SUPREME COURT OF FLORIDA

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

vs. CASE NO.: SC05-304
Lower Tribunal No.: 5D03-3902

DON R. MORGAN, Individually, and d/b/a
MORGAN-STRESING ASSOCIATES,

Respondent.

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

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DO NOT DELETE FOLLOWING SECTION BREAK OR PAGE NUMBERING WILL BE INCORRECT.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

PRELIMINARY STATEMENT

Petitioner, The District Board of Trustees of St. Johns River Community College will be referred to as "The College" or as "The Board."

Respondent, Don R. Morgan, Individually and d/b/a Morgan-Stresing Associates will be referred to as "MSA."

The following abbreviations will be used:

[R. __]	Record on Appeal
[AR. ___]	Appellate Record on Appeal
[Tr. ___]	Trial Transcript
[App. ___]	Appendix
[Pl's Ex. ___]	Plaintiff's Exhibits Introduced at Trial
[Def's Ex. ___]	Defendant's Exhibits Introduced at Trial
[Depo. at ___]	Deposition Transcript

Deposition transcript references are to original page numbers assigned by the Court Reporter.

STATEMENT OF THE CASE AND FACTS

Don Morgan, an architect doing business as Morgan-Stresing Associates (MSA) put on the partnership cloak solely to get more business. The business entity known as MSA was never properly licensed in Florida. Unlicensed, MSA solicited business and entered into contracts in violation of Florida law. Don Morgan fraudulently induced the College to enter into a contract with MSA by holding MSA out as a partnership with architect Paul Stresing. The jury found MSA guilty of procuring the contract by fraud. Notwithstanding MSA's failure to be properly licensed and an unappealed jury finding that MSA induced the College to enter into a contract by fraud which caused damage to the College, the Fifth District Court of Appeal affirmed the lower court's entry of Final Judgment in favor of MSA. In its opinion, the Fifth District certified conflict with the decision of the First District Court of Appeal in *O'Kon and Co., Inc. v. Riedel*, 588 So. 2d 1025 (Fla. 1st DCA 1991).

MSA Was Never Properly Licensed Under Florida Law

After practicing architecture as a sole practitioner for many years as "Don R. Morgan, Architect," Morgan began practicing with architect Paul Stresing in 1995. [Tr. 207-208] In 1996, the firm name changed to Morgan-Stresing Associates (MSA). [Tr. 208] Don Morgan put on the false cloak of partnership solely to solicit and procure better contracts. [Tr. 209] MSA never applied for nor received

the certificate of authorization required by Florida Statutes § 481.219 (1997) prior to nor during the time it solicited business from the public, including the College. [Tr. 510-519] [R. 58-65; 69-72] [Pl's Ex. 35] [Def's Ex. 21]. Showing his distain and disregard for the law, Morgan referred to the licensing requirement as crap.[1] [Tr. 877-79]

Unlicensed MSA Procures a Contract With
The College by Fraud

In 1998, the College solicited proposals from architects to design a theatre and business/tourism complex on its Orange Park campus[2] which became the Thrasher Horne Center[3]. [Def's Ex. 1] Due to the project's size, complexity and technical nature, the College mandated that the architect chosen for the project have specialized theatre experience. [Def's Ex. 1] [Tr. 684-85; 1190-91] MSA submitted a proposal expressly representing itself to be a partnership between Don Morgan and Paul Stresing. [Def's Ex. 2]

MSA survived the initial cut, making the short list based solely on Paul Stresing's theatre experience because Don Morgan lacked the experience required by the College. [Tr. 688-89; 703-04; 1196-98; 1379-82; 1668-69] Even after the oral presentations, the College had reservations about MSA's ability to properly

[1] Don Morgan used more colorful language, which Paul Stresing would not repeat at trial.
[2] Orange Park, near Jacksonville, Florida was one of three campuses of St. Johns River Community College.
[3] MSA referred to it as VPAC (Visual and Performing Arts Center).

staff the project. [Def's Ex. 3] Given that Stresing's experience was critical to MSA's consideration, the committee wanted assurances of his participation. [Tr. 1673-75]

In response MSA stated in writing that, Stresing would be involved "at every level of the project's design and construction," thus "providing 100% principal participation." [Def's Ex. 2, 3] [Pl's Ex. 7] Everyone knew that Paul Stresing's involvement in the entire project was a requirement. [Tr. 393, 398; 403-06; 1857] With this assurance, MSA was ultimately chosen as the architect. The College would not have awarded MSA the contract had it known that Paul Stresing was not a partner in MSA. [Tr. 688-92; 703-04; 1195-99; 1376-82; 1667-71]

MSA signed the contract with the College on April 20, 1999. [Pl's Ex. 10] [Tr. 703] MSA did so without ever attempting to comply with Florida Statute § 481.219. [R. 58-65; 69-72] Immediately after signing the contract, Don Morgan began dismantling the trappings of partnership, yet continued to hold himself out as "Senior Partner" of Morgan-Stresing Associates. [Def's Ex. 15, 18-20] [Tr. 475-82] [Pl's Ex. 13] The College was unaware of Don Morgan's deceit concerning the true nature of MSA and the fact that MSA was not licensed as required by Florida law.

January 12, 2000 – College Discovers MSA's Fraud

Soon after execution of the contract, College personnel observed that Paul Stresing was not participating as originally promised and required by MSA's contract. [Tr. 1871-72] College personnel wanted the situation rectified and were assured by Morgan that it would be. [Tr. 1871-75] [Pl's Ex. 13] On January 12, 2000, however, Stresing advised College personnel that he had just been told by Morgan that he, Stresing, was not Morgan's partner, but only an employee of MSA. [Def's Ex. 23] Recognizing that the contract with the College was in serious jeopardy, MSA requested an opportunity to effectuate a cure. Unaware that MSA was not properly licensed, the College gave Morgan and Stresing an opportunity to continue if, within one week, they provided the College with a written plan to complete the project as the team required by the contract. [Def's Ex. 23] [Pl's Ex. 15] The required plan was never provided.

Instead, on January 26, 2000, Don Morgan once again falsely assured the College that both architects would abide by the MSA contract and that both would be involved in every phase of the project through completion as was required under the contract. [Pl's Ex. 44] In fact, Morgan and Stresing were not working together. Paul Stresing's participation in the project dwindled and ultimately ceased. [Def's Ex. 8] According to a letter from Morgan's attorney, Stresing ceased all work on April 29, 2000. *Id*.

June 2000 – College Learns MSA Is Not Licensed

On June 1, 2000 Paul Stresing advised college personnel that MSA did not have the certificate of authorization required by Florida Statute § 481.219 (1997). [Tr. 726-27; 878-80] [App. Q] Because MSA was not properly licensed, Stresing said he was prohibited from working on the project. *Id.* He did no further work on the project after that date.

