

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 81,799

THIRD DCA CASE NUMBER: 92-1237

CIRCUIT COURT CASE NUMBER: 91-36468

HALLEGERE (Hall) MURTHY, et al.,

Petitioners,

vs.

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

Respondents.

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

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND THE FACTS

The Petitioners, Halleger Murthy, and Myetraie Murthy, (hereinafter "The Owners") entered into a construction contact with N. Sinha Corporation (hereinafter "the Corporation") for the corporation to make certain improvements to a piece of property located in Dade County, Florida. The Respondent, Niranjana Sinha, (hereinafter "Mr. Sinha"), a licensed contractor, served as the qualifying agent for the corporation. In May of 1991, the Corporation filed a Claim of Lien against the subject property. In June of that year, the Owners filed a Notice of Contest of Lien against the Corporation.

On September 5, 1991, the Corporation filed a complaint for damages against the Owners for breach of contract and foreclosure of its statutory mechanics lien. Thereafter, the Owners filed a Counterclaim against the Corporation and an Amended Third Party Complaint against Mr. Sinha, individually, alleging in paragraph (10)(b) that Mr. Sinha is individually liable for alleged defects in the construction pursuant to Chapter 489, Florida Statutes. On April 14, 1992, the trial court entered an Order Dismissing the Owner's Third Party Complaint against Mr. Sinha. The Owners then filed an appeal with the Third District Court of Appeal to challenge the trial court's Dismissal of Counts II, IV and V of the Amended Third Party Complaint. The Third

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District affirmed the trial court's dismissal of the Third Party Complaint, reasoning that sections 489.119 and 489.129 are regulatory and penal statutes and thus do not create a private cause of action against a qualifying agent. 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?

The Respondent respectfully submits that the above question should be answered in the negative.

SUMMARY OF ARGUMENTS

- I. **Chapter 489, Florida Statutes, is a regulatory and penal statute which regulates the construction industry by establishing strict licensing and certification procedures and by imposing specific penalties for violations of the rules created by the Chapter. To enforce these rules, the legislature created the Construction Industry Licensing Board which was created specifically to carry out the provisions of the Chapter. §489.107, Florida Statutes. The legislature refused to expressly create a civil cause of action despite the fact that the Chapter has undergone several amendments and reenactments over the years and at one point even contained an express civil right of action against unlicensed contractors. While the Owners assert that a conflict exists between the Third District's position and all of the other districts in the state, the actual intra-district conflict is limited. Based upon the Third District's analysis and persuasive reasoning, and in the absence of any expressed language or legislative intent to create a private right of action under Chapter 489, the Third District's decision in the case appealed from should be affirmed.**

- II. Under Florida law, there are several remedies available to property owners who have suffered damages under the circumstances raised in the instant case. Injured property owners may sue in common law against the corporation under a variety of theories and may pursue a statutory cause of action against the corporation for violation of the state minimum building code. In the event the corporation is without assets and was used for improper purposes, the property owner may sue the individual members of the corporation under a "corporate veil" theory. Furthermore, Florida courts are in agreement that the injured property owner may sue the qualifying agent, individually, under a common law theory of negligence. The property owner may also seek redress from the Construction Industry Licensing Board, which has the authority to order the individual contractor to provide financial restitution to a damaged property owner. In light of the variety of remedies available to an injured property owner, it is unnecessary to construe Chapter 489 as creating a private right of action against a qualifying agent.
- III. A corporate entity is an accepted, highly regarded form of business organization whose purpose is generally to limit liability and serve a business convenience.

Absent direct statutory authority, the members of a corporation have the right to rely on the rules of law which protect them from personal liability. Roberts Fish Farm v. Spencer, 152 So.2d 718 (Fla. 1963). The Owners' assertion that Chapter 489 should automatically lift the corporate veil so that qualifying agents can be sued individually is contrary to established public policy. While other professionals possess only a limited ability to obtain corporate protection from individual liability, this limitation exists because the legislature expressly enacted Chapter 601, Florida Statutes, for the purpose of granting such individuals limited protection from individual liability. There is no corresponding statute which limits an individual contractor's right to be protected from individual liability; this Court should deny the petitioners' request to construe Chapter 489 as such a device.

