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.

REPLY BRIEF OF THE DISTRICT BOARD OF TRUSTEES OF ST. JOHNS RIVER COMMUNITY COLLEGE

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STATEMENT OF THE CASE AND FACTS

The College fell prey to Don Morgan's fraudulent scheme to get more lucrative contracts as a partnership. The College contracted with the partnership, Morgan-Stresing Associates as the "Architect." [Pl's Ex. 10] [App. T] The Architect was never an individual or two individuals, but a partnership entity. The contract was signed on behalf of the partnership. [App. T] Respondent does not dispute that Morgan-Stresing Associates never had the required certificate of authorization, that Don Morgan submitted under oath an application for certification for MSA containing material misrepresentations of fact, and that MSA's application for the certificate of authorization was denied. [App. J]

Respondent misstates the facts concerning the events that occurred after the College learned of Morgan's fraud. The College learned of the fraud on January 12, 2000. [Def's Ex. 23] [App. U]. Morgan's reference to December 1999 is wrong. The College did not tell Morgan and Stresing to continue working full time. Morgan and Stresing asked for the chance to cure the default which the College agreed to consider with the proviso that the architectural services be provided as required by the contract with the partnership. [App. U] [Tr. 709]

Respondent further misstates the facts concerning Paul Stresing's June 2000 announcement that MSA was not licensed. First, Stresing called it a "licensing problem". [Tr. 878] [App. Q] Second, the College did not demand the plans be

completed and Respondent's record cites do not support this claim. To the contrary, on June 14, 2000, the College wrote Morgan and Stresing and told them that they were in default. [App. K]. One last chance to cure the default was given and it required compliance with the terms of the contract AND full compliance with the licensing and other requirements of Florida law. [App. K]

The College never requested that Don Morgan and Paul Stresing provide a modification to the contract. To the contrary, the College wanted compliance with the contract it had made with the partnership entity. [App. K, L] Further, it was only after the College terminated its relationship with MSA, Morgan and Stresing on August 22, 2000, that the College sought a copy of the computer files allowing it to determine the extent of completion of the MSA plans. The College needed the plans to determine their usefulness and whether MSA had been overpaid or underpaid. [App. O]

JURISDICTION

This is not a case of first impression, hence the certified conflict. In the First District, section 481.219, Fla. Stat. (1997) is a mandatory licensing statute and failure to fully comply with its certificate of authorization requirement renders any contract void. The Third and Fourth Districts also deem statutory compliance to be mandatory and failure to do so fatal to the contracts of the noncompliant. The Fifth District has now held directly to the contrary, finding section 481.219, Fla.

Stat. (1997) neither a licensing statute nor its noncompliance fatal to contracts. The Court should exercise its jurisdiction to resolve this conflict to avoid the otherwise inevitable forum shopping, conflicting results and inconsistency in Florida law.

ARGUMENT

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

Respondent does not refute that Florida law has long held that an agreement entered into in violation of 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). Respondent also does not refute the application of this principle to void the contracts of those who have failed to comply with a statute regulating an occupation or profession. *Fabricant v. Sears Roebuck, et al.*, 202 F.R.D. 310, 320 (S.D. Fla. 2001) Given that long standing Florida law precludes him from recovering on MSA's contract, Morgan does not argue for a change in Florida law. Instead, Morgan attempts to convince this Court that MSA fully complied with Chapter 481, Florida Statutes, regulating the practice of architecture, a patently false assertion.

Morgan repeatedly asserts that he was "fully licensed," as if having an individual license was all that was required of MSA. The statute is clear and unambiguous. "[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." § 481.219(2), Fla. Stat. (1997). The plain and ordinary meaning of the statute is that before a corporation, partnership or person practicing under a fictitious name may offer architectural services in Florida, it must have a certificate of authorization. *Dept. of Revenue v. Bank of America*, 752 So. 2d 637,641 (Fla. 1st DCA 2000) ("An unambiguous statute is not subject to construction; it must be given its plain and ordinary meaning.").

Morgan now attempts to convince this Court that Morgan-Stresing Associates' failure to have the required certificate of authorization was an easily remedied oversight that he intended to correct. However, at the time Morgan vehemently refused compliance with the section 481.219 licensing requirement.[1] [Tr. 878] [App. Q] He submitted a sworn application for the certificate of authorization which Stresing refused to sign because it contained material misrepresentations, only after the College demanded full compliance with Florida law. [App. J, K, N] No certificate of authorization was ever issued to Morgan-

[1] Morgan's actual words were so explicitly vulgar that Stresing would not repeat them at trial. [App. Q]

Stresing Associates. Morgan never was in full compliance with Chapter 481 and his suggestion that he intended to comply at some future date is of no consequence.