On June 14, 2000, the college administration notified MSA in writing that MSA was in default because both architects were not working on the project. [Pl's Ex. 24] [Tr. 727-28] [App. K] The College set a deadline of June 30, 2000 for MSA to cure the default. [Pl's Ex. 24] [App. K] As part of the cure, the College demanded that MSA be in full compliance with Florida's licensing requirements. [Tr. 514-15; 728-29] [Pl's Ex. 24] [App. K] It is undisputed that MSA failed to cure the default and failed to become properly licensed under Florida Statute § 481.219. [R. 58-65; 69-72] Morgan submitted an application for certification for MSA, which Stresing refused to sign because Morgan had made material misrepresentations. [Tr. 512-14; 885-89] [Def's Ex. 24] [App. N] The application was never approved. [R. 58-65; 69-72] [Tr. 512-13]

Board of Trustees Severs Its
Relationship with MSA

The District Board of Trustees of St. Johns River Community College is the legal entity that contracted with MSA. [Tr. 1857-58] The Board of Trustees meet

monthly. The first scheduled meeting following Stresing's announcement that MSA was not properly licensed was on June 27, 2000. [Def's Ex. 32] [App. L] [Tr. 1808] At that time, Joe Miller, legal counsel for the Board, reported that Morgan and Stresing were not partners as had been represented, and that MSA was not in compliance with Florida architectural licensing law. [Def's Ex. 33] [Tr. 1810-14] [App. M, Q] Joe Miller advised, that as such, there was no contract for architectural services with the College. *Id.* [App. M] The Board then voted to suspend payments to MSA until the situation was rectified. [Def's Ex. 33] [App. M]

When MSA failed to meet the June 30, 2000 deadline to show compliance with Florida law and the other requirements set by the College, the Board began the process of terminating its relationship with MSA. In the interim, Don Morgan gratuitously delivered to the College on July 11, 2000 plans and specifications which he falsely represented were 100% construction documents. [Tr. 1882] After delivering the plans, Morgan left for vacation not returning until early August 2000. [Tr. 1885-86; 1816] As a result, the first Board meeting at which Morgan could be present was August 22, 2000. With Don Morgan and his attorney present at the August meeting, the Board voted to sever its relationship with Don Morgan, Paul Stresing and/or MSA. [Pl's Ex. 34] [App. O]

The College Seeks To Cover

To mitigate its damages, the College sought the most cost-effective means of completing its project having already paid MSA $413,330. [Tr. 351; 2226-27] A threshold issue was whether the MSA plans could be used or should be scrapped with the successor architects beginning anew. If the MSA plans were unusable, the College would lose any benefit from its $413,330. On top of that, it would have to pay the successor architect a fee similar to the contract fee with MSA, over $1.1 million. [Tr. 2192; 2230] The College had the plans reviewed by another architectural firm. Having been advised that the plans were salvageable, the College sought bids from successor architects and awarded the contract to the lowest bidder, Reynolds, Smith and Hills (RS&H). [Tr. 1902]

Once retained, RS&H discovered that the MSA plans had significant and fundamental deficiencies that had not been initially apparent. [Tr. 911-13] For instance, the MSA plans were not code compliant, did not meet life safety requirements and were not coordinated between disciplines. [Tr. 912-13; 919-21; 960-66] MSA had also failed to pay its sub-consultants. [Tr. 2191; 2208-09] To complete the plans, the College paid MSA's sub-consultants relieving MSA of any obligation to do so. [Tr. 2191; 2208-09; 2226] Even with its efforts to mitigate damages, the College spent substantially more to correct the MSA plans than the

amounts it had withheld from MSA under the terminated agreement. [Ex. 2 to Lott deposition] [App. P]

The Suit and Trial

MSA filed a two-count complaint against the College. [R. 6-24] Count I, Breach of Contract, alleged that MSA was wrongfully terminated and that the College continued to use MSA's drawings without paying the outstanding balance. This was the only surviving issue at trial.[4] [Tr. 1167] The College denied MSA's allegations filing affirmative defenses and a compulsory counterclaim. The College's counterclaim alleged fraud in the inducement, breach of contract, negligent misrepresentation, and fraud. [R. 29-44]

Don Morgan admitted during discovery that he had been practicing under the fictitious name of Morgan-Stresing Associates, that Morgan-Stresing Associates was not properly registered as a fictitious name in the State of Florida as of April 20, 1999 and that Morgan-Stresing Associates had never had the certificate of authorization as required by Florida law. Morgan further admitted that he had solicited business from the College as MSA without having a certificate of authorization. [R. 58-65; 69-72]

[4] MSA's *quantum meruit* claim was abandoned at trial.

College's Motion for Directed Verdict

At trial, the College timely moved for entry of directed verdict in its favor on three grounds: (1) MSA's admitted failure to have the certificate of authorization required by § 481.219 Florida Statutes rendered the contract void *ab initio*; (2) the contract was void and unenforceable by MSA because MSA had procured the contract by fraud; and (3) if the contract were valid and enforceable, MSA had committed the first material breach by failure of both architects to perform as required which occurred no later than June 1, 2000 when Paul Stresing ceased all work on the project.[5] If the contract were deemed enforceable, this was more than a month before MSA's claimed breach of failure to pay could have accrued. [Tr. 1882] [R. 58-65; 69-72] [Tr. 1160-82; 2374-77] The motion for directed verdict was denied. [Tr. 2374-77]

Verdict Form

The College submitted a verdict form consistent with its position that MSA had procured the contract by fraud, and as a result, MSA could not, as the wrongdoer, sue to recover on the contract. It asserted the contract was void as to MSA. [R. 2721-22] [App. F] Over the College's objection, the trial court declined to use this proposed verdict form. [Tr. 2042]

[5] Correspondence from Don Morgan's attorney stated that Stresing had not worked on the project since April 29, 2000. [Def's Ex. 8]

Jury Finds Fraudulent Inducement

The jury found that MSA had procured the contract by fraud and the College had suffered damages as a result thereof. The jury also found that the College had breached the contract and that MSA had suffered damages. [R. 2780-81] [App. G] The College filed a motion for entry of final judgment, or in the alternative, motion for judgment in accordance with motions for directed verdict and a motion for new trial, which were denied. [R. 2795-2980; 2798-2980] [App. H] Final judgment was entered in favor of MSA. [R. 2988-89] [App. I]

Appeal to the Fifth District Court Of Appeal

The College timely appealed to the Fifth District Court of Appeal. [AR. 1-8] The Fifth District affirmed the Final Judgment for MSA. [AR. 9-18] [App. A] In its opinion, the Fifth District certified conflict with the decision of the First District Court of Appeal in *O'Kon and Company, Inc. v. Riedel*, 588 So. 2d 1025 (Fla. 1st DCA 1991). On January 19, 2005, the Fifth District Court of Appeal denied the College's timely motions for rehearing and clarification. [AR. 46] On February 17, 2005, the College timely filed its Notice to Invoke the Discretionary Jurisdiction of this Court. [AR. 48-49]

SUMMARY OF THE ARGUMENT

The Final Judgment entered in favor of MSA should be reversed and the Fifth District's opinion quashed because the contract between the College and

MSA was void *ab initio* and not enforceable by MSA for two independent reasons. By statute, MSA was required to have a certificate of authorization before it could offer and/or provide architectural services in Florida. MSA never had the license required by Florida Statute § 481.219 (1997). Long-standing Florida Supreme Court precedent and Florida public policy hold that a contract that cannot be performed without violating a constitutional or statutory provision is illegal and void *ab initio*, and as such, cannot form the basis of any lawsuit.

The second independent ground for reversal of the Final Judgment is the unappealed jury determination that MSA procured the contract with the College by fraud. In Florida, one who procures a contract by fraud cannot sue to enforce the contract. As to the wrongdoer, the contract is void. Thus, MSA cannot sue to enforce a contract that it fraudulently procured.

Even if the Fifth District opinion is affirmed, the Final Judgment in favor of MSA should still be reversed for two reasons. The Fifth District found that failure to have the certificate of authorization rendered the contract voidable, and the College had failed to promptly void the contract. The lower court's conclusion is based on erroneous facts. Further, whether the College acted promptly is a fact issue that was never submitted to the jury. Based on the Fifth District's own opinion, the College is entitled to a new trial on the breach of contract.

