SUPREME COURT OF FLORIDA

THE DISTRICT BOARD OF TRUSTEES OF ST. JOHNS RIVER COMMUNITY COLLEGE,

Petitioner,

vs. **Case No.SC05-304**

DON R. MORGAN, Individually and d/b/a MORGAN-STRESING ASSOCIATES, **L.T. CASE NO. 5D03-9302**

Respondent.

RESPONDENT'S ANSWER BRIEF

Peter A. Robertson
Florida Bar No. 0876089
T.J. Frasier
Florida Bar No. 0567681
Robertson Group, P.L.
5216 SW 91 Drive
Gainesville, FL 32608
(352) 373-9031
Attorneys for Respondent

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PRELIMINARY STATEMENT

In this brief, THE DISTRICT BOARD OF TRUSTEES OF ST. JOHNS RIVER COMMUNITY COLLEGE will be referred to as SJRCC, the Defendant or the Petitioner; **DON R. MORGAN, Individually and d/b/a MORGAN-STRESING ASSOCIATES** will be referred to as MORGAN, the Plaintiff or the Respondent. References to the record will be AR.___@, and to the transcript will be AT.___@, with the designation for page number and line numbers being APage:Lines,@ i.e. T.805:25-30, meaning page 805 of the transcript, lines 25 through 30.

STATEMENT OF THE CASE AND FACTS

This appeal was taken from a decision affirming the trial court from the Fifth District Court of Appeal, District Board of Trustees v. Morgan, 890 So.2d 1155 (5th DCA 2004). The Plaintiff at trial and Respondent here is Don R. Morgan, individually and doing business as Morgan-Stresing Associates (AMORGAN@). The Defendant and Petitioner here is The District Board of Trustees of St. Johns River Community College (ASJRCC@). Id.

At trial, MORGAN presented one theory of recovery to the jury: Breach of Contract. SJRCC presented two theories: Fraud in the Inducement and Breach of Contract. R. 2778-79.

The dispute between the parties is related to an architectural services contract

for the Visual Performing and Arts Center (VPAC) which was signed April 20, 1999. R.796-806. The contract was signed by DON R. MORGAN, architect, and PAUL R. STRESING, architect. Id. Prior to signing the contract, at the proposal stage, PAUL R. STRESING ("STRESING") had stated to SJRCC that he and DON R. MORGAN were "partners." At that time, both MORGAN and STRESING intended to enter into a formal partnership; however, a written agreement was never executed.

In January 2000, STRESING met with SJRCC's attorney, Melissa Miller, and told her that he and MORGAN were not partners. T.852:17-25; T.854:4-16; T.709:6-8; R.1667-68. This fact, the lack of a formal partnership, formed the first attempt by SJRCC to set aside the contract with MORGAN and receive the plans at no cost.

Judge Hedstrom summed up their attempt at trial by stating:

> **[I]t seems patently unfair to produce the product, and then take the product, and then claim they can't sue you to get paid for the property you've taken.**

T.1182:2-6 (emphasis added). Despite being informed that MORGAN and STRESING were not partners in December of 1999, SJRCC told them to continue working full time on completing the project plans. T.709:12-22. In fact, in February 2000, SJRCC paid MORGAN $242,300.00 for services to date on the contract. R. 947.

In June 2000, STRESING again met with Melissa Miller, SJRCC's attorney, and told her MORGAN-STRESING did not have a business certification with DBPR

for the name MORGAN-STRESING ASSOCIATES. T.726:1-11; T.731:1-19. Despite knowing this in June, SJRCC did two things: First, they demanded that the plans be completed and turned over to them. R.1005-08; R.1693 and 1694. On July 11, 2000, MORGAN delivered the completed plans to SJRCC. T.730:2-5. Second, SJRCC requested MORGAN and STRESING to provide a modification to the contract to resolve both the partnership and business certification issues. T.1823:10-16.

MORGAN and STRESING provided this modification to SJRCC on August 22, 2000, signed by both MORGAN and STRESING. R.1128-38; T.1829:7-12. The modification proposed three different resolutions to the issues:

> **MODIFICATION OF AGREEMENT**
>
> This is a modification of various terms and conditions of that certain Agreement between the undersigned, DON R. MORGAN and PAUL R. STRESING, which was orally reached between them on January 26, 2000, and thereafter reduced to writing and signed by them respectively on February 24, 2000, and February 28, 2000 ("the Agreement".
>
> WHEREAS, the parties hereto have found it in the best interests of St. Johns River Community College ("the College"), certain of their former clients (the "miscellaneous clients"), and themselves to modify the Agreement,
>
> NOW THEREFORE, for and in consideration of the mutual covenants and promises contained herein, together with other good and valuable consideration exchanged between them, the sufficiency of all of which is hereby acknowledged, the parties do hereby stipulate, agree and contract to this Modification of Agreement, as follows:
>
> 1. In order to assure the fullest compliance with the

