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San Francisco, CA, Jan. 21-22

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Current Events

MDC® INDUSTRY EVENTS



[2016 ASHRAE Winter Conference, Orlando, January 23-27, 2016](#)

[E. Mitchell Swann, Principal](#) at MDCSystems®, is highly involved in this conference. His schedule follows:

Join MDCSystems® at the Forum on Construction Law Midwinter Meeting, San Francisco, January 21-22

MDCSystems® will joined distinguished colleagues at the American Bar Association (ABA) Forum on the Construction Industry's Midwinter Meeting in San Francisco.



Join MDC® for rich discussions on the current state of project audits, environmental permits, cybersecurity, bid errors, owner/contractor bankruptcies and more. Take a moment to stop by **MDC's exhibit** to discuss "livin' on the fault line," pick up company information, or just to say hello. All visitors will have a chance to drop their business card at our booth for a chance to win our chic, yet practical, give-away!

Look forward to seeing you in San Francisco!

[Read More](#)

Construction Defect Inspector Protected Against Contractor Defamation Suit

*Written by Kent Holland
Reprinted from ConstructionRisk, LLC, 2015*

Where homeowners retained an inspection firm to investigate the cause of their leaky roof, the inspector issued a report stating that the roof had been installed years earlier over fiberboard roof insulation that was soaking wet, thereby causing the later leakage.

When the homeowners then sued the contractor for construction defects, the contractor brought a third party defamation action against the

Sunday, Jan. 24 (8 am)
Commissioning: Closing the Loop (Chair)

Tues., Jan. 26 (1:30 pm)
Commissioning Is Not Part of the Construction Contractor's Turnover Package (Debater)

Wednesday, Jan. 27 (11 am)
Don't Call it a Comeback!
The New and Improved Design-Build Survival Guide

ABA-Forum on Construction, 2016 Winter Meeting
Cutting Edge Solutions for Seismic Events
San Francisco, CA
January 21-22, 2016
[More Info](#)

MDC's Man in Pakistan
[Mitchell Swann, PE](#), completed speaking engagements in Lahore, Islamabad, and Karachi, Pakistan as part of ASHRAE's "Distinguished Lecturer" program
December 5-11, 2015
[More Info](#)

ABA-Forum on Construction, 2015 Fall Meeting
Construction ADR Summit
MDC® Attended & Exhibited
Austin, TX
October 8-9, 2015

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inspector, asserting that the statement about the roof being installed over wet insulation was false and defamatory. Summary judgment was granted for the inspector by the trial judge, and this was appealed by the contractor. On appeal, the court found that the statement by the inspector could indeed be actionable as defamation, but that a conditional privilege existed to publish the statement to the homeowner to serve the purposes of the contract between the homeowner and inspector. There are several lessons to be learned from this decision as explained herein. *Downey v. Chutehall Construction*, 86 Mass.App.Ct. 660, 19 N.E. 3d 470 (2014).

Contractor Defamation Suit

The trial court judge found that the inspector's report constituted a statement of "opinion" and "not fact," it was not negligently made, and it was in any event protected by a conditional privilege. The appellate court did not agree that the statement was an opinion rather than made as a statement of fact, but it concluded that the statement was protected by privilege that was not abused and that summary judgment in favor of the inspector was properly granted.

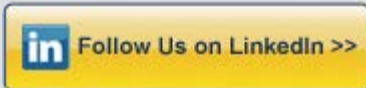
In order to recover on a defamation claim, the contractor would have had to establish that (1) a defamatory statement was "published", (2) the statement was a false statement of fact as opposed to opinion, (3) the inspector was at fault for making the statement and abused any privilege that may have otherwise attached, and (4) the contractor suffered damages as a result.

Here, the inspector stated that the homeowner's roof had been installed over wet insulation. "This appears to be an assertion of fact that, at least in theory, could be verified as true or false." The court concluded this was stated as more than merely an opinion and as such summary judgment could not be based on the argument that the inspector had merely voiced an "opinion." The court that published statement was not introduced merely as an expression of opinion. For example, the court pointed out that the statement was not "cautiously prefaced as representing 'the opinion of ...'" "Nor was the statement expressly qualified or limited as being based on the results of particular observations."

In addition, the intended audience for the statement (i.e., the homeowner) "could, we conclude, reasonably be expected to understand [inspector's] statement as one of determined fact and not just a qualified opinion., despite their understanding that [inspector] did not personally observe the installation." "We conclude that the unqualified assertion here, which might have been proven true or false, could reasonably be construed as a defamatory statement of fact. Summary judgment should not have been granted on the ground that it was an unambiguous opinion. We therefore turned to the questions of fault and privilege."

The court next looked at the question of whether there was a conditional privilege and if so whether it had been abused. "Under Massachusetts law, a publication will be deemed conditionally privileged if the publisher of the statement and the recipient have a common interest in the subject and the statement is 'reasonably calculated to further protect that interest.'"

Here, the court found that the inspector's statement involved a common



business interest between the inspector and the homeowner. Specifically, it involved the evaluation of the likely source of the roof leak so that repairs could be made. The statement furthered this common business interest as it affected the homeowners' decision on how they would proceed in addressing the roof leakage.

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