The Final Judgment should further be reversed notwithstanding an affirmance of the Fifth District's opinion, because the trial court improperly adjusted the damages found by the jury when entering the Final Judgment. The trial court erroneously deducted the damages awarded to the College for fraud from the amount found due to MSA under the fraudulently induced contract. Because the College's damages are the difference between the contract balance and the amounts incurred in excess of the contract, the trial court compounded the harm suffered by the College rather than making the College whole.

JURISDICTION

The College has invoked the discretionary jurisdiction of this Court under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). The Court has jurisdiction pursuant to Article V, § 3(b)(4) of the Florida Constitution. The Fifth District Court of Appeal certified conflict with the opinion of the First District Court of Appeal in *O'Kon & Company, Inc. v. Reidel*, 588 So. 2d 1025 (Fla. 1st DCA 1991). [App. C] In *O'Kon*, the First District held that an architect's failure to have the certificate of authorization required by Florida Statute § 481.219 was a violation of Florida's licensing statute for architectural services rendering the architect's contract void *ab initio* and unenforceable. In direct conflict, the Fifth District held that section 418.219 was not a licensing statute and non-compliance did not void the architect's contract. The Fifth District's opinion also directly conflicts with the

opinions of the Third District in *Rolls v. Bliss & Nyitray, Inc.*, 408 So. 2d 229 (Fla. 3d DCA 1981) [App. D] and the Fourth District in *Alfred Karram, III, Inc. v. Cantor*, 634 So. 2d 210 (Fla. 4th DCA 1994). [App. E]

This Court has also jurisdiction to consider all other issues which have been raised in the appellate process as though this case had originally come to this Court on appeal. *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982). *See also, Ocean Trail Unit Owners Ass'n, Inc. v. Mead*, 650 So. 2d 46 (Fla. 1995) (having accepted jurisdiction, the Court may review the entire record for error).

ARGUMENT

I. CONTRACTS ENTERED INTO IN VIOLATION OF STATE LICENSING LAWS ARE VOID AB INITIO

A. STANDARD OF REVIEW

"Judicial interpretation of Florida statutes is purely a legal matter and therefore, subject to *de novo* review." *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998). *See Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 670 (Fla. 1993), *aff'd* in part, *rev'd* in part on other grounds, 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994).

B. CONTRACTS THAT VIOLATE STATUTES ARE VOID

Florida law has long held that an agreement or purported contract that cannot be performed without violating a constitutional or statutory provision is illegal and void, and as such, cannot form the basis of any lawsuit. *Local No. 234*

of United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of U.S. and Canada v. Henley & Beckwith, Inc., 66 So. 2d 818, 821 (Fla. 1953). In *Local No. 234*, this Court agreed with the union that the agreement resulted in a closed shop violative of public policy, thus rendering the agreement void. Justice Sebring stated:

> [A]n agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice. … For courts have no right to ignore or set aside a public policy established by the legislature or the people. Indeed there rests upon the courts the affirmative duty of refusing to sustain that which by the valid statutes of the jurisdiction, or by the constitution has been declared repugnant to public policy. *Id.*

While applicable to all statutes, Florida courts have frequently applied this common law principal to licensing statutes holding "that where the law requires licenses to conduct business, the contracts by the unlicensed to perform licensed services are illegal and void." *Fabricant v. Sears Roebuck et al*, 202 F.R.D. 310, 320 (S.D. Fla. 2001). This rule has been applied to void contracts involving numerous occupations and professions that are regulated by statute. *See e.g.*, *Wood v. Black*, 60 So. 2d 15 (Fla. 1952) (contracts by unlicensed contractors are void *ab* initio); *Deep South Systems, Inc. v. Heath*, 843 So. 2d 378, 380 (Fla. 2d

DCA 2003) (contracts by unlicensed roofing contractor are unenforceable as a matter of law); *Vista Designs v. Silverman*, 774 So. 2d 884, 885 (Fla. 4th DCA 2001) (contract with lawyer not licensed to practice law in Florida was void *ab initio*; lawyer was prohibited from recovering fees and was required to disgorge fees); *Steinberg v. Brickell Station Towers Inc.*, 625 So. 2d 848, 850 `(Fla. 3d DCA 1993) *rev. den.* 637 So. 2d 237 (Fla. 1994) (contract with unlicensed mortgage broker was illegal and unenforceable; trial court erred in failing to deny motion for directed verdict); *Spiro v. Highlands General Hospital,* 489 So. 2d 802, 804-805 (Fla. 2d DCA 1986) (Hospital contract with dentist to perform non-dental anesthesia for which he did not have a medical license was void *ab initio*; hospital could not breach unenforceable contract.); *D&L Harrod, Inc. v. U.S. Precast Corp.*, 322 So. 2d 630, 631 (Fla. 3d DCA 1975) ("[S]ince appellant was not properly certificated by the State Public Service Commission to engage in the trucking activities contracted for with appellee, the contract sought to be enforced by appellant is contrary to the public policy of this state and therefore unenforceable. There is no legal remedy for that which is illegal itself").

C. SECTION 481.219 IS A LICENSING STATUTE AND COMPLIANCE IS MANDATORY

The Florida Legislature has adopted a comprehensive licensing statute regulating the practice of architecture by individuals and businesses. Florida Statute Chapter 481.201 *et seq.*, (1997) governs and regulates the provision of

architectural services in the state, outlining the requirements that must be met by architects to practice in Florida. All architects who are natural persons must have a valid Florida certificate of registration. § 481.213, Fla. Stat. (1997). All registered architects who offer their services through a corporation, partnership or under a fictitious name must also have a valid Florida certificate of authorization. Corporations, partnerships or persons who want to practice under a fictitious name are permitted to do so, subject to the provisions of § 481.219, which states:

> 481.219 Certification of partnerships and corporations.
>
> (1) The practice of or the offer to practice architecture or interior design by licensees through a corporation or partnership offering architectural or interior design services to the public, or by a corporation or partnership offering architectural or interior design services to the public through licensees under this part as agents, employees, officers, or partners, is permitted subject to the provisions of this section.
>
> (2) For the purposes of this section, a **certificate of authorization shall be required for a corporation, partnership, or person practicing under a fictitious name, offering architectural services to the public** jointly or separately. However, when an individual is practicing architecture in his own name, he shall not be required to be certified under this section. … (emphasis added)

Chapter 481 defines a "certificate of authorization" as "a certificate issued by the department to a corporation or partnership to practice architecture or interior

design." § 481.203(5), Fla. Stat. (1997). A fictitious name is "any name under which a person transacts business in this state, other than the person's legal name." § 865.09, Fla. Stat. (1997). The "certificate of authorization" and the "certificate of registration" are both part of the state's licensing scheme through which the practice of architecture is regulated.

The licensing requirements of Chapter 481 are mandatory. Before an architect can practice under any name other than his or her own legal name, a certificate of authorization must be obtained. The importance of compliance with section 481.219 is illustrated by the certificate of authorization application which states:

> "IMPORTANT NOTE: Florida Statutes strictly prohibit solicitation of architectural services prior to licensure. Applications are processed in date received order and NOT expedited for purposes of allowing a business to bid on specified projects." [Def's Ex. 21] (emphasis added) [App. J]

Regardless of whether MSA was a partnership consisting of Don Morgan and Paul Stresing or a fictitious name for Don Morgan, MSA was required to apply for and be issued a certificate of authorization before Don Morgan and Paul Stresing could lawfully practice architecture as Morgan-Stresing Associates. MSA never had the mandatory certificate of authorization. Thus, MSA should have never submitted its proposal to the College, much less have been awarded the contract.