> requirements of Chapter 481 Florida Statutes, and Chapter 61G1 Florida Administrative Code, the parties agree to request that the College amend the contract dated April 20, 1999, between "Morgan-Stresing Associates" and the District Board of Trustees, St. Johns River Community College ("the SJRCC job") to designate DON R. MORGAN, Individually, as "architect" and to designate PAUL R. STRESING as "Consultant," with both parties being and remaining in direct privity with the College, with both parties to continue on the SJRCC job with full and continuing responsibilities to the College as though no such modification were made, all without any change or modification in their professional responsibilities or liability either jointly and singularly to the College. In the event that the College will not modify the contract for the SJRCC job in this fashion, then **the parties agree to alternatively request that the College modify the contract to name the parties individually as "Architect." In the event, but only in the event, the College will not modify the contract for the SJRCC job in this fashion, then the parties agree then to request that the College provide them sufficient time to obtain a "Certificate of Authorization" in the name of "Morgan-Stresing Associates" under the applicable provisions of Chapter 481 Florida Statutes; in that event the parties agree to immediately submit a completed application with all required supporting documentation for a "Certificate of Authorization" to the Florida Board of Architecture and Interior Design.**

R.1128-38 (emphasis added). Under the modification proposal, both MORGAN and STRESING requested the contract be modified to name them individually as project architects.

At trial, Melissa Miller testified:

> 17: Now, this modification was given to the college, correct, this Agreement?
>
> 1: That is correct.

T.571:19-21.

> 17: You're an attorney?
>
> 1: That's correct.

17: General Counsel for the college. You have no objection to them both being named as architects, correct?

1: They were already named as architects.

17: I understand that, but change the contracts so it's in their individual names; you would have no objection to that?

1: They needed to be properly licensed, and we needed to make arrangements for them to work together.

17: If they both had the contract amended in their individual names **B** they're both fully licensed, correct, Don Morgan and Paul Stresing? So there is no licensure issue, correct, if they do in their individual names?

1: That's correct. There's a partnership issue.

17: Put that aside. If they've signed this contract as Don Morgan and Paul Stresing individually as architects, there's no licensure issue; is that correct?

1: Yes, if you started on August 22nd and they had signed the contract in that fashion, that would be as **B** if I understand correctly, that would be correct.

17: That would solve the problem; it would solve the licensure problem?

1: That would solve one of the problems.

17: It would solve the licensure problem?

1: One of the issues. That would solve one of the issues.

17: The licensure issue?

1: Yes.

T.574:4-575:13.

17: And then there was a third proposal, and that is, **A**Give us time to get the Certificate of Authorization.@ And Mr. Stresing is the one that had raised

that issue: AIf you don't want to modify the contracts at all, give us more time to get the Certificate of Authorization, and we'll do that immediately.@ Correct? That was the third option in that letter?

1: Yes, sir.

17: And that would have solved that **B** if there was a Certificate of Authorization signed by Morgan and Stresing, that would have solved that issue with DBPR?

1: That would have solved the licensure issue, apparently, sir.

T.576:12- 577:1.

Melissa Miller testified at trial that had SJRCC accepted the modification, the certification issue would have been resolved because both MORGAN and STRESING were always fully licensed architects in Florida. It is important to note that the original contract is signed by both architects individually! Despite Melissa Miller's statement, the Board rejected the modification and, on August 22, 2000, SJRCC voted to terminate the contract and not pay MORGAN for the completed plans. T.1836:3-7; T.1838:2-4.

On September 7, 2000, SJRCC requested the most current CADD files [1] for the purpose of estimating the costs which would be incurred in completing the project. R.1693. The next day, SJRCC again requested the CADD files, and reassured MORGAN that its purpose was to evaluate Awhere we are.@ Furthermore, SJRCC acknowledged that it was not authorized to copy or alter the CADD files. R.1694.

MORGAN agreed to submit the plot files, which could be used to print additional copies of the plans, but not the drawing files, which could be manipulated and changed. R.1696. With reservation, MORGAN agreed to provide the drawing files to SJRCC on the condition that they would not be modified, and that SJRCC acknowledge that they were still the property of MORGAN and STRESING. R.1700-03. Once SJRCC acquired possession of the disks, they immediately turned them over to Reynolds, Smith and Hills (ARSH@) and began modifying the plans, contrary to their stated agreement with MORGAN.

