IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,799

THIRD DCA CASE NO.: 92-1237

CIRCUIT COURT CASE NO.: 91-36468

HALLEGERE (HALL) MURTHY, et al.,

Petitioners,

vs.

NIRANJAN N. SINHA, etc., et al.,

Respondents.

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AN APPEAL FROM A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CERTIFYING A QUESTION (F. R. APP. P. 9.030 (a)(2)(A)(vi))

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PETITIONERS' BRIEF ON MERITS

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PREFACE

THE FOLLOWING ABBREVIATIONS SHALL BE USED THROUGHOUT THIS BRIEF:

"App."	for	Appendix
"F.S."	for	Florida Statutes

STATEMENT OF THE CASE

This Appeal is pursuant to a question certified by the District Court of Appeal of Florida, Third District (hereinafter "Third DCA") due to a conflict created by its decision in this case and in Finkle v. Mayerchak, 578 so. 2d 396, (Fla. 3d DCA 1991) with the decisions of the First, Second, Fourth, and Fifth Districts in Florida. Gatwood v. McGee, 475 So. 2d 720 at 723 (Fla. 1st DCA 1985); Hunt v. Department of Professional Regulation, Constr. Ind. Lic. Bd., 444 So. 2d 997 (Fla. 1st DCA 1983); Alles v. Department of Professional Regulation, Construction Industry Licensing Board, 423 So. 2d 624 (Fla. 5th DCA, 1982); also Mitchell et al. v. Edge et al., 598 So. 2d 125 (Fla. 2d DCA 1992)(Hall, J., concurring); and Edlin Construction Co. v. Groh, 522 So. 2d 1001 (Fla. 4th DCA 1988). The Third DCA's decision in this case denied Petitioners (Appellants below) a cause of action against the qualifying agent of a construction corporation for violations of the State Minimum Building Codes (F.S. § 553) and for filing a fraudulent lien (F.S. § 713) against the Petitioners. While the Third DCA agreed that Petitioners had stated a cause of action against the contractor, individually, for common law negligence, the Third DCA affirmed in part the trial Court's dismissal of Petitioners' above mentioned claims based on the following principle :

> "...this Court has determined that neither section 489.119 nor 489.129, the regulatory and penal statutes, respectively, of chapter 489 creates a

> private cause of action against qualifying agents individually...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", Murthy v. N. Sinha Corp., 618 So. 2d 307 at 309 (Fla. 3d DCA 1993).

However, the Third DCA noted the conflict created by its decision with the other districts in the State of Florida 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?

Accordingly, the Petitioner seeks an answer from the Supreme Court of Florida to the certified question as per Fla. R. App. P. 9.030(a)(2)(A)(vi). This Court has discretionary jurisdiction in this case as it is of great public importance. Petitioners assert 89, 119 and 489.129 Fla. Stats do create a private cause of action against Contractors. Contractors must be held responsible and accountable for the consequences of their negligent actions. This has become patently obvious after the Hurricane Andrew disaster which was caused in large part by the unscrupulous construction work before the storm and compounded by so many contractors after the storm.

STATEMENT OF THE FACTS

The Petitioners, Hallegere Murthy and his wife (hereinafter "Petitioners" or "Owners") entered into negotiations with Respondent Niranjan N. Sinha (hereinafter "Contractor") for additions and improvements to their home. The Contractor prepared a contract in the name of his construction corporation, N. Sinha Corp., (hereinafter "Sinha Corp." or "Corporation") of which he was the President, sole director, sole stockholder and the qualifying agent pursuant to Section 489.119, Florida Statutes. The Owners knew the Contractor socially, dealt with him exclusively for all negotiations, and relied on him for performance.

During the course of construction, the Owners noted many construction defects and Building Code violations. Consequently, the Owners requested the Contractor to rectify the defects. The Contractor refused to make any repairs, and, instead, asked for an additional payment which was not yet due.

Under the Contract, the Contractor could not require a payment before the completion of a pre defined phase unless it was mutually agreed by both parties. The Contractor had already collected 63% of the contract amount for only 30 to 40% of the work completed. The Contractor asked the Owners for an additional payment of $21,573.50 for Phase III without having completed that phase. The Owners requested the Contractor to complete the Phase III work and

to satisfy the county building code requirements before any additional Phase III payments could be made. The Contractor refused to correct the defects, abandoned the project, and filed a Claim of lien for an invoice of $28,010.57 which was not due until after the completion of Phase III.

As a result of the defective work and code violations committed by the contractor, the Dade county Building and Zoning Department cited and red-tagged the Owners' home for building code violations. The Owners had to spend substantial additional monies, in excess of the contract amount, in correcting the building code violations and completing the project.

Initially, the Owners filed an action against Sinha Corp. and the Contractor. Thereafter, Sinha Corp proceeded to foreclose its mechanic's lien against the Owners' property along with a claim for breach of contract. The Owners dismissed their own action, counterclaimed under Sinha Corp.'s action and filed a third party claim against the contractor individually since he was the real wrongdoer. The Trial Court held that the personal injury suffered by Mrs. Murthy was not enough to meet the economic loss rule and dismissed the Owners' claim against the Contractor under negligence. Therefore, the Owners tried to follow Mills v. Krauss, 114 So. 2d 817 (Fla. 2d DCA 1959) and filed on amended third party complaint against the Contractor based on negligent Performance of Contract along with a claim for violations of State Minimum Building Codes and for filing a fraudulent lien. The Trial Court

again dismissed the Owners' third party complaint completely. The Third DCA recognized the Owners' claim against the individual contractor under common-law negligence based on property damage and personal injury suffered by one of the owners due to Contractor's negligence. However, Third DCA did not find the Contractor liable for any statutory violations noting that he was not a party to the contract and concluded that Florida's regulatory and penal statutes §489.119 and §489.129 do not create a private cause of action even when the individual contractor breached his statutorily imposed duties. The Third DCA noted the conflict of their decision in this case with decisions from the first and fifth districts and certified a question to this Court. The Owners filed this appeal to request this Court to review the question certified by the Third DCA and the related decision.

QUESTION CERTIFIED

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?

ISSUES PRESENTED ON APPEAL

1. Does a homeowner have a cause of action against the qualifying agent (the real wrongdoer) of a construction corporation who failed to supervise the construction and caused damages to the homeowner, or, does the homeowner have to be satisfied with a potentially uncollectible judgment against the construction corporation only?
2. Does Chapter 489, Florida Statutes, impose certain duties upon the designated qualifying agent for a construction project, for the benefit of the homeowners, who are parties to a construction contract?
3. If Chapter 489 of Florida Statutes does impose a duty upon the designated qualifying agent, then, does the protected class have any power, by implication, to enforce the performance of such duty?
4. If Chapter 489 does create a cause of action against a qualifying agent, does that cause of action constitute negligence per se because (1) Chapter 489 is a penal statute, (2) Chapter 489 carries strict liability, as it imposes a duty upon the qualifying agent for protection of those parties to a construction contract who are incapable of protecting themselves, and (3) Chapter 489 protects the parties to a construction contract (particular a group of people) from a particular harm as a consequence of shoddy construction or

negligent financial management by the contractor?