- IV. As the Third District has held, Chapter 489 is a regulatory and penal statute which does not create a private cause of action against an individual qualifying agent. Contrary to the Owners' assertions, however, this does not limit a property owner's right to pursue a cause of action under the fraudulent lien statute or for a violation of the state minimum building code. Those options are

still available to damaged property owners provided that they sue the proper party. In the case before this Court, the construction corporation was the party that filed the construction lien and it was the party that allegedly violated the state minimum building codes. The Owners have not provided any authority to support their assertion that, but for the Third District's position, they would be able to pursue a claim against Mr. Sinha, individually, for filing a fraudulent lien or violating the state minimum building codes.

ISSUES ON APPEAL

- I. WHETHER THE FLORIDA LEGISLATURE INTENDED FOR CHAPTER 489, FLORIDA STATUTES, TO PROVIDE A PRIVATE RIGHT OF ACTION AGAINST AN INDIVIDUAL QUALIFYING AGENT.
- II. WHETHER FLORIDA LAW PROVIDES OTHER ADEQUATE REMEDIES TO PROPERTY OWNERS WHO HAVE SUFFERED DAMAGES AS A RESULT OF SUBSTANDARD CONSTRUCTION WORK.
- III. WHETHER, AS A MATTER OF PUBLIC POLICY, CHAPTER 489 SHOULD BE CONSTRUED TO CREATE A PRIVATE RIGHT OF ACTION AGAINST AN INDIVIDUAL QUALIFYING AGENT.
- IV. WHETHER, THE NON-AVAILABILITY OF CHAPTER 489 AS A PRIVATE CAUSE OF ACTION PRECLUDES THE USE OF OTHER DISTINCT STATUTES AND LEGAL THEORIES.

ARGUMENTS

- I. **THE FLORIDA LEGISLATURE DID NOT INTEND FOR CHAPTER 489, FLORIDA STATUTES, TO PROVIDE A PRIVATE RIGHT OF ACTION AGAINST AN INDIVIDUAL QUALIFYING AGENT.**
 - A. **Chapter 489 is Exclusively a Regulatory and Penal Statute.**

Chapter 489, Florida Statutes, is a regulatory and penal statute designed to regulate the construction industry in the interest of the public health, safety and welfare. Section 489.101, Florida Statutes, Part I, entitled "Construction Contracting", the relevant part of the section with respect to the instant case, regulates the construction industry by establishing examinations, minimum qualifications and strict application procedures for all persons who wish to become contractors, §489.111, §489.113, Florida Statutes; by requiring certain registration and certification procedures to ensure that only properly licensed contractors engage in construction, §489.117, §489.123-489.125, Florida Statutes; by requiring qualifying agents to apply for permits and supervise construction sites, §489.119, Florida Statutes; and by imposing specific penalties for violations of the rules created by the Chapter. §489.127, §489.129, Florida Statutes.

In furtherance of these goals, the legislature created the Construction Industry

Licensing Board, the members of which are appointed the by the Governor. This Licensing Board was specifically created to carry out the provisions of Chapter 489, Part I. §489.107, Florida Statutes. The Board is specifically empowered to "revoke, suspend or deny the issuance or renewal of the certificate or registration of a contractor, require financial restitution to a consumer, impose an administrative fine not to exceed \$5,000.00, place a contractor on probation, require continuing education, assess costs or reprimand a contractor or qualifying agent if that person violates" a rule specified in the chapter. §489.129, Florida Statutes. In fact, in the case before this Court, the Owners did file a Complaint with the Board, an investigation was properly commenced, and the Board dismissed the Complaint, concluding that there was no violation of Chapter 489 (See Exhibit "A");

Chapter 489 does not in any way create a private right of action against a qualifying agent. The chapter unequivocally states that the Construction Industry Licensing Board was specifically created to carry out provisions of Part I, (§489.107, Florida Statutes), and also provides that the Board shall conduct disciplinary hearings, §489.129(1), Florida Statutes, and impose penalties §489.127(3); §489.129(1), Florida Statutes. There is no evidence within the chapter that a private right of action was ever contemplated. Unless legislative intent "can be inferred from the language

of the statute, the statutory structure, or some other source, the essential predicate for the implication of a private remedy simply does not exist". Thompson v. Thompson 484 US 174, 179, 108 S.Ct.513, 98 L.Ed2d 512 (1988).