SJRCC refused to pay MORGAN the sums due him under the contract for the architectural services provided. On October 13, 2003, the jury found that MORGAN had completed the plans and SJRCC had breached the contract by wrongfully terminating MORGAN and not paying for the plans. R.1156-59; R.2780-81.

On appeal to the Fifth District Court of Appeal, SJRCC raised several issues, including 1) whether the contract was enforceable under Florida law by fully licensed architects without a certificate of authorization, 2) whether the contract is enforceable against SJRCC, who ratified the contract and sought damages against MORGAN after discovering a basis for fraudulent inducement, 3) whether the jury was properly instructed on SJRCC's defenses to MORGAN's breach of contract claim, 4) whether

[1] These are computer files on disk.

a portion of SJRCC's damages were properly excluded from evidence on theories of failure to segregate and betterment, and 5) whether the trial court correctly Anetted@ the jury's awards to MORGAN and SJRCC against each other resulting in a positive judgment for MORGAN. After briefing and oral argument, the District Court affirmed the trial court and wrote an opinion on the first issue and, briefly, on the second issue presented.

The opinion is reported at District Board of Trustees v. Morgan, 890 So.2d 1155 (5th DCA 2004). In affirming the trial court, the District Court found itself in closer agreement with the holding in O'Kon and Co., Inc. v. Riedel, 540 So.2d 836 (1st DCA 1988) (AO'Kon I@) and the special concurrence by Judge Allen in O'Kon and Co., Inc. v. Riedel, 588 So.2d 1025 (1st DCA 1991) (AO'Kon II@). The District Court noted from O'Kon I that

> Initially, a summary judgment was rendered in favor of the developer on both its mechanic's lien claim and its contract claim. The First District Court of Appeal affirmed with respect to the mechanic's lien claim, and held that the architect was precluded from asserting a lien because it was in violation of section 713.03(1) and (2), Florida Statutes (1987). Of greater importance for our purposes, however, the appellate court reversed the summary judgment on the contract claim, and remanded for a trial on the merits. The First District noted that **the trial court's order Agoes to far . . . where it declares that the contract is invalid and unenforceable at law.@**

Id. at 1158 (citation omitted) (emphasis added). From the special concurrence in O'Kon II, the District Court stated, AAs Judge Allen pointed out, the language of section 481.219 does not compel a conclusion that the failure to obtain a certificate of

authorization invalidates a contract by the architectural organization *ab initio.@* Id.

In discussing the opinion in O'Kon II, the District Court pointed out that

> One of the alternative rulings of the trial court was that the contract under which the architect sought damages was unenforceable because the architect failed to obtain the certificate of authorization described in section 481.219. The architect again appealed. The First District this time held that the certificate of authorization was not simply a technical requirement, and that the language of the statute was mandatory. More importantly, however, the court held the employment of an unlicensed architect to work on the plans was a violation of the state's Alicensing statute@, and justified the conclusion that the contract was unenforceable.

Id. (citation omitted).

The key difference between O'Kon II and the instant case is that both architects here that worked on the project were fully licensed in Florida. The District Court rejected O'Kon II's reasoning, stating:

> Because there was substantial competent evidence that all persons working on the project under the [Morgan-Stresing] banner were fully licensed; and that the College was fully aware of the lack of a certificate of authorization for months before they terminated contract; and that the College accepted the work produced by [Morgan-Stresing] well after it became aware of the lack of a certificate, there was no risk that professional architectural services would be foisted on the public, in general, and on the College, in particular, by unlicensed persons. To blindly adopt the *O'Kon II* rationale under these circumstances would, in our judgment, be unjust, and would elevate form over substance.
>
> . . . . Voiding the contract after hundreds of thousands of dollars of work was performed and accepted just does not pass the smell test. . . . The fairer way to conceptualize an agreement tainted by non-compliance with section 481.219 is to consider the contract to be voidable, in much the same way that fraudulent inducement renders a contract voidable, but not void.

Id. at 1158-59.

SJRCC has taken appeal from the Fifth District Court of Appeal's decision.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal correctly affirmed the judgment for MORGAN despite SJRCC's arguments to the contrary regarding the statutory effect of certification, or lack thereof, for architects, and the effect of fraud. Additionally, the District Court properly affirmed without opinion the trial court's entry of a net judgment in favor of MORGAN based on the jury's verdict. Based on the following argument and the record, MORGAN respectfully requests that the Court affirm the decision of the Fifth District Court of Appeal.

JURISDICTION

This is a case of first impression. None of the decisions of the district courts have dealt with the specific fact pattern present here - rendering architectural services to Florida citizens by fully licensed architects as a business entity without a certificate of authority. In each of the decisions previously made, the architectural services were performed by unlicensed architects. For this reason, the Court may chose to exercise its discretion to decline review of the instant case.

