCW 4.16.300 through 4.16.320 shall be construed as extending the period now permitted by law for bringing any kind of action.

By requiring that a cause of action for construction defects accrue (the statute of limitations begin to run within a six-year window following substantial completion) the repose statute restricts the judicially created discovery rule with a 6-year overall bar; therefore, the discovery rule, if applicable for accrual of actions, is limited to the 6-year period.[35]

Economic Loss Rule

The economic loss rule is a conceptual devise used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract.[36] In cases where only the defective product is damages, the Court should identify whether the particular injury amounts to economic loss or physical damage. The line between tort and contract should be drawn by looking at "interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These facts bear directly on whether the safety insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to the claim in question."[37]

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[35] *Architechtonics Const. Management, Inc. v. Khorram*, 111 Wn.App. 725, 45 P.3d 1142 (2002).
[36] *Washington Water Power Co. v. Gray bar Electric Co.*, 112 Wn.2d 847, 861, 774 P.2d 1199 (1989).
[37] Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 420, 745 P.2d 1284 (1987), *citing*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1168-69 (3d Cir. 1981).

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For purposes of construction cases, the economic loss rule can be used to eliminate claims based on negligence for damage to just the product (or structure). If, however, separate injury occurred (i.e. to an accessory structure or a person), then tort law properly applies.

Comparative Fault

Washington also allows for a defense that an act of God, or an act of the plaintiff caused the damage. Note that these are affirmative defenses to be pled and proven by the defendant.

RCW 4.16.326. Actions or claims for construction defects--Comparative fault

> (1) Persons engaged in any activity defined in RCW 4.16.300 may be excused, in whole or in part, from any obligation, damage, loss, or liability for those defined activities under the principles of comparative fault for the following affirmative defenses:
> (a) To the extent it is caused by an unforeseen act of nature that caused, prevented, or precluded the activities defined in RCW 4.16.300 from meeting the applicable building codes, regulations, and ordinances in effect at the commencement of construction. For purposes of this section an "unforeseen act of nature" means any weather condition, earthquake, or manmade event such as war, terrorism, or vandalism;
> (b) To the extent it is caused by a homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the failure of the homeowner to allow reasonable and timely access for inspections and repairs under this section. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the untimely or inadequate response of a builder to the homeowner's claim;
> (c) To the extent it is caused by the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant by virtue of their failure to follow the builder's or manufacturer's maintenance recommendations, or commonly accepted homeowner maintenance obligations. In order to rely upon this defense as it relates to a builder's recommended maintenance schedule, the builder shall show that the homeowner had written notice of the schedule, the schedule was reasonable at the time it was issued, and the homeowner failed to substantially comply with the written schedule;
> (d) To the extent it is caused by the homeowner or his or her agent's or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose;
> (e) As to a particular violation for which the builder has obtained a valid release;
> (f) To the extent that the builder's repair corrected the alleged violation or defect;
> (g) To the extent that a cause of action does not accrue within the statute of repose pursuant to RCW 4.16.310 or that an actionable cause as set forth in RCW 4.16.300 is not filed within the applicable statute of limitations. In contract actions the applicable contract statute of limitations expires, regardless of discovery, six years after substantial completion of construction, or

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during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later;

(h) As to any causes of action to which this section does not apply, all applicable affirmative defenses are preserved.

(2) This section does not apply to any civil action in tort alleging personal injury or wrongful death to a person or persons resulting from a construction defect.

V. Discovery

Construction litigation allows for a wide variety of discovery. The claims asserted require discovery into personal interactions between the real estate agent and the buyer, the design and engineering of the structure, the construction process, the scope of the sales process, advertising materials, and, potentially, personal injuries.

At a minimum, formal discovery should seek the following documentary evidence:

Contracts *et al.*	Contracts between: Owner and General Contractor Owners and Architects General and Individual Subcontractors Second Tier Subcontractors Material Contracts Supply Contracts
Drawings and Specifications	Bid Set Shop Drawings Specifications Take-Offs, Drafts and Sketches "As Built" Drawings
Computerized Project Documents	E-mails Electronic Plans and Specs
Project Files and Documentation	Submittals and Submittal Logs Requests for Information/Requests for Bids Logs Bids and Bid Documents Change Orders and Change Order Logs Project Manager Daily Reports or Logs Photographs Project Scheduling Charts, Meeting Minutes, Notes Progress Reports Inspection Reports Draw Requests
Supplies and Materials Documents	Purchase Orders Supplier Invoices Delivery Receipts

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Safety Documents	Safety Meeting Notes Agendas and Minutes Safety Inspection Reports
Pre-Construction Documents	Permit Department Files Statements of Qualification and Promotional Materials Subcontractor Estimates
Post-Construction	Building Maintenance Records Occupant Complaint Forms/Logs Building Advertisements and Lease Agreements

As Courts are restricting the number and scope of discovery, litigators will need to find alternative methods of obtaining information to support their claims and defenses. There are several processes to use to gather information from third parties.

