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.

N. SINHA CORP., 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' REPLY BRIEF

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PREFACE

The following terms and/or abbreviations shall be used, as necessary, throughout this Brief:

Hallegere Murthy and his wife	as	"Petitioners" or "Homeowners"
Respondent Niranjan N. Sinha	as	"Contractor" or "Sinha"
Respondent N. Sinha Corp.	as	"Sinha Corp." or "Corporation"
District Courts of Appeal of Florida	as	"1st District", "2d District", etc., as applicable
Petitioners' Brief on Merits	as	"P.B. _____."
Respondents' Brief on Merits	as	"R.B. _____."
Brief of Amicus Curiae Florida Home Builders Association	as	"A.C.B. ____."
Amended Appendix to Petitioners' Brief on Merits	as	"App. ____."
Supplemental Appendix to Petitioners' Reply Brief	as	"S.A. ____."
Florida Statutes	as	"F.S."
Construction Industry Licensing Board	as	"Licensing Board"
Department of Professional Regulation	as	"DPR"
Florida Home Builders Association	as	"Builders Association"

The Reply Brief includes arguments in response and rebuttal to those presented in Respondents' Answer Brief.

ARGUMENT

Reply to Issue I:

I. FLORIDA LEGISLATURE DID NOT INTEND FOR CHAPTER 489, F.S. TO SHIELD THE MISFEASANCE OF A QUALIFYING AGENT FROM A CAUSE OF ACTION FOR INJURIES TO THE VERY CLASS OF PEOPLE IT INTENDED TO PROTECT.

Petitioners had already recognized and, therefore, agree with the Respondents that Chapter 489, F.S., is a regulatory and penal statute. Petitioners assert that the Chapter 489, would not effectively regulate the construction industry if it did not have the teeth to punish the real wrongdoer. No regulatory or penal statute whether applicable to attorneys, doctors, accountants or other professionals, prohibits a cause of action against a professional if his conduct was wrongful. However, in this case, contractors are using the very statute which was designed to regulate their conduct, to shield themselves in direct contravention of the intent of the Statute to protect the public.

I.a. There can be no "implied denial of civil remedies" where the original statute and its transferred version carries an express provision for civil remedies.

Builders Association and Respondents are mistaken in stating that a civil action under Chapter 489 is limited to an action against unlicensed contractors only. Quite to the contrary, section 489.5331, F.S. entitled "Civil Remedies" was renumbered as §768.0425, F.S., and retitled "Damages and Actions against Contractors for injuries sustained from negligence, malfeasance, or

misfeasance". The title itself points to civil remedies against any contractor. A closer scrutiny reveals that a private cause of action against licensed contractors under chapter 489 had to exist; because only in such instance the triple damages would be justified for wrongdoing by an unlicensed contractor. F.S. Sec. 768.0425 (formerly F.S. 489.5331) states:

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

Surely, the legislature did not intend that when an unlicensed contractor causes the harm, the consumer would be entitled to treble damages but if a licensed contractor committed misfeasance, a consumer would not be entitled to even a right of an action against the contractor. The statute is to regulate and discipline the licensed as well as unlicensed contractors. Licensing is one form of regulation and should not operate to excuse irresponsible conduct or exempt one from consequences of one's wrongdoing. Since the consumer is entitled to three times the damages from an unlicensed contractor, it can be inferred that the consumer would be entitled to at least one time the damages in case of a negligent licensed contractor. Therefore, expressed private cause of action did exist in Chapter 489. Even the renumbered Section 768.0425

allows a private cause of action since it applies to Chapter 489:

> (1) For purposes of this section only, the term contractor means any person who contracts to perform any construction or building services which is regulated by any state or local law, including but not limited to , chapters 489 and 633....." Section 768.0425, Fla. Stats.

Therefore, Builders Associations is mistaken to state that "Chapter 489 makes no express provision for civil liability" (A.C.B. 5). Since Chapter 489 has an express provision for civil remedies, there can be no "implied denial" of civil remedies.

Ib. The Legislature intended a civil cause of action against a qualifying agent under chapter 489 of Florida Statute.

Respondents are mistaken in alleging that "there is no evidence within the Chapter that a private right of action was ever contemplated" (R.B. 9), and that since the legislature "refused to" create an expressed cause of action against qualifying agents, it can not be reasonably interpreted as a "mere oversight". (R.B. 12). Respondents or the Builders Association have been unable to cite any evidence that would lead to the conclusion that the Chapter specifically prohibited a private right of action against the negligent contractors. They have failed to cite any reference to the legislative intent or debate which would show that this issue was actually debated in the legislature and that the legislature refused to expressly create a civil cause of action.

