30

IN THE SUPREME COURT,
STATE OF FLORIDA

HALLEGERE (Hall) MURTHY,
etc. et ux.

Appellees,

vs.

N. SINHA CORP., etc., et al.

Appellants.

_____/

Case No.: 81,799

BRIEF OF AMICUS CURIAE
FLORIDA HOME BUILDERS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

All of the facts stated herein are derived from the Third District's opinion in Murthy v. N. Sinha Corp., 618 So.2d 307 (Fla. 3d DCA 1993), which is included in this brief as an appendix. (App. 1-3).

The petitioner homeowners entered into a construction contract with N. Sinha Corporation ("the Corporation") for the latter to construct improvements to their home. After perfecting its statutory mechanics lien rights, the corporation filed a complaint against the petitioners for breach of contract and to foreclose its lien. The petitioners thereafter filed an amended third party complaint against the corporate qualifying agent in his individual capacity, which included (in Counts IV and V) claims for violation of §§489.119 and 489.129, Fla. Stats. (1991). The trial court dismissed these counts, and the Third District affirmed, reasoning that these statutes are regulatory and penal in nature, and that neither creates a private cause of action against a qualifying agent individually. The Third District noted intra-district conflict and certified the following question to this Court:

> Does Chapter 489, Florida Statutes (1991), the licensing and regulatory chapter governing construction contracting, create a private cause of action against the individual qualifier for a corporation acting as a general contractor?

It is respectfully submitted that this question should now be

answered in the negative.[1]

SUMMARY OF THE ARGUMENT

As Petitioners recognize, Chapter 489 is penal in nature (P.I.B. 22). laws which are penal in nature are strictly construed. The threshold issue before the Court is, in the absence f an express provision for civil liability under the circumstances presented here, what test should be used in determining whether a cause of action should be judicially implied.

Over the years, as legislation has grown in volume and become increasingly more complex, the Federal test has been changed and narrowed to one which focuses on whether Congress intended to create the private remedy asserted. Florida case law shows a similar focus on legislative intent and, while none of the Federal decisions are binding on this court in construing a state statute, their rationale is nonetheless compelling. Florida legislation has become increasingly more comprehensive and our court likewise bear an ever greater burden of ascertaining legislative intent.

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[1] The present case certifies a question of law presented by an order dismissing a third party complaint. Questions as to what evidentiary effect should be given to a statutory violation (Petitioners' Initial Brief ("P.I.B.") at pages 20-22, 30-31) are beyond the scope of this appeal and constitute nothing more than an attempt to obtain an advisory opinion from this Court. Petitioners assertions as to "proof" provided below should likewise be disregarded as no evidence can either be adduced or considered the motion to dismiss stage. See e.g., Parkway General Hospital v. Allstate Ins. Co., 393 So.2d 1171, 1172 (Fla. 3d DCA 1981) (consideration of evidence is forbidden on a motion to dismiss as "wholly irrelevant")

It is clear that the Florida legislature knew how to create a private right of action, if it chose to do so. Indeed, this is not a case of judicial silence. Instead, a review of the Chapter and its history, reflects that the legislature chose to create a private right of action against uncertified or unlicensed contractors for injuries sustained from negligence, malfeasance or misfeasance. The existence of this provision makes it highly improbable that the legislature "absentmindedly forgot" to mention a private right of action against license contractors, and other circumstances presented here. Instead, it smacks of conscious choice. Where a statute provides a comprehensive scheme of administrative and judicial enforcement, courts should be wary of implying others into it.

Still further, the construction industry is subject to some of the most comprehensive regulation and discipline imposed on any profession. Chapter 489 requires education, experience and rigorous testing prior to licensing. In addition to suspension, denial of issuance or renewal of a license, qualifiers are subject to the highest administrative fines imposed upon any profession as well as criminal sanctions. A qualifier who loses his or her license cannot reapply for five years, and cannot serve as a partner, officer, director or trustee of a contracting organization for five years. In 1988, the disciplinary provisions were strengthened so as to empower restitution orders in favor of

consumers. While the statute thus "lifts the corporate veil" of the individual qualifier, it thus does so in the context of a regulatory scheme which can compel restitution to consumer -- not in the context of a new civil cause of action.

