

Construction Defect

Part I: Case Management Strategies

Part II: Discussion of *D.R. Horton, Inc. v. Heron's
Landing Condo. Assoc. of Jacksonville, Inc.*



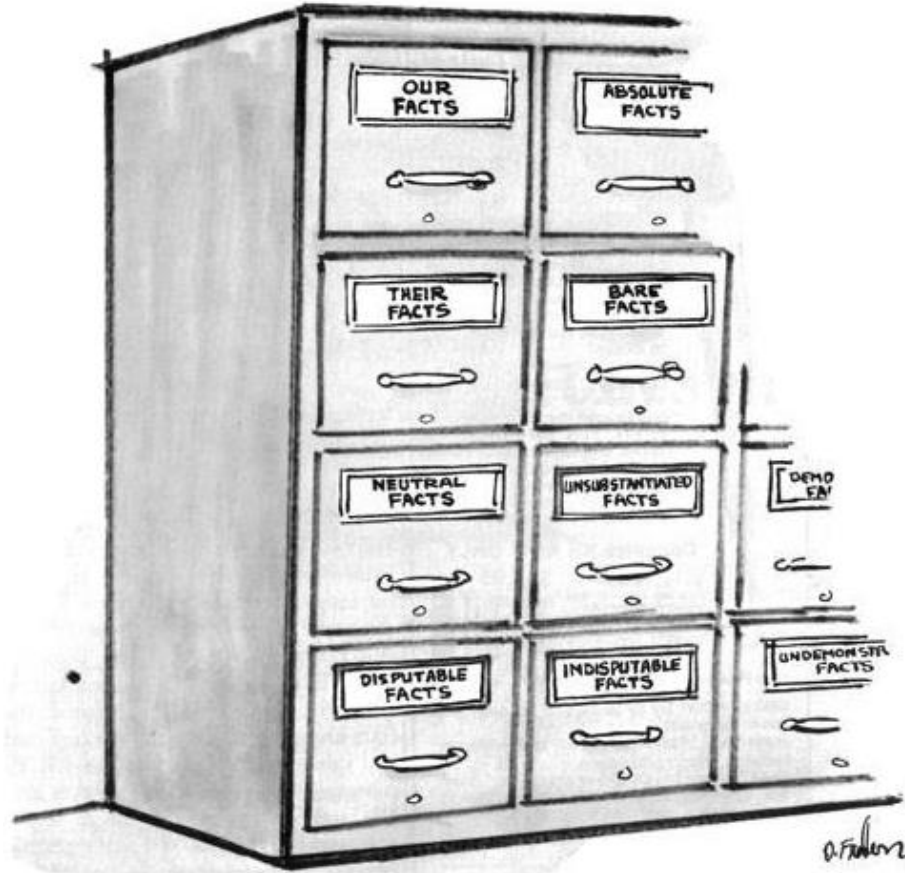
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Initial Client Contact



- **Meet with the Client as soon as possible**
- Request original project file and records
 - As-Built Plans
 - Change Orders
 - Requests for Information (RFIs)
 - Submittals
 - Photographs
- Consider additional sources for records
 - Building Department
 - Municipalities / Gov't Agencies

Ongoing Claims or Notices?

- Has Client received any notices since completion of construction?
 - Warranty claims
 - Demand letters
 - Repair notices
 - Florida Statute Chapter 558 Notices
- Has Client performed any repairs post original construction?



Flow Down Notices

General Contractor



Subcontractor



Sub-Subcontractor



Supplier

TIP: Florida Statute does not require flow down notices to subcontractors, etc.

Project Inspection

- **Visit the Project to evaluate present conditions**
 - Attend with client if possible
 - Consider retaining expert
 - Confirm who will be in attendance
 - Plaintiff's counsel?
 - Plaintiff's expert?
 - Property management?
 - Board members?



Retaining an Expert



- **Hire an Expert**
 - Experience working for plaintiffs and defendants
 - Worked on similar projects
 - **Type:** high-rise, single family
 - **Location:** coastal, inner-city
 - **Scope of work:** trade specific
- **Consider a Damages Expert**
 - Able to evaluate repair protocol
 - Prepare repair protocol
 - Opine on reasonableness of damages

Explore Early Resolution

- Ask for a demand early and often
- Solicit early demand from Developer/GC including:
 - I. Additional Insurance;
 - II. Contractual Indemnity;
 - III. Defense Costs to completely extract the insured and carrier(s).
- Consider an early mediation before oral discovery
 - Experts can attend and talk freely with Plaintiff's expert to get to the bottom of the claims.