Petitioner agrees with the Builders Association that anything that is not clearly described in the Statute has to be construed

from what was manifestly intended by the legislature. Chapter 489 provided, and still provides, a civil remedy. However, the expressed grant of the civil remedy under this chapter is ambiguous as to a qualifying agent. This Court needs to interpret whether the legislature intended to provide such civil remedy against a construction corporation but shield the individual contractor acting as its qualifying agent.

Primarily, the legislative intent has to be determined from the plain language of the Statute. Plain language of Chapter 489 provides for a civil remedy against a contractor and defines the contractor as one "who is qualified for and responsible for the entire project contracted for...." Section 489.105(3), Fla. Stats. Since, Sections 489.119 and 129, F.S., provide that a qualifying agent is responsible for the entire project, the definition of contractor clearly includes a qualifying agent. Therefore, the grant of a civil remedy under this Chapter against any contractor should be inferred to include a qualifying agent. However, this provision has been interpreted differently by different District Courts. Therefore, this question was certified by the Third District to This Court.

Petitioners agree with Builders Association that Florida Courts have applied a test from Fischer v. Metcalf, 543 So.2d 785 (Fla. 3d DCA 1989) to such a "threshold inquiry" to interpret a Statute. When applied to this case, the first factor of Fischer

test is met, as the Statute was enacted for the benefit of the homeowners. Petitioners, homeowners belong to the class for whose "especial benefit" the Statute was enacted. Even though the Statute states its purpose to be to protect the public, the statutory provisions provide protection to those who deal with the contractors, specific class of people. Moreover, the qualifying agent has a duty to supervise the particular projects, a duty to the project homeowners, a special class of persons. Additionally, the definition of a "contractor" under Chapter 489 establishes a relationship between the contractors and a specific class of consumers who contract for their services. Thus, the Statute is clearly designed to protect the consumers, a specific class of persons, for whom contractors provide services.

The Second factor of Fischer test requires some explicit or implicit legislative intent as regards to the civil remedy. As discussed earlier, through Section 489.5331 (renumbered as §768.0425), legislature clearly provided for a civil remedy under Chapter 489. Though, the transfer of Section 489.5331 to Section 768.0425 appears to restrict the civil remedies to the parties of a contract; when read carefully, it includes all actions under Chapter 489. Under Chapter 489, definition of "contractor" includes a qualifying agent. Therefore, it can be inferred that legislature intended to create a civil remedy against a qualifying agent.

Furthermore, the legislative intent derived from legislative reports shows that Chapter 489 always carried a grant of civil remedy. Legislative report, "H.R. Committee on Regulatory Reform, Final Staff Analysis & Economic Impact Statement", Bill # CS/SB 155, Chapter #88-156, at 214 & 215, (App. 4-10), described under "PRESENT SITUATION" that 1988 Status of Chapter 489 before amendment provided "both disciplinary and civil penalties" (App. 4)and that as a result of the proposed change "A section on damage actions by consumers is transferred to the chapter on negligence." (App. 7) Nowhere did the report express that civil remedies were being abolished or denied under Chapter 489.

Additionally, all Districts agree as to the duty owed by a qualifying agent to a homeowner. Each amendment of Chapter 489 has reaffirmed the qualifying agent's absolute duty to supervise a project. None of the amendments to Chapter 489 have reduced a qualifying agent's duties.

In Summary, the expressed legislative intent to allow a civil remedy, and the absolute duties of a qualifying agent along with expressed purpose to protect the homeowners, justify an inference that the legislature did intend to provide for a private cause of action against a qualifying agent. Thus the second factor of Fischer test is met.

The third factor of the Fischer test requires that a grant of a private cause of action be consistent with the underlying

legislative purpose of the Statute. A Judicial implication of a private cause of action against a qualifying agent will protect the homeowners and will work to deter dishonest and incompetent contractors from causing harm to the consumers. On the other hand, a denial of a cause of action against a qualifying agent will work against the very purpose of Chapter 489, as it would fail to protect the consumers of a contractor's services. Therefore, a Judicial interpretation to grant a private cause of action is, in every way, consistent with the underlying purpose of Chapter 489.

Thus, all three factors of Fischer test are met by Chapter 489. This Court has the important task to allow the homeowners some redress against the wrongdoers against whom they cannot file a common law action in negligence because of economic loss rule and the construction corporation generally has insufficient assets to provide restitution to the victims. Therefore, a private cause of action should be allowed against a qualifying agent.