Finally, Petitioners do not seek "equal treatment" with other professions. Instead, they attempt to single qualifiers out for special, more stringent treatment. They have not cited a single case in which a cause of action has been implied from a regulatory statute against other professionals. Indeed, the Florida Bar code governing attorneys expressly states that the rules are intended for regulating conduct through disciplinary agencies and "are not designed to be a basis for civil liability."

Because the Third District has correctly interpreted Chapter 489, it is respectfully submitted that the certified question be answered in the negative.

ARGUMENT

THERE IS NO PRIVATE IMPLIED RIGHT OF ACTION UNDER CHAPTER 489, FLORIDA STATUTES (1991) AGAINST THE INDIVIDUAL QUALIFIER FOR A CORPORATION ACTING AS A GENERAL CONTRACTOR.

A. Statutory History and Analysis

Chapter 489, Florida Statutes is the licensing and regulatory chapter of the Florida Statutes governing construction contracting. As Petitioners recognize, the chapter "is penal in nature, and

imposes fines and disciplinary penalties for its violations." (P.I.B. at 22). Laws which are penal in nature are to be strictly construed in favor of the individual against whom the penalty is to be imposed. State v. Wershow, 343 So.2d 605, 608 (Fla. 1977). In construing a criminal statute, "[n]othing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms...". Id. at 608.

Chapter 489 makes no express provision for civil liability. The Court's "threshold inquiry" therefore concerns the appropriate test to be used in determining whether a cause of action should be judicially implied. Fischer v. Metcalf, 543 So.2d 785, 788 (Fla. 3d DCA 1989) (en banc)

Historically, when statutes were less comprehensive, the United States Supreme Court used a relatively simple test in determining whether a cause of action should be judicially implied. "[W]here a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done him contrary to the said law". Texas Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39, 36 S.Ct. 482, 60 L.Ed. 874 (1916), citing Holt, Ch. J., Anonymous, 6 Mod. 26, 27. Florida courts followed the identical test. See Rosenberg v. Ryder Leasing, Inc., 168

So.2d 678 (Fla. 3d DCA 1964) (court would imply a cause of action where a statute imposed a duty to benefit a class of members, and a class member was injured by breach of that duty).

In 1975, citing "[t]he increased complexity of federal legislation and the increased volume of federal litigation" the Supreme Court reconsidered its prior test. In Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975), the Court concentrated on determining Congressional intent in enacting the statute under review. Three of the four factors enumerated in Cort are germane in a state court setting. See Fischer v. Metcalf, 543 So.2d at 788. These are:

(1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted;

(2) whether there is any indication, either explicit or implicit, of a legislative intent to create or deny such a remedy; and

(3) whether judicial implication is consistent with the underlying purposes of the legislative scheme.

Cort v. Ash, 422 U.S. at 78, 95 S.Ct. at 2088, 45 L.Ed. 2d at 36 (emphasis in original).

In recent years, the scope of the Federal inquiry has been further narrowed to "whether Congress intended to create the private remedy asserted... ." Transamerican Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15-16, 100 S.Ct. 242, 62 L.Ed. 2d 146 (1979). Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377-78, 102 S.Ct 1825, 72 L.Ed. 2d 182 (1982)

("The key to the inquiry is the intent of the Legislature"); Public Health Trust of Dade County v. Lopez, 531 So.2d 949 (Fla. 1988) ("[L]egislative intent controls construction of statutes in Florida.")

The remaining Cort factors, the language and focus of the statute, its legislative history and purpose, simply relate to the issue of determining congressional intent. Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1976); St. Petersburg Bank and Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982) (legislative intent is determined primarily from the language of the statute and "[t]he plain meaning of the statutory language is the first consideration").

Unless such congressional intent "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Thompson v. Thompson, 484 U.S. 174, 179, 108 S.Ct. 513, 98 L.Ed 2d 512 (1988); Karahalis v. National Federation of Federal Employees, Local 1263, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed 2d 539 (1989) (Court unanimous in judgment, but not analysis).

While none of these Federal decisions are binding upon this Court, their rational is compelling. "Legislation in Florida has become increasingly comprehensive in recent years, and Florida courts bear an ever-greater burden of ascertaining legislative

intent when it is not otherwise clear". Fischer v. Metcalf, 543 So.2d at 789.

