Stuck between a Collapsed Wall and a Hard Place:
The Failure to Establish the "Standard of Care" in a Negligence Claim

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Generally, "to establish a claim for negligence, a plaintiff must show: (1) the defendant had a legal duty to conform to a certain standard of conduct; (2) the defendant breached that duty; and (3) the plaintiff sustained damage that was proximately caused by the defendant's breach." *Beltran v. Rodriguez*, 36 So. 3d 725 (Fla. 3d DCA 2010). Most oftentimes, subrogation attorneys and claim professionals are focused on retaining forensic experts to help establish the second and third elements, to wit: the defendant's conduct was the legal cause of the loss. However, a recent decision by the United States Court of Appeals for the Eleventh Circuit provides a cautionary tale for claimants to not overlook proffering expert testimony to establish the requisite "standard of care."

In *Insurance Co. of the West*, 679 F.3d 1295 (11th Cir. 2012), Hawaiian Inn Beach Resort ("Hawaiian"), a condominium, contracted with Island Dream Homes ("IDH") to conduct a roof repair, which called for the cutting of a stone veneer wall ("the Wall"). *Ins. Co. of the West v. Island Dream Homes, Inc*. When IDH cut into the Wall, the wall collapsed and caused substantial damages. Hawaiian's insurer, Insurance Company of the West ("ICW") brought a negligence claim against IDH. Specifically, ICW alleged that IDH was negligent, because the roofers did not conduct adequate testing on the Wall, failed to review the condominium's original plans, and failed to consult with an engineer. At the conclusion of ICW's case at trial, the court granted IDH's motion for judgment as a matter of law, because ICW failed to present <u>any</u> evidence establishing the standard of care for the roofing industry.

ICW appealed the trial court's decision, and the Appellate Court affirmed the ruling. The Court indicated that expert testimony is required to establish the standard of care in all cases that involve "specialized knowledge," including roofing. The Court cited *AMH Appraisal Consultants, Inc. v. Argov Gavish P'ship*, 919 So. 2d 580, 581–82 (Fla. 4th DCA 2006), for the proposition that "expert testimony is required to define "the standard of care" when[ever] the subject matter is beyond the understanding of the average juror." The Court then ruled, "ICW was <u>required</u> to present evidence on the standard of care in the roofing industry – either by expert testimony or by presenting testimony of roofing custom"…"from which a jury could conclude that the roofer's actions were contrary to custom or the relevant standard of care." (emphasis added). "Because it did not, judgment as a matter of law was appropriate."

Based on the foregoing, and as a necessary precaution, attorneys and subrogation professionals must retain experts who are not only qualified to testify to the cause of the loss, but also must be able to testify as to the requisite standard of care that the defendant had a duty to conform to. The failure to do so may result in having your negligence claim crumble like the condominium's wall.