5. Does an action against the qualifying agent, authorized under other statutory provisions, or theories of law, depend on the availability of a private cause of action under Chapter 489, Florida Statutes?

SUMMARY OF ARGUMENTS

I. Florida Statutes §489.119 requires every construction corporation to be registered under a qualifying agent's general contractor's license. Florida Statutes §489.1195 makes every qualifying agent of a corporation jointly and severally responsible for supervision of all operations of the construction business. Florida Statutes §489.129 provides the Construction Industry Licensing Board power to discipline a contractor in the event of statutory violations.

Florida District Courts of Appeal for First, second, fourth and fifth Districts have held qualifying agents liable for their failure to supervise, a duty imposed by Section 489.1195. The very purpose of Chapter 489 of Florida Statute is to make sure that only licensed persons undertake construction. That is why the Statute forbids a corporation to enter into a construction contract without a qualifying agent to supervise the project. Hence, to allow a contractor to be the qualifying agent for a corporation, without holding him responsible for his duty under the Statute, would defeat the very purpose of the statute.

Under Florida law, whenever a Statute, or an ordinance, requires an act to be done, or not to be done, for the benefit of another, then, by implication, that Statute carries with it each and every power necessary to enforce the performance of

such duty. See Girard Trust Co. v. Tampashores Development Co., 117 So 786 at 788, 95 Fla 1010 at 1015, (Fla. 1928). Similarly, Florida Statutes Chapter 489 also requires a qualifying agent to supervise the construction and business operations of a project so as to protect the consumers. Therefore, by implication, Chapter 489 also creates a private cause of action against the qualifying agent.

As per deJesus v. Seaboard Coastline Railroad, 281 So. 2d 198, 201 (Fla. 1973), Statutory Violation of Chapter 489 creates a private cause of action which constitutes negligence per se because, the Statute is regulatory and penal in nature, imposes duty upon a qualifying agent for protection of the homeowners and others like them who are incapable to protect themselves, and the purpose of the Statute is to protect a particular class of persons (the homeowners and others like them) from a particular harm.

II. It would be a better public policy to allow a private cause of action under Chapter 489, Florida Statutes, to homeowners and others like them. During Hurricane Andrew, thousands of people suffered due to defective workmanship of General Contractors. After the hurricane, it has become even worse. Many unscrupulous contractors have taken substantial advances under their corporation's construction contracts with homeowners, have done shoddy construction or no construction, and have then abandoned the projects. As per the current

interpretation of Florida law by the Third DCA, Homeowners do not have any right of action against such unscrupulous contractors under (1) breach of contract (contractor is not a party to the contract), or (2) common law negligence (the only damage caused, most of the time, is to the home under the contract - economic loss rule applies) or (3) statutory violations (Third DCA is of the opinion that Chapter 489 governing construction contracting does not create a private right of action). Thus the only recourse the homeowners have against the contractor is to obtain a potentially uncollectible judgment against the contractor's corporation. Therefore, This Court needs to recognize the wrong and provide for a remedy.

It is to be noted that granting a private right of action against the Contractor would not result into a surge of additional actions. This is because actions against the corporations would be filed anyway. A cause of action against the Contractor would enable the owners to name an additional party defendant, the qualifying agent. Furthermore, such decision would not have a significant affect on the availability of qualifying agents, as appropriate bonds for the performance of qualifying agents or indemnity agreements would reduce their exposure for major commercial projects.

Therefore, in order to provide the protection that Chapter 489 intended to bestow upon the homeowners and others

like them, this Court should answer the certified question in the "affirmative".

III. Petitioners further contend that violations of Florida Statutes §713 (Mechanic's Liens) and §553 (Building Construction Standards) do grant a private right of action against a wrongdoer in express terms. It is undisputed that Chapter 489 does impose a duty upon a qualifying agent. Therefore, a claim for statutory violations against the qualifying agent available under §553 and §713 should not be denied regardless of the availability of a private cause of action under Chapter 489.

ARGUMENTS

I. CHAPTER 489, FLORIDA STATUTES (1988 as amended in 1991), THE LICENSING, REGULATORY, AND PENAL CHAPTER GOVERNING CONSTRUCTION CONTRACTING, DOES CREATE A PRIVATE CAUSE OF ACTION AGAINST THE INDIVIDUAL QUALIFIER OF A CORPORATION ACTING AS A GENERAL CONTRACTOR.

Florida Statute §489.119 requires every construction corporation to be registered under a qualifying agent's license as a general contractor. Florida Statute §489.129 provides the Construction Industry Licensing Board certain powers to discipline a contractor in the event of statutory violations.

In 1988, the legislature had codified the prevailing case law and specifically imposed a duty to supervise on the qualifying agent of a corporation pursuant to section 489.1195, Florida Statutes. Section 489.1195 makes every qualifying agent of a corporation jointly and severally responsible for supervision of all operations of the construction business. Florida Statute §489.1195(1) states that:

> "....All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job." § 489.1195(1), Fla. Stat. (1988)and (1991).

With the Statute having the effect of essentially lifting the corporate veil, a qualifying agent should be held personally liable

for the construction defects and statutory violations caused by the qualifying agent's failure to exercise due care in supervising a construction project. However, the Third DCA has not held a qualifying agent liable for such violations while other Districts in Florida have.

A. Other Districts in Florida are in conflict with the Third DCA's denial of a private cause of action against a qualifying agent under Section 489.1195, Florida Statutes.

Florida's First, Second, Fourth and Fifth Districts have properly recognized a duty imposed on a contractor by 489.119 to supervise any construction undertaken. Even before the 1988 and 1991 amendments and additions to 489, the Court in Alles v. Department of Professional Regulation, Construction Industry Licensing Board, 423 So. 2d 624 (Fla. 5th DCA, 1982), the Fifth DCA had found a qualifying agent responsible for the supervision of construction. Similarly, in Gatwood v. McGee, 475 So. 2d 720 at 723 (Fla. 1st DCA 1985), the First DCA stated:

> "We hold that the negligent performance of the qualifying agent's statutorily imposed duty of supervision may support a cause of action for damages sustained by subsequent purchasers... We further hold that the qualifying agent's duty of supervision is nondelegable in the sense that the agent will not be allowed to evade responsibility for negligent supervision by relying on one who, even though apparently a competent builder, has not been certified as a qualifying agent pursuant to Chapter 489 (emphasis added) ." Gatwood v. McGee, 475 So. 2d 720 at 723 (Fla.1st DCA 1985),

The Second DCA in Montgomery v. Chamberlain, 543 So. 2d 234 (Fla. 2d DCA 1989), would have allowed an action even for the breach of implied warranty against a qualifying agent based on Gatwood v. McGee, Supra. Again in Mitchell et al. v. Edge et al., 598 So. 2d 125 (Fla. 2d DCA 1992), the Second DCA allowed a consecutive action for failure to supervise against the qualifying agent of a corporation. In Edlin Construction Co. v. Groh, 522 So. 2d 1001 (Fla. 4th DCA 1988), the Fourth DCA also allowed a private cause of action against a qualifying agent.

Thus, four out of five District Courts of Appeal (DCAs) in Florida have recognized a private cause of action against a qualifying agent. The Owners pray this Honorable Court to uphold the abovementioned decisions of the First, Second, Fourth and Fifth District Courts of Appeal by finding a qualifying agent responsible to those protected by the Statute for a statutory violation.