It is clear that the Florida legislature knew how to create a statutory civil action if it chose to do so. So, for example, in §553.84, Fla. Stats. (effective 1974), the legislature created a civil cause of action in favor of any person or party damaged as a result of a violation of the state minimum building codes against the party committing the violation.

In contrast, Chapter 489 provides no such remedy. First enacted in 1979, §489.101, Fla. Stats. provides that the purpose of the chapter is "to regulate the construction industry" in the interest of the public health, safety and welfare. (emphasis added). The Chapter created the Construction Industry Licensing Board. §489.105(1), 489.107, Fla. Stats. That board is responsible for probable cause determinations for violations of the Chapter. §489.107(6), Fla. Stats. (1991). It may conduct disciplinary proceedings, which are penal in nature. §489.129, Fla. Stats. (1991).

In 1988, the Chapter was amended inter alia to add §489.1195, Fla. Stats. pertaining to the responsibilities of qualifying agents. Simultaneously, the legislature renumbered §489.5331, Fla. Stats., which created a civil action against unlicensed and certified contractors under certain circumstances, and relocated it

to §768.0425, Fla. Stats. Laws of Florida, Chapter 88-156.[2] This is thus not an instance of legislative "silence" on an issue. Instead, the legislature chose to create a private right of action in certain circumstances -- where a contractor is neither state certified nor county/municipality licensed -- but not in others. The legislature clearly chose not to provide a cause of action against licensed contractors under the circumstances presented here.

See Fischer v. Metcalf, 543 So.2d at 790 ("The legislature has had ample opportunity to broaden the penalty for failure to report or add a companion civil remedy. The unchanged nature of the penalty, in the face of repeated reenactments and revision, implies an intention on the part of the legislature not to provide a private right of action"). See also Transamerican Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. at 19-20, finding action

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[2] Section 489.5331 ("Civil Remedies"), was renumbered §768.0425 ("Damages in actions against contractors for injuries sustained from negligence, malfeasance, or misfeasance.") As renumbered, the statute, in subsection (2) provides that:

> In any action against a contractor for injuries sustained resulting from the contractor's negligence, malfeasance, or misfeasance, the consumer shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorney's fees if the contractor is neither certified as a contractor by the state nor licensed as a contractor pursuant to the laws of the municipality or county within which he is conducting business. (emphasis added).

for rescission, but not damages was available to investors under the Investment Advisor's Act because:

> We view quite differently, however, the respondent's claims for damages and monetary relief under §206. Unlike §215, §206 proscribes certain conduct, and does not in any terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must be read into the Act. Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." (Citations omitted) Congress expressly provided both judicial and administrative means for enforcing compliance. In view of those express provisions for enforcing the duties imposed by §206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action." (emphasis added).

This analysis is directly applicable here, and warrants affirmance of the court below.

An analysis of the cases Petitioners cite further supports the conclusion that the Third District's decisions below and in Finkle v. Mayerchak 578 So.2d 896 (Fla. 3d DCA 1991) regarding Chapter 489, Florida Statutes, are the most consistent with legislative intent.

Both Alles v. Department of Professional Regulation, 423 So.2d 624 (Fla. 5th DCA 1982) and Hunt v. Department of Professional Regulation, 444 So.2d 997 (Fla. 1st DCA 1983) involved regulatory

appeals.

In Alles, the Construction Industry Licensing Board of the Department of Business Regulation sought to suspend the license of Alles, qualifying agent for a corporate general contractor, after the construction project with which the corporation was associated collapsed, with great loss of life. Alles attempted to defend on the basis that the corporate general contractor had delegated supervision to another corporate supervisor. Both the hearing officer and court of appeals found that Alles could be disciplined for abrogation of his statutory duties, which were non-delegable. Similarly Hunt involved an appeal from a general contractor's license revocation, by virtue of wilful or deliberate violations of the building codes.

Neither of these cases implicated an implied right of action by a third party. Instead, they held only that negligent qualifying agents may be sanctioned in administrative proceedings. See Lake v. Ramsey, 566 So.2d 845, 848 (Fla. 4th DCA 1990).

