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Feature

Defending design

Firm builds practice focused on architecture copyrights



Tessier

By **FRED HORLBECK**
Senior Staff Writer

A South Carolina law firm is reaching out to clients nationwide in a practice area that it has, appropriately enough, built from the ground up since 2001.

Wyche, Burgess, Freeman & Parham of Greenville has turned one member's early interest in architecture copyright law into a specialty that has six lawyers advising architects and builders around the country.



Holleman

Today, the 38-lawyer firm says it has represented clients in more than 100 architecture copyright-infringement cases, reaping awards that have gone as high as eight figures.

"It took us a couple of years to get the practice ramped up a bit, but once we got it going, it kind of took off," said Troy Tessier, a Wyche litigation attorney who handles copyright cases.

In its most recent success, the firm settled a federal lawsuit on June 10. Its client, HRH Architects, Inc. of Marietta, Ga., asserted that multiple defendants had pirated its copyrighted design for an office building and had built 17 all-too-similar structures.



Lightsey

After a federal judge granted summary judgment to the plaintiff on several issues, the parties mediated, Tessier said. In the end, they settled for \$540,000 (see settlement report on right).

In addition to litigation, the firm counsels clients on how to protect intellectual property.

"We provide pretty general advice to a number of clients who are primarily home-plan designers and architects relating to their intellectual property, which for them primarily revolves around their architectural works," Tessier said.



Lightsey

Clients also include builders who have rights in architectural designs, said Frank Holleman, a litigator who is active in Wyche's copyright practice.

"Oftentimes, the builder will be the alleged infringer, but sometimes, too, the builders themselves have ownership interests in copyrights or licensing interests in copyrights and will discover that other builders are infringing on their rights," he said.

'Bigger and better'

It all started with Wyche member Wallace Lightsey's exploration of copyright law in the late 1990s.

He lacked formal training in that area, but he worked in other areas of intellectual property law. And copyright law intrigued him.

When Wyche started doing copyright-compliance work for the American Society of Composers, Authors and Publishers, Lightsey suddenly was in his element.

"At that point, my copyright litigation practice became very active. Again, it was something I enjoyed. I thought it was interesting and wanted to expand it," he said.

He started talking to local groups — photographers, writers, commercial artists — about copyright law.

Then, about nine years ago, a Greenville architectural firm retained him as its counsel on copyright issues. Pretty soon, an Atlanta architectural firm invited Lightsey to visit and hired Wyche as its copyright counsel.

"Because of that, that's really led to bigger and better things. We've had some big cases with both companies," he said.

Those cases raised Wyche's profile as the firm associated counsel in other states to help with litigation outside the Palmetto State.

"That really led to it becoming a more national practice," Lightsey said.

'A major problem'

It didn't hurt that, a few years before Lightsey got involved, Congress had enacted the nation's first federal copyright protection of architectural designs.

The Architectural Works Copyright Protection Act amended the U.S. Copyright Act to include architectural designs among the list of protected works.

It came just in time to catch the wave of Internet and computer technology that has helped turn copyright infringement into what Lightsey called a "major problem in the U.S."

"One thing we've become very convinced of is that copyright infringement is really rampant in this country," he said.

"A lot of it is that Internet technology makes it so easy," he said. "With file-sharing of music, there's an acceptance of it that I think desensitizes people to the fact that this is illegal."

Computer design programs also play a role, said Tessier.

"It becomes very, very easy for anyone with some basic drafting experience or training to take an existing plan and then manipulate it any which way they like. So it's enticing to them, I think, and it's also very easy," he said. "When they couple that with the thought that they won't get caught, it becomes hard to resist."

Another cause of architectural copyright infringement: In the highly competitive building industry, cutting costs can mean cutting corners.

And when it comes to architectural design, cutting corners can be all too tempting, especially when designers are hard-pressed to meet production quotas on plans that are original, functional and aesthetically pleasing, Lightsey said.

Moreover, builders who don't keep track of their own designs may inadvertently appropriate those of other builders, said Holleman.

"That's not something they pay attention to — maintaining clear records of where things came from. And so they'll

get designs into their system that they really don't have any ownership rights to," Holleman said.