Respondent respectfully submits its brief on the merits of the case below.

ARGUMENT

1. THE CONTRACT ENTERED INTO IS ENFORCEABLE UNDER FLORIDA LAW.

The most important fact to remember is that both DON R. MORGAN and PAUL STRESING, the architects who signed the contract with SJRCC to provide architectural services for the VPAC project, were at all times **fully licensed** architects in the State of Florida. This is absolutely uncontroverted. Furthermore, all architectural services were provided to SJRCC by MORGAN or STRESING. There is absolutely no argument that any unlicensed architect provided services under the contract.

Failure to obtain a certificate of authorization does not make a contract for architectural services unenforceable. Proper construction of '481.219 does not result in the contract being Anull and void.@

In construing statutes, courts must try to discern and give effect to the legislative will, in effect by determining their **intent**. Great Outdoors Trading, Inc. v. City of High Springs, 550 So. 2d 483, 485 (Fla. 1st DCA 1989). The primary source for determining that intent is the language chosen by the legislature in the statute. Donato v. AT&T Co., 767 So. 2d 1146, 1150 (Fla. 2000). In doing so, the words

used in the statute must be given their plain and ordinary meaning. Hankey v. Yarian, M.D., 755 So. 2d 93, 96 (Fla. 2000); Great Outdoors, 550 So. 2d at 485. If helpful, statutes relating to the same subject matter should be construed together and compared with the questioned statute to aid in its interpretation. Id.; see also, Hankey, 755 So. 2d at 96 (advocating examination of uses of same words in other statutes). However, courts must follow what the Legislature has written and neither add, subtract, nor distort the words written. State v. Byars, 804 So. 2d 336, 338 (Fla. 4th DCA 2001).

Furthermore, under the rule of construction, *expressio unius est exclusio alterius*, the Legislature is presumed to have intended to omit certain provisions of a statute that it had included in others. Sova Drugs, Inc. v. Barnes, 661 So. 2d 393 (Fla. 5th DCA 1995) (court refused to apply a statutory defense to pharmacists because they were specifically omitted from statute that expressly listed other professionals).

Chapter 481, Part I, Florida Statutes, deals with the professional regulation of Architecture and Interior Design. Section 481.201 (1999) provides,

> The Legislature finds that the practice of architecture is a learned profession. The primary legislative purpose for enacting this part is to ensure that every architect practicing in this state meets minimum requirements for safe practice. It is the legislative intent that architects who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state. The Legislature further finds that it is in the interest of the public to limit the practice of interior design to interior designers or architects who

have the design education and training required by this part or to persons who are exempted from the provisions of this part.

No violation of the purpose of the chapter occurred here because all architects providing architectural services were at all times fully licensed. Architect is defined as follows:

481.203 Definitions. B As used in this part:
. . .
(3) "Architect" or "registered architect" means a natural person who is **licensed**[2] under this part to engage in the practice of architecture.

(Emphasis added)(footnote added). A plain and fair reading of all of Chapter 481 indicates that the term license, as used there over 100 times, refers to the individual's

[2] License is defined in Chapter 455, Business and Professional Regulation: General Provisions, as follows:

455.01 Definitions. **B** As used in this chapter, the term:
. . .
(4) ALicense@ means any permit, registration, certificate, or license issued by the department.

(Emphasis added). This definition was misquoted by Petitioner at page 29 of its Initial Brief by omitting the words Aor license@ and inserting Aand/or@ before Acertificate@.

qualification or competency to practice architecture. The certificate of authorization relates to business entities and is defined as follows:

> 481.203 Definitions. B As used in this part:
> . . .
> (5) ACertificate of Authorization@ means a certificate issued by the department to a corporation or partnership to practice architecture or interior design.

Nowhere in Chapter 481 does the Legislature state that contracts entered into by partnerships that fail to obtain a certificate of authority are unenforceable or void. By comparison, Chapter 489, Florida Statutes, regulating the similar area of construction contracting, reinforces MORGAN's interpretation of '481.219 that failure to obtain a certificate of authority **does not** render the contract between MORGAN and SJRCC unenforceable because nowhere in the statute does the Legislature make such statement.[3]

[3] Such a comparison is perfectly logical and helpful under the above-cited authority. In fact, the court in Alfred Karram, III, Inc. v. Cantor, 634 So. 2d 210 (Fla. 4th DCA 1994), made a similar comparison when it interpreted an aspect of '481.219 by comparing it to a similar provision in Chapter 489. There, the Alfred Karram court refused to add a provision contained in Chapter 489 to '481.219, acknowledging that the Legislature Ahad the opportunity to [include the same provision contained in Chapter 489 in Chapter 481] , and did not do so.@ Id. at 212.