Contrary to suggestion, the Fourth District's opinion in Edlin Construction Co., Inc. v. Groh, 522 So.2d 1001 (Fla. 4th DCA 1988) merely reverses a summary judgment based on factual disputes. There is no telling from the opinion whether the action was one for general negligence, or based on an implied statutory right of action. Similarly, in Mitchell v. Edge, 598 So.2d 125 (Fla. 2d DCA 1992), the Court did not determine whether a statutory cause of

action existed. Instead, the issue on appeal was whether the defenses of res judicata and collateral estoppel barred the action.[3] Montgomery v. Chamberlain, 543 So.2d 234 (Fla. 2d DCA 1989) was not a negligence case at all, but one based on a breach of warranty. The District Court disagreed with "the trial judge's extension of Gatwood," but held a contractor liable on agency principles.

The only case to squarely find an implied right of action based on Chapter 489 is Gatwood v. McGee, 475 So.2d 720 (Fla. 1st DCA 1985) which engaged in no analysis of the statutory language or context but merely quoted the foregoing regulatory cases. The First District without explanation,

> reject[ed] appellant's urging that Chapter 489 is a regulatory apparatus and should not be construed in a manner such that the statutory duties imposed upon qualifying agents may be relied upon by those who seek to impose civil liability for damages by reason of the negligent breach of such duties. Id. at 724.

In contrast, in Finkle v. Mayerchak, 578 So.2d 396 (Fla. 3d DCA 1991), the Third District correctly focused on legislative intent, and concluded that there was no evidence of a legislative intent to create a private remedy on behalf of individuals.

Petitioners assert that the "obvious purpose of Chapter 489 is

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[3] In concurrence, only Judge Hall reached the issue, concluding that such a statutory cause of action should be impled.

to financially protect the public with a long range goal to 'provide improved protection' to the class of people to be protected by this statute". (Initial Brief at 15-16). (emphasis added). However, it is well established that violation of a general duty owed to the public as a whole does not create a duty of care and resulting tort liability to an individual citizen. See e.g. J.B. v. Dept. of H.R.S., 591 So.2d 317 (Fla. 4th DCA), rev. den., 601 So.2d 552 (Fla. 1992); Rest. (2d) of Torts §288(b) (1978). Additionally, the legislative history to which the appellant cites, reflects that the ostensible goal of protecting the public financially is met by certain concomitant new enforcement mechanisms:

> Several violations and two new disciplinary penalties, continuing education, and financial restitution are added. (P.I.B., App. 1, pp. 214-15, subs. B; p. 216, §14); House of Representatives Committee on Regulatory Reform -- Final Staff Analysis and Economic Impact Statement, Bill #CS/SB155, Chapter #88-156.[4]

In the instant case, it is respectfully submitted that the Third District's decision that neither §489.119, nor §489.129, Fla. Stats. created a private right of action is correct and should be confirmed as the law of this State.

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[4] Prior to the 1988 amendments, the administrative board was not authorized to require financial restitution to a customer. See Boneski v. Department of Professional Regulation, 562 So.2d 441 (Fla. 4th DCA 1990). This has now been changed. See §489.129(1), Fla. Stats. (1991).

B. The Policy Implications at Issue.

The construction industry is subject to some of the most comprehensive and rigorous regulation and discipline imposed on any profession.

Chapter 455, Florida Statutes (1992), entitled "Regulation of Professions and Occupations: General Provisions" grants certain enumerated powers to Administrative boards, including the Department of Professional Regulation, §§455.01, 455.20, 455.201, Fla. Stats (1991) ("the Dept."). The chapter reflects a legislative intent to allow the Department to regulate "any lawful profession", only to the extent that "The public is not effectively protected by other means, including, but not limited to, other state statutes, local ordinances, or federal legislation." §455.201(2)(b), Fla. Stat. (1991) (emphasis added). The chapter further provides that "such professions should be regulated only for the preservation of the health, safety, and welfare of the public under the police powers of the state," §455.201(1), Fla. Stats. (1992), but that "[n]o board ... shall create unreasonably restrictive and extraordinary standards that deter qualified persons from entering the various professions." §455.201(3), Fla. Stats. (1992). It thus strikes a balance between competing interests: sufficient regulation to ensure that the public is protected competes with the rights of a citizen to practice a

profession.