Myths within the construction industry also fuel copyright infringement. For example, one persistent misconception holds that anyone who makes seven modifications to a design has created an original work.

Catching the culprits

But copycats do get caught.

Under the Architectural Works Copyright Protection Act, plaintiffs can recover three possible types of damages, including statutory and actual damages, by proving ownership of a valid copyright and showing infringement of the copyright.

But before any suit arises, a key strategy for any architectural designer is to register his design with the U.S. Copyright Office.

Creators automatically have a copyright interest in their creations, but registration "is a means by which you acquire statutory rights to enforce it or obtain certain remedies," Holleman said.

For example, registration entitles a plaintiff to recover attorney fees in a lawsuit.

"Under the law currently, you have to have a plan registered before you can file a lawsuit over that plan," Tessier said. "There are some exceptions to that. Many circuits in the country allow you to sue on a plan, even if you haven't got it registered yet, as long as you have applied for registration."

At best, a plaintiff can win damages based on the profits the defendant pocketed as the result of the infringement, Holleman said.

"What you have to prove ... are the gross revenues of the infringer. In a case involving the construction of homes that are then sold, that's a pretty big number, as you might imagine," Tessier said.

"If you imagine that the builder took a plan and built \$250,000 houses from it and sold a bunch, every four houses is \$1 million in terms of the gross-revenue figure. And so, as the plaintiff at a trial, all we have to do on behalf of our client is prove that gross-revenue figure, and then we are done."

A little luck helps, said Lightsey.

And he's occasionally seen the kind of luck that stalls defendants' denials of wrongdoing.

In one such instance, he said, defendants stoutly rejected his client's claim that they had infringed on townhouse designs. A deposition of the real estate agent who marketed the townhouses at issue changed all that, though.

"She brought her file with her to the deposition, and in her file was a copy of our client's plans," Lightsey said.

"She said, 'Well, the defendant's president gave me this early on and said this is what they had in mind and wanted to know if I thought it would sell,'" he said with a chuckle.

— Questions or comments may be directed to the writer at fred.horlbeck@sc.lawyersweekly.com.

SETTLEMENT REPORT

Brief statement of claim: Architecture copyright infringement

Special damages: n/a

Tried or settled: Settled

County and court where tried or settled: U.S. District Court for the Northern District of Georgia (Atlanta Division), Fulton County, Ga.

Case name and number: HRH Architects, Inc. v. Neil Lansing, Crescent Development, Inc., et al., C.A. No. 1:08-cv-01479-RLV

Date concluded: Stipulation of dismissal filed June 10, 2009

Name of judge: Senior U.S. District Court Judge Robert L. Vining Jr.

Amount: \$540,000

Insurance carrier: Columbia National Insurance Co.

Expert witnesses, areas of expertise and hometown: n/a

Attorneys for plaintiff: Troy A. Tessier and Rita Bolt Barker of Wyche, Burgess, Freeman & Parham, P.A., Greenville

Other useful info: The plaintiff, HRH Architects, Inc., is a small architecture firm in Marietta, Ga. HRH said that between 2001 and 2006 it contracted to provide architectural services to Neil Lansing and Crescent Development, Inc.

The plaintiff said part of the work it did for Crescent and Lansing included the design of an office building that it had copyrighted as an architectural work. HRH claimed that, after the entities concluded their business relationship in 2006, it discovered that Crescent and other companies formed by Lansing were constructing office buildings from designs remarkably similar to the HRH design.

HRH filed a lawsuit for copyright infringement in federal court against several defendants involved in the construction and sale of 17 buildings.

After discovery and on HRH's motion, the court granted summary judgment to HRH on several issues, including a finding as a matter of law that all 17 of the buildings in question were infringements of HRH's copyrighted design, the plaintiff said.

Counsel for HRH said they successfully filed motions in limine to exclude both expert witnesses that the defendants sought to present at trial.

The plaintiff reported that, on the strength of the favorable rulings from the court on summary judgment and the exclusion of the defense experts, the defendants settled the case at mediation shortly thereafter.

Submitted by: Troy A. Tessier

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