I.c. The new restitution provision was not intended to be the exclusive remedy allowed for violation of Chapter 489

Respondents' inference is mistaken that just because the revision added financial restitution to the disciplinary procedure of Chapter 489, that it should be the end of personal liability for a qualifying agent. The financial restitution was only added to the Statute recently. This does not imply that before the addition, the Chapter 489 did not intend to hold the qualifying

agent accountable or liable to the homeowner for damages he caused. A more reasonable interpretation would be that the addition of the restitution provision is intended to facilitate restitution for homeowners. Thus, the additions to this Section did not, in any way, deny the right of action against the individual Contractor.

Arguendo, if Respondents' and Builders Association's interpretation is adopted, then the public would be better off without Chapter 489. Then the consumer would, at least, have a right of action against the individual contractor and/or the corporation whom ever was responsible for the wrongful conduct. Chapter 489 was not intended to allow the contractors to be negligent with only remedy allowed to the consumers to be some bureaucratically and provide the administrative/disciplinary proceedings, as the sole remedy. There is no rational basis for not allowing the consumers to hold the individual contractor accountable for his wrongful action.

Respondent have cited that the Homeowners filed a Complaint with the Licensing Board and that the Board has closed the file. Respondents failed to mention that no evidence was sought from the Petitioners, no testimony was taken and the Petitioners had no opportunity to present their point of view. Petitioners are now struggling to have the case reopened and present evidence of code violations (S.A. 1-34). This is an excellent example why a consumer cannot count on disciplinary proceedings of the

Construction Industry Licensing Board and should have the option of pursuing an independent cause of action, if he chooses to do so.

REPLY TO RESPONDENTS' ISSUE III

II. AS A MATTER OF PUBLIC POLICY, CHAPTER 489 SHOULD NOT BE CONSTRUED TO ABRIDGE THE RIGHT OF A HOMEOWNER TO INSTITUTE A CAUSE OF ACTION AGAINST A WRONGDOER.

Respondents argue that a qualifying agent has the right to enjoy the limited liability of a corporate entity. However, Respondents fail to note that the integrity of a Corporation as highly regarded entity can be maintained only by if flagrant abuses of this organizational entity are disallowed. Chapter 601, F.S. does not permit the individuals who engage in "professional services" to escape personal liability to their wrongful actions. The contractors are professionals and it is reasonable to hold them to the same standards other professionals. Contractors are required to obtain a license as a condition precedent to the rendering of their services and, therefore, are in no way exempt from the operation of Chapter 601, F.S.

Respondents' further argue that if Chapter 489 is interpreted to impose personal liability on all qualifying agents in the state then this would be tantamount to virtually eliminating the use of corporate entity in the construction industry. (R.B. 22). However, just like other professional service businesses, Chapter 489 requires an individual contractor to qualify a corporate entity before it can engage in construction contracting business.

Therefore, a construction corporation should be treated like other professional service businesses and held to the same standards. Respondents gives no justification or authority against the contention that the individual contractor should have personal liability similar to other professionals like doctors, dentist, engineers, architects or accountants. Chapter 489 does not afford any special treatment to contractors so that they may enjoy all the benefits of providing professional services but avoid the liability and personal accountability for being professionals. Respondents' argument that there is no corresponding Statute that imposes personal liability on contractors or qualifying agents is defective because Chapters 489 and 601 are intended to do just that.

Builders Association further states that the construction industry is subject to some of the most comprehensive and rigorous regulation and discipline imposed on any profession. (A.C.B. 14). The statement is self laudatory and lofty in the context of actual number of complaints filed against contractors and the relatively few who are actually disciplined or prosecuted. It does not do any good to the public to have a regulatory apparatus if the actual wrongdoer is not held accountable for his wrongful conduct. When we do not hold the qualifying agent accountable for his unlawful conduct, it is as good as not having him.

Both Respondents and Builders Association refer to the comprehensive legislative scheme where a generalized action for

negligence would be sufficient instead of an availability of a right of action against the qualifying agent. Petitioners assert that the common law negligence cause of action is not available to homeowners unless and until it is accompanied by personal injury or property damage. As a result, of the limitation imposed by economic loss rule, and in the absence of a right of action for violation of the Statutory duty under Chapters 489, 553, or 713, F.S., homeowners are limited to pursue an action based on contract only.

Builders Association argues that general expressions of intent in the regulatory licensing provisions for doctors, engineers, architects, and dentists do not convert licenses or regulatory statutes into private rights of action. However, it is to be noted that none of these regulatory or penal statutes shield the professionals from the liability of their unlawful, and wrongful acts that constitute malpractice. The contractors should be similarly liable for their actions, without any treatment.

