CONSTRUCTive Talk

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Construction Law Committee Newsletter, a committee of the Florida Bar Real Property, Probate & Trust Law Section

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The Lowdown on Latent Defects

By Natalie M. Yellow Esq. and Kristen E. Gray[1],

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Owners and contractors alike should be wary of when the statute of limitations is triggered for a construction defect claim. The answer hinges, in part, on whether the defect is considered patent or latent and whether the plaintiff is on notice of his right to a cause of action.

Understanding Section 95.11(3)(c), *Florida Statutes*

Section 95.11(3)(c), *Florida Statutes*, provides lawsuits founded on the "design, planning, or construction of an improvement to real property," must be commenced within four years of: (1)

owner's actual possession; (2) issuance of the certificate of occupancy; (3) date of abandonment of construction; or (4) the date of completion of the contract between owner, and engineer, architect, or contractor – whichever is latest. However, Section 95.11(3)(c) also provides that when an action involves a latent defect, "the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence." Section 95.11(3)(c) is the legislature's attempt to protect engineers, architects, and contractors from time barred claims. *Snyder v. Wernecke*, 813 So. 2d 213, 216 (Fla. 4th DCA 2002).

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: Peter Kapsales at pkapsales@milnelawgroup.com or Avery Sander at adsander@mdwcg.com

INSIDE THIS ISSUE:

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What Does it Mean for a Defect to be Latent?

Black's Law Dictionary defines a latent defect as a hidden defect not discoverable upon reasonable inspection. *Defect*, BLACK'S LAW DICTIONARY (11th ed. 2019), *available at* Westlaw. A patent defect is a defect that is apparent to a normally observant person. *Id.* Florida courts define latent defects as defects that are "not apparent by use of one's ordinary senses from a casual observation of the premises." *Kala Investments, Inc. v. Sklar*, 538 So. 2d 909, 913 (Fla. 3d DCA 1989); *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1058 (Fla. 3d DCA 2002) ("Latent defects are generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection, and of which the owner has no knowledge."). Reasonable care is key — a defect is latent if it is hidden from knowledge and sight and could not be discovered through the exercise of reasonable care. *Grall v. Risden*, 167 So. 2d 610, 613 (Fla. 2d DCA 1964).

To determine whether a defect is patent or latent, the court must examine whether the defective *nature* of the construction was obvious and apparent. In *Kala,* a child fell through a screened window in an apartment building, and the parents proceeded to sue the building owner, and multiple construction entities associated with the window installation. 538 So. 2d at 912. The parents alleged the window installation did not comply with the building code, which required that windows less than 32 inches from the floor have either a guardrail or protective screening capable of withstanding a certain load of weight. *Id*. The trial court held the defects were patent. *Id.* The appellate court disagreed and reasoned, "the test for patency is not whether the object itself or its distance from the floor was obvious to Kala, but whether the *defective nature* of the object was obvious to Kala with reasonable care." *Id.* at 913 (emphasis in original). The appellate court reasoned that if the window screening was of a certain strength and able to withstand a certain load, then the low placement of the window without a guardrail would not have violated the building code and would not have been a defect. *Id.* The appellate court held that genuine issues of fact remained as to whether the defect was obvious to the owner and whether the owner should have known that the window screening was insufficient. *Id.*

If a professional contends additional testing or investigation of a condition is required in order to determine the existence or nonexistence of defective conditions, then in such circumstances, the engineer is describing a latent defect. *Saltponds Condo. Ass'n, Inc. v. McCoy*, 972 So. 2d 230, 231-32 (Fla. 3d DCA 2007). In *Saltponds*, a condominium association sued the architect for alleged latent construction defects. 972 So. 2d at 231. The condominium association attached a 2005 engineering report to its complaint against the architect. *Id*. In some parts of the report, the engineer noted he could not reach a conclusion and recommended further testing and investigation. *Id.* at 232. The architect argued to the trial court that the defects were patent because the engineer's report noted he based his conclusions on a *visual* inspection of the buildings. *Id.* The appellate court rejected this novel argument and noted the fact that defects were obvious to a trained professional engineer does not mean the defects are automatically obvious to the condominium association, thereby making them patent. *Id.* The court also noted that the defects, to which the engineer recommended further testing for, were by definition, latent defects—meaning a visual examination was

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not enough and further investigation was required to ascertain the existence or absence of suspected defects. *Id.* at 232. The appellate court reversed the trial court's dismissal and held the engineering report did not conclusively establish the defects were patent. *Id*.