Under Chapter 489,[4] the legislature has stated a substantially similar purpose to Chapter 481[5] -- namely to protect the public health and safety from the dangers of incompetent professionals (i.e. contractors). Yet unlike Chapter 481, the Legislature expressly and specifically included a section in Chapter 489, namely 489.128,[6] that renders any contract entered into by an unlicensed **contractor** unenforceable in law or in equity. This provision voiding the contract was expressly excluded from the

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[4] Section 489.101 (1999) provides, AThe Legislature recognizes that the construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable or short-lived products or services. Therefore, it is necessary in the interest of public health, safety, and welfare to regulate the construction industry.@

[5] See supra, pg.11.

[6] Section 489.128 (1999) is titled AContracts performed by unlicensed contractors unenforceable,@ and provides, AAs a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain a license in accordance with this part shall be unenforceable in law or in equity. However, in the event the contractor obtains or

architect's statute; thus the Legislature did not intend that unlicensed architect's contracts for services should be voided for failure to obtain licensing.

Furthermore, Chapter 489 was amended in 2003 to make it clear that there is no unenforceability penalty for lack of certification for the business organization. Section 489.128(1)(a) provides: "As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor." However, Section 489.128(1)(b) provides:

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reinstates his or her license, the provisions of this section shall no longer apply.@

> For purposes of this section, an individual or business organization shall not be considered unlicensed for failing to have an occupational license certificate issued under the authority of chapter 205. A business organization shall not be considered unlicensed for failing to have a **certificate of authority**[7] as required by " 489.119 and 489.127.

(Emphasis added)(footnote added). Consequently, even if a contractor's business lacks a certificate of authority, the contracts are enforceable. By analogy, this latest statement of legislative intent shows that, in the case of architects, the Legislature has never and does not now intend for architectural contracts to be unenforceable for lack of a certificate of authority. Because all of the architectural services to be provided were performed by fully licensed architects, there is no argument that the contract is unenforceable.

Nor can SJRCC argue that it has the right to enforce Chapter 481. Chapter 481, Florida Statutes (1999), does not establish a private cause of action or defense which SJRCC can assert against MORGAN to avoid the contract or otherwise render it unenforceable. Section 481.219(2) - the statute upon which SJRCC relies - merely provides, in relevant part, that "a certificate of authorization shall be required for a corporation, partnership, or person practicing under a fictitious name, offering

[7] This certificate of authority is commonly referred to as a AQB license@.

architectural services to the public jointly or separately." Nothing in that section, or in Chapter 481 generally, expressly establishes a civil remedy which shields SJRCC against enforcement of the contract or otherwise invalidates contracts with uncertified architectural firms.

SJRCC simply does not have the authority to impose a sanction against MORGAN for not obtaining a certificate. Section 481.225[8] specifically provides for the consequences that will face an architect who fails to obtain the certificate. That section authorizes the Board of Architecture and Interior Design to carry out any disciplinary proceedings and to levy any penalties to be imposed. Individuals or entities contracting with architects subject to discipline are not authorized to take any action against such architect, and are certainly not authorized to avoid otherwise valid contracts.

Although SJRCC listed as a witness a representative of the Department of Business and Professional Regulation, no one testified. Ms. Miller testified that Asomeone@ notified the state attorney and DBPR regarding MORGAN and

[8] Section 481.225 (1999) is titled ADisciplinary proceedings against registered architects.@ The section describes the various offenses in subsection (1) and the penalties available under subsection (3). The penalties include revocation or suspension of licensure, fines, reprimands, probation, and restriction in scope of practice.

STRESING's alleged violation of the statute. However, prior to trial, DBPR **never** engaged in any investigation or disciplinary proceedings. Despite being informed of the situation, these facts did not rise to the level of concern necessary for action on behalf of DBPR.

Additionally, a civil remedy cannot be judicially implied unless the Legislature clearly intended that such a remedy exist. See Murthy v. N. Sinha Corp., 644 So. 2d 983, 985 (Fla. 1994), and Greene v. Well Care HMO, Inc., 778 So. 2d 1037, 1039-40 (Fla. 4th DCA 2001). In Greene, the court stated that A>legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one.'@ Id. at 1039 (quoting Murthy, 644 So. 2d at 985). A[I]n general, a statute that does not purport to establish civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability.@ Id. at 1040 (quoting Murthy, 644 So. 2d at 986). There is no clear expression from the Legislature providing for a private cause of action.