The regulatory chapter at issue, Chapter 489, contemplates education, experience and rigorous testing before a qualifier can obtain a license. §489.111, Fla. Stats. (1991). In addition to revocation, suspension, denial of issuance or renewal of a license, and the imposition of an administrative fine not to exceed $5000, the board is allowed, in its discretion, to impose the maximum fine upon showing of aggravating circumstances, §489.129(4), Fla. Stats. (1991), as well as to require financial restitution and continuing legal education. §489.129(1), Fla. Stat. (1991). Violations of the statute subject a qualifier to criminal sanctions. §489.127, Fla. Stats. (1991).[5]

Still further, a qualifier who loses his or her license cannot serve as "a partner, officer, director, or trustee of a (contracting) organization defined by this section for a five year period," nor can they "reapply for certification or registration ... for a period of 5 years." §489.119(2)(b), Fla. Stats. (1991).

When a party files a complaint against a licensed professional, the Department is required to investigate.

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[5] In contrast, only the Medical Practice Board can apply commensurate fines. §458.331(2)(d), Fla. Stats. (1991). The Dentistry Board can fine up to $3000. §466.028(2)(c), Fla. Stats. (1991). The Engineering and Architecture Boards are limited to $1000. §§471.033(3)(c), 481.225(3)(c), Fla. Stats. (1991). In addition to the Construction Contracting Board, only the Medical Practice Board possesses the power to require financial restitution to consumers. §458.331(2)(i), Fla. Stats. (1991).

§455.225(1), Fla. Stats. (1992). Unlike a civil action which may be voluntarily dismissed by the plaintiff, Rule 1.420(a), Fla. R. Civ. Proc., an administrative complaint (including an anonymous complaint) may continue even if the original complainant subsequently suffers a change of heart. §455.225(1), Fla. Stats. (1991) ("[t]he department ... may investigate or continue to investigate and the department ... or the appropriate regulatory board may take appropriate final action on a complaint even though the original complainant withdraws it or otherwise indicates his desire not to cause the complaint to be investigated or prosecuted to completion."). Once probable cause has been established by a majority of a probable cause panel, either the department or a regulatory board of the department may prosecute the licensee under Chapter 120. §455.225(4), Fla. Stats. (1991).

Section 455.227(1), Fla. Stats. (1991) conveys upon the board, and no other person, "the power to revoke, suspend, or deny the renewal of the license, or to reprimand, censure or otherwise discipline a licensee..". (emphasis added). Additionally, it is up to the board and the board alone to determine disciplinary guidelines, "It being the legislative intent that minor violations be distinguished from those which endanger the public health, safety and welfare...". §455.2273(2), Fla. Stats. (1991).

In sum, the legislature has imbued the Department with broad discretion and a wide panoply of powers pursuant to a comprehensive

statutory scheme to protect and vindicate the public interest where no express right of action exists. There is simply no need to imply a private right of action in the face of such a comprehensive legislative scheme, where a generalized action for negligence would suffice.

Petitioners advance several arguments in support of implying a private right of action. Among these, Petitioners assert that a "parallel may be drawn between contractors and other professionals -- architects, engineers, attorneys and doctors." (Initial Brief at 26).

The legislature oft-expresses an "intent" in regulatory or licensing provisions. See e.g., §489.101, Fla. Stats. (1991)("The Legislature recognizes that the construction and home improvement industries may pose a significant harm to the public when incompetent or dishonest contractors provide unsafe or unstable, or short-lived products or services."); §458.301, Fla. Stats. (1991) ("the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners"); §471.007, Fla. Stats. (1991) ("that, if incompetent engineers perform engineering services, physical and economic injury to the citizens of the state would result"); §481.201, Fla. Stats. (1991) ("that the practice of architecture is learned profession"); §466.001, Fla. Stats. (1991)(that "dentists...who fall below minimum competency or who otherwise present a danger to the public shall be

prohibited from practicing in this state"). These general expressions of intent do not convert licensing or regulatory statutes into private rights of action, however.

Petitioners do not cite a single case in which a private right of action against any of these professionals has been implied from such a licensing or regulatory statute. In fact, petitioners are attempting to single out qualifying agents for special treatment, and treat them differently and more stringently from other professionals.

By way of example, the Preamble to the Rules of Professional Conduct regulating the conduct of the Florida Bar specifically states that "Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." Chapter 4, Rules of Professional Conduct, Preamble. Indeed, the Preamble notes further that:

> The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies... . They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. Id.