In Chapter 489, the Florida Legislature meticulously created a comprehensive set of licensing procedures and regulatory duties, and fashioned specific enforcement mechanisms and penalties for non-compliance. If the legislature had intended to create a statutory civil action, surely it would have done so. In Florida, "legislative intent is determined primarily from the language of the statute..." St. Petersburg Bank and Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). Courts "are not permitted to attribute to the legislature an intent beyond that expressed or to speculate about what should have been intended." Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988). This is particularly true in construing penal statutes such as Chapter 489. "(N)othing that is not clearly and intelligently described in its very words, as well as manifestly intended by the legislature, is to be construed as included within its terms..." State v. Wershod, 343 So.2d 605 (Fla. 1977). The Owners are not urging the Court to "merely construe or interpret the (statute) but rather to graft onto it something that is not there" Public Health v. Lopez, 531 So.2d at 949. This is contrary to Florida law. Accordingly, the Respondent

asserts that Chapter 489 does not create a private cause of action against a qualifying agent.

B. There Exists No "Implied" Civil Right of Action Under Chapter 489.

Unable to point to any specific language within the current chapter or legislative history, the Owners assert that a private cause of action under §489.1195 and §489.129, Florida Statutes, is implied. Owner's Brief at page 14-15. Assuming arguendo that there is some ambiguity in the language of Chapter 489, the Court must look to the legislative intent to determine the meaning of the statute. Public Health v. Lopez, 531 So.2d at 949. A review of the legislative history behind Chapter 489, however, reveals no indication that the legislature in any way intended to create a private cause of action against qualifying agents.

Enacted in 1979, Chapter 489 originally did contain a provision which created a private cause of action. Section 489.5331, Florida Statutes (1987), specifically created a civil remedy of treble damages, attorney's fees and costs in a private action against an unlicensed or uncertified contractor under certain circumstances. This section was renumbered and moved in 1988¹, the same year the legislature added

¹ Moved to §768.0425, Florida Statutes

§489.1195, Florida Statutes, which pertains to the responsibilities of qualifying agents.

Clearly then, the legislature had considered the applicability of a civil cause of action when it drafted the provisions of Chapter 489. Equally clearly, the legislature displayed that it was quite capable of specifically providing for such a private remedy when it chose to do so. Its refusal to create such a civil action against qualifying agents, therefore, cannot be reasonably interpreted as a mere oversight. Despite several amendments and reenactments over the years, and notwithstanding its clear decision to create a private right of action against unlicensed contractors, the legislature refused to create such an action against qualifying agents. This implies an intention on the part of the legislature not to provide a private right of action against qualifying agents or licensed contractors. Fischer v. Metcalf, 543 So.2d 785, 790 (Fla. 3d DCA 1989) (emphasis in the original).

In Finkle v. Mayerchak, 578 So.2d 396 (Fla. 3d DCA 1991) and in the decision appealed from, Murthy v. N. Sinha Corp., 618 So.2d 307 (Fla. 3d DCA 1993), the Third District held that neither §489.119 nor §489.129 creates a private right of action against qualifying agents. The court arrived at this decision after concluding that there is no evidence of a legislative intent to create such remedy. Finkle v.

Mayerchak, 578 So.2d at 396. While the Third District has noted a conflict with decisions from the First and Fifth Districts, these latter decisions make no mention of legislative intent. Therefore, the Respondent respectfully submits that the legislature did not intend to create a private right of action against qualifying agents under Chapter 489 and that the Third District's ruling in the underlying appeal should be affirmed.

C. Limited Conflict Between the District Courts of Appeal.

In certifying a question to this Court, the Third District noted a conflict between its decision and decisions from the First and Fifth Districts.² The Owners contend that all of the other district courts of appeal in this state have authored decisions that conflict with the Third District's decisions in Finkle and Murthy (See Owner's Brief at Page 1). Upon a closer review of the case law, however, it appears that the actual conflict between the districts is limited.

The Owners cite Alles v. Department of Professional Regulation, Construction Industry Licensing Board, 423 So.2d 624 (Fla. 5th DCA 1982) and Hunt v.

² The Murthy Court cited Gatwood v. McGee, 475 So.2d 720 (Fla. 1st DCA, 1985); Hunt v. Department of Professional Regulation, Construction Industry Licensing Board, 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); Mitchell v. Edge, 598 So.2d 125 (Fla. 2d DCA 1992)(Hall, J., Concurring).

Department of Professional Regulation, Construction Industry Licensing Board, 444 So.2d 997 (Fla. 1st DCA 1983) as cases that conflict with the Third District's decisions in Finkle and Murthy. Both Alles and Hunt, however, were appeals from administrative hearings regarding the revocation of a contractor's license due to his alleged failure to supervise a construction site. Neither case involved a civil action, and both opinions turned on an administrative agency's authority to discipline a contractor due to his violations of Chapter 489. Neither opinion even addressed the issue of a qualifying agent's potential statutory liability under Chapter 489. Thus, the decisions in Alles and Hunt do not conflict with the Third District's position that Chapter 489 does not create a private cause of action against a qualifying agent.

