DESIGN PROFESSIONAL LIABILITY

By

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INTRODUCTION

An architect is defined as one whose profession is to devise the plans and ornamentation of buildings or other structures and supervise their construction. An architect or engineer is also defined as one whose special business is to design buildings, adjust the thickness of their walls, design the supports necessary for the maintenance of them in their proper position, and do all other things necessary to guide builders in the erection of buildings. A design professional is "any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida." Moransais v. Heathman, 744 So.2d 973 (Fla. 1999). However, with these responsibilities comes potential liability.

As a result, the State of Florida has enacted various licensing statutes to regulate the design professional industry. The State of Florida requires design professionals to obtain and maintain licensure to carry out their respective trades. Licensure of engineers is governed by Chapter 471, Florida Statutes. Land Surveying and Mapping is governed by Chapter 472, Florida Statutes. Architecture, Interior Design and Landscape Architecture is governed by Chapter 481, Florida Statutes. Rules governing architects and interior designers can be found at Chapter 61G1, Florida Administrative Code, rules governing landscape architects can be found at Chapter 61G10, Florida Administrative Code, and the rules governing engineers are contained within Chapter 61G15, Florida Administrative Code.

DEFINITIONS

"*Architecture*" means the rendering or offering to render services in connection with the design and construction of a structure or group of structures which have as their principal purpose human habitation or use, and the utilization of space within and surrounding such structures. These services include planning, providing preliminary study designs, drawings and specifications, job-site inspection, and administration of construction contracts. §481.203(6), Fla. Stat.

"*Interior design*" means designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to non-structural interior elements of a building or structure. "Interior design" includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the fabrication of non-structural elements within and surrounding interior spaces of buildings. "Interior design" specifically excludes the design of or the responsibility for architectural and engineering work, except for specification of fixtures and

their location within interior spaces. As used in this subsection, "architectural and engineering interior construction relating to the building systems" includes, but is not limited to, construction of structural, mechanical, plumbing, heating, air-conditioning, ventilating, electrical, or vertical transportation systems, or construction which materially affects life-safety systems pertaining to fire-safety protection such as fire-rated separations between interior spaces, fire-rated vertical shafts in multi-story structures, fire-rated protection of structural elements, smoke evacuation and compartmentalization, emergency ingress or egress systems, and emergency alarm systems. §481.203(8) Fla. Stat.

"*Interior decorator services*" includes the selection or assistance in selection of surface materials, window treatments, wall-coverings, paint, floor coverings, surface-mounted lighting, surface-mounted fixtures, and loose furnishings not subject to regulation under applicable building codes. §481.203(15) Fla. Stat.

"*Landscape architecture*" means professional services, including consultation, investigation, research, planning, design, preparation of drawings, specifications, contract documents and reports, responsible construction supervision, or landscape management in connection with the planning and development of land and incidental water areas, including the use of Florida-friendly landscaping as defined in s. 373.185, where, and to the extent that, the dominant purpose of such services or creative works is the preservation, conservation, enhancement, or determination of proper land uses, natural land features, ground cover and plantings, or naturalistic and aesthetic values; determination of settings, grounds, and approaches for and the siting of buildings and structures, outdoor areas, or other improvements; setting of grades, shaping and contouring of land and water forms, determination of drainage, and provision for storm drainage and irrigation systems where such systems are necessary to the purposes outlined herein; and design of such tangible objects and features as are necessary to the purpose outlined herein. §481.303(6), Fla. Stat.

"*Landscape design*" means "consultation for and preparation of planting plans drawn for compensation, including specifications and installation details for plant materials, soil amendments, mulches, edging, gravel, and other similar materials. Such plans may include only recommendations for the conceptual placement of tangible objects for landscape design projects. Construction documents, details, and specifications for tangible objects and irrigation systems shall be designed or approved by licensed professionals as required by law." §481.303(7), Fla. Stat.

"*Engineering*" includes the term "professional engineering" and means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water, teaching of the principles and methods of engineering design, engineering surveys, and the inspection of construction for the purpose of determining in general if the work is proceeding in compliance with drawings and specifications, any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment

of a mechanical, electrical, hydraulic, pneumatic, or thermal nature, insofar as they involve safeguarding life, health, or property; and includes such other professional services as may be necessary to the planning, progress, and completion of any engineering services. §471.005(7), Fla. Stat.

"*Surveyor and mapper*" includes the term "professional surveyor and mapper" and means a person who is registered to engage in the practice of surveying and mapping under ss. 472.001-472.037. For the purposes of this statute, a surveyor and mapper means a person who determines and displays the facts of size, shape, topography, tidal datum planes, legal or geodetic location or relation, and orientation of improved or unimproved real property through direct measurement or from certifiable measurement through accepted photogrammetric procedures. Includes the term "surveyor-mapper-in-training" and means a person who complies with the requirements provided by ss. 472.001-472.037 and who has passed an examination as provided by rules adopted by the board. §472.005(3), Fla. Stat.

Despite these definitions identified above, there is still some overlap when a design professional provides services. Consider the following from Trikon Sunrise Assoc., LLC v. Brice Bldg. Co., Inc., 41 So.3d 315 (Fla. 4th DCA 2010):

> Chapter 481, Florida Statutes (2005), "Architecture and Interior Design," describes the services and responsibilities of an "Architect," which specifically include services of "planning, providing preliminary study designs, drawings and specifications, job-site inspection, and administration of construction contracts." § 481.203(6), Fla. Stat. (2005). Chapter 471, Florida Statutes (2005), "Engineering," describes the services of an "Engineer," including the engineer's responsibility for inspection of the construction and the services provided involved in safeguarding life, health, and property. § 471.005(7), Fla. Stat. (2005). It would seem under the statutes that the two disciplines (engineering and architecture) are clearly distinct as are their duties and responsibilities. However, section 471.003(3), Florida Statutes (2005), acknowledges there are times in a project where an engineer may be performing architectural services that are purely incidental to her or his engineering practice and times when an architect may be performing engineering services that are purely incidental to her or his architectural practice.

EXEMPTIONS TO CHAPTER 481 ARCHITECTURAL LICENSURE

In Florida, individual persons receive licenses from the state that authorize them to practice as a design professional. The individual design professional will then apply to qualify their respective businesses. Qualified business entities receive authorizations or certifications for their individual design professionals. The following are some statutory exemptions:

481.229 Exceptions; exemptions from licensure.—

(1) No person shall be required to qualify as an architect in order to make plans and specifications for, or supervise the erection, enlargement, or alteration of:

(a) Any building upon any farm for the use of any farmer, regardless of the cost of the building;
(b) Any one-family or two-family residence building, townhouse, or domestic outbuilding appurtenant to any one-family or two-family residence, regardless of cost; or
(c) Any other type of building costing less than $25,000, except a school, auditorium, or other building intended for public use, provided that the services of a registered architect shall not be required for minor school projects pursuant to s. 1013.45.

(2) Nothing contained in this part shall be construed to prevent any employee of an architect from acting in any capacity under the instruction, control, or supervision of the architect or to prevent any person from acting as a contractor in the execution of work designed by an architect.

