IN THE SUPREME COURT OF FLORIDA

Case No: SC10-1892
Lower Tribunal No(s): 5D09-1761,
06-CA-1003,
06-CA-8702

EARTH TRADES, INC. and FIRST SEALORD SURETY, INC.,

Petitioners,

T&G CORPORATION d/b/a T&G CONSTRUCTORS, et al.,

Respondent.

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PREFACE

EARTH TRADES, INC. will be referred to in this brief as "EARTH TRADES" or "Subcontractor". FIRST SEALORD SURETY, INC. will be referred to in this brief as "FIRST SEALORD" or "Surety". FIRST SEALORD and EARTH TRADES will be collectively referred to as "Petitioners". T&G CORPORATION d/b/a T&G CONSTRUCTORS, will be referred to in this brief as "T&G" or "General Contractor".

The Record on Appeal is referred to as "R.___."

The Trial Transcript is referred to as "T.___."

INTRODUCTION

The issue on appeal is whether Florida Statute §489.128 precludes an unlicensed subcontractor from enforcing its contract claim and the unlicensed subcontractor and its surety from defending a general contractor's breach of contract claims where the general contractor knew the subcontractor was unlicensed when the contract was entered into.

STATEMENT OF THE FACTS AND THE CASE

Facts

A Subcontractor entered into discussions with a General Contractor to perform a construction project in Jacksonville, Florida ("Jacksonville Project") (R.1102-1112). Prior to entering into any contracts for the performance of work, the Subcontractor's president met with employees of the General Contractor, explained his qualifications and experience, and discussed the fact that the Subcontractor was a new corporation and was unlicensed in the State of Florida. (R.743-745) The Subcontractor's president explained that he had been in the construction industry for over eighteen (18) years, had passed the state licensing requirements and was working on the final documentation for application of a contractor's license in Florida. (R.743-745) The Subcontractor's application was still pending approval with the Department of Business and Professional Regulation ("DBPR"). (R.743-745)

The Subcontractor was subsequently awarded the Contract for the Jacksonville Project and began a working relationship with the General Contractor. (R.743-745) The General Contractor prepared and provided a letter of recommendation on behalf of the Subcontractor which was required by and submitted to the DBPR together with all other licensure application documents. (R.743-745)

During the performance of the work on the Jacksonville Project, the General Contractor's representative stated that he was impressed with Subcontractor's performance and discussed the possibility of the Subcontractor submitting a bid on a project located in Hialeah, Florida which had not begun. ("Hialeah Project") (R.743-745) The Subcontractor again discussed its pending status as an unlicensed contractor. (R.743-745)

The General Contractor selected the Subcontractor to perform work on the Hialeah Project, and on December 16, 2004, entered into a Contract with the Subcontractor for the sum of $265,358.00 without requiring proof of a license.[1]

[1]**The General Contractor's website contains the following requirements for Subcontractors:**

Although T&G Constructors does not require Subcontractors to be qualified before submitting a bid, all Subcontractors selected will have to meet our qualifications before beginning work on a project. The requirements for qualification will vary depending on the project size and the client, however, our minimum requirements typically involve the following:

- **Provide current contractor and business licenses**
- A bond will be required based on individual projects

(R. 1280-1297) On February 14, 2005, the Subcontractor provided the required Payment and Performance Bonds from its Surety. (R.1298/1299) (T.175)

As of April, 2005, the General Contractor submitted a draw request to the Owner that Subcontractor had completed $256,000.00 of the $265,358.00 Contract, which was 97% of the work. (R.1735-1736) (T.59/69) The General Contractor was paid the $256,000.00 from this draw request, but refused to pay the Subcontractor, who was owed $182,500.00. (T. 59,69) The General Contractor informed the Subcontractor that it would not be compensated for work completed on the Hialeah Project or the $100,000.00 still due and owing from the Jacksonville Project, and terminated the Contract for the Hialeah Project (T. 181/182)

Lawsuit

The Subcontractor initiated a lawsuit against the General Contractor for Breach of Contract for failure to pay for the work performed and change orders in the amount of $182,500.00. (R.1-7) The General Contractor counterclaimed against the Subcontractor for Breach of Contract and filed a third party complaint against the Subcontractor's Surety for Breach of the Payment and Performance Bonds. (R.86-109/113-135)

