

# Knowing When to Ask for Help: Early, Effective Use of Expert Witnesses in Construction Defect Disputes

Ryan A. Williams, Esq.

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July 25, 2023

# Overview

- Navigating the Notice of Claim Process
- Maximizing Pre-Suit Settlement Opportunities
- Creating springboard into Litigation

# Pre-Suit Process

## 1. Colorado Construction Defect Action Reform Act (“CDARA”) – C.R.S. § 13-20-801, *et seq.*

- Applies to builder-vendor, general contractors, subcontractors, design professionals
- Requires “actual damages”
- Consent of association

## 2. Notice of Claim

- Contractor has 30 (residential) or 45 (commercial) days to respond
- Describes type and location of defect
- Claimant required to accommodate inspection
- Construction professional may propose remedy
- Potential Settlement Discussions

# Pre-Suit Notice



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July 19, 2021

**Via U.S. Mail First Class, Certified, Return Receipt Requested**

Designs by Sundown  
Adam Hallauer and Nick Valencia  
6875 S. Santa Fe Drive  
Littleton, CO 80120

Re: Notice of Claim  
Lirtzman Residence, 9 Village Road, Cherry Hills Village, Colorado

Dear Mr. Hallauer and Mr. Valencia:

Foster Graham Milstein & Calisher LLP represents Danny and Joey Lirtzman. As you are aware, the Lirtzmans are frustrated and disappointed with the negligent, incorrect, and deficient work performed by Designs by Sundown ("DBS") at the Lirtzman's residence at 9 Village Road in Cherry Hills Village, Colorado ("Property"). This letter constitutes a written notice of claim pursuant to C.R.S. §13-20-802.5.

Note that this letter is not intended to provide a comprehensive list of all negligent and defective work performed by DBS at the Property. No intrusive inspection has been performed. Nothing in this letter is intended to waive any rights related to patent or latent conditions currently unknown to the Lirtzmans.

#### Known Defective Conditions

In or about December 2019, the Lirtzman's began the process of retaining Designs by Sundown for landscape and hardscape, exterior lighting, and irrigation for the Property. This included, but was not limited to, placement of 3,296 square feet of mortar set Indian Blue Stone hardscape and associated hardscape elements forming the patio around the Property and associated inground swimming pool.

The Lirtzmans have identified multiple conditions indicating the hardscape and landscape work by DBS was non-compliant and/or defective, which has resulted in damage to other elements of the Property. Attached you will find a Summary of Non-Compliant Construction Report from Fiebig Architecture dated July 1, 2021. Among the defects identified, the following are noted as being within DBS's scope of work:

1. Non-Compliant Slope of Impervious Surfaces Adjacent to Building Foundation
2. Heaving & Cracking of Exterior Tile Floor
3. Bounded Landscaping zones adjacent to Building Foundations
4. Flat Precast Coping/Parapet Caps

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5. Missing Handrail at Exterior Stairway
6. Non-Compliant Weeps at Horizontal Terminations

#### Notice and Demand

Pursuant to C.R.S. § 13-20-801 *et seq.* including, but not limited to C.R.S. § 13-20-803.5, this letter constitutes a demand that DBS and/or any applicable subcontractors make mutually convenient arrangements with the undersigned to access the Property as described in C.R.S. § 13-20-803.5(2) and make a written offer to remedy or pay for the repair of all defects identified above.

DBS should forward a copy of this notice of claim to (1) all subcontractors whose work may be the subject of this notice and (2) any and all liability insurers who insured DBS during any portion of its work on the Property.

The statement of defective conditions above and attached report is not intended to be a complete statement of all defective conditions at the Property. No intrusive investigation has been performed and nothing in this letter is intended to waive any rights related to latent conditions currently unknown to the Lirtzmans.

By this correspondence, we also request that you inform all members, officers, and employees of DBS of their obligation to preserve all records, including without limitation, all correspondence, emails, text messages, documents, reports, project files, subcontractor files, and any other information related to the Property.

Sincerely,

Michael J. Gates  
Foster Graham Milstein & Calisher, LLP

CC: Client

4826-5302-0913, v. 1

# Pre-Suit Notice



JULY 1, 2021

## SUMMARY OF NON-COMPLIANT CONSTRUCTION REPORT

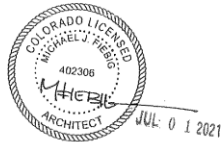
LIRTZMAN RESIDENCE  
9 VILLAGE ROAD  
ENGLEWOOD, CO 80113  
FIEBIG ARCHITECTURE PROJECT #210625

### PREPARED BY:

MICHAEL J. FIEBIG, RA, AIA, NCARB, LEED GA, CFPS, CEP  
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Fiebig Architecture, PLLC

Summary of Non-Compliant Construction Report

Lirtzman Residence

## Summary of Non-Compliant Construction:

### A. BUILDING SITE

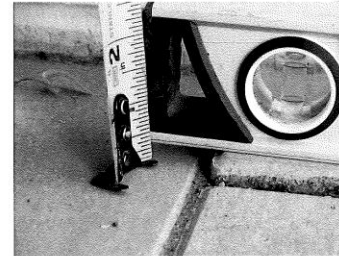
#### 1. SITE DRAINAGE

##### a. Non-Compliant Slope of Impervious Surfaces Adjacent to Building Foundation



June 25, 2021, Photo Disc 1, Photo 9; the IRC requires impervious surfaces within 10-feet of the building foundation to slope a minimum of 2-percent away from the building. This slope was consistently measured to be less than this required minimum.

##### b. Heaving & Cracking of Exterior Floor Tile



June 25, 2021, Photo Disc 1, Photo 11; the lack of drainage is causing the exterior tiles to heave and crack due to soil swelling.