B. The legislative purpose behind Chapter 489, Florida Statutes (1991) is to Protect a Particular Class of persons from a particular injury as they are not able to protect themselves.

Petitioners request this Court to review the legislative purpose of Chapter 489 in order to answer the question certified by the Third DCA.

An examination of the legislative intent behind Chapter 489 (1988, which remained to be the basis of unchanged parts of the 1991 Statute) reveals that the obvious purpose of Chapter 489 is 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, See App. 1, House of Representatives Committee On Regulatory Reform - Final Staff Analysis & Economic Impact Statement, Bill # CS/SB 155, Chapter # 88-156. Moreover, it must be assumed that in 1988, when the legislature recommended some changes in Section 489, it must have done so for an intended useful purpose. Additionally, the 1990 amendment of Section 489.129(1) did clearly recognize the relief entitled to the Owners when it added financial restitution to the consumers as one of the penal and disciplinary procedures. It appears that the useful purpose of the Florida Statute Section 489.1195 and 489.129 was to protect the Owners of the construction projects and others like them (the protected class) by making contractors supervise those projects on which they are named as the registered qualifying agents. Enforcement of the performance of such a Statutorily imposed duty is crucial to achieving the intended purpose of the Statute. To deny the protected class any power to enforce the statutorily imposed duties would completely bypass the useful purpose of that Statute.

In order to achieve the legislative purpose of Sections 489.1195 and 489.129 of Florida statute, a private cause of action for their violation is implied. The Court in Alles, properly described the consequences of not holding a qualifying agent responsible for the supervision of the project as follows:

"To allow a contractor to be the "qualifying agent"

> for a company without placing any requirement on the contractor to exercise any supervision on the company's work done under his license would permit a contractor to loan or rent his license to the company. This would completely circumvent the legislative intent that an individual, certified as competent, be professionally responsible for supervising construction work on jobs requiring a licensed constructor..." Alles v. Department of Professional Regulation, Construction Industry Licensing Board, 423 So. 2d 624 at 626 (Fla. App 5th DCA, 1982).

Alles, Hunt, Gatwood and Mitchell, are all good examples of what the Court in Alles was afraid of. In all four cases, the qualifying agents had allowed someone else to do the supervision of the projects. In other words, they virtually rented or loaned their licenses. Over and above that, the qualifying agents claimed they had nothing to do with the project and therefore should not be held liable. However, the Courts did hold them responsible so that the legislative purpose and requirements of Section 489 would not be circumvented. These cases, along with some others, resulted in getting the legislature to enact 489.1195 to impose specific duties on a qualifying agent. They have also created a consciousness among contractors to properly perform their duties. These cases have served as a deterrent of mischief by the contractors.

The Third DCA's position would, in effect, protect the contractors - and not the consumers, in violation of the express purpose of the statute. It would sabotage the useful purpose of the statute to deny the protected class (homeowners) a remedy against the contracting professionals, especially after

experiencing the havoc caused by shoddy construction all over Florida.

C. Where a Statute requires one to do certain acts for the benefit of another, it carries with it every power necessary to enforce such duty though not granted in express terms.

In construing a Statute, Florida law has been well established that the requirement of an act, to be done for the benefit of another, carries with it, by implication, each particular power necessary to enforce the performance of such duty. This Court had clarified this general rule as to the right of action predicated upon violation of Statutory duty in Girard Trust Co. v. Tampashores Development Co., 117 So 786, 95 Fla 1010, (Fla. 1928):

> "Where a statute requires an act to be done for the benefit of another or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured should have an action; for, where a statute gives a right, there, although in express term it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident...." Girard Trust Co. v. Tampashores Development Co., 117 So 786 at 788, 95 Fla 1010 at 1015, (Fla. 1928)

Also see Mitchell v. Maxwell, 2 Fla 594 (1849), State ex rel. Smith v. Burbridge, 3 So. 869, 24 Fla 112 (1888), Jacksonville Electric Light Co. v. Jacksonville, 18 So. 677, 36 Fla 229, (1895), McNeill v. Pace 68 So. 177, 69 Fla 349 (1915), Bailey v. Van Pelt, 82 So. 789, 78 Fla 337, reh den 82 So. 794, 78 Fla 353 (1919),

Halmer v. Jacksonville, 122 So. 220, 97 Fla 807 (1929), Lewis v. Miami, 173 So. 150, 127 Fla 426 (1937), Deltona Corp. v. Florida Public Service Comm., 220 So. 2d 905 (Fla. 1969), Zorick v. Tynes, 372 So. 2d 133 (Fla. 1st DCA 1979).

The case at hand deals with Chapter 489, Florida Statutes. Sections 489.119, 489.1195, and 489.129 clearly require a qualifying agent to properly supervise a construction project and its financial affairs. Since these sections impose certain duties upon the qualifier for the benefit of others, the Statute confers, by implication, every particular power necessary to insure the performance of that duty. These Sections of Chapter 489, without any power with the protected class to enforce the performance of the underlying statutory duties (as per Girard, ibid), would be worse than useless.

In the instant case, the Third DCA held that the Owners (protected class) cannot maintain an action against the Contractor to enforce the performance of Contractor's statutory duties as a qualifying agent. Upholding the Third DCA's decision, would allow the Statute to shield the Contractor rather than protect the Owners. If the Statute is interpreted to grant no power to the Owners for its enforcement, then it would be of no use to the Owners and cannot be considered to be enacted to protect the Owners and others like him.

In Smith v. Piezo, 427 So. 2d 182 (Fla. 1983), the Third DCA had certified a question similar to the one in the instant case

regarding a private cause of action upon the violation of Section 440.205, where no right of action was conferred upon the protected class in express terms. The Court in Smith went on to hold that Section 440.205 created a statutory cause of action though it was not given in express terms, when it stated :

> "FN1. The legislature could have specifically designated the forum for adjudicating claims under section 440.205 and provided the relief to which an aggrieved party is entitled for a violation thereof. The fact that it did neither is not determinative of the question certified." Smith v. Piezo, Supra. at 185.

The Court emphasized that where a Statute fails to designate a forum for adjudicating claims under a statute, it does not mean that the legislature did not intend to make such forum available. Just like the Smith case, in the case at hand, the legislature did not designate a forum for adjudicating claims to which the aggrieved parties are entitled to under Florida Statute Sections 489.1195 and 489.129. However, following Smith, it should not be interpreted to mean that the legislature did not intend to make such forum available and, therefore, should also not be determinative of the question certified to this Court. Instead, Florida Statute Sections 489.1195 and 489.129, by implication, should be interpreted to create a private statutory cause of action in favor of the persons to whom the qualifying agent owes the duty.

Hence, as per this Court's decisions in Girard, and Smith, the Petitioners contend that Fla. Statute Section 489.1195 and 489.129 do create a private cause of action against the qualifying agent.

Therefore, this Court should not deny the Owners' claims against the Contractor for damages suffered due to the violations of Chapter 489.