The General Contractor alleged that the Subcontractor's claims and defenses were barred since the Subcontractor was unlicensed at the time it entered into the

Contract. (R. 396-398) In response, the Subcontractor alleged that that the General Contractor had knowledge of this non-licensure at the time the parties entered into the Contract, (R. 464-466) and that the General Contractor could not recover under the Contract because of knowledge of the non-licensure. (R. 477-480)

Summary Judgments

The General Contractor moved for Summary Judgment on the Complaint based solely on the Subcontractor's non-licensure pursuant to the 2004 version of Fla. Stat. §489.128 because the Contract was entered into in December, 2004. (R.481-488) On April 3, 2008, the Trial Court granted the General Contractor's Motion for Summary Judgment finding that the Subcontractor could not pursue its claim for Breach of Contract as a result of its non-licensure. (R. 878-880) On April 21, 2008, the General Contractor filed a Motion for Summary Judgment on the Counterclaim against both the Subcontractor and its Surety, again based solely on the non licensure. (R.881-937) The Subcontractor and Surety opposed the summary judgment alleging that as a result of the General Contractor's knowledge of the Subcontractor's lack of license, the parties were "*in pari delicto*", and that summary judgment was improper. (R. 990-1001) The Trial Court granted summary judgment against both the Subcontractor and Surety, and found that the defense of the General Contractor's knowledge of the Subcontractor's licensure was irrelevant as a result of the 2003 amendment to Fla. Stat. §489.128 as follows:

Well, first, it seems a matter of first impression and I think that you all have, although you may not agree with that, it seems to me that it's a matter of first impression since the statute has been changed. I recognize your argument.

But you don't think it's changed the case law. But I think that it does because I think Ms. Ashby is correct that now this Court is sitting in law and the contract is not enforceable in law or in equity, the contract is not void as to the general contractor but it's unenforceable by the unlicensed contractor.

We are not in equity where both parties are present before the Court with a void contract and the possibly innocent party is asking the Court to do equity where the Court is then going to analyze how innocent are you. The legislature could have carved out an exception for nonparticipation by one of the parties in this contract, so that – they have seemed to take pains to make it unenforceable only by the unlicensed individual.

And while this concept of impaired (sic) delicto has existed under the law, it's always been raised, and it strikes me, in this equitable setting and the Court isn't in relief. Seeing it right now, analyze the equities of the parties.

I do have some concerns that this position can have some apparent harsh results and that is a general contractor could only contract with an unlicensed sub and realize that if there are any legal or equitable issues down the road, the unlicensed contractors would be restricted on causes of action and any defenses to causes of actions.

But it might be that the legislature feels so strong that this state is plagued by unlicensed contractors, that it has precluded them from any affirmative relief or defenses to relief until they get their license.

So I'm going to grant the Motion for Summary Judgment as to the issue of liability but I find that the impaired (sic) delicto defense is unavailable under the limited statute that it took place, I guess in 2003 but it became effective in 2004. (R. 1270-1272)

The Trial Court's ruling left both the Subcontractor and its Surety without the ability to raise any of its affirmative defenses to the General Contractor's claims, and the case proceeded to trial solely on the issue of the General Contractor's alleged damages.

Trial

At trial, the General Contractor alleged that a $265,358.00 contract with a specific scope (in which the General Contractor submitted a draw request that the Subcontractor had completed $256,000.00 or 97%) cost the General Contractor in excess of $700,000.00 to perform and complete. The General Contractor alleged $494,614.00 of direct cost to complete the Subcontract (T.129-143), $51,789.00 in extended supervision during delays, (T.100-105) and claims by unpaid suppliers totaling $209,008.00. (T.99-104)

Final Judgment

After a non-jury trial, the Trial Court entered a Final Judgment in the General Contractor's favor against the Subcontractor in the amount of $712,063.00 and against the Subcontractor's Surety in the amount of $610,473.80 (R.1139-1141), and denied the Subcontractor and Surety's Motion for Rehearing. (R.1241-1242)

The Decision

The Subcontractor and Surety appealed the Final Judgment, alleging that the Trial Court improperly precluded the Subcontractor from enforcing its Contract and from precluding the Subcontractor and Surety from raising the defense that the General Contractor had knowledge of Subcontractor's unlicensure.

