Contractor Negligence in a Florida Construction Defects Case

Part I: Elements and Duty

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Construction defects are a problem in Florida. In an environment that is hot, humid, and stormy, defective construction is magnified, often causing damaging water leaks, harmful mold intrusion and amongst other things, a serious disruption to our everyday lives. Typical sources of water intrusion are roofs, windows, sealant failures, stucco failures, and balconies. Aside from the obvious financial challenges, construction defect cases present many legal challenges. Initially, recognizing the valid causes of action to assert against culpable parties can be a proverbial "tap dance". To remedy any harm, a plaintiff must look to the contractor(s) at fault for the construction defect, including the general contractor, subcontractors, and other lower-tier trades and maybe even suppliers. A negligence claim is one of the possible causes of action that a victim of construction defects can assert against contractors in Florida.

Elements of Negligence. Negligence is an action in tort law, as opposed to contract law. In Florida, to recover on a tort action for negligence, a plaintiff needs to prove that: (1) the defendant owed plaintiff a legal duty; (2) the defendant breached that duty; (3) plaintiff suffered injury as a result of that breach; and (4) the injury caused damage. Kayfetz v. A.M. Best Roofing, 832 So.2d 784, 786 (Fla. 3d DCA 2002). In short, negligence is the breach of a legal duty. However, a claim for negligence does not exist if the contractor breached some duty that attached only because of a contract. *See e.g.* Monroe v. Sarasota County School Bd., 746 So.2d 530 (Fla. 2d DCA 1999). In other words, negligence is the breach of a legal duty other than a contractual duty. *See* Goldberg v. Fla. Power & Light Co., 899 So.2d 1105, 1110 (Fla. 2005).

Where a contract for construction exists, a tort action will lie for negligent acts considered to be *independent* from the acts that breached the contract. Indemnity Ins. Co. v. American Aviation, Inc., 891 So. 2d 532, 537 (Fla. 2004). Stated differently, there is no claim for negligence unless the facts and harm are distinguishable (i.e. separate and distinct) from the claim of breach of contract. Eye Care Intern., Inc. v. Underhill, 92 F. Supp.2d 1310, 1315 (M.D. Fla. 2000); HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238 (Fla. 1996). Alleging that someone was negligent by improperly or negligently performing duties in a contract will not be a viable cause of action in negligence. Even an intentional, willful and outrageous breach of a contract generally will not create a tort where a tort does not otherwise exist. Lewis v. Guthartz, 428 So.2d 222, 224 (Fla. 1982); Jewelcor Jewelers & Distributors, Inc. v. Southern Ornamentals, Inc., 499 So.2d 850 (Fla. 4th DCA 1986). "[I]t is only when the breach of contract is attended by some additional conduct which amounts to an independent tort that such breach can constitute negligence." American Aviation, Inc., 891 So.2d at 537. And "[w]here damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort." Id. at 536. Simply stated, if you have a contract for the construction of the building, the claims a plaintiff will bring are associated with the right arising under the contract or any warranty, express or implied, stemming therefrom.

Proving Non-Contractual Duty. To succeed in a claim for negligence, a plaintiff must prove that the contractor defendant breached a *non-contractual* legal duty to the plaintiff. Non-contractual legal duties include those prescribed by statutes and ordinances, as well as the

common law duty to exercise reasonable care to prevent foreseeable harm. Goldberg, *supra*. Proving the breach of a legal duty based on statute or ordinance is fairly straightforward. For instance, contractors have a duty to comply with the building code, and violation of a building code "constitutes prima facie evidence of negligence, but not negligence per se." St. Cyr v. Flying J Inc., 2006 U.S. Dist. LEXIS 52239 (M.D. Fla. 2006); Lindsey v. Bill Arflin Bonding Agency, 645 So.2d 565, 567 (Fla. 1st DCA 1994).

Proving the breach of a common law duty can be quite challenging. First, the court must determine whether such duty exists. L.A. Fitness Int'l, LLC v. Mayer, 980 So.2d 550, 557 (Fla. 4th DCA 2008). When a contractor renders services, he assumes a common law duty to exercise a reasonable degree of care in the performance of those services to prevent reasonably foreseeable harm. *See* Barfield v. Langley, 432 So.2d 748, 749 (Fla. 2d DCA 1983). But defining the reasonable degree of care is the issue. Here, defining the contractor's standard of care begins by establishing construction industry standards. *See* L.A. Fitness Int'l, LLC, 980 So. 2d at 558 ("Although the custom and practice of an industry can help define a standard of care a party must exercise after it has undertaken a duty, industry standards do not give rise to an independent legal duty.")

Proving such duty is typically accomplished with the hiring of experts who will opine on the construction and design standards of care. Expert witness testimony then becomes critical in establishing the parameters of industry standard. After the standard is established, the plaintiff must then prove that the construction defect constituted a failure to meet that particular standard of care. *See Id.* at 556. This is typically an issue for the finder of fact or jury. *Id.* Here again, expert witness testimony is critical in proving whether the contractor's performance satisfied industry standards. In Part II of this article, we will discuss certain defenses that a contractor may assert against negligence claims.

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Part II: Contractor Defenses to Negligence Claims

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Part I of this posting discussed various considerations with proving contractor negligence in Florida. Part II of this posting will discuss defenses and hurdles in proving such negligence. Just as the Plaintiff has the burden of proof on its negligence claim, the contractor defending such negligence claim has the affirmative burden to prove its defenses. Contractor defenses can be based in legal theory or factual accounts, but both are designed to thwart the notion that the contractor has breach its duty of care in the construction.

