

Design Professional Liability

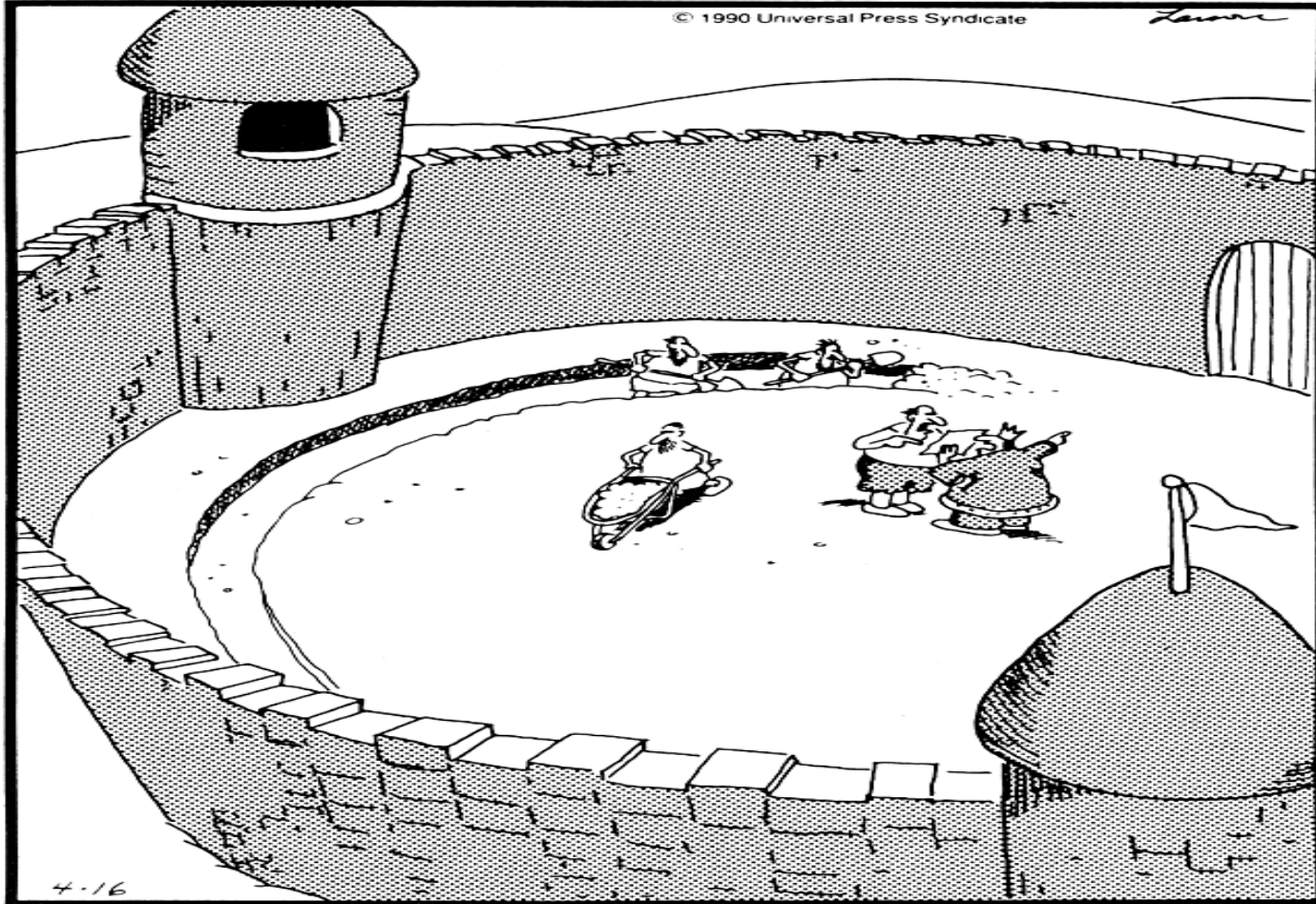
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Design Liability

- Who is a Design Professional?
- Exemptions to Chapter 471 and 481
- Negligence / Contract Liability
- Florida Building Code Violation
- Limitation of Liability - Ch. 558
- Common Defenses

THE FAR SIDE

By GARY LARSON



Suddenly, a heated exchange took place between the king and the moat contractor.

Design Liability

- Chapter 455 – All Professions
- Chapter 471 – Engineers
- Chapter 472 – Land Surveyors / Mapping
- Chapter 481 – Architects / Interior Designers
- Section 713.03 – Liens
- Section 558.0035 – Limitation of Liability
- Chapter 61G1, Fla Admin Code

Design Liability

Architecture

- 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.
- Services include planning, providing preliminary study designs, drawings and specifications, job-site inspection, and administration of construction contracts.
- §481.203(6), Fla. Stat.