The Fifth District correctly rejected Respondent's argument that MSA was exempted from obtaining a certificate of authorization because Don Morgan and Paul Stresing had individual licenses. The lower court agreed with the College that MSA had not fully complied with Chapter 481. However, rather than follow long standing Florida precedent and declare MSA's contract void, the Fifth District created a judicial exception based on its finding that section 481.219 is not a "licensing" statute. The lower court failed to appreciate that Florida law is far broader, invalidating any contract the performance of which would violate Florida constitutional or statutory law. *Local No. 234*, 66 So. 2d 818; *American Casualty Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957 (Fla. 1989). Morgan has not and cannot offer this Court any authority to support such a narrow reading of Florida law.

Even if the Fifth District's overly narrow view of Florida law were correct, Morgan offers no support for the conclusion that a certificate of authorization is not a "license." The Florida Legislature has defined "license" as including "any . . . certificate . . . issued by the [Department of Business and Professional Regulation]" § 455.01(4), Fla. Stat. (2003). Respondent concedes this definition. Thus, a "certificate of authorization" is a license which corporations, partnerships

and persons practicing under a fictitious name must have to practice architecture in Florida. The legislative history for Chapter 481 confirms the Legislature's intent that the certificate of authorization is a licensing requirement:

> Chapter 481, Part I, Florida Statutes, . . . regulates the practice of architecture. . . . The law requires that individuals, corporations, and partnerships, be licensed by the Department before practicing architecture in this state or using protected titles indicating he or she is a "Registered Architect."
>
> House of Representatives Committee on Regulatory Reform, Staff Analysis and Economic Impact Statement, May 19, 1988. [App. V]

Finally, the First, Third and Fourth District Courts of Appeal all consider the provisions of Chapter 481, including the certificate of authorization in section 481.219, to be licensing provisions. *See Alfred Karram, III, Inc. v. Cantor*, 634 So. 2d 210 (Fla. 4th DCA 1994); *O'Kon and Co., Inc. v. Reidel*, 588 So.2d 1025 (Fla. 1st DCA 1991); *Rolls v. Bliss & Nyitray, Inc.*, 408 So.2d 229 (Fla. 3rd DCA 1981). The Fifth District erroneously found a distinction between a license and a certificate of authorization.

Nonetheless, the Fifth District agrees that "unlicensed persons have no right to enforce a contract for services that require a license . . . ." *District Board of Trustees v. Morgan,* 890 So. 2d 1155, 1158 (Fla. 5th DCA 2004). Under the plain and ordinary meaning of the statute, MSA is an unlicensed person and cannot offer architectural services in Florida. § 1.01(3), Fla. Stat. (2003). Florida's long standing pubic policy and its common law hold that those who need a license to

practice a profession cannot enforce their contracts if they are not properly licensed. *Fabricant,* 202 F.R.D. at 320. The *Fabricant* Court noted:

> The broad basis for the doctrine that contracts of certain unlicensed persons are unenforceable is that the court should not render aid to the enforcement of contracts where performance would tend to deprive the public of the benefits of regulatory measures. *Id.*

The Florida Legislature has adopted a comprehensive regulatory scheme to govern business and professional practice within the state which includes licensing statutes regulating the practice of architecture by individuals and businesses. Respondent's proposed interpretation disregards the entire framework created by the Legislature. This is neither a fair nor reasonable interpretation of Chapter 481 and in particular, section 481.219, nor is it consistent with the law. A fair and reasonable interpretation is that certificates of authorization are the licenses given to business entities whether they be corporations, partnerships or individuals practicing under a fictitious name, which authorize them to practice architecture in the State of Florida. To uphold the lower court's finding that a certificate of authorization is not a license requires complete disregard of the language and intent of the Florida Legislature as set forth in Chapter 455 and Chapter 481, Florida Statutes, as well as prior judicial treatment of section 481.219 which hold that it is a licensing statute.

Because Chapter 481 is silent on the effect of failure to have a required certificate of authorization, Respondent urges the Court to graft provisions found

in Chapter 489 into Chapter 481. When a statute is silent, the gap must be filled by reliance upon the common law. *Dove v. McCormick*, 698 So. 2d 585, 589 (Fla. 5th DCA 1997) (". . . where a statute is silent, the courts 'fill the inevitable statutory gaps' by relying on the common law.") On the subject of contracts entered in violation of law by failure to have a license, the common law speaks in a loud and consistent voice – such contracts are void *ab initio* and unenforceable. E.g., *Fabricant,* 202 F.R.D. at 320. ("Florida law is well-settled that where the law requires licenses to conduct business, the contracts by the unlicensed to perform licensed services are illegal and void"). *See also* Petitioner's initial brief at 14-16. The Legislature is presumed to know the common law and unless the statute unequivocally states it changes common law, it will not be held to change common law. *Dept. of Health and Rehabilitative Svcs. v. S.A.P.*, 835 So. 2d 1091, 1098 (Fla. 2002).