First, the Washington Public Disclosure Act[38] allows access to records filed in government agencies. These records would include the permit application, including proposed plans and specifications, the inspection reports, and safety violations.

Next, you should attempt to get a copy of the municipal/county building code that was in effect at the time the plans were approved. Washington has adopted, in general, the Uniform Building Code (UBC). Each local jurisdiction can modify some of the UBC's provisions, so use the actual code in effect within the jurisdiction. One good source for this information is the Municipal Research Code Service (www.mrsc.org). This website had links to many jurisdiction's building codes. In addition, www.municode.com also has links to jurisdictional building codes. Both of these resources provide access to the current codes, but historical building codes can be difficult to find on-line. The King County Law Library can obtain copies of most historical building codes for Washington cities.

A third area warrants investigation is construction standards and installation instructions. While there is an acceptable industry standard, there is also the manufacturers'

[38] Ch 42.17 RCW.

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instructions. Once you have information regarding the specific brands of materials used, contact the manufacturer to obtain installation and handling instructions. These can be helpful in both educating your expert, and also in proving (or disproving) a claim that a material was defectively installed.

VI. Jury Instructions

At least one study has shown that only 20% of American adults are capable of understanding complex legal information.[39] This means that jury instructions must be clear and easily understandable to the average person, not just to lawyers and judges.

First, the instructions must, obviously, correctly state the law; a failure to do so is grounds for reversal. A party is only entitled to instructions supported by the law and the evidence presented at trial. Fortunately, Washington's Pattern Instructions cover many of the basics for general instructions and breach of contract, negligence, and the measure of damages.

Unfortunately, for the ordinary (and therefore complex) construction case, the Pattern Instructions are not adequate. The American Bar Association published in 2001 *Model Jury Instructions: Construction Litigation*[40] which is an excellent resource for jury instructions. The book presents party-neutral instructions that can be adapted to most construction issues.

VII. Damages

Washington has adopted the measure of damages rule for "defective or unfinished construction" stated in 1 Restatement of Contracts s 346, at 573 (1932), which provides that the injured party may obtain either, (1) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or (2) the difference between the value that the product contracted for would have had and the value of the

[39] Herman, Jeffery, *Getting More Litigation Value from Mock Trials: Educating Juries and Determining the Themes.*
[40] ISBN: 1570738904

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performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.[41]

A more modern case adopts the Restatement (Second) of Contract's damages in construction cases. The court set forth "the proper measure of the owners' damages for breach of a construction contract resulting in both remediable and irremediable defects," and adopted the rule in *Restatement (Second) of Contracts* § 348 (1981):

> If a breach [of a construction contract] results in defective or unfinished construction and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on (a) the diminution in the market price of the property caused by the breach or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.[42]

Where there has been substantial performance the measure of damages is the cost of remedying the defects or completing the work. If the cost of curing the defects exceeds the contract price then there has been no substantial performance and the measure to be applied is the difference between the value of the work performed and the value it would have had if it had been performed properly.[43] The cost of repair is at the time of discovery of defects, not the value at the time of trial.[44] Normally, the cost of repair is the appropriate measure of damages if the repair does not entail material structural changes, damages or unusual expenses.[45]

[41] *Baldwin v. Alberti*, 58 Wn.2d 243, 245, 362 P.2d 258 (1961); *Fuller v. Rosinski*, 79 Wn.2d 719, 488 P.2d 1061 (1971). *Alpine Industries, Inc. v. Gohl*, 30 Wn.App. 750, 637 P.2d 998 (1981).
[42] *Park Avenue Condominium Owners Ass'n v. Buchan Developments, L.L.C.* 117 Wn.App. 369, 384, 71 P.3d 692 (2003).
[43] *Eastlake Construction v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984); *Fuller v. Rosinski*, 79 Wn.2d 719, 488 P.2d 1061 (1971); *Marshall v. Food Chem. Lab.*, 4 Wn. App. 789, 484 P.2d 426 (1971); 1 *Restatement of Contracts* § 346(1)(a) at 572.
[44] *Maryhill Museum v. Emil's Concrete*, 50 Wn. App. 895, 751 P.2d 866 (1988).
[45] *Alpine Industries, Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981), *opinion changed*, 645 P.2d 737 (1982).

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