On August 27, 2010, the Fifth District Court of Appeal in *Earth Trades, Inc. v. T&G Corporation, d/b/a T&G Constructors*, 42 So. 3d 929 (Fla. 5th DCA 2010) (the Decision) (App. 1), affirmed the Final Judgment, stating in pertinent part:

> "Prior to June 25, 2003, § 489.128, Florida Statutes (2001), provided that contracts performed in full or in part by an unlicensed contractor, shall be "unenforceable in law or in equity." Some Florida courts interpreted the former statute to preclude a party from enforcing a contract against an unlicensed contractor (or its bonding company), where that party had knowledge of the lack of a license. *See, e.g., Kvaerner Constr., Inc. v. Am. Safety Cas. Ins. Co.*, 847 So. 2d 534 (Fla. 5th DCA 2003) (general contractor cannot recover from subcontractor's surety for breach of surety's obligations on a performance bond following County's stopping of work on construction project due to subcontractor not being licensed, since some license was required to perform work, general contractor knew that subcontractor had no license, and general contractor allowed subcontractor to work on project without license); *Castro v. Sangles,* 637 So. 2d 989, 991 (Fla. 3d DCA 1994) ("homeowner" precluded from enforcing agreement against unlicensed contractor where homeowner, having knowledge of contractor's lack of license, participated in wrongdoing by improperly securing building permit as "owner-builder").

> However, effective June 25, 2003, the statute was amended to provide that a contract with an unlicensed contractor was unenforceable only by the unlicensed contractor.
>
> (1) As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity *by the unlicensed contractor.*
> * * *
> (3) *This section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. This section shall not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed for purposes of this section.*
> § 489.128, Fla. Stat. (2005) (emphasis added).
>
> The trial court's decision below was consistent with the clear and unambiguous language of § 489.128, as amended in 2003."

The Subcontractor and Surety requested that this Court review the Decision which this Court granted on October 21, 2011.

SUMMARY OF THE ARGUMENT

A General Contractor entered into a contract with an unlicensed Subcontractor after being impressed with the Subcontractor's work. The General Contractor knew that the Subcontractor was applying for a license, and submitted a recommendation to the licensing board on behalf of the Subcontractor. After the contract was entered, the Subcontractor's Surety provided a performance bond.

After the General Contractor refused to pay the Subcontractor, and terminated its contract, both parties sued the other for breach of contract, and the General Contractor sued the Surety for breach of the performance bond. The General Contractor asserted that the Subcontractor could not enforce its claim and neither the Subcontractor nor Surety could defend the claims because the Subcontractor was unlicensed when the contract was entered into.

The Trial Court entered summary judgment in favor of the General Contractor precluding the Subcontractor from enforcing its claim and precluding the Subcontractor and Surety from defending the claim by alleging the General Contractor's knowledge of Subcontractor's lack of license. After a non-jury trial, a final judgment was entered in favor of the General Contractor.

In *Earth Trades, Inc. v. T&G Corporation, d/b/a T&G Constructors*, 42 So. 3d 929 (Fla. 5th DCA 2010) (the Decision), the court affirmed the final judgment, and held that the 2003 amendment to Florida Statute § 489.128 provided that a

contract with an unlicensed contractor was unenforceable only by the unlicensed contractor, regardless of the General Contractor's knowledge of the unlicensure.

This Court should reverse the Decision and find that the Subcontractor should be able to enforce its contract rights and the Subcontractor and Surety should be able to assert defenses to the General Contractor's claims.

A general contractor's knowledge of a subcontractor's unlicensure creates a defense on behalf of an unlicensed subcontractor and its surety as to a general contractor's claims. The 2003 amendment to Florida Statute § 489.128 does not change this analysis; the amendment based mainly on concerns that non-licensure of one subcontractor could invalidate an entire prime contract, and did not affect the defense of "*in pari delicto.*" The Decision conflicts with cases decided before and after the amendment which continue to recognize the "*in pari delicto*" defense.

