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It is impossible to predict the outcome of litigation. And the lack of predictability can make it difficult to ascertain the risks of litigation. Not only do the parties disagree, but the judges also disagree on significant issues. Two recent Court of Appeals cases highlight the uncertainty that is inherit in construction litigation, both before trial and after trial.

In *Park Rise HOA v. Resource Construction Co.*, decided June 15, 2006, Park Rise Homeowners Association, Inc. (the “HOA”) brought construction-defects claims against both the developer of the community and the general contractor. Although the HOA settled with the developer, the jury still had the task of apportioning fault for its damages between construction problems (which were the responsibility of general contractor) and design defects (which were the responsibility of the developer).

The trial court, relying on a prior Court of Appeals decision, concluded that the HOA had not presented sufficient evidence to allow the jury to apportion damages among construction and design defects. Because of this, the trial court entered a directed verdict in favor of the general contractor. At that point, the general contractor had won, based on a ruling interpreting prior Court of Appeals precedent. But the Court of Appeals reversed the trial court. According to the Court of Appeals, the HOA had presented sufficient evidence that the defects complained of for at least three of its 18 categories of damages were construction errors, not design problems. Thus, the Court of Appeals sent the case back (all 18 categories) to the trial court to be tried again to a second jury.

The *Park Rise HOA* decision shows how dramatically judges' opinions on key issues can vary. In addition to showing how judges' interpretations of the law can differ, *Belfor USA Group, Inc. v. Rocky Mountain Caulking and Waterproofing, LLC*, decided August 9, 2006, shows the unpredictable nature of a jury verdict. Belfor had hired Rocky Mountain to install caulking and waterproof coatings on 161 exterior decks of an apartment complex for a lump sum of $184,831. Rocky Mountain partially completed the work, and Belfor paid Rocky Mountain only $65,380. The parties then went to court, both alleging that the other had breached the contract.

Rocky Mountain indicated throughout the preliminary stages of the lawsuit that it was seeking only $12,582.90 for unpaid work performed. Rocky

Mountain's mechanics' lien was for $12,582.90. In the Trial Management Order, Rocky Mountain identified that it was seeking $12,582.90. And Rocky Mountain's principal testified at trial that only four invoices totaling $12,582.90 remained unpaid. Thus, Belfor and the trial court apparently presumed that Rocky Mountain was only seeking $12,582.90.

At trial, Rocky Mountain put on evidence that it was not allowed to perform $106,868.10 in contract work. But the trial court directed the jury to ignore testimony related to lost profits, because Rocky Mountain had not made a claim for lost profits. Despite the trial court's instruction to the jury, after trial, the jury awarded damages to Rocky Mountain for $106,868.10, the exact amount in contract value that Rocky Mountain's principal testified his company was not allowed to perform.

The trial court then reduced the jury award to the $12,582.90 that Rocky Mountain had been claiming since the beginning of the lawsuit. The trial court did this primarily because of Rocky Mountain's continued representation throughout the various states of the case that is claim was for $12,582.90. But on appeal, the Court of Appeals reversed the trial court, and reinstated the jury award of $106,868.10, plus pre- and post-judgment interest. The Court of Appeals appears to suggest in its opinion that had the trial court chosen a different vehicle or rule by which to reduce the jury award, then it would not have been reversed.

Both *Park Rise HOA* and *Belfor* have legal implications beyond what is mentioned above. But still, they both highlight the unpredictable nature of litigation. This intangible, yet real, factor should be considered when considering settling a dispute.
