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Appellate Division Ruling in Construction Defect Case Highlights Importance of Timely Expert Testimony and Adherence to Discovery Schedules

John D. North and Charles J. Vaccaro
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A recent decision by the Superior Court of New Jersey Appellate Division underscores the fact that in construction defect litigation, where general contractors, project managers, architects and engineers are the primary defendants, it is imperative that qualified experts be retained and properly utilized by the parties in a timely manner. The failure of a party to timely make use of a qualified expert and abide by the trial court's discovery schedule can be fatal to a plaintiff's claims for construction defects, and can also severely hamper the defense of such claims.

This principle was exemplified by the Appellate Division's February 2018 ruling in *Riva Pointe at Lincoln Harbor Condominium Association, Inc. v. Riva Pointe Development, LLC*, in which the plaintiff, a condominium association, filed suit against the developer, general contractor/project manager, architect, and other parties involved in the construction of a condominium complex. The association's complaint, which was first filed in October 2012 and amended five times, alleged that defective construction caused water infiltration into condominium units and common areas, causing extensive damage.

After "numerous" extensions for the deadlines of expert reports, the association served a "preliminary" expert report setting forth the negligence of each defendant. The association thereafter told the trial court and defendants that this report would be final. As a result, the Court said the association could only submit a supplemental expert report for the sole purpose of addressing the defense experts' reports, and not to introduce any new issues or opinions. The submission deadline for any such supplemental report was June 24, 2015.

Attorneys

John D. North
Charles J. Vaccaro

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Over a month after the supplemental expert report was due, the association submitted a report that, contrary to the Court's earlier ruling, set forth new issues, opinions and conclusions regarding construction defects and increased the claim for damages by \$8 million. The Court then threw out the portions of the report that raised new issues and increased the association's damages claim. When the association failed to produce their expert for depositions, the judge precluded the expert from testifying at trial.

On the day of trial, the association's counsel argued that "it would be fruitless and futile to continue with the case given that we don't have a liability expert" as the Court precluded him from testifying. The Court then dismissed the association's case.

The association filed an appeal. The Appellate Division affirmed all of the trial court's rulings and added a few brief comments. The three judge panel ruled that the trial court had not abused its discretion. The panel highlighted that the trial court held multiple case management conferences and issued five case management orders specifying discovery deadlines, which were adjusted as necessary to accommodate reasonable delays. The Appellate Division also affirmed the trial court's refusal to allow the association's expert to add new issues and \$8 million to his calculation of damages only three months prior to trial.

Expert testimony is often needed in construction defect litigation to establish and explain how design and construction work was deficient and how it can be corrected, as well as the cost of corrective work. Expert testimony assists the jury on issues related to building codes and compliance, building delays, construction costs, and construction defects. With respect to architects and engineers, expert testimony is needed to establish the higher professional standard of care that must be followed and any deviations from that standard.

The holding in *Riva Pointe* should serve as a cautionary tale to community associations and builders alike that they should not drag their feet in prosecuting claims for construction defects. Experts should be retained early so that they can provide comprehensive input and set forth all of their opinions and conclusions before critical deadlines have passed.

To learn more about the issues addressed in this Alert, or if you have questions regarding construction defect litigation in general, please contact the authors, **John D. North** and **Charles J. Vaccaro**.