D. Statutory Violation of Chapter 489, Florida Statutes, constitutes Negligence per se.

Petitioners assert that violations of Section 489.1195 and 489.129 of Florida Statutes, as involved herein, constitutes negligence per se. In deJesus v. Seaboard Coastline Railroad, 281 So. 2d 198, 201 (Fla. 1973), this Court had clarified then prevailing confusion at that time by classifying Statutory actions into the following categories:

(1) Violation of Strict liability Statutes which are designed to protect a particular class of persons who are unable to protect themselves constitutes negligence per se. An example of such a Statutory violation is that of Statute which prohibits sale of firearms to minors. See Tamiami Gun Shop v. Klein,116 So. 2d 421 (Fla. 1959).

(2) Violation of a penal statute (except traffic penal statutes) imposing upon one a duty to protect another, is also negligence per se. See Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953).

(3) Violation of a statute which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury is also considered negligence

per se.

(4) Violations of any other type of statute is considered a prima facie evidence of negligence. See deJesus v. Seaboard Coastline Railroad, Ibid. at 201. This kind of negligence requires proximate cause and other elements of negligence to be proven. However, even this prima facie showing of negligence, by evidence of a statutory violation, without negligence per se, is ordinarily sufficient to require submission of all the facts to a jury. See Jackson v. Hertz Corp. 590 So. 2d 929, Reh. den. (Fla. 3d DCA 1991).

Construction Contracting laws, especially Sections 489.1195 and 489.129 of Florida Statutes, impose specific certification and registration requirements on a qualifying agent along with a duty to supervise the construction and financial aspects of the project. These laws were created to protect a particular class of persons, like the Petitioners, who enter into a contract with a Contractor. The legislature recognized the fact that a house is one of the most important investments of one's life which, most of the times, involves the homeowners' life savings. Homeowners are incapable of protecting themselves, as most of them do not understand the construction process. This places the homeowners in a similar vulnerable position as that of a minor buying a gun in Tamiami Gun Shop v. Klein, Ibid. Petitioners maintain that Sections 489.1195 and 489.129 are designed to protect these homeowners and others like them, a certain class of people who are incapable to protect

themselves, from a particular type of injury. Therefore, a violation of any of these sections is negligence per se against the homeowners.

In addition, Chapter 489 of Florida Statutes is penal in nature, and imposes fines and disciplinary penalties for its violations. This also makes an action for statutory violation under chapter 489 a negligence per se, also see Hoskins v. Jackson Grain Co., 63 So. 2d 514 (1953) and Concord Florida, Inc. v. Lewin, 341 So. 2d 242 (Fla. 3d DCA, 1977). The Court in Concord, wrote "...the fact that the above code was penal in nature, imposing a fine/or imprisonment for its violation equally lends credence to aforementioned instructions" regarding the action being negligence per se.

The Owners contend that Chapter 489 is designed to protect those who are incapable of protecting themselves and is penal in nature. Therefore, a violation of Section 489.1195 or 489.129 constitutes negligence per se.

E. Contract law allows Owners a private cause of action against a qualifying agent under Chapter 489 of Florida Statutes.

i. The Corporation is not able to enter into a contract without a registered qualifying agent who should be held responsible, as a principal, for his agent Corporation's actions under the Agency Law:

The Contractor had allowed his corporation to use his license to obtain a general contractor's license and then to enter into a

construction contract with the Owners. Accordingly, the corporation became an agent of the Contractor. Contractor, therefore, should be responsible for the work done by its agent, the corporation. Contractor should be considered to be in privity with the Owners through Contractor's agent, the Sinha Corp.. It is to be emphasized that Sinha Corp. is agent of the Contractor and not vice-versa. The duties imposed upon the Contractor under Chapter 489, became implied duties under the contract between Owners and the Sinha Corp. Therefore, Owners should be able to pursue at least all contract remedies against the Contractor. In Montgomery v. Chamberlain, 543 So. 2d 234 (Fla. 2d DCA 1989), the Court found that Montgomery was "responsible, as a principal" under the principles of agency law for even implied warranties under the contract, even though he was not a party to the contract. The Court in Montgomery found (and properly so) a registered contractor to be responsible for the work done under his license.

The Owners believe that since they, and others in their class, are not qualified to protect themselves, the licensing Statute was enacted for the very purpose for which Montgomery Court applied it, that is, to protect the Homeowners and to hold the contractors responsible for their work. The application of agency principle emphasizes the importance of holding a qualifying agent liable for statutory violations. If a qualifying agent can be held liable for supervision of a project when he allows an individual to use his license, then he should be also liable when he lets a corporation

use his license. If the Contractor is not held responsible for the contract between his agent, the Sinha Corp., and the Owners, it would be tantamount to letting an unlicensed contractor enter into a construction contract. This would operate to make a mockery of the construction contracting statutes.

ii. The Corporation is not able to enter into a contract without a registered qualifying agent to supervise the project. Therefore, the qualifying agent is liable as a third party obligor. :

In the instant case, Sinha Corp. could not have entered into the construction contract without the Contractor being its registered qualifying agent. This makes the Contractor (the qualifying agent) a third party obligor under the contract. In addition, Chapter 489, Florida Statutes, requires certain duties to be performed by the qualifying agent, as well as by Contractor's agent, Sinha Corp. Therefore, the Contractor was a necessary third party to the contract. Furthermore, Sinha Corp. could not have entered into a contract with Owners without the Contractor being ready to perform the implied duties imposed by the Statute. On the other hand, the Owners would not have entered into a contract with Sinha Corp. without the Contractor being available to perform his statutorily imposed duties for the project.

The Contractor, a third party obligor, abandoned the project, filed a fraudulent lien against the Owners' property, and failed to

properly supervise the project causing building code violations. If this Court does not allow the Owners a private cause of action against the Contractor, (qualifier/third party obligor under the contract), both contract law and the legislative purpose of the statute would be undermined.

F. A private cause of action against the qualifying agent of a construction corporation would not cause a proliferation of law suits.

One might argue that if a private cause of action against the individual qualifier for a corporation acting as a general contractor is recognized under chapter 489, Florida Statutes, then it might cause runaway litigation. If this concern is examined closely, such fears are without merit. Homeowners who have suffered damages due to negligent performance and violations of chapter 489, Florida Statutes, now sue the corporation anyway. A private cause of action against the qualifying agent would logically be filed in the same very action.

Furthermore, there is generally one qualifying agent for each construction project and, most of the time, for the construction corporation. Thus the owners, who have suffered damages due to non-performance of and breach of statutorily imposed duties by the qualifying agent, can have a cause of action against him. Owners can then recover from the individual who benefitted from the contract, violated the statute, and caused the damages. Recognizing a private cause of action would place the liability

where it belongs and provide a real remedy, without any appreciable increase in the number of cases that may be filed by the victims of such violations.

G. A private cause of action against the qualifying agent would not have a significant adverse effect on the construction industry.

Another policy concern that may be raised is that a private cause of action against the qualifying agents would scare otherwise eligible individuals from becoming qualifying agents and, consequently, it would hurt the construction industry. Ideally, if a person is qualified and conscientious of his obligations, he would have no qualms in owning up to the consequences of his actions, or the lack of them, whether or not there is any statute. Chapter 489, Florida Statutes, establishes minimum requirements for execution of the work under the contract. A good contractor who becomes a qualifying agent, would perform those duties anyway.

