

**NEGLIGENCE
AND THE
STANDARD
OF CARE**

**PROFESSIONALS
(LICENSED OR NOT)
ARE PERSONALLY LIABLE
FOR THEIR
PROFESSIONAL ACTS.**

**IN MOST STATES, ONLY
PROFESSIONALS
(NOT THE FIRMS THEY
WORK FOR)
CAN BE SUED FOR
NEGLIGENCE.**

**THE FIRMS ARE
FINANCIALLY
RESPONSIBLE BECAUSE
THE PROFESSIONALS
BEING SUED ARE THEIR
AGENTS.**

**PROFESSIONALS'
NUMBER-ONE
FEAR**

**PROFESSIONALS'
NUMBER-ONE
FEAR
NEGLIGENCE
CLAIM**

**PROFESSIONALS'
NUMBER-ONE
FEAR
LITIGATION**

**OUR LEGAL SYSTEM IN
(VERY) BRIEF**



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

Statutory Law



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

**Statutory Law
Common Law**



**Statutory law is based on
statutes (laws) passed by a
legislature, enacted by an
executive, and not
overthrown by the courts.**



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

Statutory Law



**OUR LEGAL SYSTEM IN
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**Statutory Law
CRIMINAL**



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

**Statutory Law
CRIMINAL
CIVIL**



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

**Statutory Law
CRIMINAL
Misdemeanors**



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

Statutory Law
CRIMINAL
Misdemeanors
Felonies



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

Statutory Law
CRIMINAL
Misdemeanors
Felonies
CIVIL



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

Statutory Law
CRIMINAL
Misdemeanors
Felonies
CIVIL
Superfund (CERCLA)



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

Common Law



Common law is based on the
Constitution and legal
precedents.



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

Common Law
CONTRACTS



**OUR LEGAL SYSTEM IN
(VERY) BRIEF**

**Common Law
CONTRACTS
TORTS**



A contract is a legally enforceable agreement between two or more parties to do or not do something.



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A tort is a civil wrong for which the law will grant a remedy.



**NEGLIGENCE
IS A
TORT**



**The
"Reasonable-Person
Rule" Applies**



**PROFESSIONAL
NEGLIGENCE
IS A
TORT**



**The
"Reasonable-
Professional
Rule" Applies**



**WHAT IS
PROFESSIONAL
NEGLIGENCE?**

**PROFESSIONAL
NEGLIGENCE
IS A FAILURE
TO ABIDE BY THE
STANDARD
OF CARE
THAT
RESULTS IN
INJURY OR DAMAGE**

**WHAT IS
STANDARD
OF CARE?**

**STANDARD OF CARE
is the ordinary skill and
competence exercised by
members of a profession
in good standing in the
community at the
time of the event creating
the cause of action.**

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STANDARD
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THAT
RESULTS IN
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**THAT
RESULTS IN
INJURY OR DAMAGE**

**NO
HARM,
NO
FOUL
THAT
RESULTS IN
INJURY OR DAMAGE**

The case of the
**HOUSE ON
THE HILLTOP**



**MEETING THE
STANDARD OF CARE
IS A
PIECE OF CAKE!**

**WHAT IS THE
STANDARD OF CARE
YOU MUST ABIDE BY?**



**You don't learn
what the applicable
standard of care
is until
after the fact.**

**HOW IS THE
STANDARD OF CARE
DETERMINED?**

**THROUGH
LITIGATION
THAT CULMINATES
IN A**

**THROUGH
LITIGATION
THAT CULMINATES
IN A
TRIAL**



THE ACTION



**THE ACTION
THROUGH WHICH
THE CREDIBILITY
OF THE DISPUTED
FACTS IS TESTED OR
"TRIED"**



**(IF THE FACTS ARE
NOT IN DISPUTE,
THERE'S NO REASON
FOR A TRIAL)**



**WHO DETERMINES
WHAT THE
STANDARD OF CARE
WAS AT THE
TIME OF THE EVENT
CREATING THE CAUSE
OF ACTION?**

**THE
TRIER
OF FACT**

**WHO DETERMINES
WHETHER OR NOT
YOU MET THE
STANDARD OF CARE?**

**THE
TRIER
OF FACT**

**WHO DETERMINES
WHETHER OR NOT
YOU WERE
NEGLIGENT?**

**THE
TRIER
OF FACT**

**WHO
IS
THE
TRIER OF FACT?**

**THE JUDGE OR,
FAR MORE
COMMONLY,
A JURY,**

**THE JUDGE OR,
FAR MORE
COMMONLY,
A JURY,
NEITHER OF
WHICH KNOWS
ANYTHING
ABOUT WHAT YOU DO!**

WHY?

