

Supreme Court of Idaho Rules That Substantial Compliance With the Notice and Opportunity to Repair Act Suffices to Bring Suit

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7.10.18

In *Davison v. Debest Plumbing, Inc.*, 416 P.3d 943 (Ida. 2018), the Supreme Court of Idaho addressed the issue of whether plaintiffs who provided actual notice of a defective condition, but not written notice as stated in the Notice and Opportunity to Repair Act (NORA), Idaho Code §§ 6-2501 to 6-2504, et. seq., substantially complied with the act and if the plaintiffs' notice was sufficient to bring suit. Section 6-2503 of the NORA states that, "[p]rior to commencing an action against a construction professional for a construction defect, the claimant shall serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect." Any action not complying with this requirement should be dismissed without prejudice. The court held that the defendant's actual notice of the defect was sufficient to satisfy the objectives of the NORA and, thus, the plaintiffs' action complied with the NORA.

In *Davison*, Scott and Anne Davison hired general contractor Gould Custom Builders (Gould) to remodel a vacation home in McCall, Idaho. Gould subcontracted out the plumbing work to Debest Plumbing (Debest). This work included installing a bathtub. When the Davisons arrived at their home for the first time on July 25, 2013, they noticed a leak from the subject bathtub. The Davisons contacted Gould and, the next morning, Gil Gould arrived with a Debest employee to inspect the home. In addition to inspecting the home, the Debest employee repaired the leak and helped Gould remove some water-damaged material.

It was undisputed that Debest was at fault for this loss and that the Davisons never provided written notice of the defect directly to Debest. Although Debest admitted that the leak was its fault, the parties' adjusters could not agree on the repair cost. Thus, the Davisons filed suit against Debest.

Debest filed a motion for summary judgment on the Davisons' breach of contract and warranty claims for lack of privity and on their negligence claim for not complying with the written notice requirement of the NORA. In addition to dismissing the Davisons' contract claims, the lower court awarded summary judgment on their negligence claim based on their failure to comply with the NORA.

The Supreme Court of Idaho reversed the lower court's grant of summary judgment for the negligence claim. [1] The court analogized the facts herein to a case in which the plaintiffs substantially complied with the notice requirement of the Idaho Tort Claims Act by sending written notice to the district's attorney, who forwarded it to the district secretary, instead of the plaintiffs sending it to the secretary directly. The court reasoned that, similarly to that case, the plaintiffs in this case met the objective of the NORA because the defendant had actual notice of the defective bathtub. Since the statute does not state that the plaintiff must specify the cost of remediating the defect, it found Debest's argument that actual notice was insufficient to provide notice of the scope of the damage unpersuasive.

The court's ruling in *Davison* establishes that, as long as plaintiffs satisfy the objectives of Idaho's NORA, they fulfill its notice requirement and can proceed with a lawsuit. However, it should also serve as a warning for practitioners to be mindful of applicable statutory notice requirements and the fact that they have to satisfy them prior to filing suit. While the facts in *Davison* may have been sufficient for the court to find that the plaintiffs complied with the NORA's notice requirement in this instance, courts will not, necessarily, find compliance in all cases where a plaintiff claims that the defendant had actual notice of the defects at issue.

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Furthermore, depending on the language of another state's statute and/or that state courts' interpretation of the applicable statute, actual notice may not suffice.

[1] The court affirmed the dismissal of the contractual claims and vacated an award for attorney's fees.

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