D. NONCOMPLIANCE WITH § 481.219 RENDERS CONTRACT VOID

Florida courts first applied the "controlling legal principal . . . that contracts which are made in violation of such professional regulation statutes are generally held to be invalid and unenforceable at law" to the architectural licensing statute in *Rolls v. Bliss & Nyitray, Inc.*, 408 So. 2d 229 (Fla. 3d DCA 1981), *dism.*, 415 So. 2d 1359 (Fla. 1982). [App. D] In *Rolls*, the architect brought suit in Florida claiming breach of contract arising from a dispute with builders who were involved in an overseas construction project. *Rolls*, 408 So. 2d at 230. At trial, the court found that the plaintiff architect was licensed in several foreign countries but not in Florida. As a result, architect was barred from bringing his contract claim because of Florida's architect licensing statute. *Id.*

On appeal, the Third District Court of Appeal undertook an extensive analysis of the failure to comply with the architect licensing statute on a party's right to enforce a contract for architectural services. The first step in the court's analysis was a finding the statute was "a type of professional regulation statute commonly enacted by the states to govern the conduct of certain persons whose occupations are said to affect the public interest, such as e.g., contractors, pharmacists, C.P.A.'s, teachers, pawnbrokers, insurance agents, cosmetologists, funeral directors, engineers and architects." *Id.* at 233-34. The *Rolls* court then expressly recognized that "the controlling legal principle" in Florida is that

"contracts which are made in violation of such professional regulation statutes are generally held to be invalid and unenforceable at law." *Id.* at 234 (emphasis added) Noting that case law from several other states had held that non-licensed architects were barred from recovering on contracts to perform services which required a license to perform, the *Rolls* court stated that Florida courts had recognized the same rule as it related to the practice of various regulated professions. *Id.* The *Rolls* court also noted that statutes like Chapter 467[6] which "impose a penalty on the unlicensed practice rather than an explicit prohibition on the making or performance of the 'illegal' bargains, have been applied to bar contractual recovery." *Id.* (emphasis added) Quoting Corbin on Contracts, the *Rolls* court stated:

> "[T]he legislature may prohibit the carrying on of a specified business or profession without first obtaining a license, permit, or certificate from some examining or inspecting officer or board of officers. In such a case, the carrying on of the business or profession may involve the making and performance of bargains of various kinds; and the courts have declared in innumerable cases that the bargains before them were made illegal because the requirement of the license or certificate was not complied with by one of the bargaining parties. 6A Corbin on Contracts s 1513 at 722-23. See generally *51 Am.Jur.2d Licenses and Permits* s 66 at 72-73." 408 So. 2d at 234-35.

While affirming the general principal, the *Rolls* court found there to be no violation of the architect licensing statute in the case before it. *Id.* at 235-36. The

[6] Florida Statutes Chapter 467 was the predecessor to Chapter 481.

statute governing the practice of architecture was only designed to protect the public within the State of Florida's boundaries. Because the work in *Rolls* was for a project outside the State of Florida, the architect was not required to be licensed in Florida. Therefore, the statute did not bar recovery on the contract. *Id.* at 236.

The issue of whether non-compliance with Florida's architect licensing statute voided an architect's contract was next addressed by the Florida courts in *O'Kon and Company, Inc. v. Riedel*, 588 So. 2d 1025 (Fla. 1st DCA 1991). [App. C] In *O'Kon*, a Georgia architectural and engineering corporation was hired to perform services in Florida. 588 So. 2d at 1026. While a Florida licensed architect supervised the work and sealed the drawings, the corporation did not have the certificate of authorization required by Florida Statute § 481.219.[7] *Id.* After financing problems were encountered, the owner terminated the contract, and the architect sued for breach of contract. *Id.* at 1027. The trial court held the contract was unenforceable by the corporation because it had never obtained the certificate of authorization required by Florida law. *Id.*

On appeal, the corporation asserted that its failure to comply with the certificate of authorization requirement of Chapter 481 was merely a technical violation. The First District Court of Appeal disagreed stating:

[7] Section 481.219, Fla. Stat. (1987) had the same requirement of a certificate of authorization for corporations, partnerships and persons practicing under a fictitious name as did § 481.219, Fla. Stat. (1997) and as does the statute today.

> Addressing first O'Kon's contentions that this case presents a mere technical violation of Chapter 481, we must respectfully disagree. The state regulates a corporation seeking to provide architectural services through certification. Obviously, the Legislature thought it was important to provide for the regulation of both the individual and the corporate entity offering architectural services, as revealed by separate statutory criteria governing each. *O'Kon I*, 540 So. 2d at 841. As we noted in *O'Kon I*, the language in section 481.219(1)(b) is straightforward and *mandatory*, and appellant has offered no good rationale for excising this requirement from this regulatory statute. *Id*. at 1028.

Finding the certificate of authorization mandatory, the court upheld the final judgment stating, "Accordingly, we agree with the trial court that O'Kon's contract for architectural services, which were performed in violation of Florida's licensing statute, was unenforceable in Florida under the rationale and in accordance with the authority cited in and discussed in *Rolls v. Bliss & Nyitray.*" *Id*. (citation omitted) (emphasis added)

The *O'Kon* reasoning and rationale were subsequently adopted by the Fourth District Court of Appeal in *Alfred Karram III, Inc. v. Cantor*, 634 So. 2d 210 (Fla. 4th DCA 1994). [App. E] In *Karram*, the issue was whether a Florida corporation providing architectural services in Florida was required to have a certificate of authorization pursuant to Florida Statute § 481.219 before it could seek enforcement of its contract to design a single family home. At the time the corporation designed the house, it did not have the certificate of authorization

required by Florida law. *Id.* at 211. When the owner failed to pay, the corporation filed suit under its contract. *Id.* The trial court entered summary judgment against the corporation.

On appeal, the Fourth District Court of Appeal stated: "We take no issue with the argument that unlicensed persons have no right to enforce a contract for services that require a license. But here, as Appellant asserts, its services did not require a license under the statutory exception." *Id.* at 212. The statute provided an express exemption from the certificate requirement for the design of one or two family residences. *Id.* Thus, although the corporation was unlicensed, its contract was not illegal under Florida law, permitting the architectural firm to recover for its services. *Id.*

In its analysis, the Fourth District recognized that the term "persons" included not only natural persons, but business entities including firms, associations, partnerships, corporations, as well as individuals. *Id.* at 212. The Florida legislature has also defined "person" as including "individuals, children, firms, associations, joint venturers, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." § 1.01 (3), Fla. Stat. (2003). Although the corporate entity was an "unlicensed person" within the meaning of the statute, its contract was valid only because it met a

statutory exception. Those designing single-family homes were expressly exempt from the licensing requirements of section 481.219. 634 So. 2d at 211.

Thus, the holdings in *Rolls, O'Kon*, and *Karram* are all consistent with and follow the long established and well-settled common law of Florida. Contracts entered into in violation of a statute are void *ab initio* and unenforceable in Florida courts. This is particularly true when the statute in question is a licensing statute that prohibits engaging in a business without the required license or certificate.