(3) Notwithstanding the provisions of this part, a general contractor who is certified or registered pursuant to the provisions of chapter 489 is not required to be licensed as an architect when negotiating or performing services under a design-build contract as long as the architectural services offered or rendered in connection with the contract are offered and rendered by an architect licensed in accordance with this chapter.

(4) Notwithstanding the provisions of this part or of any other law, no registered engineer whose principal practice is civil or structural engineering, or employee or subordinate under the responsible supervision or control of the engineer, is precluded from performing architectural services which are purely incidental to his or her engineering practice, nor is any registered architect, or employee or subordinate under the responsible supervision or control of such architect, precluded from performing engineering services which are purely incidental to his or her architectural practice. However, no engineer shall practice architecture or use the designation "architect" or any term derived therefrom, and no architect shall practice engineering or use the designation "engineer" or any term derived therefrom.

(5)

(a) Nothing contained in this part shall prevent a registered architect or a partnership, limited liability company, or corporation holding a valid certificate of authorization to provide architectural services from performing any interior design service or from using the title "interior designer" or "registered interior designer."
(b) Notwithstanding any other provision of this part, all persons licensed as architects under this part shall be qualified for interior design licensure upon submission of a completed application for such license and a fee not to exceed $30. Such persons shall be exempt from the requirements of s. 481.209(2). For architects

licensed as interior designers, satisfaction of the requirements for renewal of licensure as an architect under s. 481.215 shall be deemed to satisfy the requirements for renewal of licensure as an interior designer under that section. Complaint processing, investigation, or other discipline-related legal costs related to persons licensed as interior designers under this paragraph shall be assessed against the architects' account of the Regulatory Trust Fund.

(c) Notwithstanding any other provision of this part, any corporation, partnership, or person operating under a fictitious name which holds a certificate of authorization to provide architectural services shall be qualified, without fee, for a certificate of authorization to provide interior design services upon submission of a completed application therefor. For corporations, partnerships, and persons operating under a fictitious name which hold a certificate of authorization to provide interior design services, satisfaction of the requirements for renewal of the certificate of authorization to provide architectural services under s. 481.219 shall be deemed to satisfy the requirements for renewal of the certificate of authorization to provide interior design services under that section.

(6) This part shall not apply to:

(a) A person who performs interior design services or interior decorator services for any residential application, provided that such person does not advertise as, or represent himself or herself as, an interior designer. For purposes of this paragraph, "residential applications" includes all types of residences, including, but not limited to, residence buildings, single-family homes, multifamily homes, townhouses, apartments, condominiums, and domestic outbuildings appurtenant to one-family or two-family residences. However, "residential applications" does not include common areas associated with instances of multiple-unit dwelling applications.

(b) An employee of a retail establishment providing "interior decorator services" on the premises of the retail establishment or in the furtherance of a retail sale or prospective retail sale, provided that such employee does not advertise as, or represent himself or herself as, an interior designer.

(7) Nothing in this part shall be construed as authorizing or permitting an interior designer to engage in the business of, or to act as, a contractor within the meaning of chapter 489, unless registered or certified as a contractor pursuant to chapter 489.

(8) A manufacturer of commercial food service equipment or the manufacturer's representative, distributor, or dealer or an employee thereof, who prepares designs, specifications, or layouts for the sale or installation of such equipment is exempt from licensure as an architect or interior designer, if:

(a) The designs, specifications, or layouts are not used for construction or installation that may affect structural, mechanical, plumbing, heating, air conditioning, ventilating, electrical, or vertical transportation systems.

(b) The designs, specifications, or layouts do not materially affect life-safety systems pertaining to fire-safety protection, smoke evacuation and compartmentalization, and emergency ingress or egress systems.

(c) Each design, specification, or layout document prepared by a person or entity exempt under this subsection contains a statement on each page of the document that the designs, specifications, or layouts are not architectural, interior design, or engineering designs, specifications, or layouts and not used for construction unless reviewed and approved by a licensed architect or engineer.

EXEMPTION TO CHAPTER 471 ENGINEERING LICENSURE

471.003 Qualifications for practice; exemptions.—

(2) The following persons are not required to be licensed under the provisions of this chapter as a licensed engineer:

(a) Any person practicing engineering for the improvement of, or otherwise affecting, property legally owned by her or him, unless such practice involves a public utility or the public health, safety, or welfare or the safety or health of employees. This paragraph shall not be construed as authorizing the practice of engineering through an agent or employee who is not duly licensed under the provisions of this chapter.

(b)

1. A person acting as a public officer employed by any state, county, municipal, or other governmental unit of this state when working on any project the total estimated cost of which is $10,000 or less.
2. Persons who are employees of any state, county, municipal, or other governmental unit of this state and who are the subordinates of a person in responsible charge licensed under this chapter, to the extent that the supervision meets standards adopted by rule of the board.

(c) Regular full-time employees of a corporation not engaged in the practice of engineering as such, whose practice of engineering for such corporation is limited to the design or fabrication of manufactured products and servicing of such products.

(d) Regular full-time employees of a public utility or other entity subject to regulation by the Florida Public Service Commission, Federal Energy Regulatory Commission, or Federal Communications Commission.

(e) Employees of a firm, corporation, or partnership who are the subordinates of a person in responsible charge, licensed under this chapter.

(f) Any person as contractor in the execution of work designed by a professional engineer or in the supervision of the construction of work as a foreman or superintendent.

(g) A licensed surveyor and mapper who takes, or contracts for, professional engineering services incidental to her or his practice of surveying and mapping and who delegates such engineering services to a licensed professional engineer qualified within her or his firm or contracts for such professional engineering services to be performed by others who are licensed professional engineers under the provisions of this chapter.

(h) Any electrical, plumbing, air-conditioning, or mechanical contractor whose practice includes the design and fabrication of electrical, plumbing, air-conditioning, or mechanical systems, respectively, which she or he installs by virtue of a license issued under chapter 489, under part I of chapter 553, or under any special act or ordinance when working on any construction project which:

1. Requires an electrical or plumbing or air-conditioning and refrigeration system with a value of $125,000 or less; and

2.

a. Requires an aggregate service capacity of 600 amperes (240 volts) or less on a residential electrical system or 800 amperes (240 volts) or less on a commercial or industrial electrical system;
b. Requires a plumbing system with fewer than 250 fixture units; or
c. Requires a heating, ventilation, and air-conditioning system not to exceed
a 15-ton-per-system capacity, or if the project is designed to accommodate 100 or fewer persons.

(i) Any general contractor, certified or registered pursuant to the provisions of chapter 489, when negotiating or performing services under a design-build contract as long as the engineering services offered or rendered in connection with the contract are offered and rendered by an engineer licensed in accordance with this chapter.

(j) Any defense, space, or aerospace company, whether a sole proprietorship, firm, limited liability company, partnership, joint venture, joint stock association, corporation, or other business entity, subsidiary, or affiliate, or any employee, contract worker, subcontractor, or independent contractor of the defense, space, or aerospace company who provides engineering for aircraft, space launch vehicles, launch services, satellites, satellite services, or other defense, space, or aerospace-related product or services, or components thereof.