The Owner's also cite Edlin Construction Co., Inc. v. Groh, 522 So.2d 1001 (Fla. 4th DCA 1988), as a case that conflicts with the Third District's holding. Edlin involved a suit by a property owner against the construction corporation that allegedly permitted construction defects to occur on the property site. While the Court questioned whether the qualifying agent had exercised due care in his supervisory position, the Fourth District did not consider holding the qualifying agent personally liable for the alleged defects. The only issue involved was whether the construction corporation would be held liable for the damages based upon the qualifying agent's

alleged lack of due care.

The Owners further assert that Mitchell v. Edge, 598 So.2d 125 (Fla. 2d DCA 1992) stands in conflict with the Third District's opinions in Finkle and Murthy. Notwithstanding the concurring opinion, however, the central issue in Mitchell involved whether the property owner's claims against the individual contractor and construction superintendent were barred by collateral estoppel. The majority did not expressly analyze whether the property owners had a private cause of action against the individual qualifying agent pursuant to Chapter 489.

The only case to squarely hold that a property owner has a private cause of action against a qualifying agent based upon a breach of the qualifying agent's statutorily imposed duty to supervise is Gatwood v. McGee, 475 So.2d 720 (Fla. 1st DCA 1985). The Gatwood Court, however, conducted no analysis of the legislative intent behind Chapter 489, nor did it cite any particular section in support of its determination that Chapter 489 is something more than a "regulatory apparatus". Gatwood at 724.

In contrast, the Third District in Finkle v. Mayerchak, 578 So.2d 396 (Fla. 3d DCA 1991) reviewed the legislative history behind the statute. Finkle at 397. The Court expressly concluded that "there is no evidence here of a legislative intent to

create a private remedy on behalf of individuals." Finkle at 398. Accordingly, the Third District held that Florida Statutes, §489.119 and §489.129 are regulatory and penal statutes and thus do not create a private cause of action against an individual qualifier for a construction corporation.

In light of the Third District's analysis and persuasive reasoning, and in the absence of any express language or evidence of legislative intent to create a private right of action under Chapter 489, the respondent respectfully submits that the Third District's decision in the case appealed from should be affirmed.

II. FLORIDA LAW PROVIDES OTHER ADEQUATE REMEDIES TO PROPERTY OWNERS WHO HAVE SUFFERED DAMAGES AS A RESULT OF SUBSTANDARD CONSTRUCTION WORK.

In support of their argument that Chapter 489 should create a private cause of action, the Owners repeatedly assert that there exists no other "adequate remedies at law to protect victim homeowners" (Owner's Brief at page 35) from the actions of "unscrupulous contractors" (Owner's Brief at page 38). Under Florida law, however, there are several remedies available to a property owner who has suffered damages

under such circumstances. Thus, there is no need to imply an additional private cause of action under Chapter 489.

A. Common Law Action Against The Corporation.

The most straight-forward remedy for a damaged property owner is an action for damages against the wrongdoer -- the Corporation. The damaged party is free to bring an action for breach of contract, in tort, or under a variety of other legal theories against the party that actually caused the damage. In fact, the Owners in this case have done exactly that. The Owners filed a five count claim against the Corporation -- the party with which they entered into the underlying contract. This is the Owners' proper remedy.

B. Statutory Cause of Action Against The Corporation for Violation of the State Minimum Building Code.

In addition to their rights under the common law, the Owners may file a civil action against the corporation pursuant to §553.84, Florida Statutes, for violation of the state minimum building code. This section represents a clear example of the

legislature's ability to draft statutes authorizing a private remedy. Appropriately entitled "Statutory Civil Remedy", §553.84, Florida Statutes, provides an additional remedy against a party who violates the minimum building code. The Owners in this action have also availed themselves of this cause of action at the trial court level.

C. Piercing the Corporate Veil.

Despite the availability of the above remedies, the Owners have asserted, without support, that construction corporations "generally [have] no assets to [their] name[s]", that a typical solely owned corporation "is nothing more than an alter-ego of the individual qualifying agent" and that these qualifying agents regularly engage in a deceitful game of "bait and switch" (Owner's Brief at pages 35-37). Assuming arguendo that this is true, then injured property owners may proceed directly against the principals of those corporations under a "corporate veil" theory. If the Owners' assertions are wrong -- i.e. if most construction corporations are viable, adequately capitalized entities -- then injured property owners may obtain the necessary relief directly from the alleged wrongdoer, the construction corporation. In either case, the property owner is adequately protected and there is no need to formulate an additional

remedy from a regulatory and penal statute.