If the prospect of a lawsuit in case of negligent performance scares a person, it would promote good construction practices, decrease waste, and enhance profitability. Thus, it would have a chilling effect on the negligent performance of construction contracts.

A parallel may be drawn between contractors and other professionals - architects, engineers, attorneys, and doctors. These other professionals can not walk away from their individual

liability, if they are negligent in the performance of their respective duties. As a result, the particular professionals benefit from a more careful and concerned attitude as to the discharge of their duties to a client. Construction Contractors generally require thousands, often hundreds of thousands, of dollars in "upfront" payments as compared to much smaller fees by the professionals. The unscrupulous contractors take such advances and walk away, or do a poor job, or use the money and fail to pay the subcontractors and material suppliers. The homeowners then have to contend with paying again to rectify the deficiencies or to complete the construction or they must face claims of lien on their property from the subcontractors and material suppliers. Unfortunately, the real wrongdoer, the qualifying agent, can thumb his nose at the homeowner because, under the Third DCA opinion, all the homeowner can do is to pursue a judgement against the corporation which, by that time, generally would have no assets.

Here we may need to distinguish between a residential construction on a home versus a commercial construction project. Often the owner of a home, to be built, repaired, or improved, does not have the knowledge and experience in dealing with the contractor. Generally, the Owner is not represented by an attorney, engineer, or architect either. The homeowner generally does not understand the mechanics' liens law and gets scared when the subcontractors talk about a "foreclosure of their lien" because they have not been paid by the general contractor. Thus, holding

the general contractor liable for his actions would promote more confidence in the Owners' mind and would therefore, help the residential construction industry.

As to commercial projects, a corporation may have to indemnify or bond its qualifying agents. The small additional cost would be worth the enhanced confidence in the construction industry. A private cause of actions would serve as a disincentive for the unscrupulous and callous individuals who should not be serving as qualifying agents to start with. The Contractors who take pride in their performance, and who serve their clients well by discharging their statutory and other duties, would have nothing to fear. They would actually have more business, more satisfied clients, and more confidence in and respect for their profession.

II. CHAPTER 489, FLORIDA STATUTES (1991) SHOULD NOT WORK TO PROHIBIT PRIVATE CAUSES OF ACTION OTHERWISE CREATED BY OTHER STATUTES.

The Owners had asked for relief against the Contractor for discharge of a fraudulent lien filed against Owners' property and for violation of the State Minimum Building Codes (Counts IV and V respectively of the Third Party Complaint). Both these claims were based on violations of Florida Statutes other than Chapter 489. However, Third DCA denied these claims against the Contractor based on their finding that Section 489 does not create a private cause of action against the qualifying agent. Thus, Chapter 489, in

effect, is being used to prohibit a private cause of action otherwise created and granted by other Statutes.

A. Availability of a Private Cause of Action under Chapter 489, Florida Statutes, cannot be used as a Threshold Test to deny relief otherwise available under other statutes or legal theories.

i Violations of Chapter 553, Florida Statutes:

One of the Owners' claims against the Contractor was based on statutory violation of Section 553.84 of Chapter 553, Florida Statutes, Building Construction Standards. Which creates a private right of action against a person who committed the violation:

> "Notwithstanding any remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of violation of this part or the State Minimum Building Codes, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation." Section 553.84, Fla. Stat. (1989).

The language of this section, especially the words, "Notwithstanding any remedies available", clearly creates the cause of action against anyone who caused Building Code(s) Violations - no questions asked. There is no condition precedent to filing an action under this section. As long as there is a violation, and there is an individual or group who committed the violation, an action under this section arises. There is no privity requirement prior to filing this action. The Owners are clearly the protected class against the wrongdoers under the statute. In the instant case, the Contractor had the responsibility of construction and his

negligence caused the Building Code violations. The Contractor, in fact, was the wrongdoer under the Statute. Therefore, the Courts below erred in dismissing the Owners' claim for Building Codes violations against the Contractor.

Owners further maintain that the violation of the South Florida Building Code is, at least, a prima facie evidence of negligence. The Petitioners recognize that the Court in Morowitz v. Vistaview Apt. Ltd., 613 So. 2d 493 (Fla. 3d DCA 1993) demonstrated that some courts have construed violation of the South Florida Building Code as evidence of negligence and not negligence per se. Holland v. Baguette, Inc., 540 So. 2d 197, 198 (Fla. 3d DCA 1989); Brogdon v. Brown, 505 So. 2d 19, 20 (Fla. 3d DCA), review denied, 513 So. 2d 1060 (Fla.1987); Cadillac Fairview of Fla., Inc. v. Cespedes, 468 So. 2d 417, 421 (Fla. 3d DCA), review denied, 479 So. 2d 117 (Fla.1985). The Court, in Morowitz, called the violations of Building Code as an evidence of negligence:

> "in light of the detailed testimony presented surrounding the Building Code and its standards regarding slip resistance of floors, a jury instruction to consider violations of the Code as evidence of negligence would have been appropriate. Brogdon v. Brown, 505 So. 2d at 20." Morowitz v. Vistaview Apt. Ltd., 613 So. 2d 493 at 496 (Fla. 3d DCA 1993).

However, even this prima facie showing of negligence, by evidence of a statutory violation, without negligence per se, is ordinarily sufficient to require submission of all the facts to a jury. See Jackson v. Hertz Corp. 590 So. 2d 929, Reh. den. (Fla.

3d DCA 1991). In the instant case, enough proof was provided to show the violation of Building Codes. Section 553.84, Florida Statutes, authorizes Owners a cause of action against the Corp. as well as the individual responsible for the Building Code violations. But the Third DCA has disallowed Owners' action against the Contractor for building Codes violation on the basis that Owners' do not have a private cause of action against a qualifying agent. The result of this decision of Third DCA is unjustified since the Owners, who are held liable to anyone who gets injured due to Building Codes Violations, have no recourse against the person who actually caused such violations.

Therefore, it was an error to disallow such private cause of action against the Contractor because of a confusion attributable to Section 489 of Florida Statutes.

ii Violations of Chapter 713, Florida Statutes:

Third DCA also denied Owners relief for individual liability under fraudulent lien Section of Mechanics' Liens Statute, based on the Court's opinion that no cause of action exists under Chapter 489.

The Mechanics' liens Statute, Chapter 713, expressly provides a cause of action against one who files a fraudulent lien. Count IV of Owners' claim specifically sets forward the facts and allegations which support the position that the Contractor wrongfully included claims for work not performed, or materials not

furnished, and compiled the claim of lien with willful and gross negligence tantamount to a intentional and willful exaggeration. This information alone would meet requirements of Section 713.31, Florida Statutes. Such action does not depend on availability of a private cause of action under chapter 489. Chapter 489, Florida Statutes, may not expressly provide for a private cause of action but it does impose a duty. Such prima facie showing of negligence, by evidence of a statutory violation, without negligence per se, is ordinarily sufficient to require submission of all facts to a jury. See Jackson v. Hertz Corp. 590 So. 2d 929, Reh. den. (Fla. 3d DCA 1991).