Surely a homeowner is in need of no greater protection from an individual qualifier for a corporate general contractor than a client from a negligent legal professional. In each instance, however, the remedy is a cause of action for negligence -- not an

implied statutory (or rule) right of action, as petitioners contend. See Finkle v. Mayerchak, 578 So.2d 396 (Fla 3d DCA 1991) (homeowners remedy against qualifier was in common law negligence, not private right of action under §§489.119 or 489.129, Fla. Stats. (1989)); see Fischer v. Metcalf, 543 So.2d at 785 (where legislature provided a comprehensive scheme of regulation, including administrative enforcement mechanisms, it was clear that legislative intent was that any enforcement was to be through increased supervision and regulation by administrative agency, rather than implication of a private remedy).

The petitioners talismanically invoke "Hurricane Andrew" in an impassioned plea for this Court to create a new cause of action (Brief at 2, 9 and 36). Such policy decisions are, however, more appropriately addressed to the legislature. As in Public Health Trust of Dade County, 531 So.2d at 949, the petitioners

> [a]re not asking [this Court] merely to construe or interpret the amendment but rather to graft onto it something that is not there. This we cannot do. We are not permitted to attribute to the legislature an intent beyond that expressed ... or to speculate about what should have been intended ... . Nor may we insert words or phrases in a constitutional provision, or supply an omission that was not in the minds of the people when the law was enacted. (Citations omitted, emphasis added).

This logic is directly applicable here.

Finally, this appeal arises from an order on motion to

Accordingly, we reverse the order on appeal granting appellant the right to a belated appeal. Our action is without prejudice to appellant seeking a belated appeal in this court.

SMITH, ZEHMER and ALLEN, JJ., concur.

1

Arthur A. FINKLE and Amelia Finkle, Appellants,

v.

MPF ENTERPRISES, INC., d/b/a Marc Firestone Design and Construction and Marc Firestone, Appellees.

No. 92–1685.

District Court of Appeal of Florida, Third District.

May 4, 1993.

Rehearing Denied June 8, 1993.

An Appeal from the Circuit Court for Dade County; Martin Greenbaum, Judge.

Shutts & Bowen and Barbara E. Vicevich, Miami, for appellants.

Jose A. Bolanos, Coral Gables, for appellees.

Before BARKDULL, GERSTEN and GODERICH, JJ.

PER CURIAM.

Affirmed. *See and compare AFM Corporation v. Southern Bell Telephone and Telegraph Company*, 515 So.2d 180 (Fla. 1987); *J. Allen, Inc. v. Humana of Florida, Inc.*, 571 So.2d 565 (Fla. 2d DCA 1990); *Kingswharf, Ltd. v. Kranz*, 545 So.2d 276 (Fla. 3d DCA 1989); *John Brown Automation, Inc. v. Nobles*, 537 So.2d 614 (Fla. 2d DCA 1988); *Larry Kent Homes, Inc. v. Empire of America FSA*, 474 So.2d 868 (Fla. 5th DCA 1985); *State ex rel. Herring v. Murdock*, 345 So.2d 759 (Fla. 4th DCA 1977).

2

Hallegere (Hall) MURTHY, etc., Appellants,

v.

N. SINHA CORP., etc., et al., Appellees.

No. 92–1237.

District Court of Appeal of Florida, Third District.

May 4, 1993.

Rehearing Denied June 15, 1993.

Construction corporation filed complaint against homeowners for breach of contract and to foreclose on mechanics' lien. Homeowners filed third-party complaint against corporation's qualifying agent alleging breach of contract, negligent performance of contract, breach of implied warranties, discharge of fraudulent lien, and violation of minimum building codes. The Circuit Court, Dade County, Maria M. Korvick, J., dismissed third-party complaint. Homeowners appealed. The District Court of Appeal held that: (1) homeowners stated cause of action against qualifying agent for negligence, and (2) regulatory and penal statutes governing construction industry do not create private cause of action against individual qualifying agent for corporation acting as general contractor.

Affirmed in part; reversed in part.