Design Liability

Interior Design

- Designs, consultations, studies, drawings, specifications, and administration of design construction contracts relating to non-structural interior elements of a building or structure.
- 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.

Design Liability

Landscape Architecture

- 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.
- §373.185, Fla. Stat.

Design Liability

Engineering

- 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
- Includes consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water and the inspection of construction for the purpose of determining in general if the work is proceeding in compliance with drawings and specifications,
- 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.
- §471.005(7), Fla. Stat.

ENGINEER
SOLVING PROBLEMS
YOU DIDN'T KNOW
YOU HAVE
IN WAYS YOU CAN'T
UNDERSTAND

Design Liability

- Trikon Sunrise Assoc v. Brice Bldg Co., 41 So.3d 315 (4th DCA 2010)
 - §471.003(3), acknowledges there are times in a project where an Engineer may be performing architectural services that are **purely incidental** to engineering practice and times when an Architect may be performing engineering services that are purely incidental to architectural practice.

Exceptions - Architects

- Farm Buildings
- CGC – Design/Build
 - Work performed by Architect
- Engineer – Purely incidental work
- Manufacturer of commercial food equipment
- Single/double family residence
- Building under \$25,000.00 – not for public use

Exceptions - Engineer

- Owner improvements to property
- Fabrication of manufactured products
- Employee of Public Utility
- Surveyor or Mapper – Incidental work
- CGC – Design/Build
 - Work performed by Engineer
- Defense, space or aerospace company – aircraft, satellites, space launch vehicles

Negligence

- Duty requiring certain standard of conduct
 - Failure/Breach of duty
 - Causal Connection – Proximate Cause
 - Actual loss or damage
-
- Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182 (Fla. 2003)

Negligence – Jury Instructions

- **Negligence is the failure to use reasonable care. Reasonable care on the part of a (*Architect/Engineer/Surveyor*) is the care that a reasonably careful (*Architect/Engineer/Surveyor*) would use under like circumstances. Negligence is doing something that a reasonably careful (*Architect/Engineer/Surveyor*) would not do under like circumstances or failing to do something that a reasonably careful (*Architect/Engineer/Surveyor*) would do under like circumstances.**
- Fla. Std. Jury Instr. (Civ.) 402.5 (2018)

Negligence - Statute

Section 481.221(8), Florida Statutes

- 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.

Design Liability - Contract

§2.2 AIA Document B101-2017

- 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.

Design Liability - Contract

§3.1.5 AIA Document B101-2017

- The Architect shall contact governmental authorities required to approve the Construction Documents and entities providing utility services to the Project. The Architect shall respond to applicable design requirements.

Design Liability - Contract

§3.2 AIA Document B101-2017

- **Schematic Design Phase**

- Architect reviews laws, codes, and regulations.
- Architect prepares a preliminary evaluation of the schedule, budget, project site, proposed procurement and delivery method, and any other initial information for the project.

Design Liability - Contract

§3.3 AIA Document B101-2017

- **Design Development Phase**

- Architect will further refine the schematic concepts and add information regarding structural, mechanical and electrical systems of the Project.
- Provide plans, elevations and construction details.
- Provide major material systems and establish quality levels.

Design Liability - Contract

§3.4 AIA Document B101-2017

- **Construction Documents Phase**

- Architect will prepare the construction drawings and specifications setting forth the detail and quality levels and performance criteria of materials, and systems required for the work.
- From these the owner can bid the work to contractors.
- Contractor is to add shop drawings, Product Data and other submittals.

Design Liability - Contract

§3.5 AIA Document B101-2017

- **Procurement Phase**

- Architect assists the owner in establishing a list of prospective contractors.
- When the owner approves, the Architect will assist in:
 - ✦ Facilitating bidding documents to bidders
 - ✦ Organizing and conducting pre-bid conference
 - ✦ Preparing responses to bidders
 - ✦ Opening bids and documenting/distributing results

Design Liability - Contract

§3.6 AIA Document B101-2017

- **Construction Phase**

- After the selection of the contractor
- Architect can advise and consult with the owner
- May have authority to act on behalf of the owner in making certain decisions
 - ✦ Review and approve submittals for the limited purpose of checking conformance with design concepts in construction documents
 - ✦ Payment requests
 - ✦ Perform general contract administration

Design Liability - Contract

§3.6.4 AIA Document B101-2017

- **Submittals**

The Architect shall review the submittal schedule and shall not unreasonably delay or withhold approval of the schedule.