Builders Association states that the preamble to the rules of professional conduct regulating the Florida Bar states that "violation of a rule should not give rights to a cause of action nor should it create any presumption that a legal duty has been breached...the rules...are not designed to be a basis for civil liability... .", Chapter 4, Rules of Professional Conduct, Preamble, (A.C.B. 18). Builders Association fails to note, that

the Florida Bar Rules intended that they not be used as a basis for civil liability and stated so expressly. Chapter is not designed to be basis for civil liability. The Conclusion by Builders Association that a homeowner is in need of no greater protection from an individual qualifier for a corporate general contractor than a client from a negligent legal professional is entirely misplaced and inaccurate. A client who has been damaged by a negligent attorney has appropriate right of action against him personally for the damages suffered. While The Florida Bar Rules do not provide a basis for civil liability, they do not shield the attorney from such right of action either. Any professional is not, and should not be, allowed to hide behind his/her regulatory statute and avoid the personal liability for their wrongful conduct or malpractice in their professions. Petitioners submit that the contractors should not be able to do so either.

REPLY TO RESPONDENTS' ISSUES II AND IV

III. HOMEOWNERS CANNOT BE DENIED A CAUSE OF ACTION AGAINST THE QUALIFYING AGENT, THE REAL WRONGDOER, REGARDLESS OF OTHER REMEDIES AVAILABLE AGAINST THE CORPORATION.

Respondents state that there are several other remedies available to a homeowner who has suffered damages under such circumstances (R.B. 16-17). While certain remedies may be available, most of the times, they are against the corporation and do not effectively protect the public.

Lower Courts are interpreting Chapter 489 to deny any remedies

against a qualifying agent even when allowed under other statutes. Chapter 553.84, Florida Statutes, allows an action against "the person or party who committed the violation." However, the Trial Court and 3d District disallowed a cause of action against Respondent Sinha stating that Chapter 489 does not allow a private cause of action against a qualifying agent.

Respondents have argued that the injured homeowners may proceed directly against the principals of the construction corporation under a "corporate veil" theory. However, Petitioners' claim against Respondent Sinha, by trying to pierce the corporate veil, was also denied based on Chapter 489 provisions.

An action based on common law negligence against a qualifying Agent is often thwarted because the Petitioners must show personal injury or property damage due to the operation of the economic loss rule. While the licensing board has the authority to order the individual contractor to make financial restitution to a homeowner, it is available after lengthy administrative proceedings, does not fully compensate for the actual damages, and the results are often unsatisfactory to the homeowners. DPR's inapt handling of Petitioners' Complaint (S.A. 1-34) shows that complainants often do not get the opportunity to present any evidence as to their position of the issue.

The Third District's view effectively barred a fraudulent lien action under Florida Statutes §713.31. Respondents argue that the

§713.31 of Florida Statutes creates a cause of action only against the "Lienor" and that the Lienor in this case was the corporation. Clearly, the Respondent corporation did not have anybody else but its sole qualifying agent and contractor, to take whatever steps necessary to file the fraudulent lien. But the trial court denied to pierce the corporate veil and to allow a 713.31 violation action against a qualifying agent, citing Chapter 489, Florida Statutes.

The Third District's view, as argued by the Respondent and Builders Association, that a homeowner can have a right of action against the corporation, but not against the real wrongdoer - individual qualifying agent, does not comport with the concept of fairness.

Even with all the sophisticated regulatory, and disciplinary procedures, as cited by Builders Association, Homeowners are suffering at the hands of unscrupulous contractors against whom the Homeowners have no redress. If The Florida Supreme Court allows a private cause of action against qualifying agents, Florida residents will finally have some recourse against the real wrongdoer. [see Note, Murthy v. Sinha Corp.: Does Florida's Construction contracting Statute Create a Private Cause of Action Against Individual Qualifying Agents?, 18 Nova Law Rev. 651 (1993)] The most significant impact would be on the construction contractors who would be more likely to comply with the Statute and take their duties seriously.

CONCLUSION

For the foregoing reasons, and those argued in the Petitioners' Initial Brief, the Petitioners pray this Honorable Court to answer the question certified by the Third District in the affirmative and reverse the Third District's opinion in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing was filed by Federal Express with the Clerk of the Supreme Court of Florida, at 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was served by U.S. Mail this 20th day of January, 1994, to Adam Trop, Esq., Law Office of Jeffrey R. Mazor, 1021 Ives Dairy Road, Suite 111, North Miami Beach, Florida 33170-2536; Richard Gentry, Esq., 201 E. Park Avenue, Tallahassee, Fl 32301 and Lauri Waldman Ross, Esq., Maland & Ross, Two Datran Center, Suite 1209, 9130 S. Dadeland Blvd., Miami, Florida 33156.

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SUPPLEMENTAL APPENDIX TO
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