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CONSTRUCTive Talk

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CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

More Eyes on the Ball for a Better Call

By: Larry R. Leiby, Esq., Of Counsel, Malka & Kravitz, P.A., Ft. Lauderdale, FL

Did you ever have that case where you felt like you were dead right but the other side was treating your case like you were from outer space? You tend to ask yourself "What am I missing?" It can be unnerving. Most of the time you are not missing anything but there could be something that you are missing – a determinative but obscure legal point, a

fact or two that the other side sees that you do not, a reaction to an aspect of the case that can be determinative, or a related circumstance that could cause one or more of the parties (or the fact finder) to react



in an unusual manner. As lawyers we try to see things objectively, but may be guilty of seeing the case through the eyes of our clients or with a backdrop of wishful thinking. Alternatively we may have an unjustified paranoid view of the case.

Wouldn't it be nice to be able to have

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Case Law Update

By: Steve Sellers, Esq., Dudley, Sellers and Healy, P.L.,

☐ **Department of Business and Professional Regulation, Construction Industry Licensing Board v. Requejo**, Case No. 15-7339PL.

Recommended Order entered on March 17, 2016, finding that respondent assisted an unlicensed person in the unlicensed practice of contracting by applying for a permit to perform construction work under contract with the owner and the unlicensed person, and recommending six (6) months suspension of license, probation as determined by the board, a \$7,000 fine and restitution of \$3,500.

Note: While the licensee did not appear at the final hearing in this case, the recommended order is a good indication of the types of sanctions that can be expected in such cases, making it critical that the contract bear the name of the licensee or the business entity qualified as licensee at the time the contract is entered into.

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"We are not talking so much about legal issues since most lawyers should be able to do adequate research given resources such as WestLaw. We are addressing here which concepts in the presentation sell and which concepts in the presentation or line of questioning may turn someone off."

More Eyes on the Ball for a Better Call

By: Larry S. Leiby, Esq., Of Counsel, Malka & Kravitz, P.A., Ft. Lauderdale, FL
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someone else look at your case from another lens to either give you comfort; or allow you to refocus your presentation or line of questioning for a possibly better result?

Confidentiality is an issue here. You can't just bounce your case off of anyone. It may be beneficial to review the case or do a dry run with someone you trust as having subject matter expertise. It may be beneficial to bounce it off someone who really knows nothing about the subject if you are faced with a jury. The point is that another view may be beneficial to the understanding of what will sell in your case. Other people may have a different view about what is seen as being important, persuasive, or distasteful in the case. We are not talking so much about legal issues since most lawyers should be able to do adequate research given resources such as WestLaw. We are addressing here which concepts in the presentation sell and which concepts in the presentation or line of questioning may turn someone off. We know that there are many ways to communicate a thought or concept. Which is most effective? Which can cause the decision maker to either distrust you or think that you are off base? Should you drill down on this particular point or issue, or should you minimize the attention on a particular point?

Some law firms offer the availability to have other lawyers in the firm review, or listen to, the case for purposes of reacting to the concepts or line of questioning and offering alternative suggestions. You may wish to get a few colleagues together to listen to your concepts, or even the actual questions, to give suggestions about what seems to work and what seems to be offensive, wasteful, or misguided. Based on the reactions, you may choose to refocus or reword your presentation.

Cost is a factor here too. There are organizations that will help you conduct a mock trial or arbitration such as Decision Quest or the AAA CaseXplorer program. These formal programs are pricey for all but the larger cases. For a larger case they may be appropriate.

You may choose to hire someone to listen to the case and evaluate what they thought was effective and where problematic spots were that could be improved. I know of a large construction case where the contractor hired two experienced construction lawyers for a mock run through of the case. The case was an arbitration and the lawyers chosen to review the case were both familiar with the arbitrators in the case. The firm representing the claimant had lawyers role play representing each side and present the case in an abbreviated form. Critiques were made. The firm ultimately did very well in the arbitration.

Considering factors such as confidentiality and cost, having an independent review of your case may be worth the effort.

Case Law Update

By: Steve Sellers, Esq., Dudley, Sellers and Healy, P.L.,
Tallahassee, FL

✧ **Gray v. Mark Hall Homes**, 2016 WL 459436 (Fla. 2nd DCA 2016).

This case applies the *Grossman* measure of damages for loss of value. A homeowner sued her contractor for construction defects in her new residence. At trial the homeowner presented the testimony of a general contractor, realtor, and home inspector, none of which were qualified to testify as experts, but each of which gave lay opinion testimony with no objection by the contractor. The testimony of these three witnesses was sufficient to establish that the residence should be bulldozed because the cost to repair would not justify the result. The jury awarded the homeowner the \$168,000 she contracted to pay for the residence, but the trial court directed a verdict for the contractor and limited the damages to the \$16,000 paid by the homeowner for repair of a balcony.

On appeal, the Second District Court of Appeal cited *Grossman Holdings Ltd. v. Hourihan*, 414 So.2d 1037 (Fla. 1982), and its adoption of the Restatement (First) of Contracts' rule that, in a case where the cost of repairs would constitute economic waste, the measure of damages is "the difference between the value that the product contracted for would have had and the value of the performance that has been received." The Court held that the lay opinion of the three witnesses was sufficient evidence for a complete loss of value and reversed with instructions to reinstate the jury's verdict. The contractor argued that the evidence was gratuitous lay opinion and therefore insufficient, but the Court held the argument was waived when the contractor failed to object.

Note: There is no discussion in the opinion concerning proof of the value of the residence that the homeowner contracted for. It appears the Court assumed the contract price is the same as the contracted-for value.

✧ **Brock v. Garner Window & Door Sales, Inc.**, 2016 WL 830452 (Fla. 5th DCA 2016).

Does the four-year statute of limitations for construction of improvements to real property benefit unlicensed contractors or only those who are practicing in compliance with state licensing law? Two judges from the Fifth District Court of Appeal interpreted section 95.11(3)(c), Fla. Stat., to apply whether the contractor is licensed or not while one judge penned a compelling dissent. The case turned on application of the rules of statutory interpretation. Section 95.11(3)(c) provides that the four-year limitations period begins on the latter of four dates, one of which is the "date of completion or termination of the contract between the . . . licensed contractor and his or her employer." (Emphasis added). The two-judge majority held that this language does not limit the type of actions the statute applies to.

All three judges also held that section 489.128, which prevents an unlicensed contractor from enforcing a contract, does not prevent an unlicensed contractor from defending against an action to enforce a contract by the owner by asserting a statute of limitations defense.

Steve E. Sellers is a partner at Dudley, Sellers and Healy, P.L. in Tallahassee, FL. Steve is Board Certified in Construction Law, Civil Trial, and Business Litigation.

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Arnie Tritt at arnold.tritt@atritt.com advising you would like to join the CLC and provide your contact information.

Editor's Corner:

Do you have an article, case update, or topic you would like to see in Constructive Talk? Submit your article, note, or idea to jsmith@rumberger.com or tbench@rumberger.com.



Jared E. Smith
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Timothy N. Bench
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Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@cfjblaw.com)

ADR - Deborah Mastin (deborahmastin@gmail.com)

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Certification Review Course - Deborah Mastin (deborahmastin@gmail.com) and Bryan Rendzio (brendzio@fi-law.com)

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Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include .5 hours of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming RPPTL Events

June 1-5, 2016

Executive Council Meeting
Loews Portofino Bay Hotel
Orlando, Florida