While it is the public policy of this state to assist homeowners against unlicensed contractors, it is doubtful that this statute was intended to benefit general contractors in contract disputes. The policy behind Florida Statute § 489.128--to protect the public from shoddy workmanship--does not apply where the unlicensed party is a subcontractor hired by a general contractor. Because licensing statutes are intended to protect the general public from persons who are not qualified to render a professional service rather than to protect those who are qualified to render such professional service, an unlicensed member of a profession

or trade has been permitted recovery for services rendered to a licensed member of the same profession or trade who are dealing at arm's length with each other.

Even assuming that the amendment to Florida Statute § 489.128 precludes any claims or defenses by an unlicensed subcontractor, the Surety had separate defenses and should be entitled to assert same. The Decision forfeits any defenses a surety may have under its bond if its principal is unlicensed. This conflicts with the traditional rule in Florida that a surety cannot be called on to perform, or pay damages for the non-performance of an illegal contract.

If this Court were to affirm the Decision, it could encourage a general contractor to knowingly contract with unlicensed subcontractors, receive compensation from the owner for the subcontractor's work, then refuse to pay the subcontractor and recover a default judgment against the subcontractor and its surety. A surety's loss of these vested rights to defend these claims could expose the surety industry to abuse by obligees who could secure contracts with unlicensed contractors to take advantage of a surety's obligations and its lack of defenses to a bond claim. This sort of application cannot be harmonized with decades of public policy and would unconstitutionally restrict a subcontractor and a surety's right of access to the courts, without a legitimate reason for doing so.

STANDARD OF REVIEW

This appeal involves the statutory interpretation of Florida Statute §489.128. On appeal from a decision involving matters of statutory interpretation, a *de novo* standard of review is applied. *See*, *American Honda Motor Co., Inc. v. Cerasani*, 955 So. 2d 543 (Fla. 2007).

ARGUMENT

I.
THE FIFTH DISTRICT'S INTERPRETATION OF FLORIDA STATUTE § 489.128 IMPROPERLY PRECLUDES AN UNLICENSED CONTRACTOR FROM ENFORCING OR DEFENDING A BREACH OF CONTRACT CLAIM UNDER ANY CIRCUMSTANCES

A. "In Pari Delicto" Still Applies To Florida Statute §489.128

Purpose Of Florida Statute §489.128

Florida Statute § 489.128, was enacted to protect the public health, safety and welfare as a whole from the work of unlicensed contractors. Florida Statute § 489.101. In *Castro v Sangles,* 637 So. 2d 989 (Fla. 3d DCA 1994), the court explained:

> This statute was enacted to safeguard the public as a whole from the activities of incompetent contractors**.** The effect of the combination of Hurricane Andrew and shoddy construction practices not only upon the owner himself, but his neighbors and the entire community, is too recent a memory to require emphasis of the fact that violations of the statute present a real danger, as the legislature foresaw, to the general public. *Id.* at 990-991 (*emphasis in original*).

See also *Poole & Kent Co. v. Gusi Erickson Const. Co.*, 759 So.2d 2 (Fla. 2nd DCA 1999) (legislative history suggests that § 489**.**128 was intended to address the problems consumers and the public face due to shoddy work by unlicensed**,** unqualified contractors); *Kvaerner Cons., Inc. v. American Safety Cas. Ins. Co.*, 847 So. 2d 534 (Fla. 5th DCA 2003).

As a result, the statute provided that "As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity".

Exception Of *"In Pari Delicto"*

However, the consequence of a homeowners knowledge of non-licensure were described by the concept of "*in pari delicto*", in which both parties were equally prohibited from obtaining relief based on an illegal contract. *See* Black's Law Dictionary 806 (8th ed. 2004) (noting that under the *in pari delicto* doctrine, "a plaintiff who has participated in a wrongdoing may not recover damages resulting from the wrongdoing"). This concept has been consistently applied by courts in conjunction with Florida Statute § 489.128.