PROFESSIONAL DESIGN LIABILITY ISSUES

This section provides a general view of the various theories of liability, defenses and issues respective to design professionals in Florida. Practitioners should seek additional guidance, because the topic discussions are broad in scope and are the subject of separate, more detailed treatises. *See generally*, 8 FLORIDA CONSTRUCTION LAW MANUAL § 15.02 (Thomson/West 2010-2011 Ed.) (Larry Lieby); FLORIDA CONSTRUCTION LAW &

PRACTICE, Chapter 3, *Rights and Liabilities of Architects and Engineers* (Hammer, Prats & Wright)(2013). These materials do not constitute legal advice.

A. Design Professional Liability Founded in Negligence

Under Florida law, four elements are necessary to sustain any negligence claim:

1. A duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the defendant's part to conform to the standard required: a breach of the duty.
3. A reasonably close causal connection between the conduct and the resulting injury, legal cause or proximate cause.
4. Actual loss or damage.

Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003).

In addition to Florida case law, guidance on the requisite elements and proof requirement of Professional Negligence claims in Florida are found in the Florida Standard Jury Instructions (Civil). Instruction 402.5 provides:

> **Negligence is the failure to use reasonable care. Reasonable care on the part of a** (identify professional) **is the care that a reasonably careful** (identify professional) **would use under like circumstances. Negligence is doing something that a reasonably careful** (identify professional) **would not do under like circumstances or failing to do something that a reasonably careful** (identify professional) **would do under like circumstances**.

Fla. Std. Jury Instr. (Civ.) 402.5 (2013).

The standard of care applicable to an architect or engineer is compliance with standards of good practice recognized at the same time and in the same locality. Courts have held that an architect or engineer, as a member of a highly specialized profession on whom laypersons rely, is required to meet a professional standard created by like professionals in the community. Work that is below such professional standard in the community may be noncompliant with the contractual agreement between the layperson and the employed architect or engineer. The result may relieve the person employing the architect from financial responsibility for the substandard work.

There may also exist a duty between an architect and a contractor if the appropriate allegations can be plead and proven. *See* Hewett-Kier Constr., Inc. v. Lemuel Ramos & Assocs., 775 So.2d 373 (Fla. 4th DCA 2000)(holding a "special relationship" existed between a general contractor and architect even though they were not in privity of contract because general contractor agreed to construct a project in accordance with design documents specifically prepared by architect); Southland Constr., Inc. v. Richeson Corp., 642 So.2d 5 (Fla. 5th DCA 1994) (holding engineer owed contractor, with which he was not in privity of

contract, a duty because contractor used engineer's plans on project and was therefore within the "circle of foreseeability of injury"); A.R. Moyer, Inc. v. Graham, 285 So.2d 397 (Fla. 1973)(holding general contractor relying on design specifications could sue architect or engineer who prepared plans, despite the absence of privity, where the architects were obligated to supervise and had the "power of economic life or death" over the general contractor).

In some occasions, an architect has contractually agreed to a duty to supervise a construction project. This is known as a "*supervising architect.*" When architects contract for supervision of construction in addition to the preparation of plans, their charges for supervision are generally different than for preparation of the plans. If the architect fails to supervise or performs their supervisory duties in a negligent fashion they can incur liability for the failure. These types of supervisory services generally exceed the basic preparation of the construction plans and specification. Depending on the supervisory services agreed to, such services can encompass the following:

(1) Making sure the contractor complies with the plans and specifications;
(2) Ensuring that the material placed in the building is of the type and quality called for by the plans and specifications;
(3) Where substituted materials are permitted under the contract, ensuring such materials will fit into the plans and specifications under which the contract is being performed; and,
(4) To whatever other special duties are expressly listed in any agreement between the owner and the architect.

Language in the architect's contract which imposed a duty on the architect to make periodic visits to the site and generally familiarize himself with the progress and quality of the work would likely be sufficient to make the architect responsible for construction defects where the architect ignored that duty. Public Health Trust of Dade County, Fla. v. George Hyman Const. Co., 606 So.2d 728 (Fla. 3d DCA 1992).

B. Design Professional Liability Founded in Contract

There are a number of different types of services a design professional can offer. An example of these services is set forth in the B101-2007. These services are Schematic Design, Design Development, Construction Documents, Bidding Phase, and Construction Phase. Schematic Design is where the Architect prepares a preliminary evaluation of the schedule, budget, cost of the work, project site and project delivery method and any other initial information for the project. In the Design Development phase, the Architect will further refine the schematic concepts and add information regarding structural, mechanical and electrical systems of the Project. The Design Development phase is when the Architect will provide plans, elevations and construction details, but these plans are typically not sufficient for construction and are used for obtaining the negotiated price from a contractor. Once the owner of the project approves the design development documents, the Architect will begin work on the Construction Documents phase of services. This is when the Architect will prepare the construction drawings and specifications setting forth the detail and quality levels of materials and systems required for the work. Then the owner and Architect can generate a list of

prospective Contractors and commence the Bidding Phase.

When the Contractor is selected, the Architect will likely have a certain level of contract administration and the parties will enter into the Construction Phase of the project. During this phase, the Architect can advise and consult with the owner and may even have authority to act on behalf of the owner in making certain decisions. Agency theories such as apparent authority and express authority would come into play in this phase of construction. The Architect will not have any control of the means and methods of the project; however, as that is left to the Contractor. The Construction Phase will usually require the Architect to make certain trips to the project to ensure that the work is progressing in accordance with the plans and specifications. The frequency of these visits is a matter for the parties to agree upon. The Construction Phase is also where the Architect will review and approve submittals and review payment requests from the Contractor.

A design professional's contract will typically contain an express obligation for them to design the project in accordance with the local and/or applicable code, as well as, language regarding the standard of care. Consider the following contractual provisions:

> **§2.2 AIA Document B101-2007**: The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.
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> ****
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> **§3.1.5 of AIA Document B101-2007** and **§2.1.5 of AIA Document B201-2007**: The Architect shall, at appropriate times, contact the governmental authorities required to approve the Construction Documents and the entities providing utility services to the Project. In designing the Project, the Architect shall respond to *applicable design requirements imposed by such governmental authorities* and by such entities providing utility services. (emphasis added)

These contractual provisions are an express obligation for the Architect to design the project in accordance with the applicable building codes. Failure to design in accordance with the applicable codes could also constitute a breach of contract, as well as, a departure from the design professional standard of care. Aside from the contractual requirements, the standard of care has also been codified. Another standard of architect's care is prescribed by statute. Section 481.221(7), Florida Statues, states:

> Final construction documents or instruments of service which include plans, drawings, specifications, or other architectural documents prepared by a registered architect as part of her or his architectural practice shall be of a sufficiently high standard to clearly and accurately indicate or illustrate all essential parts of the work to which they refer.

When it is demonstrated that a design professional ignored his contractual duty to make periodic visits to the site, liability could possibly arise regardless of exonerating contractual language. Shepard v. Palatka, 414 So.2d 1077 (Fla. 5th DCA 1981). In Shepard, the architect's contract used language typically found in AIA standard agreements:

> The Architect shall make periodic visits to the site to familiarize himself generally with the progress and quality of the work and to determine in general if the Work is proceeding in accordance with the Contract Documents. On the basis of his on-site observations as an architect he shall endeavor to guard the Owner against defects and deficiencies in the work of the Contractor. The Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he shall not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.
>
> The Architect shall not be responsible for the acts or omissions of the Contractor, or any Subcontractors, or any of the Contractor's or the Subcontractors' agents or employees, or any other persons performing any of the Work.