1. Negligence ⇐111(1)

Home owners stated cause of action against qualifying agent for home construction business for common-law negligence by alleging that contractor prematurely cut overhang around existing house

dismiss. The petitioners' rhetoric regarding uncollectible judgments (Brief at 10, 27, 35, 36 and 39) "bait and switch" tactics (Brief at 35), "alter egos" (Brief at 37), and general knowledge that "there is generally one qualifying agent for such construction projects" are not part of the record, are not supported by any evidence and should not be considered on appeal.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the certified question be answered in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/faxed this 15 day of November, 1993 to:

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and left it uncovered for several weeks with full knowledge that owners were living at property and that uncovered cut overhang caused flooding in house during rain showers, resulting in damage to owners' personal property, and that one owner suffered personal injuries due to collapsed ceiling.

2. Negligence ⇐6

Regulatory and penal statutes governing construction industry do not create private cause of action against individual qualifying agent for corporation acting as general contractor. West's F.S.A. §§ 489.119, 489.129.

Damodar S. Airan, Coral Gables, for appellants.

Jeffrey R. Mazor and Adam Trop, North Miami Beach, for appellees.

Before NESBITT, GERSTEN, and GODERICH, JJ.

PER CURIAM.

Hallegere and Myetraie Murthy (owners) appeal from a final order dismissing their amended third-party complaint against Niranjan Sinha (contractor). We affirm in part and reverse in part.

Contractor Sinha was the president, sole stockholder, and qualifying agent[1] of N. Sinha Corporation, a home construction business. The owners entered into a construction contract with the corporation for certain improvements to their home. In May 1991, the corporation filed a claim of lien against the owners' home, claiming $28,010.57 remained unpaid on the contract. In June of that year, the owners filed a notice of contest of lien against the corporation. Thereafter, the corporation filed a complaint against the owners for breach of contract and to foreclose on its statutory mechanics' lien. The owners then filed an amended third-party complaint against the contractor, individually, for breach of contract (count I), negligent performance of a contract (count II), breach of implied warranties (count III), discharge of a fraudulent lien (count IV), and violation of Florida's minimum building codes (count V). The trial court granted the contractor's motion to dismiss the amended third-party complaint, and the owners filed the instant appeal challenging the dismissal of counts II, IV, and V.

[1] We agree with the owners that the amended third-party complaint, although inartfully drawn, stated a cause of action against the contractor, individually, for common-law negligence, and it was thus error for the trial court to dismiss count II of that complaint. *Finkle v. Mayerchak*, 578 So.2d 396 (Fla. 3d DCA1991). The contractor contends that count II must fail because the owners' alleged damages amount to purely economic losses, citing *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So.2d 180 (Fla.1987) (there can be no independent tort flowing from a contractual breach without some conduct resulting in personal injury or property damage). Here, however, the owners alleged, "In November of 1991, Contractors prematurely cut the overhang all around the existing house and left it uncovered for several weeks with full knowledge of the fact that Owners were living at the property. Uncovered cut overhang caused flooding in the house repeatedly during the rain showers and resulted in considerable damage to the personal property of the Owners. Mrs. Murthy suffered personal injuries due to a collapsed ceiling." Since the owners alleged both property damage and personal injury, the dismissal of count II must be reversed.

1. Pursuant to chapter 489, Florida Statutes (1991), which contains the licensing and regulatory provisions governing construction contracting, the only way a company may be a contractor, § 489.105(3), Fla.Stat. (1991), is by obtaining an individual licensed as a contractor as its qualifying agent, *id.* at § 489.105(4). Applicants who wish to engage in contracting as a corporation or other business entity must apply through a qualifying agent. *Id.* at § 489.119. The application, among other things, must show that the qualifying agent is legally qualified to act for the business and that he has authority to supervise construction undertaken by the business. *Id.; see also Gatwood v. McGee*, 475 So.2d 720, 722 (Fla. 1st DCA1985).

[2] However, this court has determined that neither sections 489.119 nor 489.129, the regulatory and penal statutes, respectively, of chapter 489 creates a private cause of action against qualifying agents individually, *Finkle*, 578 So.2d 396, and, therefore, the trial court's dismissal of counts IV and V of the amended third-party complaint must be affirmed. The contractor cannot be held personally liable under the construction contract in this case because the contract is between the owners and the construction corporation.