Turning to the Florida precedent, three Florida cases, Rolls v. Bliss & Nyitray, 408 So. 2d 229 (Fla. 3rd DCA 1981), Alfred Karram, III, Inc. v. Cantor, 634 So. 2d 210 (Fla. 4th DCA 1994), and O'Kon and Company, Inc. v. Riedel, 588 So. 2d 1025 (Fla. 1st DCA 1991) have touched on the issues presented to this Court, however none are directly on point. Each of these cases is factually distinguishable from the instant

case. None of the cases involve architectural services rendered to Florida citizens by Florida licensed architects as a business entity that did not have a certificate of authorization. In Rolls, the court allowed an architect to recover on his contract even though he had not complied with the then existing statutory licensing requirements. 408 So. 2d at 235. However, although the contract was executed in Florida, the project was located in another country; and as such, the court determined that it could not apply Florida's statutes Aextraterritorially.@ Id. In both Alfred Karram and O'Kon II, although neither architectural firm had obtained the certificate of authority, **the cases turned on the fact that the architects performing the work were not licensed in the State of Florida**.

Here, it is undisputed that both signatories to the contract, MORGAN and STRESING, were fully licensed architects in the State of Florida. It is this key fact which makes all of the difference. None of the authorities cited by SJRCC deal with the facts of this case on point - where the work is actually performed by fully licensed architects.

Other courts have examined the enforceability of a contract in violation of the law. In John E. Rosasco Creameries, Inc. v. Cohen, 11 N.E.2d 908, 909 (N.Y. 1937), the Court of Appeals of New York discussed the enforceability of "illegal" contracts:

Illegal contracts are generally unenforceable. Where contracts which violate

> statutory provisions are merely *malum prohibitum*, the general rule does not always apply. If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied. See Williston on Contracts, vol.3, ' 1789; vol.5 (2d Ed.) ' 1630 Cf. American Law Institute, Restatement of the Law of Contracts, " 548, 600.

Id. at 909. There, a milk dealer sought to enforce a contract for milk sold and delivered to the defendants, who were also milk dealers. Id. at 908. There was no dispute that the milk dealer had not delivered good milk; rather the buyers saw a way to avoid paying for what they had already received. The court concluded that the contract was enforceable despite the fact that the plaintiff did not have a milk dealers license, saying

> The statute involved does not expressly provide that contracts made by unlicensed milk dealers shall be unenforceable, although it does make a violation of the so-called milk control law a misdemeanor punishable by a fine of not less than $25 nor more than $200 or by imprisonment for not less than one month nor more than six months, or both. In the case at bar, if the contract is declared unenforceable, the effect will be to punish the plaintiff to the extent of a loss of approximately $11,000 and permit the defendants to evade the payment of a legitimate debt.

Id. at 910.

In Wilson v. Kealakekua Ranch, Ltd., 551 P.2d 525 (Haw. 1976), the Supreme Court of Hawaii reversed and remanded the case to the trial court after it had dismissed the suit after trial on grounds that the architect's license had lapsed and was not renewed at the time architectural services were provided. It concluded that the

architect's failure to pay the $15 renewal fee did not render the contract unenforceable. Id. at 530. The court cited Corbin on Contracts:

> It is far from correct to say that an illegal bargain is necessarily "void" or that the law will grant no remedy and will always leave the parties to such a bargain where it finds them. . . . Before granting or refusing a remedy, the courts have always considered the degree by the offense, the extent of public harm that may be involved, and the moral quality of the conduct of the parties in the light of the prevailing mores and standards of the community. 6A Corbin on Contracts ' 1534 p.816 (1962).
>
> The Restatement of Contracts, ' 600, likewise indicates that under certain circumstances an illegal contract may be enforced by the courts:
>
> If neither the consideration for a promise nor the performance of the promise in an illegal bargain involves serious moral turpitude, and the bargain is not prohibited by statute, it is enforceable unless the plaintiff's case requires proof of facts showing the illegality, or they are pleaded by the defendant, and even in that event **recovery may be allowed of anything that has been transferred under the bargain**, or its fair value, if necessary to prevent a harsh forfeiture. (P. 115) (emphasis added).
> . . .
> (E)ven in these cases enforcement of the wrongdoer's bargains is not always denied him. The statute may be clearly for protection against fraud and incompetence; but in very many cases the statute breaker is neither fraudulent nor incompetent. He may have rendered excellent service or delivered goods of the highest quality, his non-compliance with the statute seems nearly harmless, and **the real defrauder seems to be the defendant who is enriching himself at the plaintiff's expense**. Although many courts yearn for a mechanically applicable rule, they have not made one in the present instance. Justice requires that the penalty should fit the crime; and justice and sound policy do not always require the enforcement of licensing statutes by large forfeitures going not to the state but to repudiating defendants.
> It must be remembered that in most cases the statute itself does not require these forfeitures. It fixes its own penalties, usually fine or imprisonment of minor character with a degree of discretion in the court. The added penalty of non-enforceability of bargains is a judicial creation. In most cases, it is wise to apply it; but when it causes great and disproportionate hardship its application

may be avoided. . . . 6A Corbin on Contracts ' 1512, pp.712-714 (1962).