Architect is to maintain the record of submittals and copies supplied by Contractor.

Design Liability - Contract

Supervision of Project

- Generally not required
- Can be contracted to supervise
 - Additional Service
- Can increase liability for construction defects/
code violations
- Can be liable for personal injuries
 - Geer v. Bennett 237 So.2d 311 (Fla. 4th DCA 1970)

Moransais v. Heathman

- 744 So.2d 973 (Fla. 1999)
- Removed Economic Loss Rule defense to claims against design professionals
- 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

Supervisory Role by Design Professional

- The common theme in cases finding a duty is the presence of a supervisory role or element of control by the architect and engineer. Posen Constr., Inc. v. Lee County, 921 F. Supp. 2d 1350, 1364 (M.D. Fla. 2013).
- Control is often manifested in the architect or engineer's knowledge that a third party will use its designs, plans or reports. Porto Venezia Condo. Assoc., Inc. v. WB Fort Lauderdale, LLC, 2012 U.S. Dist. LEXIS 186997 (S.D. Fla. 2012).
- A determination of control will be based on the facts of the case

Negligence – Case Law

- Hewett, 775 So.2d 373 (Fla. 4th DCA 2000)
- A.R. Moyer, 285 So.2d 397 (Fla. 1973)
- Navajo, 373 So.2d 689 (Fla. 2d DCA 1979)
- Lochrane, 552 So.2d 228 (Fla. 5th DCA 1989)
- Moransais, 744 So.2d 973 (Fla. 1999)
- Shepard, 414 So.2d 1077 (Fla. 5th DCA 1981)

Restatement of Torts

Restatement (Second) of Torts § 552

- 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 v. Rayonier, 696 So.2d 334 (Fla. 1997) – Negligent Misrepresentation

Building Code Violation

- Cause of action for violation of building codes (§553.84, Fla. Stat.) can be asserted against design professionals.
- Edward J. Seibert, A.I.A., v. Bayport Beach and Tennis Club Ass'n, Inc., 573 So.2d 889 (Fla. 2d DCA 1990)

Building Code Violation

Section 553.84, Florida Statutes

- 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...

553.781, Fla. Stat.

- Penalty for design professional who has violated Florida Building Code.



553.781, Fla. Stat.

- Determined by Local Jurisdiction
- Material Violation of Building Code
 - 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.
 - \$500/\$5000 per Material Violation
 - Local and State – Split the fine paid
 - If fine is not paid – Permits are suspended

553.781, Fla. Stat.

- If Design Professional Disputes the Violation
 - Fine abated and conduct reported to DBPR
 - DBPR – Maintains reporting system

558.0035, Fla. Stat.

- Went into effect July 1, 2013
- Allows businesses to limit, by contract, their employee's liability for professional negligence claims.

558.0035, Fla. Stat.

- Applies to business entities
 - Architects
 - Interior Designers
 - Landscape Architects
 - Engineers
 - Surveyors
 - Geologists.

Geologists?



**GEOLOGY REPORT
ASSESSING LIABILITY**

558.0035, Fla. Stat.

- Contract between business entity/claimant
 - Individual Professional not a party to contract
 - Statement – 5 Font points larger - Uppercase
- Business maintains professional insurance
- Solely economic damages – no personal injuries
- Does not limit claims by parties who have no contract with the professional

Sample Language

- Contractual limitation on personal liability.
 - The individual employee or agent who will perform the professional services under this contract is not a party to the contract. Pursuant to section 558.0035, Florida Statutes (July 1, 2013), an individual employee or agent may not be held individually liable for negligence.

Defenses

Slavin Doctrine

Under Slavin, a design professional may not be liable in Negligence for injuries to third parties after the owner has accepted the patently deficient work.

Unless the defect was latent and could not have been discovered by the owner.

Easterday v. Masiello, 518 So.2d 260 (Fla. 1988)

Tieder v. Little, 502 So.2d 923 (Fla. 3d DCA 1987)



Defenses

Statute of Limitations

Four Years - Section 95.11(3)(c)

- Actions "founded on the design, planning, or construction of an improvement to real property".
- "Where there is an **obvious manifestation of a defect**, notice will be inferred at the time of manifestation regardless of whether the plaintiff has knowledge of the exact nature of the defect. **However, where the manifestation is not obvious but could be due to causes other than an actionable defect**, notice as a matter of law may not be inferred." Inlet Marina of Palm Beach, Ltd. v. Sea Diversified, Inc., 43 Fla. L. Weekly 257 (Dist. Ct. App. 2018).