E. THE FIFTH DISTRICT'S OPINION CONFLICTS WITH FLORIDA LAW

Breaking with long-standing Florida common law, the Fifth District in the instant case permitted an` architecture business that did not have the certificate of authorization required by Florida Statute § 481.219 to recover on its contract for architectural services. [App. A] MSA failed to have the required certificate of authorization before it bid on and entered into the contract with the College, a contract that the jury found MSA had procured by fraud. Expressing his contempt for the requirement of Florida Statute § 481.219, Morgan attempted to obtain the required certificate for MSA and failed. [Tr. 877-79; 512-13] In direct conflict with the First District's *O'Kon* decision, the Fifth District held that MSA's violation of section 481.219 did not render MSA's contract void. *District Bd. of Trustees v. Morgan,* 890 So. 2d 1155 (Fla. 5th DCA 2004). [App. B]**

To reach its conclusion, the Fifth District found that Morgan and Stresing did not violate a "licensing statute" by failing to comply with section 481.219. *Id.* at 1158. Nonetheless, the lower court was confronted with undisputed evidence that MSA had not complied with a valid statute. Rather than follow long-standing public policy as well as Florida Supreme Court precedent and hold that MSA's contract was void, the Fifth District took the unprecedented step of declaring the contract merely voidable. No other Florida court has ever held a contract voidable due to such statutory non-compliance.

Conflict with Florida Supreme Court Precedent

At the outset of its analysis, the Fifth District agreed that "unlicensed persons have no right to enforce a contract for services that require a license." 890 So. 2d at 1158. Having recognized that this Court (and every other Florida court) has consistently held that contracts made in violation of licensing laws are void *ab initio*, the Fifth District attempted to circumvent established law by finding that section 481.219 is not a "licensing statute." Offering no express rationale for its conclusion, the court seems to draw an artificial distinction between a "certificate" and a "license," stating "that Mr. Morgan and Mr. Stresing did not violate a 'licensing statute' when they failed to obtain a certificate of authorization." 890 So. 2d at 1158. In so doing, the Fifth District disregarded prior precedent of this Court.

The Fifth District's initial statement of the law, while technically correct, is overly restrictive, and thus, misleading in the instant case. Rather than being limited to "licensing statutes," Florida common law holds that a contract entered into in violation of any constitutional or statutory provision is illegal and void. *Local No. 234*, 66 So. 2d at 821 (emphasis added); *American Casualty Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989). If the performance of the contract requires conduct that violates the constitution or a statute, the courts will not enforce such a contract. *Id.* For instance, in *Local No. 234*, the contract in question violated the right to work provisions contained in the Florida Constitution and was found to be void. *Local No. 234*, 66 So. 2d at 821. Similarly, the contract in *American Casualty* was found to be void and unenforceable because it violated the bond provisions of Florida Statute § 255.05. *American Casualty*, 542 So. 2d at 958. Following the Fifth District's rationale and statement of the law, the contracts in *Local No. 234* and *American Casualty* would both have been void because the particular statutory provisions did not involve a "licensing statute."

As the First District held, the Legislature thought it was important to provide for the regulation of both the individual and the corporate entity offering architectural services, as reflected by separate statutory criteria governing each. *O'Kon*, 588 So. 2d at 1028. As a result, the Legislature required MSA to have a separate certificate of authorization before it was permitted to even offer, much

less actually contract for and provide architectural services. § 481.219, Fla. Stat. (1997). Regardless of whether the statute is classified as a "licensing statute," MSA could not perform its contract with the College without violating § 481.219, Fla. Stat. (1997). Therefore, MSA's contract was void and unenforceable because the Florida Legislature had prohibited such conduct. *Local No. 234*, 66 So. 2d at 821; *American Casualty*, 542 So. 2d at 958.

Conflict with Fifth District Precedent

Even if the Fifth District's overly narrow interpretation of Florida common law does not conflict with this Court's precedent, in the instant case the Fifth District's attempted distinction between a license and a certificate conflicts with its own precedent. *See Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA 2004). In *Promontory*, a contractor lacking the certificate of authorization required by Florida Statutes Chapter 489 entered into a construction contract in June of 2000. *Id*. at 482. The owner sued seeking a declaration that the contract was illegal and unenforceable because the contractor was unlicensed. Ironically, the *Promontory* court specifically stated that "the facts below established that [the contractor] Southern was unlicensed because it does not have the certificate of authority required under sections 489.119 and 498.127." *Id*. at 482 (emphasis added). Throughout the *Promontory* opinion, the Fifth District repeatedly referred to the contractor as

being "unlicensed" when referring to the lack of a certificate of authority. *See, e.g.*, *Id*. at 481, 482, and 485. The *Promontory* court found the terms "license" and "certificate" to be synonymous. The *Promontory* court further found that the failure to have the required certificate of authority was a violation of a licensing statute rendering the contract illegal and unenforceable.[8] *Id*. at 485.

As part of its analysis, the *Promontory* court explained that contracts entered into in violation of a statute may be specifically declared unenforceable by the Legislature. *Id*. Likewise, the courts have considered contracts entered into in violation of a statute to be illegal. *Id*. (citing *Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 48 So. 19, 25 (1908) ("Contracts . . . that violate the principals designed for the public welfare are illegal and will not in general be enforced by the courts. . . .")); *see also R.A.M. of South Fla. Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210 (Fla. 2d DCA 2004) (contract by contractor lacking certificate of authority is illegal or une`nforceable). Regardless of whether a contract "is unenforceable, illegal or both," the contract does not create enforceable rights. *Promontory*, 864 So. 2d at 485. The Fifth District's opinion in the instant case offers no explanation for departing from its prior precedent.

[8] The *Promontory* court held the contract could be enforced, finding that the 2003 amendments to Chapter 489 enacted during the pendency of the appeal should be applied retroactively.

Conflict with Florida Statutory Law

The Fifth District's attempts to distinguish between a license and a certificate also conflicts with the plain reading of Chapter 481 and flies in the face of reason. Natural persons are required to obtain a "certificate of registration" to practice architecture. §§ 481.203(4) and 481.213, Fla. Stat. (1997). For those who choose to practice architecture in business entities or groups, the Florida law requires them to have a separate "certificate of authorization" for the business entity. § 481.219, Fla. Stat. (1997). Although not called a "license of authorization," the "certificate of authorization" is clearly the regulatory means or "license" by which a corporation, partnership or person practicing architecture under a fictitious name is permitted to do so in Florida. In other words, the certificate of authorization required by section 481.219 is the license for a business entity to practice architecture in the State of Florida.

The Florida Legislature expressly recognizes that a license may be called by different names and still be a license. Florida Statutes Title XXXII is entitled REGULATION OF PROFESSIONS AND OCCUPATIONS and encompasses Chapters 454 through 493. Florida Statute § 455.01(4), which applies to the regulation of all professions, defines a license as "any permit, registration, and/or certificate issued by the [Department of Business and Professional Regulation]." The General Index to Florida Statutes states under Licenses, "(see also,

CERTIFICATES; REGISTRATION)." Florida Statutes (2003). The architect certificate of authorization application also refers to it as a license. [Def's Ex. 21] [App. J] Thus, the terms "license" and "certificate" are synonymous under Florida statutory law. The Fifth District's conclusion to the contrary elevates form over substance and is contrary to the clear intent of the statute.

To reach the conclusion that a "Certificate of Authorization" is not a license, the Fifth District also ignores the general rules of statutory construction and interpretation. Legislative intent has long been held as the "pole star" by which the courts must be guided in interpreting the provisions of a statute. *City of Clearwater v. Acker*, 755 So. 2d 597, 600 (Fla. 1999). Legislative intent is determined from the language of the statute and its plain meaning is a primary consideration. *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982) (quashing lower court decision as an impermissible "judicial rewrite" of the statute). Statutes must be interpreted in a manner that does not render the statute useless or absurd. *Alexdex Corp. v. Nachon Enterprises, Inc.*, 641 So. 2d 858, 862 (Fla. 1994). Statutory provisions which are enacted for and in the public interest should be given a liberal construction in favor of the public, and any ambiguity should be interpreted in a manner that best serves the public's benefit and interest. *Dept. of Environmental Regulation v. Goldring*, 477 So. 2d 532, 534

(Fla. 1985) ("Provisions of statutes enacted in the public interest should be given a liberal construction in favor of the public.")