**Except when a judge
decides it's absolutely obvious,
A TRIER OF FACT IS NOT
ALLOWED TO DETERMINE
THE STANDARD OF CARE
OR PROFESSIONAL
NEGLIGENCE WITHOUT**

Except when a judge decides it's absolutely obvious, **A TRIER OF FACT IS NOT ALLOWED TO DETERMINE THE STANDARD OF CARE OR PROFESSIONAL NEGLIGENCE WITHOUT AN EXPERT WITNESS**

Experts are supposed to serve the trier of fact – not their clients – by providing factual explanations and unbiased opinions.



Experts are supposed to disagree with one another only because of honest differences of opinion.



It doesn't always work that way.



Some experts are hired guns who will say anything for a buck.

Rather than conduct the research needed to know what area peers were doing at the time of the event creating the cause of action,

Rather than conduct the research needed to know what area peers were doing at the time of the event creating the cause of action, they'll testify it involved far more than you did.

How do triers of fact decide which expert to believe?

With their eyes and ears.

Which expert looks and sounds more like an expert?



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Especially when the plaintiffs are third parties – those other than the two parties to a contract – who have been injured

Especially when the plaintiffs are third parties – those other than the two parties to a contract – who have been injured and the triers of fact believe it's their responsibility to make the injured party whole.

Homeowners often have the sympathy of the court. The trier of fact can relate.

Homeowners sue so often because:

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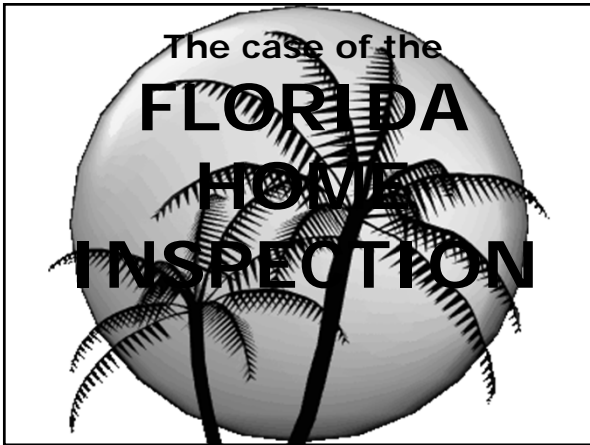
- They have unrealistic expectations and feel swindled when they are not met.

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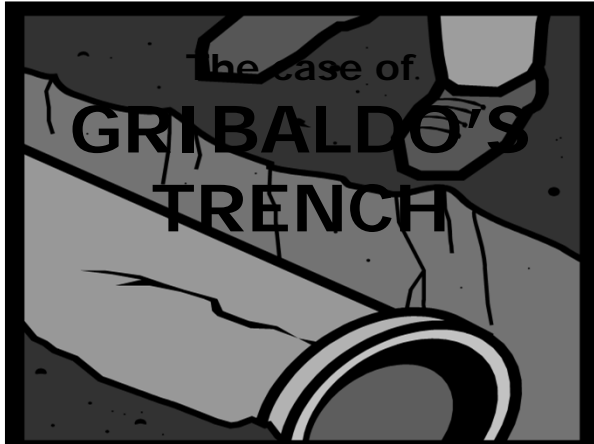
- They have unrealistic expectations and feel swindled when they are not met.
- They're told – correctly– that they have a good likelihood of winning, because they have the sympathy of the triers of fact, most of whom are homeowners, too.