In *Castro v. Sangles*, 637 So. 2d 989 (Fla. 3d DCA 1994), the court affirmed a dismissal of a homeowner's complaint based on a finding that the homeowner was aware that the contractor was unlicensed. In doing so, the court determined that the homeowner was *in pari delicto* with the unlicensed contractor, so recovery was barred. *Id*.

In *John Hancock-Gannon Joint Venture II v. McNully*, 800 So. 2d 294 (Fla. 3d DCA 2001), the court reversed a summary judgment in favor of an unlicensed contractor, holding that under Florida Statute § 489.128, an unlicensed contractor had no contractual affirmative defenses. Upon remand, the court cautioned that the

owner could be prevented from enforcing its breach of contract claim if it could be shown that the owner knew that it was dealing with an unlicensed contractor and nevertheless awarded him the contract. See *McNully* at 297, n. 2.

The 2003 Amendment

On June 25, 2003 the Florida legislature amended Florida Statute § 489.128. Those promoting the legislation were concerned about both an unreported federal trial court decision and an appellate opinion that appeared to expand the penalties for non-licensure of a subcontractor to an infirmity with enforcement of the prime contract. *See* *Larry R. Leiby, 8 Fla. Prac., Constr. Law Manual § 2:2 (2010-2011* Ed.) Both cases involve a contract between an unlicensed subcontractor (Steel Tec Construction, Inc.) and a general contractor (Kvaerner Construction Inc.).

The "unreported federal trial court decision" was a 2002 Order Denying a Motion to Compel Arbitration in *John B. Goodman Limited Partnership, et al. v THF Construction Inc., f/k/a Kvaerner Construction Inc.* Case No. 8:01-cv-02406-T-26, in which the court held that if a subcontractor who performed work on a project was not licensed, then the prime contract would be determined to be unenforceable because the contract was being performed in part by an unlicensed contractor. (App. 2)

The general contractor appealed this Order, arguing that under the trial court's ruling, the mere existence of one unlicensed subcontractor had the effect of

rendering unenforceable the entire prime contract, potentially throwing the construction industry into turmoil. On February 14, 2003, the 11th Circuit reversed this Order, and held that the issue of the validity of the contract was for the arbitrators to decide and not the court, but did not address the underlying concerns raised by the general contractor. *See John B. Goodman L. P. v. THF Construction, Inc.* 321 F.3d 1094 (11th Cir. 2003)**.**

The appellate opinion described above is *Kvaerner Cons., Inc. v. American Safety Cas. Ins. Co.*, 847 So. 2d 534 (Fla. 5th DCA 2003), in which the court held that a claim against an unlicensed subcontractor's surety failed because the underlying contract was unenforceable as to all parties. The court held that the claim on the surety bond failed as a surety's liability cannot exceed its principals, and that the general contractor's knowledge of the subcontractor's unlicensure barred recovery. *Id.*

In order to alleviate the concern that existence of one unlicensed subcontractor had the effect of rendering unenforceable an entire contract as to all parties, Florida Statute § 489.128 was amended effective June 25, 2003, as follows:

> (1) As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity *by the unlicensed contractor.*
> * * *

> (3) *This section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. This section shall not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed for purposes of this section.* (emphasis added).

Post Amendment Decisions

In *Boatwright Const., LLC v. Tarr,* 958 So. 2d 1071 (Fla. 5th DCA 2007), the court determined that an unlicensed contractor could not have successfully brought an action against an owner to recover monies for work allegedly performed under the contract and cited *Kvaerner* with approval. See *Boatwright,* at 1075. The court then addressed the "*in pari delicto*" defense and its potential applicability against the owner by stating:

> Furthermore, it is questionable whether [the owner] could have successfully brought an action against [the contractor] if [the contractor] had failed to properly perform its contractual obligations. *See, e.g., Castro v. Sangles*, 637 So.2d 989 (Fla. 3d DCA 1994). (*Id.* at 1075).

In *Austin Bldg. Co. v. Rago, Ltd.*, 63 So. 3d 31 (Fla. 3d DCA 2011)**,** the court specifically cited *Castro* with approval and determined that the issue of whether a subcontractor and successor general contractor knew of each other's lack of licensure precluded summary judgment on the successor general contractor's claims against the subcontractor and its surety for damages arising out of the subcontractor's allegedly defective work on the project.