The First and Fourth District Courts of Appeal have both expressly recognized that the Legislature intended that the certificate of authorization requirement of section 481.219 be a "licensing statute." The First District stated in *O'Kon* that the issue was whether the Georgia company was "properly licensed," clearly holding that a certificate of authorization is a license. 588 So. 2d at 1026. The Fourth District also found the statute's requirement of a certificate of authorization for a corporation, partnership, or a person practicing under a fictitious name to be a "licensure requirement." *Karram*, 634 So. 2d at 211. Thus, the Fifth District's assumption that section 481.219 is not a "licensing statute" is wholly without support.

The Fifth District's entire opinion is founded on the erroneous assumption that section 481.219 is not a "licensing statute." Absent support for this foundational proposition, the Fifth District's own opinion mandates reversal. The Fifth District agrees with this Court and all other courts of this state that unlicensed persons have no right to enforce a contract for services that require a license for their performance. 890 So. 2d at 1158. MSA's failure to have the certificate of authorization necessary to offer and provide architectural services means that MSA is "an unlicensed person" within the meaning of Chapter 481, and as an unlicensed

person, its contract is void and unenforceable. § 1.01(3), Fla. Stat. (2003) ("person" includes individuals, firms, partnerships and all other groups or combinations); *Karram*, 634 So. 2d at 211 (corporation was an unlicensed person). Accordingly, the Final Judgment for MSA should be reversed.

By its opinion, the Fifth District effectively amends Chapter 481. Finding that Morgan and Stresing did not violate a "licensing statute" by failing to have the required certificate of authorization, the lower court established an exemption to the requirements of section 481.219. No express statutory exemption from compliance with the certificate of authorization requirement exists for business entities in which all persons are Florida licensed architects. To the contrary, even a sole proprietor practicing under a fictitious name must obtain a certificate of authorization. Had the Legislature intended the exemption created by the Fifth District, it had every opportunity to include one. It did not do so and the Fifth District is not at liberty to create such an exemption. *Hamm*, 414 So. 2d at 1073 (quashing decision as impermissible "judicial rewrite" of statute).

As support for its decision to judicially amend Chapter 481, the Fifth District turned to the 2003 amendments to Chapter 489 regulating the licensing of contractors. 890 So. 2d at 1159. In so doing, the lower court attempts to divine the Legislature's intent for the 1997 architect licensing statute, Chapter 481, by reference to the 2003 amendments to the contractor licensing statute, Chapter 489.

The Fifth District's reliance on Chapter 489 is misplaced and disregards its own decisions.

In the instant case, the Fifth District suggests that the Legislature must enact a specific statute if it intends that the failure to obtain a statutorily required certificate of authorization should render a contract void. This is contrary to the general principles of statutory construction. The Legislature is presumed to follow common law unless the statute specifically states that it deviates from it. *See, Fla. Dep't. H. R. S. v. S.A.P.*, 835 So. 2d 1091, 1098 (Fla. 2002). Given the long line of cases in Florida declaring contracts in violation of the constitution or statutes unenforceable, the Legislature had no need to enact duplicative provisions in each of Florida's many licensing laws. *See, e.g., Local No. 234*, 66 So. 2d 818; *Wood*, 60 So. 2d 15; *Stewart*, 48 So. 19 (*cited with approval in Promontory*, 864 So. 2d at 485). To the contrary, it would only be necessary for the Legislature to enact a statute if it wanted to deviate from the common law.

Prior to the 2003 amendments to Chapter 489, common law held that contracts entered into by a contractor who did not have the required certificate of authority were illegal and unenforceable. *Promontory*, 864 So. 2d at 484-85; *R.A.M.*, 869 So. 2d at 1215. With the 2003 amendments, the Legislature adopted a specific enactment to change the common law. The amendments related only to Chapter 489 and did not affect Chapter 481 in any way.

In the instant case, no similar amendments exist to Chapter 481. By its opinion, the Fifth District has, in effect, retroactively grafted the 2003 amendments to Chapter 489 onto the 1997 version of Chapter 481. No authority exists for a court to amend a statute by implication, much less to apply such amendments retroactively. *See, Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 338, 395 (Fla. 5th DCA 2002) (There must be clear evidence that the Legislature intended retroactive application).

Had the Legislature intended such a result, it could have easily have adopted similar amendments to Chapter 481, but it has not done so. The Legislature has had ample opportunity to enact such amendments since *O'Kon* was decided in 1991. In fact, the Legislature has amended Chapter 481 on numerous occasions since 1991 and did not enact amendments like those found in Chapter 489. The fact that the Legislature chose not to enact amendments to Chapter 481 similar to those enacted in Chapter 489 indicates the Legislature's approval of the *O'Kon* decision, and an affirmation of Florida's common law.[9] Without such an amendment, MSA was clearly in violation of a licensing statute when it failed to have the required certificate of authorization. Thus, MSA's contract is illegal and enforceable as a matter of law, and the Final Judgment must be reversed. *Promontory*, 864 So. 2d at 485; *R.A.M.*, 869 So. 2d at 1215.

[9] Florida Statute § 481.219 was amended in 1994, 1995, and 1997.

Conflict with Florida Public Policy

The Fifth District's decision is against Florida public policy and arguably invades the province of the Legislature. Through its decision, the Fifth District has declared that violation of Florida Statute § 481.213 automatically renders a contract for architectural service void, while violation of Florida Statute § 481.219 merely renders it voidable. Such distinctions are typically only made by the Legislature. The Legislature felt that it was important to regulate corporations, partnerships and those practicing under a fictitious name who offer architectural services, stating that such entities "shall be required" to have certificates to practice architecture in Florida. § 481.219(2), Fla. Stat. (1997). The Fifth District apparently disagrees, relegating Florida Statute § 481.219 to a second-class statute, thus eviscerating the Legislature's regulatory scheme.

The ruling of the Fifth District further contravenes Florida public policy because it also has the effect of approving illegal conduct and allowing the wrongdoer to profit from that illegal conduct. If allowed to stand, the Fifth District's ruling will simply encourage others to disregard the regulatory scheme for architects established by the Legislature knowing that there are little, if any, financial consequences to failing to obtain the necessary license. Florida's entire regulatory system will be undermined as non-architects use the Fifth District's opinion to avoid the consequences of their own failure to comply with applicable

regulatory statutes. Knowing that their profit is safe because their contracts will not be held void, there is little incentive for others to voluntarily comply with the law. Such a result cannot be what the Florida Legislature intended when it enacted Chapter 481.

Florida courts have consistently held that denying compensation to one lacking the proper license or certificate to engage in an occupation may have harsh results from time to time. *E*.g., *Vista Designs*, 774 So. 2d 884 (no recovery of unpaid fees and disgorgement of paid fees). On balance, the need for adherence to statutory compliance that benefits all the citizens of this state outweighs any potential for a windfall by the innocent party. *See, Mortellite*, 819 So. 2d at 935 (concurring opinion). Here, the innocent party, the College, has already suffered a significant loss. If it is required to pay twice for the same architectural services, that loss will be compounded. Therefore, the contract between the College and MSA should be declared void *ab initio*, and the Fifth District's affirmance of the Final Judgment against the College should be reversed.