Wilson, 551 P.2d at 527-28. There is nothing illegal about paying for architectural services. The jury found that MORGAN performed his obligations under the contract and awarded him the full sum of damages he requested. Unfortunately for SJRCC, its attempts to take advantage of the precarious situation MORGAN found himself in, marching toward partnership two steps forward and one step back, seems to have backfired on them in the long run. SJRCC continued to demand further performance from MORGAN, even after it had terminated his contract. SJRCC convinced MORGAN to turn over the drawing files under the auspice of determining the completeness of his work, implying that it would compensate him fairly for what he had done, then when it received the files, it used them for whatever purpose suited it without paying MORGAN.

Finally, in Association Group Life, Inc. v. Catholic War Veterans of the United States of America, 293 A.2d 408 (N.J. 1971), The Superior Court of New Jersey reviewed a suit commenced by the insurance broker corporation for breach of contract and tortious interference. The individual brokers who owned the corporation were fully licensed, but the corporation itself was not. Id. at 411. After quoting the last passage from Corbin on Contracts above, the court concluded

> that where the operating individuals of the corporate principal are fully qualified and licensed insurance brokers the failure of the corporation, which cannot itself be trained and qualified as such independent of its operating personnel, to have

> paid the $25 fee for a license, should not bar it from access to the courts. The statute does not articulate such a consequence, as do others of cognate nature, and neither sound policy nor the interests of justice as between plaintiff and the defendants call for such an excessive penalty for mere failure to pay a licensing fee.

Id. at 413.

Here, both MORGAN and STRESING were fully licensed architects at all times. The possession of a certificate of authority would not have made them provide better architectural services. The jury found that MORGAN performed his duties under the contract and awarded him $413,049.68 in addition to the sum already paid by SJRCC. To deny him access to the courts now would be an excessive penalty and forfeiture in view of the offense.

There is no basis which supports voiding a contract for architectural services which is performed by fully licensed architects. As a result, under the facts of this case, the trial court correctly ruled that the contract was enforceable by MORGAN.

II. UNDER THE FACTS OF THIS CASE, THE CONTRACT IS ENFORCEABLE BY MORGAN DESPITE THE JURY'S FINDING OF FRAUD.

Recently, this Court stated its current position regarding the void versus voidable debate in Mazzoni Farms, Inc. v. E.I. DuPont de Nemours and Co., 761 So. 2d 306, 313 (Fla. 2000). There, the Court stated:

> It is axiomatic that fraudulent inducement renders a contract **voidable, not void**. Consistent with the majority view, Florida law provides for an election of remedies in fraudulent inducement cases: recission, whereby the party

> repudiates the transaction, or damages, whereby the party ratifies the contract. A prerequisite to rescission is placing the other party in status quo. As the court in Bass v. Farish, 616 So.2d 1146, 1147 (Fla. 4th DCA 1993), noted, AGenerally, a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his pre-agreement status.@ Moreover, a party's right to rescind is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission.

Id. (citation omitted) (emphasis added). By retaining the design prepared by MORGAN, SJRCC waived its right to rescind the contract. SJRCC asks this Court to let it retain the design prepared by MORGAN without the obligation to pay for it. SJRCC had the option, at the time it discovered that MORGAN and STRESING were not partners, to rescind the contract and give MORGAN back his design; it chose not to do that.

The Court explained further:

> A damages claim, by contrast, affirms the contract, and thus ratifies the terms of the agreement. **This principle ensures that a party who Aaccepts the proceeds and benefits of a contract@ remains subject to Athe burdens the contract places upon him.**@

Id. (citations omitted) (emphasis added). SJRCC chose to retain the design and seek damages from MORGAN at trial. By choosing to enforce the contract and seek damages from the jury, it is now bound by the jury's determination and cannot escape the verdict by now claiming the contract is void, after asking the jury to award it damages under the contract.

In Mazzoni, the plaintiffs brought suit against the defendants seeking damages for fraudulent inducement to settle claims between the parties. The plaintiffs tried to avoid the choice of law provision of the settlement agreements. The Court concluded that because the plaintiffs did not return the settlement proceeds to the defendants upon learning of the fraud, they elected to affirm the contracts and be bound by its terms, including the choice of law provision. Id.