D. Common Law Negligence Against the Qualifying Agent.

Despite the variety of legal theories an aggrieved property owner may employ to obtain relief against a negligent construction corporation, Florida law provides an additional remedy against the qualifying agent, individually. Florida courts have recognized a common law negligence theory against contractors, individually, who violate the requisite standard of care in building or repairing real property in Florida. In fact, in the underlying appeal, the Third District reversed the trial court and held that the Owners were entitled to proceed with a common law negligence against Mr. Sinha. Thus, with the existence of this common law theory of liability against an individual contractor, there is no need to fashion an additional remedy pursuant to Chapter 489.

E. The Licensing Board Has the Authority to Order the Individual Contractor to Make Financial Restitution to a Property Owner.

Furthermore, Section 489.129, Florida Statutes, specifically empowers the Construction Industry Licensing Board to require an individual contractor or qualifying

agent to provide financial restitution to a property owner in cases where the contractor fails to comply with the provisions of Part I, §489.129(1)(j); see Boneski v. Department of Professional Regulation, 562, So.2d 441, (Fla. 4th DCA 1990). Although this section does not imply that a private cause of action is available, it does provide yet another option to property owners who have suffered damages. The Owners in this action have availed themselves of this option and did file a Complaint with the Department of Professional Regulation. Although the Board in this action found that no violations had occurred, the remedy was available and the procedure was utilized.

In light of the variety of remedies available to an injured property owner under these circumstances, the Owners' assertion that a private right of action under Chapter 489 is necessary to provide adequate relief is not well taken. Chapter 489 does not create a civil cause of action against a qualifying agent.

III. AS A MATTER OF PUBLIC POLICY, CHAPTER 489 SHOULD NOT BE CONSTRUED TO CREATE A PRIVATE RIGHT OF ACTION AGAINST AN INDIVIDUAL QUALIFYING AGENT.

The Owners assert that as a matter of public policy, "this court [should]

recognize the increasing urgency to protect the generally public from the disastrous results of shoddy construction by irresponsible qualifying agents" (Owner's Brief at page 35). They go on to argue that this may be accomplished only by making qualifying agents individually liable for the alleged negligence of the construction corporations that employ them. (Owner's Brief at page 35). In reality, however, the policy considerations involved strongly support the argument against construing a private right of action under Chapter 489.

The corporate entity is an accepted, well used and highly regarded form of business organization in the economic life of our state and nation. Roberts Fish Farm v. Spencer, 152 So.2d 718 (Fla. 1963). "Their purpose is generally to limit liability and serve a business convenience. Those who utilize the laws of this state in order to do business in the corporate form have every right to rely on the rules of law which protect them from personal liability..." Roberts Fish Farm at 721. Accordingly, Mr. Sinha should have the right to rely on the premise that -- absent a showing that the Corporation was created for some improper purpose and thus should be disregarded - the corporation is a distinct and viable entity. Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984).

The Owners, however, assert that Chapter 489 should somehow automatically

"lift the corporate veil", imposing personal liability on all qualifying agents who conduct business in this state (Owner's Brief at page 12). This would be tantamount to virtually eliminating the use of the corporate entity in the construction industry. The Owners draw a parallel between contractors and those persons commonly referred to as professionals -- i.e. attorneys, physicians, architects, accounts, etc. (Owner's Brief at page 26). The Owners correctly point out that this latter group of professionals "cannot walk away from their individual liability if they are negligent in the performance of their respective duties" (Owner's Brief at page 26, 27). What the Petitioners failed to acknowledge, however, is that these "professionals" cannot escape personal liability only because the legislature specifically enacted Chapter 621, Florida Statutes, which explicitly states that these individuals cannot completely avoid individual liability by forming a corporation.³

This is another example of the legislature's ability to enact laws that expressly confer personal liability on a class of individuals. There is no corresponding statute

³ Chapter 601, Florida Statutes, authorizes the creation of "professional service corporations" for individuals who offer professional services to the public which require as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and, which prior to the passage of the section, and by reason of law, could not be performed by a corporation. The section, however, does not permit these individuals who engage in "professional services" to escape personal liability for the same extent they could if they were permitted to form a traditional corporation. Thus, a "professional service corporation" does not offer nearly the protection against individual professional liability as members of the general public could obtain by forming a standard corporation, §627.07, Florida Statutes.

that imposes personal liability on contractors or qualifying agents. Contractors and property owners should be able to continue to rely on the existence of validly formed and operating corporate entities. The Owners' attempts to have this Court construe a private cause of action implicit in Chapter 489 should be denied.