When Will the Court Infer an Owner Had Notice of a Latent Defect?

In Florida, "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." *Hochberg v. Thomas Carter Painting, Inc.*, 63 So. 3d 861, 862 (Fla. 3d DCA 2011). In *Hochberg,* on their first night in their newly constructed home, the owners recognized the overwhelming smell of mold, triggering an allergic reaction in the wife. 63 So. 3d at 862. In November 2003, the owners hired an engineer to evaluate the issue and the engineer found significant issues with the construction of the house. *Id.* In July 2008, the owners sued the construction team for negligent work and argued the statute of limitations should not have tolled until they knew that it was the negligence of the subcontractors that caused the defects. *Id.* at 863. The trial court held the statute of limitations began running when the owners discovered the manifestation of the defects and did not begin running when the owners discovered the subcontractors were responsible for the defective construction. *Id.* The appellate court affirmed. *Id.*

The statute of limitations begins to run once a latent defect is discovered, not once the cause of the defect is known. *Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard, Architects/Planners, Inc.*, 417 So. 2d 703, 704 (Fla. 2d DCA 1982). In *Havatampa*, ever since plaintiff took possession of the building from the construction team in April 1972, the roof leaked. *Id.* In April 1976, four years after moving in, plaintiff hired a consultant to assess the roof. *Id.* The consultant determined the cause of the leak was very complex and that it was not reasonably possible for the owner to have known the full extent of the specific nature of the defects that caused the leaks. *Id.* In August 1976, the owner sued the designer and construction team for the roofing leaks. *Id.* The trial court held that the owner's claim was time barred because the four-year statute of limitations began to toll when the plaintiff learned of the roof leak, upon taking possession of the building, and not when the plaintiff knew what caused the defect. *Id.* The appellate court affirmed the trial court's holding that plaintiff's action was time barred, noting "plaintiff cannot rely on a lack of knowledge of the specific cause of the problem to protect it against expiration of the four year statute of limitations." *Id.* Similarly, in *Almand Const. Co.,* the owners discovered their home was settling and causing structural damage. *Almand Const. Co., Inc. v. Evans*, 547 So. 2d 626, 627 (Fla. 1989). Plaintiffs later retained an engineer that opined the unsuitable and defective fill used caused the structural damage. *Id.* The court held the owner's knowledge of the settling and structural damage triggered the statute of limitations to run. *Id.* The engineer's report about the unsuitable fill did not trigger the four-year statute of limitations since the owners were already on notice that their home was settling. *Id.*

However, notice is not inferred simply because there is a leak in a building. When the manifestation of the defect is not obvious and could be due to causes other than an actionable defect, the court will not infer the plaintiff had

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knowledge at that time. *Performing Arts Ctr. Auth. v. Clark Const. Group, Inc.*, 789 So. 2d 392, 394 (Fla. 4th DCA 2001) (refusing to infer plaintiff was on notice after discovering a puddle of water inside a commercial building); *Snyder*, 813 So. 2d at 217 (holding plaintiff's discovery of several small building cracks in 1989/1990 did not put plaintiff on notice of his right to a cause of action) thought one Tampa federal district judge sitting in an appellate capacity in *In re Colony Beach & Tennis Club Association, Inc., 456 B.R. 545 (2011).*

Key Considerations for Practitioners

- An owner could forfeit his right to sue if he waits until he can determine whether the issue is a design or construction defect.
- There are legally significant consequences of a professional's report that recommends further testing or investigation into a condition.
- Whether a defect is latent is typically a question for the factfinder to resolve.
- The fact that defects were obvious to a trained professional engineer does not mean the defects are obvious to a layperson and should be considered patent defects.

