COMMENTARY

# The Uncertainty in Fla. Circuit Courts Concerning Section 553.84 Causes of Action Against Design Professionals

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May 02, 2024 at 10:59 AM

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By Jacob Epstein, Kara Olesky and Franchesco Soto | May 02, 2024 at 10:59 AM

As most construction litigation practitioners are aware, the vast majority of construction defect cases settle before trial and even those that proceed through trial may not get all the way through the appellate process. That means that construction litigators are left with very little guidance from the appellate courts regarding certain, nuanced issues that are specific to these types of cases.

Florida Statute Section 553.84 provides in pertinent part that any party damaged as a result of a violation of Chapter 553 or the Florida Building Code has a cause of action "against the person or party who committed the violation." Across the state of Florida, defense attorneys representing design professionals have taken the position that Section 553.84 causes of action are simply not available against design professional defendants. They argue that only a contractor can "commit" a violation of the Florida Building Code and that remedies against design professionals should be limited to what is available in tort (via professional negligence) or contract. Despite the absence of any binding legal authority supporting this position, some trial courts have agreed with these positions and have been dismissing Section 553.84 causes of action against design professionals with prejudice while finding, as a matter of law, that Section 553.84 does not apply to design professionals.

Other trial courts have routinely denied these motions to dismiss, relying on the language of Chapter 553 itself in support of their rulings. Following the devastation caused by Hurricane Andrew in 1992, the Florida Legislature adopted the recommendations of the "Florida Building Code Study Commission" and completely overhauled Chapter 553, which now applies to the design of buildings and structures in Florida. Since 1998, Section 553.72 details the Legislature's intent of Chapter 553, which is to provide for a unified state building code (the Florida Building Code), which applies to both design and construction. Section 553.72 also provides that the Legislature's intent for this chapter is to "allow effective and reasonable protection of public safety, health and general welfare for all the people of Florida at the most reasonable cost to the consumer." Furthermore, Section 553.781 provides that accountability for work performed by design professionals and contractors is the key to strong and consistent compliance with the Florida Building Code and the protection of the "public health, safety, and welfare," and goes on to allow for statutory fines against any construction professionals (including architects and engineers) who have "committed" a violation of the Florida Building Code and fail to correct that violation within a reasonable time. In sum, the Legislature has made it clear that design professionals can be deemed to "commit" violations of the Florida Building Code, both Chapter 553 and the Florida Building Code apply to both contractors and design professionals, and it was the Legislature's intention for that statute to apply to both contractors and design professionals.

Notwithstanding this language within Chapter 553, design professionals argue that a design professional cannot "commit" a violation of Chapter 553 or the Florida Building Code, and they often rely on the 1991 case of *Casa Clara Condominium Association v. Charley Toppino & Sons,* in support of that argument. In that case, the Third District Court of Appeals held that a concrete material supplier did not have a duty to comply with the "state minimum building codes" that were in effect at the time. Notably, *Casa Clara* was interpreting and applying an earlier version of Chapter 553 (before Hurricane Andrew), which applied only to the "construction, erection, alternation, repair, or demolition of any building."

Even before the law changed following Hurricane Andrew, several district courts of appeal explicitly held that causes of action are available against design professionals for code violations. For example, in the famous 1990 case of *Seibert v. Bayport Beach and Tennis Club Association*, the Second District Court of Appeals specifically held "it is clear that *Seibert* had a duty to design the second-floor units and their fire exits in a manner that complied with the Standard Building Code and his failure to use due care in doing so would make him liable."

These interpretations of Section 553.84 surely prejudice construction defect plaintiffs, but they also prejudice any contractor defendants asserting a *Spearin* affirmative defense (i.e., that the alleged defect is a result of a design deficiency in the plans and that the contractor simply followed the plans). If the design professional cannot be liable for a 553.84 cause of action, even if the specific code violation was caused by a design deficiency, those contractor defendants are potentially left holding the bag of any damages resulting from the code violation. It is hard to imagine that the Florida Legislature's intent in drafting Section 553.84 was to place all of that liability in the laps of the contractors, but that is the result being advocated for by the design professionals. How can a statute that explicitly provides for liability against any "person or party" who committed a material violation of the Florida Building Code or Chapter 553 be interpreted to only apply to contractors? Certainly, if that were the true intent of the legislature, they would and could have framed the statute to read accordingly.

Without binding appellate precedent addressing this specific issue, trial courts are left without the proper guidance to ensure consistency among the circuit courts. As it stands, without that appellate guidance, construction litigators are left with a situation where Section 553.84 causes of action are allowed to proceed against design professionals in some jurisdictions, but not in others.

**Jacob A. Epstein,** *a partner with Haber Law, is Board Certified in construction law by the Florida Bar and concentrates his practice in the areas of construction litigation, construction law, and real estate litigation.* **Kara Olesky**, *a senior associate with the firm is experienced in handling a wide variety of matters in the areas of construction and commercial litigation.* **Franchesco (Frank) Soto** *is an equity partner with the firm. He is the chair of the construction department.*