We note the conflict of this decision and the *Finkle* decision with decisions from the first and fifth districts. *Gatwood v. McGee*, 475 So.2d 720 (Fla. 1st DCA1985); *Hunt v. Department of Professional Regulation, Constr. Ind. Lic. Bd.*, 444 So.2d 997 (Fla. 1st DCA1983); *Alles v. Department of Professional Regulation, Constr. Ind. Lic. Bd.*, 423 So.2d 624 (Fla. 5th DCA1982); *see also Mitchell v. Edge*, 598 So.2d 125 (Fla. 2d DCA1992) (Hall, J., concurring). Accordingly, we certify the following question to the Supreme Court of Florida:

> Does chapter 489, Florida Statutes (1991), the licensing and regulatory chapter governing construction contracting, create a private cause of action against the individual qualifier for a corporation acting as a general contractor?

Affirmed in part; reversed in part.

1

Elsa FORTE, Appellant,

v.

HIALEAH HOSPITAL, INC., a Florida corporation d/b/a Hialeah Hospital, Appellees.

No. 92-2403.

District Court of Appeal of Florida, Third District.

May 4, 1993.

Rehearing Denied June 15, 1993.

An Appeal from the Circuit Court for Dade County; Melvia Green, Judge.

Keith Chasin and Raul Montana, Miami, for appellant.

Womack & Bass and J. Lorraine Brennan, Miami, for appellees.

Before BASKIN, GERSTEN and GODERICH, JJ.

PER CURIAM.

Affirmed. *See Calvache v. Jackson Memorial Hosp.*, 588 So.2d 28 (Fla. 3d DCA1991), *review denied*, 599 So.2d 654 (Fla.1992).

2

PUBLIX SUPER MARKETS, INC., Appellant,

v.

CONNILOUS T. LOROW, individually, as surviving husband, and as Personal Representative of the Estate of Marisa Maugeri, deceased, Appellee.

No. 92-157.

District Court of Appeal of Florida, Third District.

May 4, 1993.

Rehearing Denied June 8, 1993.

An Appeal from the Circuit Court for Dade County; Roger Silver, Judge.

Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley and William M. Douberley, Miami, for appellant.

Angones, Hunter, McClure, Lynch & Williams and Christopher Lynch and Steve Hunter, Miami, for appellee.

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 1, 1993

HALLEGERE (HALL) MURTHY, ET UX.,

Petitioners.

v.

N. SINHA CORP., ETC., ET AL.,

Respondents.

CASE NO. 81,799

****

Florida Home Builders Association's Motion for Leave to Appear as Amicus Curiae is hereby granted as to filing of brief only.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

H

cc: Ms. Lauri Waldman Ross
Mr. Richard Gentry
Mr. Damodar S. Airan
Mr. Adam Trop
Mr. Jeffrey R. Mazor
Mr. Joseph W. May

IN THE SUPREME COURT,
STATE OF FLORIDA

HALLEGERE (Hall) MURTHY, etc. et ux.

Appellees,

vs.

N. SINHA CORP., etc., et al.

Appellants.

_____/

Case No.: 81,799

FLORIDA HOME BUILDERS ASSOCIATION'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

The Florida Home Builders Association, hereby moves for leave to appear as amicus curiae in this matter, pursuant to Fla. R. App. Proc. 9.370, and to file a brief in support of the position of the appellee, and in support states:

1. The Florida Home Builders Association is a non-profit association composed of persons, firms and corporations engaged in construction throughout the State of Florida. The Association is an organization dedicated to addressing inter alia common issues and problems in the construction industry, concerning its members.

The Association has previously been granted leave to appear as amicus curiae in both this Court and other Courts including for example the following by way of example:

> Snyder v. Board of County Sommissioners, 595 So.2d 65 (Fla. 5th DCA), jurisdiction accepted, 605 So.2d 1262 (Fla. 1992), appeal pending, S.Ct. Case No. 79,720 (Order dated August 18, 1992).
>
> Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), opinion supplemented, 978 F.2d 1212 (11th Cir. 1992).

2. This case presents an important issue regarding the scope of chapter 489, Florida Statutes (1991) (the licensing and regulatory chapter governing construction contracting), and whether such regulatory chapter creates a private right of action against any person acting as the individual qualifier for a corporation.

3. This case is of vital interest to the members of the organization filing this motion, as well as the construction industry as a whole.

WHEREFORE, the movant respectfully requests leave to appear as amicus curiae and to file a brief in support of the Appellee.

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and

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By: _____
LAURI WALDMAN ROSS, ESQ.
(Florida Bar No. 311200)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/faxed this 2nd day of August, 1993 to:

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