Moreover, in the instant case, there did exist the scienter needed to establish a cause of action for a fraudulent lien. Such state of mind is comparable to that necessary to establish a cause of action for fraud. An officer or director of a corporation is personally responsible for filing a fraudulent lien and is not protected by corporate veil any more than he or she would be from committing a fraudulent act.

Therefore, the Courts below erred in denying relief to Owners against the Contractor for violation of these Statutes. It would be wrong to now interpret Chapter 489, Florida Statutes, to deny Owners the relief which they are otherwise entitled to under Chapters 553 and 713, Florida Statutes.

iii Piercing the Corporate Veil:

Florida law holds officers and agents of a corporation

personally liable where a tort has been committed, even if such acts are performed within the scope of their employment or as corporate officers or agents.

In White-Wilson Medical Center v. Dayta Consultants, Inc., 486 So. 2d 659 (Fla. 1st DCA 1986), the Court reviewed and reversed an order of dismissal of a tort Counterclaim against a sole shareholder, officer and director of a Corporation. In White-Wilson, the First DCA found an officer of the Corporation personally liable while performing under a contract as the sole shareholder, officer and the director of the Corporation even though the Corporation committed the tort. The Court wrote:

> "[t]here is substantial authority that Day may be sued for tortious acts or derelictions of duty in which he is alleged to have personally participated. Individual officers and agents of a corporation are personally liable where they have committed a tort even if such acts are performed within the scope of their employment or corporate officers or agents. There is no need to allege fraud or personal injury, as Dayta Consultant contends." White-Wilson Medical Center v. Dayta Consultants, Inc., 486 So. 2d 659, 661 (Fla. 1st DCA 1986).,

A series of recent cases have cited 18B. Am. Jur. 2d, Corporations, Section 1890, as authority and have used the following factors to determine an officer's liability:

i. The Corporation owes a duty of care to a third person.

ii. The Corporation delegates this duty to an officer

iii. The officer breaches this duty through his personal fault.

iv. Breach of the duty caused damages.

In the instant case, Sinha Corp. owed a duty to the Owners.

Sinha Corp. delegated this duty to the Contractor, its President and qualifying agent. Contractor breached this duty through his personal fault of failing to supervise the construction properly, violating building codes, and filing a fraudulent lien. The breach caused damages to the Owners. Thus, under prevailing Florida law, Contractor should be held liable for the tort committed as an officer of Sinha Corp. A private cause of action under chapter 489 is not needed to find liability against an officer of the corporation who happens to be the qualifying agent of the corporation also.

Therefore, lower Courts erred in dismissing Owners' claim against the Contractor, President of Sinha Corp., for filing a fraudulent lien and violating the Building codes - for the torts committed as an officer of Sinha Corp..

Owners pray that this Court does not let the relief available to Owners for Statutory violations (other than under Chapter 489) and under Officers' liability principles be limited by availability, or lack of it, of a private cause of action under Chapter 489 of Florida Statutes.

III. AS A MATTER OF PUBLIC POLICY, THE HOMEOWNERS NEED TO HAVE A REAL RELIEF FOR LIFE DEVASTATING INJURIES CAUSED BY THE UNSCRUPULOUS CONTRACTORS.

It would be better public policy to provide a real relief to victim homeowners against the real wrongdoer - the qualifying

agent, who blatantly breaches his statutorily imposed duties causing damages to the homeowners. If a private cause of action under Sections 489.119, 489.1195, and 489.129, Florida Statutes, is not provided to the homeowners against a qualifying agent who has been negligent, who disregarded his statutorily imposed duties to supervise the construction project, who abandoned the project and was financially irresponsible, who filed fraudulent mechanics' liens, who committed flagrant violations of State Minimum Building Codes, then the victim homeowners have no real remedy available to them. Owners have no place to turn to. All they can do is sue the construction corporation, which generally has no assets to its name.

It is time for this Court to recognize the increasing urgency to protect the general public from the disastrous results of shoddy construction by irresponsible qualifying agents, who routinely practice "bait and switch" with the homeowners. Such contractors individually negotiate the contract (baits) with a homeowner, tells them how good a contractor he is, but signs the contract in the name of his solely owned corporation (switches), of which he is the qualifying agent. The homeowners are led to believe that there is no difference since the individual is responsible for, and has the duty of care to, the homeowners. The homeowners, in fact, rely on the individual contractor.

Many construction corporations engaged in residential construction, generally, have very little or no assets. However,

when the homeowners suffer damages as a result of the negligent and substandard construction by the contractor, the contractor simply walks away from the project unscathed and, in effect says, "I have nothing to do with this job. You have to sue my corporation to collect anything." In the meantime, the contractor baits yet another would-be victim while the homeowner finds himself helpless and at the mercy, may be, another unscrupulous contractor. This sad story has been repeated much too frequently in south Florida in recent years, especially after hurricane Andrew, resulting in disastrous consequences of poor construction in violation of building Codes. As long as the contractors will be able to hide behind the shells of their corporations to evade the liability of their negligence, Florida will continue to be a haven for the unscrupulous contractors.

In comparison to other professionals, including architects, engineers, attorneys and doctors, the amount of monies involved in a home improvement contract is very substantial - often the life savings, or a loan to be paid over a lifetime. When the contractor fails to perform, or to discharge his financial obligations to the subcontractors or material suppliers, the results are disastrous. Homeowners are often tapped out as to their financial resources and cannot borrow any more, the subcontractors and material suppliers file liens against the property, and the homeowners risk to loose everything - their dream of owning a home, their credit, peace of mind and their dignity. Quite often, the homeowners end up in

bankruptcy - all because of a unscrupulous qualifying agent, who, by this time is probably negotiating another contract with yet another homeowner.

It is important to note that in most of the cases, where a contractor is the sole qualifying agent, officer, director, stock holder and registered agent of a corporation, the corporation is nothing more than an alter-ego of the individual qualifying agent. In these instances, the qualifying agent is the real wrongdoer who actually failed to perform, or committed the negligent actions.

Moreover, If an individual has the benefit of being the qualifying agent of a construction corporation as result of its corporation contract with the homeowners (the qualifying agent is the recipient of the financial benefits), then he must also bear the corresponding detriment of being the qualifying agent and should be held liable for the performance of his statutorily imposed duties for the same contract. It is well established that risks and rewards, benefits and detriments, privileges and responsibilities must go hand in hand.

Petitioners request this Court to recognize that in most of these cases, but for an individual qualifier, a corporation cannot engage in construction business, or negotiate a contract with the homeowners. But for the negligence, financial irresponsibility, non-performance, and disregard of his duties by the qualifying agent, the homeowners would not suffer any damages. In these cases, like the instant case, it is clear that, the qualifying

agent is responsible for damages suffered by the homeowners. Now it is unto this Court to consider the totality of the circumstances in deciding what label to use to hold the real wrongdoer liable for his negligent actions. Providing a private cause of action to the protected class under Sections 489.119, 489.1195, and 489.129 of Florida Statutes would be the most logical and appropriate remedy for this wrong - a remedy which has been already provided by some of the Florida Courts without any adverse consequences.

Petitioners pray that this Court sends a clear signal to unscrupulous contractors by recognizing that a private cause of action exists against a individual qualifier of a construction corporation and that the qualifying agents, like other professionals, would be held accountable and liable for their actions in the state of Florida.