The *Shepard* court noted the contract clearly protected the architect because it imposed no duty upon him to discover the omission of the contractor and clearly absolved him of liability if there were such omissions. However, the *Shepard* court still reversed a summary judgment against the architect, based on the possibility that either the architect, the contractor, or both were negligent. The *Shepard* court reasoned that if it is ultimately determined that the contractor did follow the plans and specifications, the conclusion is inescapable that the architect was negligent in their preparation and would be liable to the city. Conversely, if it is determined that the contractor did not follow the plans and specifications, then the contractor would be liable to the city but the architect would not. The jury could also find each liable to some extent under a comparative negligence theory.

Generally, an architect or engineer is not charged with a duty to supervise construction. Design professionals sometimes undertake supervision of construction, in addition to the preparation of plans, typically as an additional service. When design professionals have an obligation to supervise, they can be held liable for personal injuries resulting from negligent supervision. Geer v. Bennett, 237 So.2d 311 (Fla. 4th DCA 1970)(holding an architect was potentially liable for negligent supervision alleged to have resulted in a worker's fall).

C. Moransais v. Heathman

For a detailed discussion on Moransais, *see* Steve Lesser, Esquire's article, "*Chipping Away at the Economic Loss Rule, The Supreme Court Decides Monasais v. Heathman*." Florida Bar Journal (Page 22, October 1999). In 1999, the Florida Supreme Court decided Moransais v.

Heathman, 744 So.2d 973 (Fla. 1999), a landmark case that removed the Economic Loss Rule defense to claims against design professionals. In Moransais, the Florida Supreme Court was presented with a certified question and rephrased it into two separate certified questions:

> (1) WHERE A PURCHASER OF A HOME CONTRACTS WITH AN ENGINEERING CORPORATION, DOES THE PURCHASER HAVE A CAUSE OF ACTION FOR PROFESSIONAL MALPRACTICE AGAINST AN EMPLOYEE OF THE ENGINEERING CORPORATION WHO PERFORMED THE ENGINEERING SERVICES?
>
> (2) DOES THE ECONOMIC LOSS RULE BAR A CLAIM FOR PROFESSIONAL MALPRACTICE AGAINST THE INDIVIDUAL ENGINEER WHO PERFORMED THE INSPECTION OF THE RESIDENCE WHERE NO PERSONAL INJURY OR PROPERTY DAMAGE RESULTED?

The first question was answered in the affirmative and the second question in the negative. Moransais involved an action by a home purchaser against an engineering company and two of its engineer employees who rendered professional services to the buyer. The buyer entered into a written contract with the engineering corporation to perform an inspection of the house prior to the sale. The engineer employees performed the inspection. After closing, the buyer/plaintiff discovered construction defects that rendered the home uninhabitable. The buyer filed an action against the professional engineers for professional negligence. The trial court, applying the Economic Loss Rule, dismissed the tort actions against the individual engineers.

The Second District Court of Appeal affirmed the dismissal, but certified the issue to the Florida Supreme Court as involving a matter of great public importance. The Florida Supreme Court rephrased the certified question and held that the buyer did in fact have a direct claim for professional negligence against the individual engineers and that the Economic Loss Rule does not bar a claim for professional negligence. Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party. The elements of such negligence action are discussed above. The Court further reasoned that a specific statute of limitations applied to and defined a professional. A profession, within the meaning of section 95.11, is "any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida." *See* Garden v. Frier, 602 So.2d 1273 (Fla. 1992).

Shortly after its opinion, the Second District Court of Appeals decided Stone's Throw Condominium Association, Inc. v. Sand Cove Apartments, Inc., 749 So.2d 520 (Fla. 2d DCA 1999), where a condominium association filed claims against architects for building code violations and for a negligent misrepresentation that the state minimum building codes had been met during construction. The problem there was that the applicable building code had not been met. The Stone's Throw court referred back to Moransais in reversing the dismissal of the negligent misrepresentation claim against the architects. The court remanded the case for a determination as to whether a special relationship between the condominium association and the architect existed that would support a claim based on negligence.

D. Design Professional Liability for Personal Injuries

An architect may be liable for negligence as a result of failing to exercise the ordinary skill of his profession, resulting in the construction and erection of an unsafe structure whereby anyone lawfully on the premises is injured. Possible liability for negligence resulting in personal injuries may be based upon their supervisory activities or upon defects in the plans or both. Privity of contract is not a prerequisite to liability. The design professional is under a duty to exercise such reasonable care, technical skill and ability, and diligence which are ordinarily required of the design professional in the preparation of plans, conducting inspections and supervision construction for the protection of any person who foreseeably and with reasonable certainty might be injured by their failure. Parliament Towers Condominium v. Parliament House Realty, Inc., 377 So.2d 976 (Fla. 4th DCA 1979)(privity of contract between an architect who designs and supervises construction of a condominium project and a subsequent purchaser of a condominium unit is not an essential element in order for the purchaser to recover damages in a negligence action against the architect). Navajo Circle, Inc. v. Development Concepts Corp., 373 So.2d 689 (Fla. 2d DCA 1979)(action by purchasers of condominium units against architect for negligent supervision of construction and subsequent repairs to roof of building). *See also*, Tieder v. Little, 502 So.2d 923 (Fla. 3d DCA 1987)(designing architect sued when wall he designed for University of Miami collapsed due to automobile accident killing a student).

E. Fraud and Negligent Misrepresentation

In Florida, in order to state a cause of action for fraudulent inducement, a party must allege and prove facts that would establish:

1) A false statement concerning a material fact;
2) Knowledge by the person making the statement that the representation is false;
3) Intent by the person making the statement that the representation induced another to act on it; and,
4) Reliance on the representation to the injury of the other party.

See W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc., 728 So.2d 297, 304 (Fla. 1st DCA 1999). If a professional makes a representation to another person based on their professional opinion, that person must prove not only that there was intent to deceive but that reliance on the opinion was reasonable. Additionally, a claim for fraud in the inducement cannot be brought if the person did not reasonably rely on the design professional's representations. H&S Corp v. United States Fidelity & Guaranty Co., 667 So.2d 393 (Fla. 1st DCA 1995) and Martin K. Eby Construction Co. v. Jacksonville Transportation Authority, 436 F. Supp.2d 1276 (M.D. Fla. 2005).

In HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238 (Fla. 1997), the Florida Supreme Court held that certain torts, such as fraudulent inducement, are independent of the contractual breach and are not barred by the Economic Loss Rule. Thus, a party may have a claim for breach of contract and a claim for fraudulently inducing the other into entry of that contract.

Florida courts have also held that the design professional could be sued for negligence as a result of errors in an inspection report. The typical situation occurs with inspection reports relating to the sale of condominium units under the "Condominium Act" found in Chapter 718. The inspection reports may be provided to potential buyers as part of a condominium prospectus and contain various representations regarding the condition and structural soundness of a building or buildings. Florida has adopted the Restatement (Second) of Torts § 552 which provides for a cause of action against one who, in the course of his business, profession or employment, supplies false information for the guidance of others in their business transaction. Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So.2d 334 (Fla. 1997). To raise a claim for negligent misrepresentation, the design professional must have failed to exercise reasonable care or competence in obtaining or communicating the information.