The Fifth District Should Have Ordered a New Trial

Assuming *arguendo* that the Fifth District correctly held that statutory non-compliance merely rendered MSA's contract voidable and not void, the College is still entitled to a new trial based upon the lower court's opinion. After holding that the contract was voidable, the Fifth District concluded that the College simply

waited too long to exercise its rights. "While the College may very well have been able to void the contract when it learned of the statutory non-compliance, it did not have the luxury of waiting month after month to pull the trigger, all the while accepting the work of the architects in the interim." 890 So. 2d at 1159. Such a conclusion is wholly unsupported by the undisputed facts of the case.

Contrary to the "facts" recited by the Fifth District, no evidence was offered by either side suggesting that the Board of Trustees or College administrative personnel learned about MSA's failure to have the required certificate of authorization in December of 1999.[10] The record is clear and undisputed that the Board of Trustees did not learn of MSA's failure to have the required certificate of authorization until its Board meeting on June 27, 2000, which was the first meeting following Paul Stresing's June 1, 2000 communication with College personnel that MSA did not have the required certificate. [Def's Ex. 32, 33] [App. L, M] [Tr. 726; 1811-14] [App. Q] The facts are also undisputed that upon learning of MSA's failure to be properly licensed, College personnel demanded compliance, and the Board voted to stop payments to MSA until the situation had been resolved. [Pl's Ex. 24; Def's Ex. 33] [App. K, M] The Board terminated its relationship with MSA at the very next board meeting at which Don Morgan could

[10] College personnel first learned of the fraud on January 12, 2000, but no mention was made of licensure problems at that time.

be present, August 22, 2000. [Pl's Ex. 34] [App. O] Given the manner in which the Board of Trustees must take formal action, it could not have acted sooner than it did to terminate the contract.

Even if the lower court correctly concluded that the contract could be voided if the College had acted promptly, the Fifth District should still have reversed the Final Judgment and ordered a new trial. The Fifth District specifically held that the circumstances upon which a contract may be voided are fact dependant. 890 So. 2d at 1160. The court then inexplicably concluded that the jury had before it ample evidence to conclude that the College had unduly delayed in electing to void the contract once it learned that MSA did not have the required certificate of authorization. *Id.* In fact, the issue was never presented to the jury. As the Fifth District noted, the trial court ruled that the College had waived its right to void the contract, thus taking the issue from the jury. *Id.* at 1159. Thus, the jury was never given the opportunity to determine whether College had failed to act promptly in voiding the contract upon learning that MSA did not have the certificate.

The opinion of the Fifth District is the first in the State of Florida that holds non-compliance with statutory licensing requirements renders a contract voidable instead of void. Without prior precedent, the jury could not possibly have been instructed on the proper standards to apply in determining whether the College had acted with sufficient promptness to void the contract after learning the MSA was

not properly licensed. Similarly, the College was precluded from arguing its factual position to the jury. Therefore, this Court should order a new trial on the breach of contract claim even if it affirms the Fifth District's conclusion that the contract was merely voidable.

II. A CONTRACT PROCURED BY FRAUD IS UNENFORCEABLE BY THE WRONGDOER

A. STANDARD OF REVIEW

The issue of whether a contract procured by fraud is void as to the wrongdoer is a matter of law. The standard of review of decisions of law is *de novo*. *See Execu-Tech Bus. Sys. v. New Oji Paper Co.*, 752 So. 2d 582 (Fla. 2000).

B. CONTRACTS PROCURED BY FRAUD ARE VOID AS TO WRONGDOER

The jury found MSA procured the contract by fraud, and this finding has not been appealed. Florida's well-established public policy is not to permit nor tolerate a person to benefit from his own wrongful acts. This Court enunciated the policy in *Ashwood v. Patterson,* 49 So. 2d 848, 849 (Fla. 1951) holding that "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or found any claim upon his own inequity, or profit by his own crime." This basic and fundamental principle has been applied to contracts. In Florida, "[a] contract procured through fraud is never binding upon an innocent party thereto. As to him, such contract is voidable; as to the wrongdoer, it is void." (emphasis

added) *Florida East Coast Railway Co. v. Thompson*, 111 So. 525, 527 (Fla. 1927); *Winter Park Telephone Co. v. Strong*, 179 So. 289 (Fla. 1937); *Defigueiredo v. Publix Super Markets, Inc.*, 648 So. 2d 1256 (Fla. 4th DCA 1995); *Buchanan v. Clinton*, 293 So. 2d 120 (Fla. 1st DCA 1974).

When a contract is void as to a party, the contract is unenforceable by that party, and that party cannot recover under the contract at law or in equity. *Schaal v. Race*, 135 So. 2d 252, 257 (Fla. 2d DCA 1961). Florida's public policy prohibits a person who procures a contract by fraud to benefit from his fraudulent acts at the expense of the innocent party. In furtherance of this policy, the First District Court of Appeal stated:

> [C]ourts have an 'affirmative duty' to avoid allowing a party who violates public policy to receive any substantial benefits from his or her wrongdoing. Thus, as a general rule, if the enforcement of a contract is contrary to the public policy of the forum state, the contract need not be enforced. … This rule is based on the rationale that there can exist no legal remedy for that which is itself illegal. *Title & Trust Co. of Florida v. Parker*, 468 So. 2d 520, 521 (Fla. 1st DCA 1985) (citations omitted). (emphasis added)

With regard to the procurement of contracts by fraud and the finding that the contract is void as to the wrongdoer, "the principle of public policy is this; *ex dolo malo non oritur action* [no right of action arises from one's own **fraud**]. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." Farnsworth On Contracts, Second Edition, Section 5.1 (citing *Holman v.*

Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775); Black's Law Dictionary, 567 (6th Ed. 1990).

C. THE FIFTH DISTRICT MISAPPLIED FLORIDA LAW

The Fifth District's opinion should be quashed and Final Judgment reversed on the second and independent ground that the contract was procured by fraud. As such, MSA could not sue on the contract because, as to MSA, the contract was void. In its opinion, the Fifth District has failed to apply controlling Florida Supreme Court precedent. The opinion fails to follow the precedent enunciated in *Florida East Coast Railway Company v. Thompson*, 111 So. at 527 (Fla. 1927). *Winter Park Telephone Co. v. Strong*, 179 So. at 289 (Fla. 1937); *Defigueiredo v. Publix Super Markets, Inc.*, 648 So. 2d 1256 (Fla. 4th DCA 1995); *Buchanan v. Clinton*, 293 So. 2d 120 (Fla. 1st DCA 1974).

The Fifth District's opinion attempts to rely on *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So. 2d 306 (Fla. 2000) for the proposition that one may fraudulently induce a contract and then sue to recover on it. This is a misreading and misapplication of *Mazzoni Farms.* In *Mazzoni Farms,* this Court addressed whether a fraudulently induced contract is void or voidable as to the innocent party. Consistent with prior Florida Supreme Court decisions, the *Mazzoni Farms* Court held that a fraudulently induced contract is voidable as to the innocent party. *Id*. at 313. In so doing, the Florida Supreme Court held that the

choice of law provision in a release was enforceable, but also allowed the plaintiffs to sue for damages resulting from the fraud. *Id.*

The *Mazzoni Farms* Court did not address whether a party who has been found guilty of fraudulently inducing a contract may sue and recover on the contract, thereby profiting from his wrongdoing. Furthermore, there is no language in the *Mazzoni Farms* decision expressly or implicitly overruling prior Supreme Court precedents in *Florida East Coast Railway* and *Winter Park Telephone.* By allowing MSA to recover on a contract that the jury found was fraudulently procured, the Fifth District has essentially overruled Florida Supreme Court precedent.[11]