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[1] *Kristen E. Gray is a second year law student at Pepperdine Caruso School of Law who assisted with the preparation of this article while she was a summer associate at GrayRobinson, P.A.*

Case Law Update

By: Natalie M. Yello, Esq.
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***Broward County, Florida v. CH2M Hill, Inc.*, 4D18-3401, 2020 WL 4197936, at *1 (Fla. 4th DCA July 22, 2020)**

Owner, Broward County ("Owner" or "County") contracted with Triple R Paving ("Contractor") for construction of the Fort Lauderdale/Hollywood Airport ("Project"). CH2M ("Engineer") contracted with the Owner to perform engineering services for the Project. URS would serve as the County's on site representative. Bureay Veritas North America ("BV") provided quality assurance materials testing. Taxiway C was opened to traffic in November 2007 and in June 2008 the Owner noticed rutting and indentations in the asphalt. Contractor reached final completion in November 2008. Owner withheld portion of final payment due to the asphalt rutting. Contractor sued Owner for breach of contract and sued Engineer for professional negligence. Owner brought counterclaim for breach of contract against Contractor and Engineer and indemnification from URS. URS and BV settled at mediation. After expert testimony was presented at the nonjury trial, the trial court entered final judgment in favor, of County and against Engineer and Contractor. The court also assessed 60% of the damages to URS, 25% to Contractor, and 15% to Engineer.

The appellate court affirmed the trial court and found that the court properly allocated fault under the Comparative Fault Statute Section 768.81(c), *Florida Statutes*, which provided a "negligence action" is "without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, *professional malpractice whether couched in terms of contract or tort*." The appellate court reasoned the Owner's breach of contract claim against Engineer was a professional malpractice action with its basis in the standard of care established by contract—*therefore the breach of contract claim against the Engineer would be subject to the comparative fault statute, a departure from the previous rule which imposed joint and several liability.* Although the Contractor was not a professional like Engineer, the court found that the claims against Contractor fell under the umbrella of the "negligence action" against Engineer, noting the causes of action against Contractor and Engineer were intertwined. The appellate court also held that the trial court erred in computing damages because it computed damages based on Owner's expenditures for redesign and reconstruction—which was a substantially more robust design.

***S.-Owners Ins. Co. v. MAC Contractors of Florida, LLC*, 20-10840, 2020 WL 4345199, at *1 (11th Cir. July 29, 2020)**

Plaintiff, the estate of decedent who was killed when he fell through the skylight of Defendant's building, sued Building Owner for failure to obtain permits that created a dangerous condition that led to decedent's death. Building Owner listed the County's Building Official as an expert witness and Plaintiff sought to depose him. The County, a nonparty, filed a protective order and contended the Building Official was neither an expert witness or proper fact witness. Trial court denied the protective order. The appellate court noted the Miami Code of Ordinances does not permit a county official to testify as an expert without county authorization and further reiterated the rule that an expert witness who has not

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been retained and doesn't have personal knowledge of the facts would not be permitted to testify as an expert, therefore, the Building Official could not testify as an expert. The court also rejected Plaintiff's argument that the Building Official could testify as a fact witness with specialized knowledge pertaining to county procedure. Because the Building Official did not have personal knowledge of the facts he could not testify as a fact witness. Appellate court determined trial court department from the essential requirements of the law by denying the County's motion for protective order.

***BBG Design Build, LLC v. S. Owners Ins. Co.*, 19-14508, 2020 WL 4218108, at *1 (11th Cir. July 23, 2020)**

BBG served as the general contractor for the renovation of a domestic violence resource center in Fort Walton Beach. Southern Owners Ins. Co. ("Insurer") issued a commercial general liability policy ("Policy") that provided Insurer would defend and indemnify BBG for covered losses during the policy period. The Policy also contained a provision denying coverage for bodily injury or property damage resulting from pollution. Plaintiff, an employee of the resource center, sued BBG for bodily injuries she incurred from contact with construction debris and fiberglass particles due to BBG's failure to manage the construction site. Insurer refused to defend or indemnify BBG due to the pollution exclusion. Plaintiff sued Insurer for breach of the Policy. Insurer argued it owed no duty to defend to BBG because the four corners of the First Amended Complaint alleged facts that fell squarely within the policy exclusion.