Other Notable Liability Cases

-Law imposed a duty upon design professionals to perform their services in accordance with the standard of care used by similar professionals in the community under similar circumstances. Lochrane Engineering, Inc. v. Willingham Real Growth Inv. Fund. Ltd., 552 So.2d 228 (Fla. 5th DCA 1989).

-Project architect may be found liable for death of workman who fell when scaffolding broke. Conklin v. Cohen, 287 So.2d 56, 61 (Fla. 1973).

-Finding architect potentially liable for negligent supervision resulting in worker's fall due to lack of guard rail. Geer v. Bennett, 237 So.2d 311 (Fla. 4th DCA 1970).

-When architect or engineer fails to provide services which meet required standards, an aggrieved party may proceed against it for either or both of breach of the professional's contract with them or for negligence. Audlane Lumber & Builders Supp. v. D.E. Britt, 168 So.2d 333 (Fla. 2d DCA 1964).

-Reversed judgment granting architects' motion to dismiss plaintiff condominium association and owner's negligence action, holding privity was not an essential element in a negligence action. Navajo Circle, Inc. v. Development Concepts Corp., 373 So.2d 689 (Fla. 2d DCA 1979).

-Reversing summary judgment for engineer on owner's negligence and breach of contract claims against engineer for alleged negligence in supervising contractor's sinkhole remediation work on the property and in initial investigation and preparation of subsidence investigation report. Alderman v. BCI Eng'rs & Scientists, Inc., 68 So.3d 396, (Fla. 2d DCA 2011).

-Reversing directed verdict for architects on the issue of whether the architects were negligent in making the plans, specifications, and drawings, but affirming directed verdict on alleged negligent direction and supervision of the buildings' construction and also alleged breach of warranty. Bayshore Development Co. v. Bonfoey, 78 So. 507 (Fla. 1918).

DESIGN LIABILITY FOR VIOLATION OF FLORIDA BUILDING CODE

A direct cause of action for violation of building codes (§553.84, Fla. Stat.) can be asserted against design professionals. Edward J. Seibert, A.I.A., Architect and Planner, P.A. v. Bayport Beach and Tennis Club Ass'n, Inc., 573 So.2d 889 (Fla. 2d DCA 1990). Section 553.84, Florida Statues, states:

> **Statutory civil action**.—Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, *damaged as a result of a violation of this part or the Florida Building Code*, has a cause of action in any court of competent jurisdiction *against the person or party who committed the violation*; however, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed.

In Seibert v. Bayport, a condominium association brought claims against an architect for negligence and building code violations. The jury returned a verdict finding that the architect was not negligent and had not committed building code violations with respect to the roof, stucco, or ceiling slabs, but did find the architect liable for defective fire exit design. At trial, there was conflicting expert evidence on whether the fire exit design complied with code. The Seibert court held that the trial court erred in submitting this issue to the jury, because it was the duty of the trial court to interpret the meaning of the code and instruct the jury concerning that meaning.

The Seibert court concluded that the architect did not violate the Building Code based on review of the code. As a result, the architect was not liable under either the negligence or statutory violation claims advanced by the association. This case marks the implicit recognition of the existence of a cause of action against a design professional founded solely upon a violation of Florida Statute § 553.84. *See also* Robsol, Inc. v. Garris, 358 So.2d 865 (Fla. 3d DCA 1978) (error to grant architect's motion for summary judgment when record evidence demonstrated that there were genuine issues of material fact as to whether architect violated his duty of care to his clients in submitting high rise condominium project architectural plans which violated the City of Surfside local ordinance bulkhead line).

Fundamental duties, such as the duty to draw plans and specifications that comply with the applicable building codes, generally cannot be avoided or delegated to others. Atlantic Nat'l Bank v. Modular Age, Inc., 363 So.2d 1152 (Fla. 1st DCA 1978). As discussed in the section below, the Florida Statutes has even built in an accountability measure for design professional who are found committing violations of the building code. Arranging site plans and drawing buildings so that they conform to local ordinances and building codes are considered architecture services. Maritime Constr. Co. v. Benda, 262 So.2d 20 (Fla. 1st DCA 1972).

Design professionals have a duty to design improvements in accordance with applicable building codes. Failure to do so could result in liability to the design professional for the resulting damages. When the design professional has made an interpretation of the building code in the plans which interpretation is accepted by the local building department resulting in the issuance of a permit, then that interpretation of the code and approval by the local building department should not be subject to later court challenge. The approval of the local jurisdiction carries with it a lot of weight when analyzing whether a design profession has committed a violation of the Building Code.

DESIGN PROFESSIONAL ACCOUNTABILITY
Section 553.781, Florida Statute

Section 553.781, Florida Statutes, provides a measure to require the design professional to comply with the Building Code. The Legislature found that accountability for work performed by **design professionals** and contractors is the key to strong and consistent compliance with the Florida Building Code and, therefore, protection of the public health, safety, and welfare was required. The legislature enacted 553.781 to provide such accountability.

Upon a determination by a local jurisdiction that a licensee, certificate-holder, or registrant licensed under chapter 455, chapter 471, chapter 481, or chapter 489 has committed a material violation of the Florida Building Code and failed to correct the violation within a reasonable time, such local jurisdiction shall impose a fine of no less than $500 and no more than $5,000 per material violation.

If the licensee, certificate-holder, or registrant disputes the violation within 30 days following notification by the local jurisdiction, the fine is abated and the local jurisdiction shall report the dispute to the Department of Business and Professional Regulation or the appropriate professional licensing board for disciplinary investigation and final disposition. If an administrative complaint is filed by the department or the professional licensing board against the certificate-holder or registrant, the Florida Building Commission may intervene in such proceeding. Any fine imposed by the department or the professional licensing board, pursuant to matters reported by the local jurisdiction to the department or the professional licensing board, shall be divided equally between the board and the local jurisdiction which reported the violation.

The Department of Business and Professional Regulation, as an integral part of the automated information system provided under s. 455.2286, Florida Statutes, shall establish, and local jurisdictions and state licensing boards shall participate in, a system of reporting violations and disciplinary actions taken against all licensees, certificate-holders, and registrants under this section that have been disciplined for a violation of the Florida Building Code. Such information shall be available electronically. Any fines collected by a local jurisdiction pursuant to subsection (2) shall be used initially to help set up the parts of the reporting system for which such local jurisdiction is responsible. Any remaining moneys shall be used solely for enforcing the Florida Building Code, licensing activities relating to the Florida Building Code, or education and training on the Florida Building Code.

In addition, local jurisdictions shall maintain records, readily accessible by the public, regarding material violations and shall report such violations to the Department of Business and Professional Regulation by means of the reporting system provided in s. 455.2286, Florida Statutes. For purposes of this statute, a "material code violation" is defined as a violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems. Furthermore, when the fine is abated as provided in subsection (2) of the Statute, the failure to pay the fine within 30 days shall result in a suspension of the licensee's, certificate-holder's, or registrant's ability to obtain permits within this state until such time as the fine is paid. Such suspension shall be reflected on the automated information system under s. 455.2286, Florida Statutes.