Chapter 489 and Chapter 481 also cannot be read in *pari materia* because the statutes do not have "a common aim or purpose and scope, and relate to the same subject, object, thing or person." *Dept. of Health and Rehabilitative Svcs. v. McTigue*, 387 So. 2d 454, 456 (Fla. 1st DCA 1980); *State of Florida v. Moore*, 892 So. 2d 1218, 1221 (Fla. 1st DCA 2005) (Statutes which serve different purposes should be enforced solely in accordance to their terms without reference to another section.) The mere fact that Chapter 481 governs a professional and Chapter 489

an industry which interact with one another is insufficient to find that they can and should be read in *pari materia*. The *McTigue* court held that the statute governing licenses to practice midwifery found in Chapter 485, was not in *pari materia* with Chapter 458, the Medical Practice Act. As a result, there was no basis for referring to Chapter 458 to determine the meaning of a word found in Chapter 485. *McTigue*, 387 So. 2d at 456. As in *McTigue*, the statute regulating the practice of architecture, Chapter 481, and the statute regulating construction contracting, including electrical and alarm system contracting and septic tank contracting, Chapter 489, do not have a common aim, purpose or scope nor do they relate to the same subject, object, thing or person. Accordingly, they cannot be read in *pari materia* and should be interpreted without reference to one another.

Respondent concedes that under Florida law MSA's contract is unenforceable since he cites no Florida law to support his position. Respondent claims support from foreign case law, but such reliance is misplaced. In *John E. Rosasco Creameries, Inc. v. Cohen*, 11 N.E. 2d 908 (N.Y. 1937), the plaintiff sought and the court allowed equitable relief for the reasonable value of milk delivered. *Id.* at 908. Florida law distinguishes between recovery on a contract and recovery for *quantum meruit*. *See Wood v. Black,* 60 So. 2d 15 (Fla. 1952) (violation of licensing statute renders a contract void, but allows recovery for reasonable value of work, exluding profit). Respondent dropped his *quantum*

meruit claim at trial conceding that it was barred by sovereign immunity. *Champagne-Webber, Inc. and Miles Anderson Contracting Inc. v. City of Fort Lauderdale*, 519 So. 2d 696 (Fla. 4th DCA 1988).

In *Associated Group Life, Inc. v. Catholic War Veterans*, 293 A. 2d 408 (N.J. Super. Ct. App. Div. 1971 and *Wilson v. Kealakekua Ranch, Ltd.*, 551 P. 2d 525 (Haw. 1976), both courts found that the statutes were solely revenue raising devices, whose violation was easily cured by payment of a nominal fee. Such is not the situation here. Morgan sought a certificate of authorization for MSA, but the application was denied. Stresing refused to sign the application due to Morgan's material misrepresentations. [App. N]

Courts generally declare invalid contracts made in violation of licensing statutes, such as Florida Statute § 481.219, designed to protect the public from incompetence and fraud. Interim Ed. Vol. 15 – Corbin on Contracts, § 1512, p. 632 (1962). Compliance with section 481.219 would have required Morgan and Stresing to clearly define and state in writing and certify as true the nature of their relationship. [App. J] Statutory compliance would have avoided the fraudulent misrepresentations to the College and the dispute between Morgan and Stresing that ultimately lead to Stresing leaving the job and the delivery of seriously deficient plans to the College. Clearly, these are goals contemplated by the statute.

Finding MSA's contract void due to statutory non-compliance does not create a private cause of action. The courts simply refuse to assist with contract enforcement when it is determined that the contract should not have been entered from the outset. Declining to aid a wrongdoer in further perpetrating an illegal act is distinctly different from allowing a victim to sue for affirmative relief. See e.g., *Fabricant*, 202 F. 2d at 320.

While a windfall may sometimes result, such is not the situation here. After terminating its relationship with Morgan-Stresing Associates, the College was forced to spend hundreds of thousands of dollars to correct severe deficiencies in MSA's plans. Contrary to Morgan's assertions, the College is not trying to steal MSA's plans. Justice does not require the innocent College to pay twice for a set of plans nor does injustice result because MSA is not entitled to enforce a contract which, by law, it was prohibited from making.

Morgan wants this Court to completely ignore his failure to adhere to the requirements of section 481.219, even though the Fifth District did not ignore it. The Fifth District held that Morgan's statutory non-compliance rendered the contract merely voidable, not void. It found that the College would have been allowed to avoid any liability under the contract if it had acted promptly to terminate the relationship after learning of the statutory non-compliance. 890 So. 2d at 1159.