Fiebig Architecture, PLLC

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# Response to Notice of Claim

## 1. Attorney Review of Notice of Claim

- Fairly limited
- Ensure statutory compliance, opportunity to inspection
- Identify appropriate expert(s)

## 2. Expert Review of Notice of Claim

- Determine nature/sufficiency of substantive allegations
  - Identify which allegations are within area of expertise
  - “Poor Grading” v. Qualitative Analysis
  - Specific location of alleged issues identified?
- Identify and review necessary client documents
  - Contracts, plans, specifications, applicable codes
- Determine need for site visit
- Formulation of potential remedy

# Response to Notice of Claim

## 3. Attorney Response

- Need to send additional notices of claim to subcontractors
- Defense/Indemnity/Additional Insured tenders

# Effective Expert Site Visit

## 1. Planning ahead

- Who, what, when, where – and how long.
- If multiple experts, coordinate who will be addressing what allegations
- Anticipated site conditions, confirm necessary access
- Equipment needs

## 2. Pre-Visit Research

- Understanding client's scope of work (“SOW”)
  - Is SOW defined in existing document?
  - Understanding what the client didn't do can be as, or more, important than what they did do.



# Effective Expert Site Visit

## 2. Pre-Visit Research (continued)

- Familiarity with applicable code provisions and jurisdictional requirements
- Understand history of documented defects/conditions
- Direct communications between expert and client

# Effective Expert Site Visit

## 3. While on Site

- Documenting site conditions
  - Photos, relative level survey, compaction testing, define extent of potential repair quantities (if any)
- Helpful to have client representative at site visit, if possible
- Identify allegations that may need additional investigation or destructive testing to fully evaluate both causation and repair options (if necessary).

# Effective Expert Site Visit

## 4. Post-Visit Considerations

- De-brief conversation involving both client and expert
  - Any questions raised during inspection can be answered
  - Potential client exposure/risk if proceeds to litigation
- Need for additional document review and/or investigations?
  - Maintenance records, repair proposals/invoices
  - Discuss pros and cons of additional investigations with expert
- Request expert report?

# Attention to Detail



# Attention to Detail



# Pre-Suit Settlement Opportunities

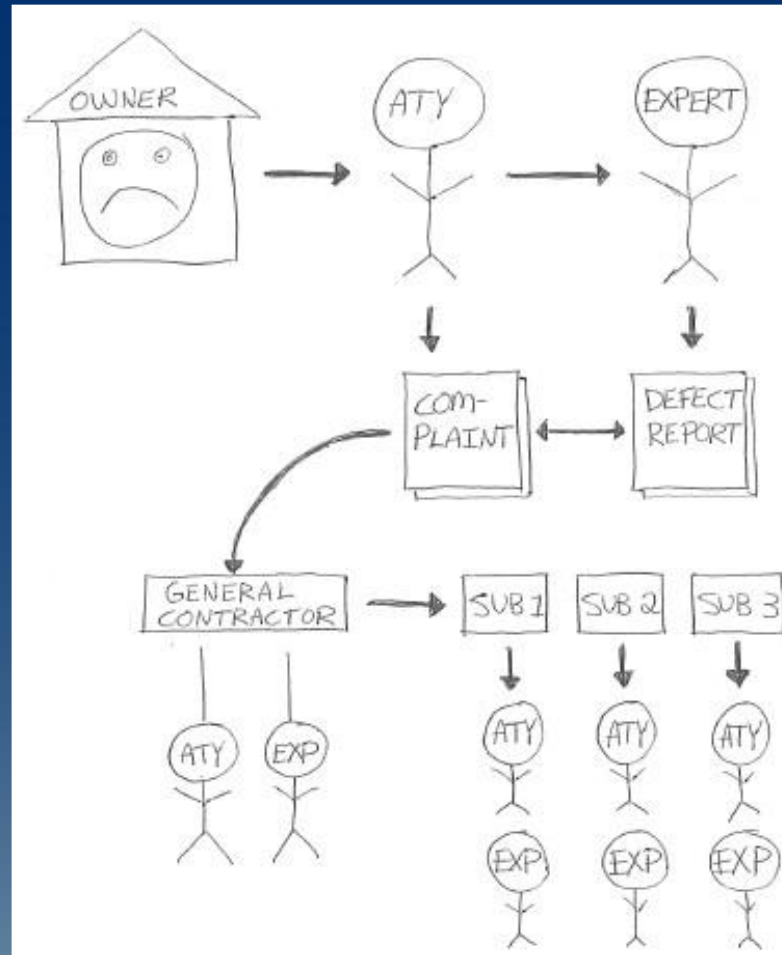
## 1. Educating the Attorney

- Expert equips attorney to adequately convey position
  - Identify and explain big picture themes, risks, and supporting details
- If report created, consideration of what level of detail to include
  - Confirm report is subject to C.R.E. 408 protection
- Confirm attorney is prepared to explain & defend position

## 2. “Plan B” Mediation

- Collaborative negotiation process involving experts
  - Often facilitated by traditional mediator
- Goal is to create space for experts to discuss and agree upon a remedy
- Protected by C.R.E. 408

# Effective Preparation for Litigation



# Effective Preparation for Litigation

## 1. Sneak Preview of Homeowners' Position

- Design and execute discovery strategy based on information provided in pre-suit report and information gained during site visits

## 2. Efficient Document Review

- Document intensive cases
- Develop understanding with expert on what materials need to be transmitted
  - If available, index of disclosure documents can be provided to expert first, which will assist with efficiently weeding out inapplicable documents
  - Abundance of caution – when in doubt, provide



# Questions

# Contact

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