NEW LIMITATION OF LIABILITY FOR DESIGN PROFESSIONALS
Section 558.0035, Florida Statute

Starting July 1, 2013, a new Florida Statute allows businesses to limit, by contract, their employee's liability for professional negligence claims. *See* Senate Bill 286 and Florida Statute Section 558.0035. The new statute applies to business entities architects, interior designers, landscape architects, engineers, surveyors, and geologists. The business entities that will be able to utilize the provisions of the statute include corporations, limited liability companies, partnerships, limited partnerships, proprietorships, firms, enterprises, franchises, associations, trusts, and self-employed individuals (whether fictitiously named or not) doing business in the State of Florida.

Under current Florida law, employees of companies may be liable for professional negligence, even though the contract for professional services was between the employer and the claimant. Moransais v. Heathman, 744 So.2d 973 (Fla. 1999). In Moransais, the Florida Supreme Court held that the economic loss rule did not bar the claim against the individual design professional employee, even though there was a contract between the claimant and the employer for the services that were the subject of the lawsuit.

In addition, there is Florida case law holding that a contractual limitation of liability clause will not shield an individual design professional from a professional negligence claim. Witt v. La Gorce Country Club, Inc., 35 So.3d 1033 (Fla. 3rd DCA 2010). Section 558.0035 of the Florida Statutes could significantly limit the types of claims at issue in Moransais and Witt, provided certain conditions apply.

In order for Section 558.0035 of the Florida Statutes to limit liability for professional negligence claims, the following conditions must be met:

1. the contract is made between the business entity and a claimant or other entity to provide professional services to the claimant;
2. the contract does not name as a party the individual employee or agent who will perform the professional services;
3. the contract includes a prominent statement, in uppercase font that is at least 5 point sizes larger than the rest of the text, that, pursuant to this section, an

individual employee or agent may not be individually liable for negligence;

4. the business entity maintains any professional liability insurance required under the contract; and
5. any damages are solely economic in nature and the damages do not extend to personal injuries or property not subject to the contract.

If conditions 1-5 listed above are not met, a claimant may still have a professional negligence claim against the design professional employee, despite having a contract with his/her employer and not the employee. Additionally, Section 558.0035 will not limit professional negligence claims by parties who have no contract with the design professional employee or his/her employer.

DEFENSES TO DESIGN LIABILITY

A. Slavin Doctrine - While a design professional can be liable for defective design resulting in bodily injury, this liability may be limited once a structure is complete and turned over to the owner. Whether liability is limited depends on whether the design error is patent (open and obvious) or latent (hidden and concealed). Florida law has long held that a building contractor is not liable to third parties for bodily injuries that occur after the contractor has completed the building, and it has been accepted by the owner, if the defect is found to be "patent." Slavin v. Kay, 108 So.2d 462 (Fla. 1958). In Slavin, the Court held a contractor cannot be held liable for creating a hazardous condition where the owner (who accepted the contractor's work) had the opportunity to inspect, detect and correct the hazardous condition but negligently failed to so do. *See also* Easterday v. Masiello, 518 So.2d 260 (Fla. 1988)(architect not liable for patent defect after owner's acceptance of the work) and Transportation Engineering, Inc. v. Cruz, 2014 WL5782251 (Fla 5th DCA) (designer was relieved of any liability for negligent design of guardrail after Department of Transportation accepted guardrail construction project).

B. Betterment - "Betterment" is a defense to damages and not necessarily liability. Betterment will prevent an owner from recovering damages that result in an improvement to the property and not merely remediation. This is premised on the cost of the work from the original design as juxtaposed to the repairs effectuated.

C. Statute of Limitations Section 95.11(4)(a) creates a two-year limitations period for suits brought for professional malpractice where the parties are in privity:

> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

For parties not in privity, negligence claims "founded on the design, planning, or construction of an improvement to real property" must be brought within 4 years, with a 10 year statute of repose, Fla. Stat. 95.11(3)(c). Baskerville-Donovan Engineers, Inc. v. Pensacola

Executive House Condo. Ass'n, 581 So.2d 1301 (Fla. 1991). The statute of limitations is a factual determination that should be made on a case-by case basis. An example of a statute of limitations jury instruction is below:

Sample Jury Instruction for Statute of Limitations

As a defense for (name of party)**, the issue for your consideration is whether** (name of party)**'s claim is barred by a statute of limitations. To find that** (name of party)**'s claim is barred by a statute of limitations, you should consider whether** (name of party)**'s causes of action and items of damage did not accrue within the time prescribed by** (identify statute of limitations) **before this action was brought. In this case the particular statute of limitations reads:**

[(read statute of limitations applicable to case)**].**

If the greater weight of the evidence supports the defense of (name of party) **on this issue, then** (name of party)**'s claim is time barred and your verdict should be for** (name of party)**. If, however, the greater weight of the evidence does not support the defense of** (name of party) **on this issue [you shall consider the following additional defenses] [your verdict should be for** (claimant) **in the full amount of [his] [her] [its] damages].**

Authorities: F.S. 95.11; Fla.R.Civ.P. Form 1.965; F.S. 713.22; Major League Baseball v. Morsani, 790 So.2d 1071 (Fla. 2001); Federal Insurance Co. v. Southwest Florida Retirement Center, Inc., 707 So.2d 1119 (Fla. 1998); Pierson D. Construction, Inc. v. Yudell, 863 So.2d 413 (Fla. 4th DCA 2003); Alexander v. Suncoast Builders, Inc., 837 So.2d 1056 (Fla. 3d DCA 2002); Otis Elevator Co. v. Theodore, 677 So.2d 966 (Fla. 3d DCA 1996); Elizabeth N. v. Riverside Group, Inc., 585 So.2d 376 (Fla. 1st DCA 1991); Dubin v. Dow Corning Corp., 478 So.2d 71 (Fla. 2d DCA 1985); Engle v. Acopian, 432 So.2d 113 (Fla. 5th CA 1983).

CONDOMINIUM CONSTRUCTION DEFECT CERTIFICATION
Section 718.301(7), Florida Statute

Condominium living is a way of life in Florida and condominium associations are creatures of the Chapter 718, Florida Statutes. "The peculiar features of condominium development, ownership, and operation require the providing of procedural vehicles for handling disputes affecting condominium unit owners concerning matters of common interest". Avila South Condo Ass'n, v. Kappa Corp. 347 So.2d 599 (Fla. 1977). Such vehicles are provided in the statutes and rules of procedure, but one curious statutory provision requires the association to examine and certify the construction defect via licensed engineer and/or contractor.

Specifically, Section 718.301(7), Florida Statutes states:

> In any claim against a developer by an association alleging a defect in design, structural elements, construction, or any mechanical, electrical, fire protection, plumbing, or other element that requires a licensed professional for design or installation under chapter 455, chapter 471, chapter 481, chapter 489, or chapter 633, such defect must be examined and certified by an appropriately licensed Florida engineer, design professional, contractor, or otherwise licensed Florida individual or entity. (emphasis added)

First, this statutory provision seems to only apply to an action against the developer. Therefore, this construction defect examination and certification does not apply to claims for negligence or violation of the building code against the contractor or subcontractors (assuming no common identity exists with the developer and contractor). In its class action complaint for the construction defects, the condominium association would generally plead compliance with all conditions precedent to satisfy this requirement. If plead in the construction defect complaint, the association should make sure the statutory examination and certification has actually occurred. The burden would then shift to the developer to deny with specificity and particularity any conditions precedent that have not been fulfilled by the condominium association.

