Court Reaffirms Damages Analysis in Construction Defect Cases

By: Thomas P. Wert B.C.S.[1]

On February 5, 2015, the Court of Appeals, Second District, reaffirmed the means by which courts determine damages for construction defect claims. *Gray v. Mark Hall Homes, Inc.*, 2016 WL 459436 (Fla. 2nd DCA Feb. 5, 2015). In 2005, Angela Gray contracted with Mark Hall Homes, Inc. to construct a single-family home on her property, agreeing to pay Mark Hall Homes $168,144 for the construction of the home. Shortly after moving in, Gray discovered a number of defects, which the builder attempted to remedy to no avail. The primary defect was a lack of flashing, which should have been installed between the walls and roof to prevent moisture penetration.

When Mark Hall Homes failed to remedy the problem, Gray paid a contractor $16,000 to replace a balcony on the home and brought legal action against the builder for breach of contract in Hillsborough County, Circuit Court. The case proceeded to trial. Witnesses testified that the lack of flashing caused damage throughout the house as moisture entered the home, causing wood rot to set in. The contractor who replaced the balcony told Gray, when he initially evaluated the house, to "get a bulldozer" and start over. He testified he could not agree to repair the entire house because "he would not even know where to start." A real estate agent, who Gray hired to sell the house, told her to tear it down because it was worthless and that a bank would not finance the home given its condition. The house had been listed for sale for a year but Gray did not receive any offers. The real estate agent testified that the home was the worst he had seen in his thirty-eight years in the business and that the wood rot in the home was "unbelievable." A structural engineer, who reviewed and approved the construction plans and inspected the home prior to trial, testified he observed wood rot, water damage, mold, and doors that were so rotted that they could not open properly. The engineer stated that the house was one of the ten worst homes he had ever inspected. He testified that the home was uninsurable, not suitable to rent and the cost to repair it would probably not justify the effort.

The jury returned a verdict in Gray's favor for $168,000, but the trial court reduced the award to $16,000 because the court held that the only damages Gray had properly proved was the $16,000 cost to replace the balcony. The appellate court reversed, holding that the trial court erred in not evaluating the evidence in the light most favorable to the plaintiff with every reasonable inference indulged in the plaintiff's favor. *Scott v. TPI Rests., Inc.,* 798 So. 2d 907, 909 (Fla. 5th DCA 2001). Additionally, where there are conflicts in the evidence or different reasonable inferences may be drawn from it, the issue is a factual one which should be submitted to the jury rather than decided by the trial court as a matter of law. Based upon the foregoing, the appellate court ruled that the jury could have reasonably concluded that the house was a total loss because multiple witnesses testified that the house was worthless and that Gray might be better off demolishing it, instead of trying to salvage it.

The *Gray* court instructed the trial court to reinstate the jury's $168,000 verdict because it was based upon a long-recognized measure of damages for construction defects from the Restatement of Contracts

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adopted by the Florida Supreme Court in *Grossman Holdings Ltd. v. Hourihan,* 414 So. 2d 1037, 1039 (Fla. 1982). In *Grossman*, the Supreme Court held that the proper measure of breach of contract damages for defective construction is:

> all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
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> (a) For defective or unfinished construction he can get judgment for either
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> (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
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> (ii) *the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.*
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> *Id.* (quoting Restatement (First) of Contracts § 346(1) (a) (Am.Law.Inst. 1932)) (emphasis added).

The *Grossman* court went on to quote comment (b) to explain the rule:

> The purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him; but this does not mean that he is to be put in the same specific physical position. Satisfaction for his harm is made either by giving him a sum of money sufficient to produce the physical product contracted for or by giving him the exchange value that that product would have had if it had been constructed. In very many cases it makes little difference whether the measure of recovery is based upon the value of the promised product as a whole or upon the cost of procuring and constructing it piecemeal. There are numerous cases, however, in which the value of the finished product is much less than the cost of producing it after the breach has occurred. *Sometimes defects in a complete structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste. If no such waste is involved, the cost of remedying the defect is the amount awarded as compensation for failure to render the promised performance.*
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> *Id.* (quoting Restatement (First) of Contracts § 346(1)(a) cmt. b (Am.Law.Inst. 1932)) (emphasis added).

Based upon the evidence admitted at trial, under the *Grossman* standard, the jury could have reasonably determined that the compensation payable by Mark Hall Homes for its failure to render the promised performance, i.e., its failure to install the required flashing, was the difference between the value of the house had flashing been installed ($168,000) and the value of the house without flashing ($0). Therefore, the Second DCA ruled the trial court erred when it limited Gray's damages to $16,000.

Mark Hall Homes argued on appeal that the testimony, supporting the conclusion that the home was worthless, was gratuitous lay opinion and, therefore, not admissible evidence. However, the builder had failed to object to the admission of this testimony at trial. A litigant cannot raise such an issue for the first time on appeal. *See Maddry v. State,* 585 So. 2d 359, 360 (Fla. 1st DCA 1991). Therefore, the appellate court refused to consider this argument. The outcome might have been entirely different if the issue of admissibility of this evidence had been challenged at trial because it appears the trial judge did not find this

evidence credible. However, because the trial court admitted this evidence without objection, it was obligated to allow the jury to consider it in rendering its verdict.

For contractors, this ruling is a sobering warning that the failure to comply with a single specification or construction standard, albeit a critical one in this case, can have far-reaching effects on the contractor's ability to remedy the defect and, ultimately, the amount of damages that can be incurred on a project.

Please address any questions with regard to the implications of the *Gray* decision to the following Roetzel Construction Law attorneys.

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