The College's attempt to mitigate its damages by efforts to salvage the MSA plans does not negate finding the contract void as to MSA. *Thor Power Tool Company v. Weintraub*, 791 F. 2d 579 (7th Cir. 1986) (cited with approval in *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234 (Fla. 5th DCA 1991)). In *Thor Power*, the plaintiff sold the assets of a business to the defendant. When a dispute arose over payment, the seller sued the buyer for breach of contract, and the buyer counterclaimed for fraud in the inducement and breach of contract. *Thor Power*, 791 F. 2d at 580. After a jury verdict finding that the seller had fraudulently

[11] Florida appellate courts are bound to follow controlling Florida Supreme Court precedent. *Hoffman v. Jones, 280* So. 2d 431, 434 (Fla. 1973).

induced the contract, the seller appealed arguing the verdict was improper because the buyer continued to operate the business after discovery of the fraud. *Id*. at 585. The Seventh Circuit ruled that the buyer's efforts to mitigate did not bar its right to recover damages for fraud. *Id.*

The *Thor Power* court acknowledged that the buyer was in a difficult position after discovering the fraud. *Id.* The court specifically held that the defrauding seller should not be allowed to use the innocent buyer's dilemma to the seller's advantage. *Id*. The *Thor Power* court went on to specifically approve the trial court's instructions to the jury that, if it found in favor of buyer on the fraud claim, it need not resolve the seller's claim and the buyer's counterclaim on the contract. *Id.* Given the jury's determination that the contract was fraudulently induced, the contract was unenforceable by the seller, and the *Thor Power* trial court properly denied recovery on the seller's breach of contract claim. *Id.* at 586.

Like the seller in *Thor Power*, the College had only two available courses of action after discovering the fraud, scrap the MSA plans or attempt to salvage the plans. Having been advised that the plans were salvageable, the College's duty to mitigate its damages obligated it to proceed with correction and completion of the MSA plans. Had the College simply scrapped the plans by returning them to

MSA, Morgan would have certainly argued that the College failed to mitigate its damages.[12]

The trial court in the instant should have followed the example of the *Thor Power* trial court and used the verdict form requested by the College that required the jury to decide the fraud question first. [Tr. 2015-28] [App. F] Regardless, the jury found the contract was fraudulently induced. As a result, the contract is unenforceable by Morgan. The Fifth District should have reversed the Final Judgment and entered Final Judgment in favor of the College. *Thor Power*, 791 F. 2d at 586; *Winter Park Telephone,* 179 So. at 292. *See also Fishman v. Thompson*, 181 So. 2d 604 (Fla. 3d DCA 1965) (defrauded owner entitled to recover fraud damages from unlicensed contractor; having paid contractor more than its out of pocket, owner considered to have restored contractor to status quo).

In furtherance of the basic and fundamental principal that wrongdoers should not profit from their wrongdoing, the courts in Florida have denied recovery sought by wrongdoers even when the innocent party retained the benefits of the wrongdoer's activities. *Vista Designs,* 774 So. 2d at 887 (Vista Designs entitled to retain benefits of attorney's work and disgorgement of paid attorney's fees). *See, Mortellite v. American Tower, L.P.,* 819 So. 2d 928, 935 (Fla. 2d DCA 2002) ("I

[12] The trial court judge agreed that this was a likely result. [November 13, 2003 hearing transcript at 31] [R. 3018]

concur with the majority's opinion. Because I agree with the proposition that it 'is more appropriate to give the defrauded party the benefit of even windfalls than to let the fraudulent party keep them,' I submit that in similar cases the trial court should apply a disgorgement theory of damages") (concurring opinion).

III. THE FINAL JUDGMENT IS AN IMPROPER "ADJUSTMENT" OF DAMAGES

A. STANDARD OF REVIEW

Application of the law to the fact findings of the jury is a matter of law which is subject to *de novo* review. *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001) (review on ruling of motion for summary judgment posing a pure question of law is *de novo*).

B. TRIAL COURT IMPROPERLY "ADJUSTED" DAMAGES

The jury should not have considered the breach of contract claims after determining that MSA had fraudulently procured the contract and that the College had suffered damages as a result of the fraud. *Thor Power*, 791 F. 2d at 586. However, the trial court further compounded its error when it entered final judgment against the College. In its verdict, the jury found that MSA was entitled to $413,049.68 under the contract. [R. 2780-81] The jury also found that the College had been defrauded and suffered damages in the amount of $61,476.58. *Id.* [App. G] Over objections of the College, the trial court deducted the College's

fraud damages from MSA's breach of contract damages resulting in a final judgment in favor of MSA. [R. 2988-89] [App. I]

In so doing, the trial court ignored the fundamental basis of the College's damages theory: the College spent more on replacement architects and consultants than it had withheld under the terminated MSA contract. The College is only entitled to recover the difference between the amounts it actually paid and the amount it would have paid MSA. Thus, the College's damage theory inherently gave MSA credit for the amounts that the jury found MSA was due under its contract. [Def's Ex. 41] [App. R] [Tr. 2195-2229] [App. S]

At trial, the College presented ample evidence that it had suffered damages because it had spent more as a result of MSA's fraud than MSA was entitled to recover under the contract. [Tr. 2195-2229] [Def's Ex. 41] [App. S, R] MSA disputed the College's position arguing that the College had in fact saved money by terminating MSA and, therefore, it had suffered no damages. [Tr. 2443-44] By its verdict, the jury resolved this issue in favor of the College finding that the College had suffered damages in the amount of $61,476.58. [R. 2780-81] [App. G] By answering the question as it did, the jury specifically found that the College had spent more to complete the plans and to obtain substitute architectural and engineering services as a result of MSA's fraud than the amount that was due to

MSA under the contract. The jury's verdict for the College inherently credits any amounts due to MSA against the amounts reasonably expended by the College.

The jury did as it was instructed by considering the claims of the parties separately. [R. 2773-74] The trial court failed to appreciate the finding inherent in both verdicts. MSA's damages were the gross amount due under the contract, while the College's damages were the net amount due the College after giving MSA credit for the amount due under the contract. [Tr. 2195-2229] [Def's Ex. 41] [App. S, R] By entering Final Judgment for MSA, the trial court compounded the damages that the College had suffered rather than making the College whole. Thus, in the alternative to all other relief requested above, this Court should reverse the Final Judgment in favor of MSA and order entry of Final Judgment in favor of the College for $61,476.58, plus interest and court costs.

CONCLUSION

Because the MSA contract was void *ab initio*, the opinion of the Fifth District should be quashed, the Final Judgment in favor of MSA should be reversed and Final Judgment should be entered in favor of the College on the contract claim. The contract was void *ab initio* due to MSA's failure to comply with Florida's mandatory license requirements. The contract was also void *ab initio* for the separate reason that the unappealed finding by the jury that MSA procured the contract by fraud, rendered the contract unenforceable by MSA. The

Fifth District's opinion should be quashed and Final Judgment should be entered in favor of the College on its claim of fraud in the inducement based on the unappealed finding of such fraud by the jury.

In the alternative to the foregoing requested relief, this Court should reverse the Final Judgment and remand this case for a new trial on the breach of contract if it concurs that the contract is merely voidable and not void *ab initio*. The factual issue of whether the College acted promptly after learning of that MSA was unlicensed has not been submitted to and resolved by the jury. Finally, notwithstanding any affirmance of the court below, the Final Judgment should also be reversed with instructions to enter judgment in favor of the College because the trial court incorrectly adjusted the damages awarded by the jury when entering the Final Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this _____ day of April, 2005 to **Peter A. Robertson, Esquire** and **T.J. Frasier, Esquire**, The Robertson Group, P.A., 5216 S.W. 91st Drive, Gainesville, FL 32608.(TO UPDATE DATE, PRESS F9 KEY).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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