Unfortunately there is zero guidance in the statute on how this condominium construction defect examination and certification works. The statute does not say that the report must be obtained prior to filing the condominium construction defect action, nor does it create a condition precedent to filing the lawsuit. There is no guidance in Section 718.301(7) as to any penalty for initiating the condominium construction defect action without obtaining the examination and certification. Additionally, there is no private right, cause of action or defense which are expressly created with this statutory provision.

Section 718.301(7) may be a statutory provision where some legislative revisions could provide some direction, but the lack of Florida case law interpreting this provision may suggest that it is rarely an issue for the parties in condominium construction defect actions. Seemingly because when the condominium association serves its Chapter 558, Florida Statutes, Notice of Construction Defects, the condominium association will have likely already had the examination and certification performed to identify with reasonable certainty the exact nature of the construction defects. If the condominium association has not performed such examination and certification, could it then use the report of the developer when it conducts its inspection during the Chapter 558 inspection period? Hopefully the condominium association is not relying on the developer to certify his own construction defects, but the complete lack of procedure and silence in the statute leaves this open to interpretation. Nevertheless, the condominium association considering pursuing class action construction defect litigation should have its examination and certification of the construction defects well in advance of initiating the construction defect lawsuit.

CONSTRUCTION LIENS FOR DESIGN PROFESSIONALS
Section 713.03, Florida Statute

Any person who performs services as an architect, landscape architect, interior

designer, engineer, or surveyor and mapper has a lien on the real property of an owner. §713.03(1), Fla. Stat. These type of lienors are defined under Chapter 713 as "professional lienors" *See* §713.01(18)(f), Fla. Stat.

Under Florida's construction lien law, "Architect" and "Engineer" typically carry the same definitions as they do under the professional regulation statutes of chapters 481 and 471. Architect will also include "a general contractor who provides architectural services under a design-build contract authorized by Section 481.229(3)". *See* §713.01(2), Florida Statutes. Likewise, Engineer will include "a general contractor who provides architectural services under a design-build contract authorized by Section 481.003(2)(i)." *See* §713.01(10), Florida Statutes.

Any design professional with a "direct contract" has a lien upon real property for the money owed for his professional services, regardless of whether the real property is actually improved. §713.03(2), Florida Statutes. Remember that "direct contract" is specifically defined under Florida's Construction Lien Law and means a contract directly with the owner. The design professional has a construction lien on the real property actually improved for any money that is owed for services used in connection with improving the real property or services in supervising any portion of the work for improving the real property. The professional service must be rendered in accordance with the contract and with the direct contract. §713.03(1), Florida Statute. The general theory behind this protection is that many times an owner will enter into the Schematic or Design Phase of construction and abandon the project prior to actually starting construction. As a result, the statute allows the construction lien for design professional regardless of whether the property is improved to protect them from the owner that abandons prior to commencement of construction operations.

However, the professional services cannot be just of a consulting nature. For instance, an architectural firm's expert witness services under a contract with the owner of a condominium project were not lienable under § 713.03, because such services protected ownership interests and did not ultimately improve the property. Robert M. Swedroe, Architect/Planners, A.I.A., P.A. v. First American Inv. Corp., 565 So.2d 349 (Fla. 1st DCA 1990).

Design professionals enjoy special protection under Chapter 713, Florida Statutes. Design professionals are not required to serve a notice to owner as required by §713.06(2) or a contractors' final payment affidavit concerning unpaid lienors as required by §713.06(3). §713.03(3), Fla. Stat. Because a Notice of Commencement is not required for design professionals to perform their services, design professional's liens are not acquired until a claim of lien is recorded and do not relate back to the Notice of Commencement. §713.03(3), Fla. Stat. The design professional's lien only attaches as of the date of recording the lien.

Notable Professional Lienor Cases

- Under this section providing for liens for professional services, in order for engineer to have lien for services, it was not necessary that there be a face-to-face personal confrontation between owners and engineer to constitute a "direct" contract; owners could become obligated through acts of an authorized agent. Warshaw v. Pyms, 266 So.2d 355 (Fla. 3rd DCA 1972).

- Corporation that performed architectural and related services in designing single family home (which was never built), and thus fit within architect licensing statutes' exemption for persons who make plans for one-family or two-family resident buildings, was not "architect" within meaning of statute granting architects mechanic's liens for services performed regardless of whether real property is actually improved. Alfred Karram, III, Inc. v. Cantor, 634 So.2d 210 (Fla. 4th DCA 1994).

- Designer builder which had entered into agreement to furnish preliminary design could not assert a valid mechanics' lien; designer builder was not an "architect," and the furnishing of drawings did not "improve" the real property. Miller Const. Co. v. First Indus. Technology Corp., 576 So.2d 748 (Fla. 3rd DCA 1991).

- Subsection (2) of this section permitting mechanic's lien in favor of architect, landscape architect, interior designer, engineer, or land surveyor with direct contract with owner, regardless of whether real property is actually improved, requires services directed to ultimate improvement of real property. Architect's services as property owner's expert witness in arbitration proceeding to obtain funds for paying debts and to protect ownership interests were not related to improvement of real property and were not entitled to protection of mechanic's lien. Robert M. Swedroe, Architect/Planners, A.I.A., P.A. v. First American Inv. Corp., 565 So.2d 349 (Fla. 1st DCA 1990).

INTERIOR DESIGNER LIENS

The profession of interior design has been a consequence of the continued development of interior space and complex architecture. Typically, the interior designer is tangential to the overall design team of a construction project. The pursuit of effective use of space is of primary importance and functional design has contributed to the development of the contemporary interior design profession. An interior designer will take on projects that include arranging the basic layout of spaces within a building. Additionally, they will need a fundamental understanding on the effects of color, acoustics, lighting and temperature in the designed space.

Types of interior design include residential design, commercial design, hospitality design, healthcare design, universal design, exhibition design, spatial branding. In Florida, interior designers are regulated, licensed and statutorily defined under Chapter 481, Florida Statutes. Interior design under Chapter 481 is defined as:

> (8) "Interior design" means designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to nonstructural interior elements of a building or structure. "Interior design" includes, but is not limited to, reflected ceiling plans, space planning, furnishings, and the fabrication of nonstructural elements within and surrounding interior spaces of buildings. Fla. Stat. §481.203(8).

An interior designer's work on a construction project constitutes an improvement and they are entitled to record a construction lien for their work under Chapter 713, Florida Statutes. The construction lien on the real property typically would seek money, as secured by the lien, which is owed for the services in connection with design improvement. Any interior designer

who performs such services with a specific parcel of real property has the right to lien the real property for the money owed for their professional services, *regardless of whether the real property is actually improved*.