The district court noted the four corners rule provides "courts generally determine the existence of a duty to defend based solely on the allegations in the complaint, with all doubts resolved in favor of the insured." However, the court also noted, "in special circumstances, a court may consider extrinsic facts if those facts are undisputed, and, had they been pled in the complaint, they clearly would have placed the claims outside the scope of coverage." The district court granted summary judgment to Insurer, thereby agreeing with Insurer that these facts permitted the court to apply the exception to the four corners rule. The district court determined it could look to extrinsic evidence outside of the allegations in the First Amended Complaint, including Plaintiff's presuit demand package, initial complaint, and medical records. The appellate court noted the First Amended Complaint omitted a "crucial, undisputed fact in a patent attempt to 'plead into coverage,'" namely, uncontroverted facts that placed Plaintiff's claims outside the scope of the Policy's coverage due to the pre-suit allegations that fiberglass particles, debris, and dust irritated Plaintiff's eyes, lungs, and skin when it contaminated the air she breathed. The extrinsic evidence shows the uncontroverted facts establish that the pollution exclusion bars Insurer's duty to defend BBG. The appellate court affirmed the district court's grant of summary judgment to Insurer and the district court's analysis that looked to extrinsic evidence.

Case Law Update

By: Brett Henson, Esq.
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***Security First Insurance Company v. John Czeslusniak*, 45 Fla. L. Weekly D1151 (Fla. 3rd DCA 2020).**

Where water damage to insured home was caused by water entering home through walls and windows, an excluded cause, and by water entering through door, a cause which was not excluded, trial court erred in granting directed verdict in favor of insured on basis of concurrent cause doctrine because policy contained an anti-concurrent cause provision. Due to the fact the evidence of water entering through the walls and windows was undisputed and expressly excluded by policy, entire loss is excluded from coverage due to anti-concurrent cause provision.

***South Winds Construction Corp. v. Preferred Contractors Insurance Company Risk Retention Group, LLC*, 45 Fla. L. Weekly D1152 (Fla. 3rd DCA 2020).**

Insurer had no duty to defend construction company in action alleging that company's employee or agent caused damage to condominium building where the damage occurred above the third story of the condominium building, and the policy contained an exclusion for construction damage to a building more than three stories in height.

By: Joseph Herbert, Esq.
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Sarasota, FL

***Lazaro Hernandez v. Citizens Property Insurance Corporation*, 2020 WL 2549534 (Fla. 3rd DCA 2020).**

The 3rd District Court of Appeal agreed with the trial court that the damage caused to plaintiff's home consisting of cracks in walls and floors caused by vibrations created by blasting operations on a neighboring property is excluded from coverage by an earth-movement/settlement exclusion in policy. The court determined that the policy excluded indirect damage to property as result of earth movement if that damage was triggered by off-site activities.

***Edwin Taylor Corp. v. Mortgage Elec. Registration Sys., Inc.*, 45 Fla. L. Weekly D1447 (Fla. 2nd DCA 2020).**

The appellate court held that a notice of commencement that was not signed by the property owner, but was instead signed by the general contractor with the authority of the owner, would not be rendered a nullity as a matter of law in a lien foreclosure action brought by a subcontractor if the subcontractor relies on the notice of commencement and otherwise strictly complied with Chapter 713. The appellate court indicate the notice of commencement must otherwise be in substantial compliance with section 713.07, holding the homeowner may not use the fact that the notice of commencement was signed by the general contractor as a sword against a subcontractor due to the fact the subcontractor does not have a duty to ensure the accuracy of the notice of commencement.

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***Kokhan v. Auto Club Ins. Co. of Fla.*, 2020 WL 2550087 (Fla. 4th DCA 2020).**

The Insured brought an action against the Insurer for breach of the insurance contract alleging the homeowner's pool suffered a leaking drain pipe which caused damages to the property. The appellate court found the trial court erred by awarding summary judgment against the homeowner indicating the all risk policy excluded coverage for the damage under a water damage exclusion. The appellate court looked to the language of water damage exclusion provisions in the policy, which excluded coverage for naturally-flowing water and waterborne material existing outside of the plumbing system. An argument regarding the policy's "wear and tear" exclusion, was not presented for review by the trial court and was not preserved for appeal.

SUBMISSIONS

Do you have an article, case update, or topic you would like to see in CONSTRUCTive Talk? Submit your article, note, or idea to:
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Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour 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. **The meetings are conducted via Zoom, which is now our standard meeting format. If you wish to attend by Zoom video, the link, meeting ID and password are below. If you do not, there is a toll-free conference call number below the link . You may call that number to hear the audio only. We will not be using the traditional conference call-in number.**

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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 Reese Henderson at reese.henderson@gray-robinson.com advising you would like to join the CLC and provide your contact information.

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