The Economic Loss Rule. The Economic Loss Rule is a legal defense, but like all defenses there is some element of factual analysis. Negligence claims seek damages including property damage, personal injury, and economic losses. If the only damages suffered are economic losses, the judicially-created Economic Loss Rule (the "ELR") presents a possible obstacle. Florida has adopted the ELR which bars recovery in tort action when a product damages itself, causing *only economic loss*, but does not cause personal injury or damage to any property other than itself. Casa Clara Condominium Association, Ina v. Charlie Toppino and Sons, Inc., 620 So. 2d 1244 (Fla. 1993). Simply put, the ELR bars negligence actions seeking recovery of economic loss.

Since 2004, the ELR in Florida has been clearly defined to apply in only two situations: (1) where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract, or (2) where the defendant is a manufacturer or distributor of a defective product which damages itself but does not cause personal injury or damage to any other property. Indemnity Ins. Co. v. American Aviation, Inc., 891 So.2d 532 (Fla. 2004). If a defendant is *not* in privity of contract with the plaintiff nor is a manufacturer or distributor of a product, a negligence action is not barred by the ELR. Id. Therefore, a property owner who is in privity with a contractor may not bring a negligence claim seeking damages for economic loss against the contractor. The property owner's claims would sound in contract and warranty However, that same property owner may assert a negligence claim against the subcontractors as no privity of contract exists with the owner and subcontractors.

Another pertinent aspect of the ELR is that it only bars claims for economic losses but does not bar a negligence claim seeking damages to *other* property or personal injury, notwithstanding privity of contract. Id. at 536. This rule begs the question: What are economic losses? Economic losses are "disappointed economic expectations," which are protected by contract law, rather than tort law. Id. at 536 n.1. Economic loss includes costs of repair and replacement of the defective product, diminution in value, or consequent loss of profits--without any claim of personal injury or damage to other property. Id. Thus the ELR bars damages to repair a roof leak, but does not prevent tort recovery to repair the drywall and carpet damaged by the roof leak.

The Slavin Doctrine. Contractors, in defense to a negligence claim, will often raise the well-settled rule (commonly known as the Slavin Doctrine, or the "open and obvious rule") that contractors are not liable to third persons after their work is completed and accepted by the owner. Slavin v. Kay, 108 So.2d 462 (Fla. 1958); Ray's Plumbing Contrs., Inc. v. Trujillo

Constr., Inc., 847 So.2d 1086 (Fla. 1st DCA 2003). Where an owner accepts work with knowledge of the defect, or where the defect was discoverable by reasonable inspection (i.e. patent defects), the owner's acceptance works as a waiver of the defective performance. Id.; Alvarez v. DeAguirre, 395 So.2d 213 (Fla. 3d DCA 1981) ("Upon learning of the defect, it is the owner's negligence which is the proximate cause of the injury rendering the owner liable and exonerating the contractor."). Thus, a contractor is protected from liability for injuries to third parties caused by defects that are open and obvious.

On the other hand, the Slavin Doctrine does not protect the contractor for its latent construction defect, which is a defect that is *not* discoverable by reasonable inspection and for which the owner has no actual knowledge. Slavin, 108 So.2d at 465. Where the completed building includes a latent defect, then the contractor may also be responsible after completion. Id. ("In the case of latent defects not discoverable and not in fact discovered, the contractor's original negligence remains the proximate cause of the plaintiff's injury and may render him liable to him although the injury has occurred after the acceptance of the work by the owner.") Put simply, a contractor can be sued for negligence based on latent or hidden defects.

Individual Liability. An injured plaintiff receives no remedy from an uncollectable judgment. Unfortunately, it is all too common to find a defendant construction company void of collectable assets, in part because the assets were quickly funneled out of the company and into the possession of individuals. One solution is to impute personal liability upon those individuals. Therefore, don't overlook the negligence of individual officers and employees, including the qualifying agent. Officers of a corporation are personally liable for their tortious acts even if those acts are performed in the corporate name. McElveen v. Peeler, 544 So. 2d 270 (Fla. 1st DCA 1989).

To be sure, Chapter 489, Florida Statutes, which governs contractor licensing, does not itself create a private cause of action against the individual qualifying agent. Murthy v. N. Sinha Corp., 644 So. 2d 983 (Fla. 1994). The owner that obtains a money judgment against a licensed contractor may file a complaint with the Department of Business and Professional Regulation and the Construction Industry Licensing Board for the contractor's non-payment of the judgment within a reasonable time. A reasonable time is viewed as 60 days. Thereafter, if non-payment of the judgment remains, the qualifier for the construction company may receive discipline on his license.

An owner may be able recover individual damages under a common law theory of negligence. Id. at 986-87 ("We agree that an owner may recover from a negligent qualifying agent, but only under a common law theory of negligence" as opposed to any duties placed upon him by chapter 489.) Breach of the duties imposed upon the qualifying agent by Chapter 489 cannot be used as evidence of negligence; there must be a breach of some other duties. Murthy 644 So. 2d at 985. The qualifying agent's negligence must be based on his own performance on the project and not his agency capacity. As such, a negligence claim may be valid against a qualifying agent where the "qualifying agent . . . himself had performed work on the project" and was negligent. Evans v. Taylor, 711 So.2d 1317 (Fla. 3rd DCA 1998).

While Florida law provides various paths to recovery, it also provides contractors with numerous defenses they may assert to avoid liability for defective work. A litigant is wise to

carefully consider the utilization of negligence in a construction defect case, however, the contractor will likely have defenses to assert against such negligence claims. These defenses are sorted out as the case progresses through discovery on their ultimate path to resolution by the trier of fact or jury.