As discussed in the section above, professional lienors are one of the exceptions to the incorporation requirement of Florida's Construction Lien law. If the interior designer has a direct contract with the owner, a lien can be recorded even if the construction never occurs. This protects the interior designer who performs design work for an owner that decides to stop the project. Additionally, interior designers do not need to serve a Notice to Owner or a Contractor's Final Payment Affidavit as they fall under the professional lienors section of Chapter 713. Once the construction lien is recorded, it encumbers the property; however, unlike subcontractors and suppliers, the professional interior designer lien does not relate back to the Notice of Commencement. Non-relation back very much affects the lien priority of the interior designer's construction lien.

Aside from the typical construction lien, interior designers also have a special lien statute §713.79, Florida Statutes, provide special lien rights to interior designers for personal property that is not permanently incorporated into the construction project. The statute reads:

> Any person who, as part of his or her services performed as an interior designer, furnishes any articles of furniture, including, but not limited to, desks, tables, lamps, area rugs, wall hangings, photographs, paintings or other works of art, or any items of furnishing, subject to compliance with and the limitations imposed by this part, shall have a lien upon all such articles furnished and upon all such articles manufactured or converted from such furnishing, provided that the same shall be tangible personal property and provided further that such furnishings are rendered in accordance with a written contract and under direct contract with the owner.

The legal ability to file a construction lien on real property and have the lien also encumber the personal property for the items the interior designer furnished, gives the interior designer arguably the most aggressive set of lien rights in the construction industry. However, the interior designer must also take an additional step under Section 481.213, Florida Statutes, to make sure they clearly identify the methods of compensation for their work and that their design drawings comply with the requirements under Rule 61G1-16, Fla. Admin. Code. While there is no case law on these sections, the failure to comply with these statutory requirements may render the interior designer lien invalid.

SPEARIN DOCTRINE

The doctrine of constructability (or the *Spearin* doctrine) provides that a contractor is not liable for unanticipated or unforeseen construction costs incurred due to a latent defect in the project plans or specifications. Under the *Spearin* Doctrine, U.S. v. Spearin, 248 U.S. 132, 136 (1918) an owner gives a contractor an implied warranty of the adequacy of the plans and specifications. Although the owner's implied warranty of constructability as to plans and specifications can be transferred against the architect or engineer, it has also been held by a Florida court that a design professional does not provide a guaranty that its plans and

specifications are perfect. Bayshore Dev. Co. v. Bonfoey, 78 So. 507 (Fla. 1918). Florida courts follow and apply the *Spearin* Doctrine. Miami-Dade Water & Sewer Auth. v. Inman, Inc., 402 So.2d 1277 (Fla. 3d DCA 1981) Jacksonville Port Auth. v. Parkhill-Goodloe Co., Inc., 362 So.2d 1009 (Fla. 1st DCA1978).

Florida courts citing *Spearin* have held that a contractor can recover its extra costs incurred after relying on inaccurate information provided by the design professional regarding site conditions. In addition to a breach of contract action against a design professional, the owner may also have a cause of action under common law indemnity against its design professional to recover any damages resulting from defective plans and specifications. Where a contractor expressly warrants that the plans and specifications are sufficient or free from defects, or expressly guarantees against the defect alleged, the contractor is liable for damages

Sample Spearin Doctrine Jury Instruction

A contractor who has attempted to comply with an owner's plans and specifications that are proved to be defective, and who has incurred additional costs because of relying on those plans and specifications, has a claim for damages.

However, for (name of party) **to recover damages, all of the following must be proved:**

1. (Name of party) **has attempted to fully comply with the plans and specifications.**

2. The plans and specifications were defective.

3. The defective plans and specifications were, in fact, the cause of the problem.

You are instructed further that, before (name of party) **may recover,** (name of party) **must prove by the greater weight of the evidence that [he] [she] [it] strictly complied with** (name of party)**'s plans and specifications.**

If you find that (name of party) **failed to fully comply with** (name of party)**'s plans and specifications and, instead, deviated from the plans and specifications in performing [his] [her] [its] work, then recovery cannot be permitted for** (name of party)**.**

Finally, your verdict must be from all of the evidence that (name of party) **has proved that [his] [her] [its] increased costs or other damages were a direct result of the defective plans and specifications of** (name of party)**.**

Authorities: United States v. Spearin, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918); Phillips & Jordan, Inc. v. State of Florida Dept. of Transportation, 602 So.2d 1310 (Fla. 1st DCA 1992).

INSURANCE FOR DESIGN PROFESSIONALS

The purpose of architects and engineers' professional liability insurance is to protect against liability arising out of "professional," as distinguished from "nonprofessional," services or activities, many of which are within the coverage of general liability policies. One of the significant differences between professional liability policies (including architects and engineers' professional liability policies) and general liability policies is that most professional liability policies are "claims-made" or "discovery" policies, whereas most general liability policies are "occurrence" policies.

In Ranger Insurance Co. v. United States Fire Insurance Co., 350 So.2d 570, 572 (Fla. 3d DCA 1977), the court held that a discovery policy is one wherein the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurance company *during the policy period no matter when the act or omission occurred*; an occurrence policy is one wherein the coverage is effective if the negligent act or omission occurs during the policy period, regardless of the date of discovery.

A significant area of litigation involving claims-made professional liability policies has been whether claims were made within the period covered by the policy. Typical exclusions from professional insurance policies are: (1) acts not arising out of the customary and usual performance of professional services; (2) loss caused by intentional act of insured; (3) work exceeding probable construction or cost estimates; (4) punitive damages; (5) work related to boundary survey, subsurface, ground testing, tunnels, bridges and dams; and (6) claims arising out of warranty, guarantee, indemnity, asbestos and pollution.

The duty of the insurance company to defend the insured is a separate and distinct obligation from the duty to indemnify. The duty to defend is much broader and applies to the lawsuit even if the allegations in the Complaint are factually incorrect or even without merit. James River Ins. v. Bodywell Nutrition, LLC, 842 F.Supp.2d 1351 (S.D. Fla. 2012). If the complaint alleges a claim that may be covered by the policy's terms, the insurer must defend. Construction practitioners should be aware that claims made or professional liability policies are typically an "eroding" or "declining limits" policy. This means that the funds available for indemnification are typically off-set by the defense costs. The practical effect of eroding limits policies is that the amount of insurance proceeds available to pay a claim are reduced by defense costs; resulting in reduced amounts for indemnification. The longer and more expensive the litigation, the less available insurance monies there are to pay for any claim or loss.

UNLICENSED ACTIVITY

Violations of the licensing provisions for architects, landscape architects, interior designers, or engineers are punishable as a first degree misdemeanor. §481.223(2), Fla. Stat.; §481.323(2), Fla. Stat.; §471.031 (2), Fla. Stat. Additionally, the lack of a proper license is a defense for an owner to a construction lien and a defense to payment under a contract. Persons who are not licensed as design professionals may be prevented from recovering their fees in court. Alfred Karram, III, Inc, v. Cantor, 634 So.2d 210 (Fla. 4th DCA 1994). Contracts made in violation of professional regulation statutes are generally held to be invalid and

unenforceable. Rolls v. Bliss & Nyitray, 408 So.2d 229 (Fla. 3d DCA 1981). Conversely, a licensed general contractor negotiating or performing services under a design/build contract is not required to be licensed as an architect, landscape architect, or engineer as long as the design services are offered and rendered by a licensed architect, landscape architect, or engineer. §481.229(3); §481.329(3); §471.003(2)(i).