IV. AT PRESENT, THERE IS NO CAUSE OF ACTION AVAILABLE IN THE THIRD DISTRICT AGAINST A QUALIFYING AGENT, UNLESS THERE IS PERSONAL INJURY OR PROPERTY DAMAGE.

At present, a homeowner who has suffered substantial damages due to shoddy construction at the hands of a unscrupulous contractor, has no remedy available to him against the qualifying agent, the contractor behind the construction corporation. The homeowner can get a judgment against the construction corporation but is uncollectible in most cases. However, the homeowners have

no cause of action available (in the Third District) against the qualifying agents because:

- An action cannot be filed under breach of contract because, supposedly, the qualifying agent is not a party to the contract since his name does not appear on the contract itself.
- An action cannot be filed under common law negligence because of Economic Loss Rule restrictions. (Specially now after Casa Clara Condominium Associations, Inc., v. Charley Toppino and Sons, Inc., 18 Fla. L. Week. S357, (Fla. 1993)).
- Under Third DCA jurisdiction, an action cannot be filed for violations of Statutory duties to supervise under Sections 489.119, 489.1195, and 489.129 of Florida Statutes.
- Under Third DCA jurisdiction, an action cannot be filed for statutory violations under Chapter 713, mechanics' Liens Statute or Chapter 553, Building Construction Standards, based on the holding that there exists no private cause of action under Chapter 489, Florida Statutes.

Therefore, if this Court were to decide that no private cause of action exists under Sections 489.119, 489.1195 and 489.129 of Florida Statutes, then no action would be available against the real wrongdoer, and the victims (homeowners) would have to suffer

devastating consequences.

CONCLUSION

The legislative purpose of amendments to Chapter 489, which specifies a qualifying agent's duty to supervise construction and financial affairs of the project, was to protect Owners and others like them under a construction contract. The imposition of duties upon a qualifying agent, under Chapter 489, carries with it each particular power necessary for the use of protected class to enforce the performance of such imposed duties. Since the Chapter 489 is a regulatory and penal statute, and carries with it a color of strict liability, and since the fact that the protected class is not capable of protecting itself from the harm, it creates a cause of action which constitutes negligence per se.

Moreover, if a qualifying agent violates his Section 489 duties, which results in other statutory violations, rights of action available under the other statutes or legal theories do not have to depend on the availability of a private cause of action under Chapter 489.

Wherefore, Owners pray this honorable Court to answer the question certified by the Third DCA in the affirmative with a clarification that the action created by Chapter 489, a regulatory and penal statute with a color of strict liability, should constitute negligence per se and that Owners' claims for Fraudulent lien and violation of Building Codes should survive.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Brief on Merits was sent by U.S. mail this 29th day of September, 1993, to Adam Trop, Esq., Law Offices of Jeffrey R. Mazor, at 1021 Ives Dairy Road, Suite 111, North Miami Beach, Fl 33179-2536; Richard Gentry, Esq., at 201 E. Park Avenue, Tallahassee, Florida 32301 and to Lauri Waldman Ross, Esq., of Maland & Ross, Two Datran Center, Suite 1209, 9130 S. Dadeland Boulevard, Miami, Florida 33156.

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By: 
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,799

HALLEGERE (HALL) MURTHY, et al.,
Petitioners,

vs.

NIRANJAN N. SINHA, etc., et al.,
Respondents.

APPENDIX TO
PETITIONERS' BRIEF ON MERITS

INDEX

STORAGE NAME: h1646-f.rr
Date: 6/9/88

HOUSE OF REPRESENTATIVES
COMMITTEE ON REGULATORY REFORM
FINAL STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 1646 (Passed as CS/SB 155)

RELATING TO: Construction Contracting

SPONSOR(S): Cmtes. on Appropriations and Regulatory Reform and Reps. Lippman, Kelly & Sansom

EFFECTIVE DATE: October 1, 1988

DATE BECAME LAW: 6-16-88

CHAPTER #: 88-156 Laws of Florida

COMPANION BILL(S): CS/SB 155

OTHER COMMITTEES OF REFERENCE: (1) Finance & Taxation

(2) Appropriations

****

I. SUMMARY:

A. PRESENT SITUATION:

Chapter 489, Florida Statutes, regulates construction contracting in Florida. This law is subject to repeal on October 1, 1988, pursuant to the Regulatory Sunset Act. The law provides for the certification or registration of general, building, and residential contractors, as well as, sheet metal, roofing, class A, B, and C air conditioning, mechanical, commercial and residential pool, swimming pool servicing, plumbing, pollutant storage systems specialty, and specialty contractors. This law creates the Construction Industry Licensing Board, lists violations, provides both disciplinary and civil penalties, and provides exemptions.

B. EFFECT OF PROPOSED CHANGES:

This bill saves Part I of Chapter 489, Florida Statutes, from Sunset repeal. It narrows certain exemptions, and broadens the scope of practice of certain kinds of contractors. The size of the Construction Industry Licensing Board is reduced and a provision is added to prevent problems with obtaining a quorum. Local government authority over unlicensed persons is strengthened to include the authority to issue citations and cease and desist orders. Local government authority to refuse to issue building permits or to issue permits with conditions is strengthened. Several changes are made related to business

organization qualifying agents. Several violations and two new disciplinary penalties, continuing education, and financial restitution are added.

Governmental entities are required to bid construction projects to licensed contractors and to report disciplinary actions monthly. Language on pollutant storage is transferred to its own section in this law and into a statute regulating the Department of Environmental Regulation. This bill will require a report on consumer complaints by a committee of building officials, industry representatives, and consumer representatives. A section on damage actions by consumers is transferred to the chapter on negligence.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 and the following sections: Make grammatical changes.

Section 2: Limits exemptions related to swimming pools and spas. Places additional requirements in the owner-builder exemption. Deletes the term "residential designer" and references the architecture law.

Section 3: Clarifies or expands the scope of practice of sheet metal, roofing, air conditioning, mechanical, and swimming pool servicing contractors. Allows employees of natural gas utilities to connect water lines to install hot water heaters. Adds definitions for underground utility contractor, primary qualifying agent and secondary qualifying agent. Deletes definitions related to pollutant storage. Redefines "specialty contractor" to include those specialty contractors currently set out in board rule.

Section 4: Deletes alternate members from the Construction Industry Licensing Board in order to reduce size and costs. Provides for members terms. Allows the two divisions of the board to borrow members on probable cause panels in order to reduce quorum problems.

Section 5: Clearly distinguishes between voluntary inactive and involuntarily inactive certificates or registrations. Changes the process by which inactive certificates or registrations are handled to encourage contractors to pay fees promptly or to voluntarily seek inactive status. Increases the penalty for late renewals. Provides for a reactivation fee. Provides more criteria for the portion of certification and registration fees that is transferred to the Department of Education.

Section 6: Expands eligibility criteria for certification examination.

Section 7: Requires the board to register specialty contractors only when the specialty is statewide and local licensing is required. Authorizes DPR, counties, municipalities, and local

licensing boards created by special act to issue cease and desist orders to unlicensed persons. Allows general contractors to construct storm collection systems. Allows local governments to issue building permits with conditions and to refuse to issue permits if a contractor has committed violations in other Florida jurisdictions. Deletes language on pollutant storage that has been moved to Sections 16 and 17.