Defenses

Statute of Limitations

Two Years:

Action for professional malpractice, other than medical malpractice, whether founded on contract or tort.

Limited to persons in privity with the professional.

Commences from the date of discovery or should have been discovered.

Defenses

Statute of Repose

Ten Years:

From

- Possession;
 - Issuance of Certificate of Occupancy;
 - Abandonment of construction; or
 - Completion of contract
 - ✦ Date of final performance of all contract services
 - ✦ Date final payment is made
 - ✦ Cypress Fairway Condominium, etc. et al. v. Bergeron Construction Co., Inc., et al., 164 So.3d 706 (2015)
- Whichever is last
 - Depends on the facts of the case.

Absolute Bar to any Defect Claim

Chapter 558 Notice Stops Clock on Statute of Repose

- A new case out of the Fourth District Court of Appeals for Florida, Gindel v. Centex Home, Case No. 4D17-2149 (Sept. 12, 2018), seeks to clarify the timing to commence an action under the statute of repose.
- On March 31, 2004, the homeowners closed and took possession of their townhome.
- As provided under Section 95.11(3)(c), the statute of repose began to run on March 31, 2004, as to any construction defects, expiring March 31, 2014.
- On February 6, 2014, the homeowners provided a pre-suit notice of construction defect to Centex, pursuant to Chapter 558.
- The homeowners filed suit against Centex on May 2, 2014 and argued their action commenced when they issued their Chapter 558 notice on February 6, 2014.

Gindel v. Centex Home Continued

- The homeowners argued the mandatory Chapter 558 pre-suit notice was a "proceeding" under Section 95.011 and therefore met the definition of an "action."
- They also argued they would have filed suit in February 2014 if Chapter 558 had not required them to serve the pre-suit notice first.
- The court agreed with the homeowners, noting that Chapter 558 lays out a series of mandatory steps that must be complied with before judicial action is to be taken.
- Pre-suit notice through 558 does constitute an "action" for the purposes of the statute of repose.

Gindel v. Centex Home - Consequences

- With this most recent ruling, the statute of repose has now been extended beyond the ten-year statute of repose when it comes to construction defect claims.
- Contractors and Design Professionals must be cognizant that the receipt of a Chapter 558 notice stops the clock on the statute of repose and, therefore, must be taken seriously.

Defenses

Additional Design Defenses

- Lack of Maintenance
- Useful Life of Materials
- Betterment of Property
- All permits Issued
- All Building Inspections Passed
- Fabre – Negligence of Others



Spearin Doctrine

- United States v. Spearin, 248 U.S. 132 (1918)
 - ***Doctrine of Constructability***
 - Contractor not liable to owner for loss or damage that results solely from defects in the plan, design, or specifications provided to the contractor.

Spearin Doctrine

- Today, the modern approach to Spearin assigns responsibility for defective construction according to whether the specification prescribing the construction is a **performance** or a **design** specification.

Spearin Doctrine

- **Performance Specifications:**
 - Set forth an objective or general standard to be achieved
 - Contractor is expected to exercise his ingenuity in achieving that objective or standard of performance
 - ✦ Selects the means
 - ✦ Assumes responsibility for the selection

Spearin Doctrine

- **Design Specifications:**
 - Precisely state how the work is to be performed
 - Describe in detail the materials to be used and manner in which work is to be executed
 - No flexibility allowed to contractor's approach
 - Contractor required to follow the specifications as one would a road map
 - Contractor does not warrant the system will perform in any certain way

Spearin Doctrine

- Phillips & Jordon v. FDOT 602 So.2d 1310 (Fla. 1st DCA 1992)
- Jacksonville Port Auth. V. Parkhill-Goodloe, 362 So.2d 1009 (Fla. 1st DCA 1978)
- Is Spearin limited to only Government contracts?

Condominium Defects

Construction Defect Certification

718.301(7) Florida Statutes

- 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.

Design Liens – 713.03

- Architect, Landscape, Interior, Engineer, Surveyor or Mapper
 - No Notice to Owner
 - No Contractor’s Final Payment Affidavit
 - No Notice of Commencement needed
- Lien priority as of date recorded
- Direct Contracts – no “improvement” required for lien to attach
- Interior Designers – 713.79, Fla. Stat.

Unlicensed Activity

- First Degree Misdemeanor
- Prevent or Disgorgement of Fees
- No Lien Rights
- Contract Void
- Design/Build
 - CGC can contract so long as licensed design professional performs the work



Thank You!

Questions? Comments? Please reach out anytime!

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