Here, SJRCC did not return the design to MORGAN upon learning of the fraud. Rather, it encouraged MORGAN to continue working to finish the design. Further, when SJRCC decided to terminate the contract with MORGAN, it demanded that MORGAN deliver the computer files to it. MORGAN delivered copies of the computer plot files which could be used to print additional sets of the drawings, but SJRCC still was not satisfied. It demanded that MORGAN deliver the drawing files under the guise of having the files evaluated for completeness. Once it received the drawing files, SJRCC delivered them to replacement architects who modified the drawings.

Because SJRCC retained the benefit of the contract and sought damages from MORGAN, it is bound by the terms of the contract including the obligation to pay MORGAN. Judge Hedstrom concisely summed it up :

> **[I]t seems patently unfair to produce the product, and then take the product, and then claim they can't sue you to get paid for the property you've taken.**

T.1182:2-6 (emphasis added).

III. THE FINAL JUDGMENT CORRECTLY REFLECTED THE JURY'S VERDICT.

At trial, SJRCC asserted damages for additional costs SJRCC allegedly incurred in designing and construction of the subject project as a result of MORGAN's breach of the architectural services contract. However, SJRCC has calculated its damages by merely deducting the original fee and reimbursable expenses to be paid to MORGAN under the parties' contract from the Atotal cost@ of the completed project design and construction. The trial court correctly excluded part of SJRCC's damages evidence, and that issue has not been brought before this Court for review.

While it is true that SJRCC presented its damages and offset an amount owing to MORGAN against its claim, that set-off amount is not equal to the amount awarded to MORGAN by the jury. Furthermore, based on the jury's award to MORGAN of $413,049.68,[9] it is mathematically impossible for SJRCC to end up with a net judgment in its favor.

First, SJRCC's calculation incorrectly assumes that the credit owing to MORGAN is $590,640.00 rather than the jury's award of $863,894.68 ($413,049.68 unpaid and $450,845.00 paid). Next, the jury's award to MORGAN incorporated a

[9] This amount is the exactly that MORGAN presented evidence of in trial and argued for in closing argument.

finding that the amount paid by SJRCC to the consultants was only $150,525.00, rather than the $204,455.50 SJRCC is advocating. Finally, the jury's award incorporated a finding that the fee was based on a construction cost of $670,000.00 for site/civil and **$16,438,056.00** for vertical construction, whereas SJRCC's calculation allowed nothing for bidding and construction administration of the site/civil contract and a fee based on only **$14,500,000.00** for the vertical construction.

Based upon the jury's verdict and award, the jury accepted MORGAN's figures. If the Court gave SJRCC the benefit of the doubt so that it gets full credit for every item not included in the jury's award to MORGAN, the judgment would not be net positive for SJRCC, in fact it would still be owing MORGAN. If the jury's award was a net number, it would be based on something other than the evidence presented at trial. That issue is not presently before the Court for review.

Also, the jury instructions instructed the jury to consider the claims of each party separately. R.2778-79. Even though SJRCC presented its damages as a set off, the jury had ample evidence to pick and choose from for its award of separate damages to SJRCC on its claim. See Tab R of Petitioner's Appendix. The jury heard the testimony presented and could attribute specific dollar sums for each line item of damages set off against SJRCC's "allowance" to MORGAN. The members of the jury took the instructions to heart when they considered each of the claims separately, in spite of SJRCC's attempt to confuse the matter. SJRCC now seeks to

take advantage of a situation it created.

It is not mathematically possible for the jury's award to SJRCC to be a net amount in favor of SJRCC. The jury was presented with ample evidence to determine separate awards to SJRCC and MORGAN. The trial court correctly found that the two dollar figures awarded by the jury should be offset against each other resulting in a net judgment for MORGAN.

CONCLUSION

In sum, SJRCC seeks to selectively enhance its results at trial. This is SJRCC's third bite at the apple. The foregoing argument demonstrates that District Court correctly affirmed the trial court ruling that the contract was enforceable by MORGAN despite a lack of certificate of authority for Morgan-Stresing Associates from the Department of Business and Professional Regulation. SJRCC took the benefit of the plans, did not pay for them, and sued for breach of contract and fraudulent inducement, and sought damages, part of which were awarded by the jury. Also, the District Court correctly affirmed the trial court's entry of a net judgment in favor of MORGAN. Based thereon, MORGAN requests that this Court affirm the Fifth District Court of Appeal.

Respectfully submitted this ____ day of April 2005.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to Wendy Vomacka, Esq. and David C. Willis, Esq., P.O. Box 1873, Orlando, FL 32802-1873 by United States Mail, this _____ day of April, 2005.

_____

Peter A. Robertson
Florida Bar No. 0876089
T.J. Frasier
Florida Bar No. 0567681

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements (Times New Roman, 14 point) of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

Peter A. Robertson
Florida Bar No. 0876089
T.J. Frasier
Florida Bar No. 0567681