Section 8: Sets a more open standard for certification by endorsement. Clarifies the method of showing insurance coverage.

Section 9: Deletes language related to specialty contractors that has been included in Section 3.

Section 10: Includes joint ventures as a type of business organization. Requires qualifying agents to be replaced within 60 days.

Section 11: Sets standards and procedures for primary and secondary qualifying agents to encourage more qualifiers. Only the primary is responsible for the business organization, but a secondary may become responsible if the primary leaves.

Section 12: Requires the board to approve a third party, including an unlicensed person, who will complete a construction contract after the death of the contractor.

Section 13: Provides a misdemeanor penalty, like that for unlicensed activity, for continuing to operate a contracting business for more than 60 days without a qualifying agent. Allows a county or municipality to issue non-criminal citations to unlicensed persons. Deletes language related to pollutant storage.

Section 14: Adds continuing education and financial restitution to consumers as disciplinary penalties. Broadens the violation for assisting an unlicensed person to engage in contracting. Creates a violation for proceeding on a job without pulling permits. Requires the department to recommend penalties, as established in the board's penalty guidelines, to hearing officers. Prohibits the board from reinstating a certificate or registration until the person has complied with the final order.

Section 15: Requires rather than permits governmental entities to accept bids from certified or registered contractors except as provided in this law. Allows counties and municipalities to refuse to issue permits or to issue permits with conditions to contractors who have had recent and serious multiple violations or to issue permits with conditions to contractors who have recently been acted against for unlicensed activity. Requires local boards to report disciplinary actions against contractors and against unlicensed persons to the board monthly rather than annually. Allows only a division I contractor, except as

otherwise provided by law, to construct or alter structural components of buildings. Strikes unnecessary language related to mechanical and plumbing licenses.

Section 16: Transfers language related to pollutant storage from other sections of the law. Provides for certification by practical examination of certain current contractors who are temporarily certified.

Section 17: Transfers language pollutant storage that related to the responsibilities of the Department of Environmental Regulation to Chapter 376, Florida Statutes. Sections 16 and 17, together, contain all the provisions on pollutant storage that are deleted earlier in the bill.

Section 18. Allows countywide ordinances regulating underground storage tanks more stringently than state law to be effective if adopted and filed before July 1, 1987, rather than September 1, 1984.

Section 19: Requires DPR to establish a committee to study consumer complaints in the construction industry. Committee members will include persons representing local building departments, the construction industry, consumers, and local governments.

Section 20: Saves Part I of Chapter 489, Florida Statutes, from Sunset repeal.

Section 21: Provides for future Sunset review of Part I of Chapter 489, Florida Statutes.

Section 22: Transfers language on damage actions by consumers against contractors to Chapter 768, Florida Statutes. This language was adopted in the 1987 legislative session.

Section 23: Saves the language in Section 23 from Sunset repeal.

Section 24: Provides an appropriation of $28,050 for the purpose of implementing the study.

Section 25: Provides for October 1, 1988 as the effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT: FY 88-89 FY 89-90 FY 90-91

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring or First Year Start-Up Effects:

Expenditures:	
Department of Professional Regulation	
Other Personal Services	$15,000
Expenses	13,050

TOTAL NON-RECURRING EXPENDITURES: $28,050

2. Recurring or Annualized Continuation Effects:

Revenues:			
Department of Professional Regulation			
License Fees	$ 0	$29,500	$ 0

The elimination of the board's requirement to register specialty contractors included only in local ordinances (and not in state law) will reduce the workload of board staff.

The reduction in the number of board members and prevention of quorum problems will allow the board to reduce its costs by as much as $15,000 annually.

Tighter disciplinary criteria should reduce the costs associated with disciplinary actions.

3. Long Run Effects Other Than Normal Growth:

None

4. Appropriations Consequenced:

Revenues:			
Department of Professional Regulation			
Professional Regulation Trust Fund	$ 0	$29,500	$ 0

Expenditures:	
Department of Professional Regulation	
Professional Regulation Trust Fund	$28,050

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring or First Year Start-Up Effects:

None (See section 2. below)

2. Recurring or Annualized Continuation Effects:

The authority provided to local governments to issue cease and desist order or to issue citations to unlicensed persons should result in a cost savings for local enforcement efforts. A citation program will specifically raise revenues by the amount of the fines collected.

The new authorities for local governments to refuse to issue permits or to issue permits with conditions to persons with violations in other localiti or at the state level should improve the cost-effectiveness of local enforcement efforts.

Local permitting agencies will have a cost associated with providing the 1-page disclosure statement to unlicensed persons qualifying under the owner-builder exemption. The requirement that local governments notify th

board monthly, rather than annually, of disciplinary actions will increase reporting costs. The amount of fiscal impact is indeterminate.

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Doubling the penalty for late renewal of a certificate or registration and creating a reactivation fee of up to $100 will have a direct impact on those contractors who choose to delay.

2. Direct Private Sector Benefits:

Limiting the liability of secondary qualifying agents should promote business organizations to have more qualifiers and reduce the time they operate without a qualifier when the primary qualifying agent leaves. This will reduce activity for which no licensed person is responsible and should financially protect the public.

Providing more guidance on the fees that are transferred to the Department of Education should result in construction studies that are more valuable to the industry, and that identify improved cost-efficiency and safety measures.

3. Effects on Competition, Private Enterprise, and Employment Markets:

Expanding provision on licensure by endorsement will allow more persons to engage in contracting. Competition is generally thought to lower prices.

Expanding the scope of practice of many types of contractors should also promote broader competition and reduce costs to consumers.

Expanding eligibility for the certification exam should encourage more competition.

D. FISCAL COMMENTS:

Revenues and expenditures collected and incurred by the Construction Industry Licensing Board to regulate the construction industry during fiscal year 1988-89 are as follows:

Available Revenues:	$6,011,700
Estimated Expenditures:	5,908,420

Currently, the Department collects an additional fee of $4.00 on certification and registration renewals. The revenues from this additional fee are transferred biennially to the Department of Education to fund research and continuing education in construction contracting. The Department estimates the transfer for the current biennium to be $245,600. The bill appropriates $28,050

of the money that is normally transferred to the Department of Education to be used to fund the committee on complaints established by the bill.

III. LONG RANGE CONSEQUENCES:

This bill is believed to provide improved protection to the public while also opening up competition within the construction industry.

IV. COMMENTS:

When two terms are used to refer to the same thing, this bill deletes the less accurate term from the current law solely for the sake of uniformity and not as a substantive change. The terms "license" and "licensee" are uniformly changed to "certificate and registration" and "certificateholder and registrant." The reference to this "act" is changed to this "part" to avoid confusion about reference to Parts II or III of Chapter 489, F.S. The term "business entity" is changed to "business organization," the term used in the original 1979 law. A "business organization" can be a person practicing in his own name.

V. SIGNATURES:

SUBSTANTIVE COMMITTEE:
Prepared by: Richard Herring

Staff Director: Cliff Nilson

APPROPRIATIONS:
Prepared by: Lori L. E. Kilpatrick

Staff Director: Dr. James A. Zingale