The Fifth District, however, was under the erroneous impression that the College took no action for nine (9) months after learning of MSA's statutory violation. This is a fallacy for which Morgan offered no support or evidence. In fact, Morgan agrees that the College learned of the license issue in June 2000, not December 1999 as stated by the Fifth District. Respondent's Brief at 3. The College immediately suspended payments under the MSA contract and terminated the relationship at the next meeting at which Morgan could be present. [App. M, O] Even under the Fifth District's analysis of the law, the College should have been allowed to void the contract and avoid liability to Morgan.

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

This Court's decision in *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So. 2d 306 (Fla. 2000) is inapplicable to the facts in this case. Morgan overlooks the unappealed jury finding of fraudulent procurement.[2] In *Mazzoni Farms*, no such fraud finding existed. The plaintiffs alleged fraud, but none had been proven. The *Mazzoni Farms* court did not address the ramifications of a fraud finding on the wrongdoer's ability to enforce a contract. The law on that issue was addressed by this Court's decisions in *Florida East Coast Railway Company v. Thompson*, 111 So. 525, 527 (Fla. 1927) and *Winter Park Telephone*

[2] Morgan never even contested the fraud claim at trial.

Co. v. Strong, 179 So. 289, 292 (Fla. 1937), where this Court held that the contract was void as to the wrongdoer, but merely voidable as to the innocent party.

Mazzoni Farms did not expressly overrule either decision. Morgan has suggested nothing to indicate that *Mazzoni Farms* implicitly changed the law in this regard. Furthermore, Morgan has offered no reason for this Court to abandon the time honored principal that no person should profit from his own wrongdoing. To do so would simply encourage others to commit fraud.

Morgan put the College in the proverbial "Catch-22" situation. Had the College simply scrapped the plans by returning them to MSA, Morgan would have argued that the College failed to mitigate its damages.[3] The College sought independent advice on the best course of action to minimize its costs and damages. The College made a good faith effort to mitigate its damages. Morgan now insists on extracting from the College the benefits of the fraudulently induced contract, adding insult to injury. Morgan argues that the College, an innocent victim, should suffer while the wrongdoer profits. Such a result is simply unconscionable. Therefore, this Court should adopt the holding and rationale of the Seventh Circuit Court of Appeals in *Thor Power Tool Co. v. Weintraub*, 791 F. 2d 579 (7th Cir. 1986) and reverse the judgment entered in favor of Morgan. In so doing, this

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

Court would affirm its prior decisions in *Florida East Coast* and *Winter Park Telephone*.

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

Morgan suggests that the College has tried to get something for nothing. To the contrary, the College has taken the position that it would pay Morgan the difference between the contract price and the actual costs incurred by the College. [App. O] As is typical when a substitute is hired to finish the work of another, the completion costs exceeded the amounts remaining under the original contract. The College could not and did not save money by terminating MSA. However, the fraud by Morgan and Stresing, their failure to cure their defaults, and failure to be properly licensed left the College with no viable alternative.

At trial, the College presented its theory of damages seeking only the amounts over and above the amount of the MSA contract. The parties disagreed on the amount due under the MSA contract, and the jury resolved that dispute. The jury was asked whether the College had suffered damages as a result of Morgan's fraud, to which it answered "YES." [App. G] By its answer, the jury found that the College had reasonably <u>spent more</u> for others to complete MSA's plans and perform MSA's obligations than was owed to MSA under the contract. The amount of the College's damages was "$61,476.58." In other words, the College

reasonably spent the amount owed to MSA, $413,049.68, plus an additional $61,476.58, for a total of $474,526.26[4] as a result of Morgan's fraud.

The trial court failed to appreciate the nature of the College's damages. As a result, the trial court erroneously subtracted the higher number from the lower number and awarded judgment against the College. The trial court improperly adjusted the damages, thus compounding the College's damages instead of making the College whole.

CONCLUSION

Florida Statute § 481.219 required MSA to have a certificate of authorization to practice architecture before even offering architectural services to the College. Compounding the initial malfeasance, Morgan and Stresing then made fraudulent misrepresentations to the College which induced the contract that was already prohibited by section 481.219. As a result, the College has suffered significant damages. Petitioner requests that this Court reverse the lower court, order the Final Judgment in favor of Morgan be reversed with instructions to enter judgment in favor of the College in the amount of $61,476.58, plus interest.

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[4] The College actually spent far more and presented those amounts to the jury. The jury rejected a portion of the damages sought by the College, as the jury is free to do.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this _____ day of May, 2005 to PETER A. ROBERTSON, ESQUIRE and T.J. FRASIER, ESQUIRE, The Robertson Group, P.A., 5216 S.W. 91st Drive, Gainesville, FL 32608.

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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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