Homeowners sue so often because:

- They have unrealistic expectations and feel swindled when they are not met.
- They're told – correctly– that they have a good likelihood of winning, because they have the sympathy of the triers of fact, most of whom are homeowners, too.
- They often win damage awards that far exceed the real cost of making repairs.

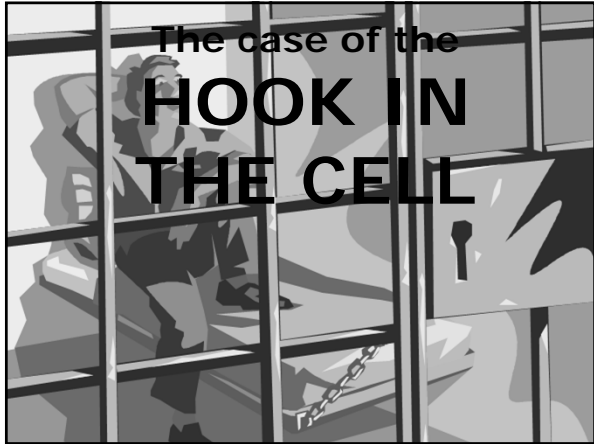


**WORKERS'
COMPENSATION
INSURANCE
CAN AGGRAVATE
THE PROBLEM
WHEN THE INJURED
THIRD PARTY IS A
CONSTRUCTION WORKER.**



**IN OTHER CASES
FORESEEABILITY MIGHT BE
THE ISSUE, BECAUSE
PROFESSIONALS OWE A
DUTY OF CARE TO ANY
PARTY THAT COULD
FORESEEABLY BE INJURED
BY THEIR NEGLIGENT ACTS.**





**OWNERS
FILE 60-70% OF ALL
CLAIMS AGAINST DESIGN
AND ENVIRONMENTAL
PROFESSIONALS.**

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FILE 60-70% OF ALL
CLAIMS AGAINST DESIGN
AND ENVIRONMENTAL
PROFESSIONALS.
MOST OF THESE CLAIMS
ALLEGE NEGLIGENCE IN
WHOLE OR IN PART.**

WHY DO OWNERS SUE SO MUCH?

- **The owner representative's ridiculously optimistic budget is exceeded.**

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- **The owner representative's ridiculously optimistic budget is exceeded.**
- **The owner believes that the project team should participate in the shortfall.**
- **The owner retains counsel (or has lawyers on staff) to identify the vulnerable.**
- **You're vulnerable so you get sued.**

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Besides...

**IT'S
EASY
FOR THEM
TO
WIN!**

They know and you know that, from a business point of view, it's better to spend \$75,000 to avoid litigation than it is to spend \$100,000 (or more) to prove you should not have been sued to begin with.

"You'll have your day in court" is almost always (95% of the time) a myth.

**STAY
OUT OF
COURT**

**STAY OUT
OF COURT**
ASFE CAN TEACH
YOU HOW

LESSON ONE:

LESSON ONE:
FRIENDS

LESSON ONE:
**FRIENDS
DON'T**

LESSON ONE:
**FRIENDS
DON'T
SUE**

LESSON ONE:

**FRIENDS
DON'T
SUE
FRIENDS**

Our Next Webinar Is Titled

**"Resolving To Win the War
against Commoditization"**

Led by Vic Donald, P.E. (*Terracon*)

The Date Is
**Wednesday
January 16, 2013**

The Time Is
Noon EST

In February

**"The Case of the
Contaminated Project"**

Led by Kurt Fraese, L.G.,
(*GeoEngineers*)

**Wednesday
February 13, 2013**

The Time Is
Noon EST

Also in February
**"Clients for Life: Their Worth;
Creating Them and Keeping
Them"**
Led by John Bachner
Wednesday
February 27, 2013
**The Time Is
Noon EST**

Also Scheduled

March 6, 2013: Expectations Management (John Bachner)

March 20, 2013: Justice Theater: Litigation and the Resolution of Your Disputes (John Bachner)

April 3, 2013: Gaining Referrals: Their Worth; Gaining More of Them (John Bachner)

April 17, 2013: Limitation of Liability (John Bachner)

Questions?

**Just e-mail
john@bachner.com**