Benefit of Receiving a Demand



Allows demand to be compared with our expert's damages evaluation

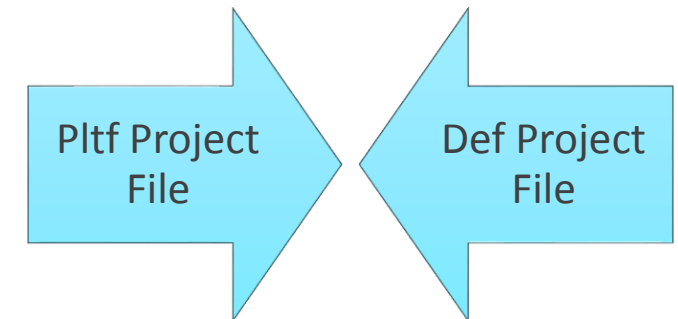
- **Helps to better understand Plaintiff's evaluation of the claim**
 - Request supporting documentation
 - If reasonable, make initial offer prior to mediation
 - Pre-Mediation conference with mediator
- **Propound written discovery to determine value of claim**

Early Mediation

- Determine how contentious case will be
- **Lock in mediator** to use through duration of case
- Assess ability to file **targeted motion for summary judgment** prior to mediation
 - Statute of Limitations / Statute of Repose
 - Standing to bring claims
- **Pre-Mediation Report** and conference call with client & adjuster
- Post-Mediation **Proposal for Settlement**

Work to Develop Detailed Case Management Order

- **Push for Expert Discovery** at the **Beginning** not End
- **Stagger** plaintiff/ defendant(s) fact & expert discovery **deadlines**
- Require project **file exchange**
- Set **deadlines** for **destructive testing**
- Use **same court reporting** service



Work to Develop Detailed Case Management Order

- **Dispositive motion briefing** prior to Pre-Trial Conference
- Mediation deadline(s)
- **Limit** number of **experts** per party



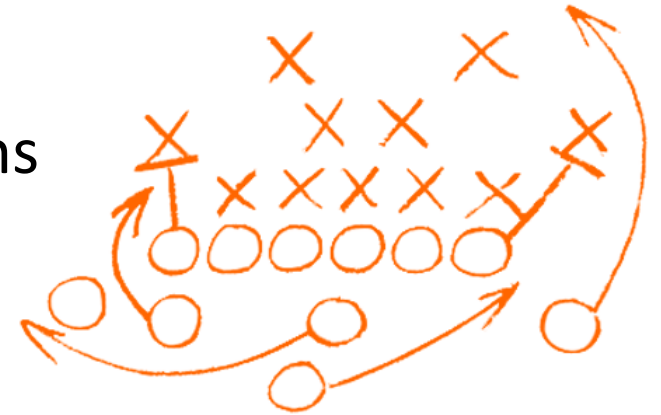
Work to Develop Detailed Case Management Order



- Determine whether to require **written expert reports**
 - Costs?
 - Lock in opposing side's expert?
- Utilize **status conferences** / Judge's short-matters calendar

Discovery to Facilitate Early Resolution

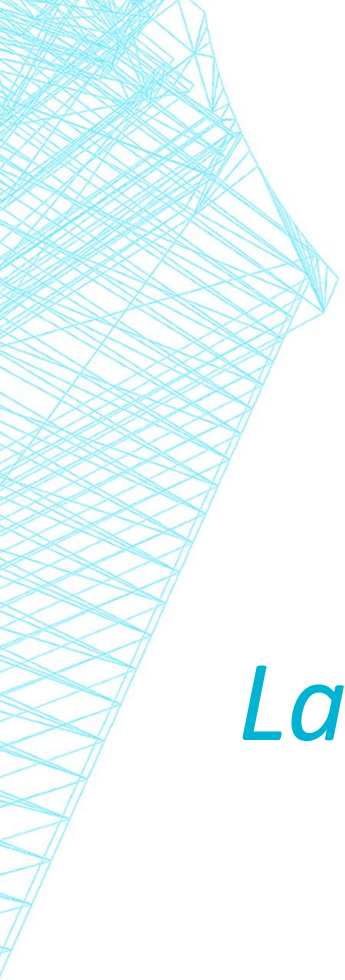
- **Expert-based Discovery**
 - Lock in plaintiff's expert's opinions
 - Written discovery targeted to expert's opinions
- **Site Inspections**
 - Document conditions of defects early in suit
 - Set up a game plan with client and/or expert
- **Depositions & Written Discovery**
 - Issue written discovery prior to deposition to use as a guide
 - Consider timing and order of depositions of client and expert



Consulting Throughout the Case

- **Client & Carrier**
 - Prior to joining in motion for sanctions or motion to compel
- **Client**
 - Prior to client's deposition
- **Expert**
 - Prior to opposing parties' expert depositions





PART II

Discussion of *D.R. Horton, Inc. v. Heron's Landing*, 266 So. 3d 1201 (Fla. 1st DCA 2018)

D.R. Horton – Expert Testimony

- Project consisted of **240 units in 20 buildings**
- Expert testified **all 220,000sf** of stucco should **be removed**
- Expert based opinion on 200 square feet of testing
- **0.00090909% sample size**



D.R. Horton – Expert Testimony



- Trial Court admitted expert testimony based on improper extrapolation
- Defense filed motion in limine to preclude, arguing:
 - “Inherently unreliable”
 - “Improper extrapolation”

D.R. Horton – Expert Testimony

- Expert's qualitative assessment:
 - “A lot of visual . . . and the unpredictability of where water actually comes in.”
- Expert asked whether it was just his opinion that one should employ **qualitative** sampling versus **quantitative** sampling



D.R. Horton – Expert Testimony

- Expert relied on ASTM E 2128 as peer-reviewed basis for protocol on performing *qualitative* assessments:
 - ASTM Standards used for Property Condition Assessments
 - Referenced peer-reviewed ASTM journal article
 - Professional engineer peer reviewed the report



ASTM INTERNATIONAL

D.R. Horton – Expert Testimony

Trial Court found that methodology used by experts was:

- 1) Scientifically reliable;
- 2) Peer reviewed;
- 3) Developed by people in the industry; and
- 4) Accepted in the scientific community.