IV. THE NON-AVAILABILITY OF CHAPTER 489 AS A PRIVATE CAUSE OF ACTION DOES NOT PRECLUDE THE USE OF OTHER DISTINCT STATUTES AND LEGAL THEORIES.

The Owners assert that the Third District's holding that Chapter 489 does not authorize a private cause of action, somehow precludes other remedies that would otherwise be available to property owners (Owner's Brief at page 20). In reality, however, Chapter 489 is not a "threshold test" to determine whether other causes of action are available to property owners. These other remedies are still available, provided that such potential claimants seek redress from parties who are actually responsible for the damages.

A. The Third District's View Does Not Bar a Fraudulent Lien Action.

The Owners assert that the Third District's holdings in Finkle and Murthy

preclude the Owners from obtaining relief under §713.31, Florida Statutes, the fraudulent lien section. This statute, however, creates a cause of action only against "the lienor", i.e. the construction corporation. Mr. Sinha, individually, is not the lienor. A copy of the Claim of Lien filed by the construction corporation and a copy of the Notice of Contest of Lien filed by the Owners against the construction corporation are included in the Respondent's appendix as Exhibits "B" and "C".

The Owners have failed to allege a theory or a set of facts under which Mr. Sinha can be held personally liable because the construction corporation filed an allegedly fraudulent lien. As the Third District held in the case appealed from, "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 at 309.

The Owners have not only asked that this Court create an implied private right of action under Chapter 489 for breach of a contractor's duty of care, they now argue that the theory should be expanded to hold the qualifier liable for the construction corporation's independent action of filing a lien. The Owners offer no support for this position and it thus should be denied.

B. The Third District's View Does Not Bar An Action For Violation of the Minimum Building Code.

The Owners have also alleged that the Third District's holdings preclude a cause of action for violation of the State Minimum Building Code. The Owners cite §553.84, Florida Statutes (1989):

"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 violations 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." (emphasis added).

In the instant case, however, the construction corporation is the "person or party who committed the violation". The Owners have not cited any authority from any district that stands for the proposition that §553.84 authorizes a private cause of action against a corporation as well as the individual qualifying agent. The Owners have an absolute right to sue for damages under §553.84; but such a suit must be brought against the party that allegedly caused the damage, i.e. the construction corporation -- not Mr. Sinha.

C. Issues Outside Of The Record Should Not Be Considered On Appeal.

The Owners have raised several arguments that are unrelated to the Record on Appeal, and respectfully should not be considered by this Court. While the Florida Supreme Court is unquestionably free to consider issues other than the one on which jurisdiction is based, the Court will only consider issues properly raised and argued before the Court. Savoie v. State, 422 So.2d 308 (Fla. 1982). The Owners have raised a number of points for the first time in their Initial Brief; these points are not part of the record and are not at issue.

The Owners have argued for the first time that Chapter 489 constitutes negligence per se. (Owner's Brief at page 20-22; 30-31). The evidentiary effect of the alleged statutory violation was not considered by the trial court or the Third District and is beyond the scope of this appeal.

Similarly, the Owners have included an entire subsection on the latest legal developments in "corporate veil" theory (Owner's Brief at page 32-34), despite the fact that this cause of action was never utilized in the underlying Third Party Complaint nor argued before the Third District. Furthermore, the Owners have for the first time raised theories of liability based upon "agency law" (Owner's Brief at page

22-24) and have argued in favor of a claim against the qualifying agent as a "third party obligor" (Owner's Brief at page 24). Again, these theories were not pled or relied upon at the trial court level, and are beyond the scope of this appeal.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the certified question should be answered in the negative and that the Third District's opinion should be affirmed.

WE HEREBY CERTIFY that a true and correct copy of the above was faxed and mailed this 16 day of November, 1993 to: Lauri Waldman Ross, Esq., Two Datran Center, Suite 1209, 9130 S. Dadeland Blvd., Miami, Florida 33156; Dar Airan, Esq., Airan and Associates, P.A., 275 S.W. 13th Street (Coral Way), Miami, Florida 33130.

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