Strategies to Defend

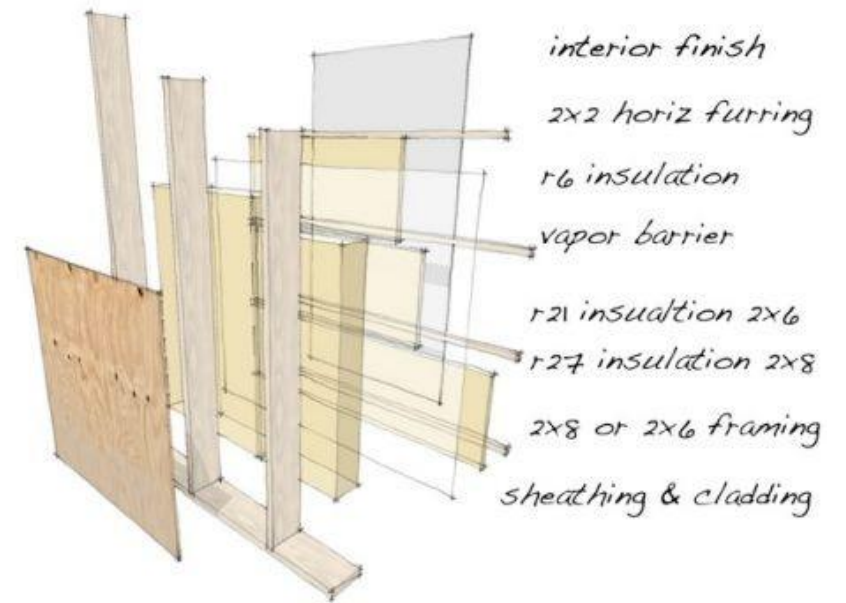
ASTM E2128: Standard Guide for Evaluating Water Leakage of Building Walls



- “Water Leakage” is water penetration that:
 - Exceeds the planned resistance and drainage capacity of wall
 - Is causing or likely to cause premature deterioration of a building
 - Is adversely affecting the performance of other components

ASTM E2128: Standard Guide for Evaluating Water Leakage of Building Walls

- “Building Walls” includes the entire wall system including exterior and interior finishes, windows, structural components and components to maintain the building interior (i.e. plumbing, HVAC equipment)



ASTM E2128

Qualitative Testing:

- Not a random sample
- Test areas with known leaks to determine path of entry
- Intended to answer why, how and to what extent a building leaks
- Investigate a spectrum of conditions (i.e. performing / not performing; undeteriorated / deteriorated)

ASTM E2128

Quantitative Testing:

- Tests enough areas to draw statistically reliable conclusions about other similarly constructed areas of the building
- Simple Random Sampling (SRS)
- Random sampling of specific types of construction in certain exposure areas (irrespective of known problems)

ASTM E2128

Why are Plaintiff Experts Using Qualitative Testing?

- **Less expensive**
- **Avoid testing areas where no problems exist**
- **Present a picture to the jury that problems are widespread because multiple leaking areas tested**
- **Render extrapolation opinions without hiring a statistician and without the risk of bad results from randomly testing areas of the building that may NOT leak**

ASTM E2128

What does E2128 require?

- Review Project Documents
- Evaluate Project Design
- Determine Service History
- Non-Destructive Inspection
- Investigative Testing
- Analysis
- Prepare Report



ASTM E2128

Proper Investigative Steps (Storefront Window Example)

- Test window with known leak to determine path
- Test another of like kind to determine if pathway same
- Test other similar storefront windows with no known history of leaks of a sufficient quantity to conclude whether a systemic leak exists (different from SRS)



ASTM D3665: Standard Practice for Random Sampling of Construction Materials

- D3665 sets forth a standard for random selection and formulas for probability sampling
- Did Plaintiff's expert use this standard?

The Tactic of Adding Context

Consider Plaintiff's Burden of Proof



- Will Plaintiff put forth photos or videos showing deficient conditions?
- What visuals can defense put forth?
 - **Photos of non-deficient conditions**
 - Overwhelming amount of photos in comparison to Plaintiff
 - **Diagrams / layouts** highlighting areas of no deficiencies

Putting it all Together

In what ways did Plaintiff expert deviate from E2128?

- Did not follow all 7 steps (review of project documents, design concept, service history, etc.)
- Misinterpretation of the terms *building walls* or *water leakage*
- Based an extrapolation opinion on inadequate samples
- Overlooked samples that provided contrary evidence

QUESTIONS?



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*Thank
you* 