These cases hold that the "*in pari delicto*" defense raised in *Kvaerner* and *Castro* are still applicable despite the 2003 amendment to Florida Statute § 489.128.

The only case in conflict with this long standing precedent is the Decision by the Fifth District Court of Appeal, which held that Trial Court properly precluded the Subcontractor from enforcing its subcontract and precluding the Subcontractor and Surety from raising affirmative defenses including but not limited to, that the General Contractor had knowledge of Subcontractor's unlicensure, finding that the "*in pari delicto*" defense raised in *Kvaerner* and *Castro* is no longer applicable. *Earth Trades, Inc. v. T&G Corporation, d/b/a T&G Constructors*, 42 So. 3d 929 (Fla. 5th DCA 2010).

The *"In Pari Delicto"* Defense Has Not Been Overruled

Neither the statute nor the legislature's intent specifically states that the "*in pari delicto"* defense no longer applies as a defense. Moreover such an interpretation is implausible when construed with Florida Statute § 455.228 which allows the DBPR to issue and deliver a notice to cease and desist to any person who aids and abets the unlicensed practice of a profession by employing such unlicensed person, and ultimately issue fines of up to $5,000.00.

A statute which conflicts with a rule of common law is required to be construed strictly, with the result that no change in the common law can be said to

be legislatively intended unless the statute speaks in clear unequivocal terms. *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1048 (Fla. 2008). The legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute. *Crescent Miami Center, LLC v. Florida Dept. of Revenue***,** 903 So. 2d 913, 918 (Fla. 2005)**.** Even where the legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise. *Essex Ins. Co.* at 1048 (quoting *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla.1977)). Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law. *Thornber v. City of Ft. Walton Beach*, 568 So.2d 914, 918 (Fla. 1990).

Similarly, here there is no clear, express change in Florida Statute §489.128 to abolish the common law defense of "*in pari delicto"* to the same extent as other defenses. Nor is the statute so repugnant to the common law that the two cannot coexist. *Thornber*, 568 So.2d at 918. Under this statute, the fact that a subcontractor is unlicensed does not automatically void a contract as to any other parties, and a surety cannot rescind its bond obligation solely because its principal is unlicensed. However, if there are any defenses, including "*in pari delicto"*, these defenses can be asserted.

B. Florida Statue § 489.128 As Interpreted Opens The Door For Abuse

Allowing Florida Statute § 489.128 to be read as disallowing, an "*in pari delicto*" defense would allow parties to seek unlicensed contractors to enter contracts in which they can rescind, despite their own misconduct. This specific concern was addressed by the court in *Poole and Kent Co. vs. Gusi Erickson Const. Co.*, 759 So. 2d 2 (Fla. 2d DCA 1999) as follows:

> The legislative history [of Florida Statute § 489.128] suggests that the Statute is intended to address the problems that consumers and the public face due to shoddy work by unlicensed, unqualified contractors. We have considerable doubt that the legislature intended this Statute to be used by the general contractor on a government contract to avoid payment by the general contractor for work actually performed by a subcontractor on a public work projects. Typically, it is the general contractor's responsibility under a contract with the owner to assure that subcontractors are validly licensed before they start work. ***Poole's* interpretation of the statute would actually encourage general contractors to select subcontractors with licensing difficulties.** (emphasis added)

Similarly, the court in *MGM Constr. Servs. Corp. v. Travelers Cas. & Surety Co. of Am.*, 57 So.3d 884, 889 (Fla. 3d DCA 2011) cautioned:

> Two competing needs confound the courts as decision makers. First is the need to shield the general public from shoddy workmanship. Second is the need to protect unlicensed parties from being preyed upon by unscrupulous owners and general contractors….The statute clearly may protect against fraud and incompetence. Yet, in very many cases the situation involves neither fraud nor incompetence. The unlicensed party may have rendered excellent service or delivered goods of the highest quality. The noncompliance with the statute may be nearly harmless. The real defrauder may be the defendant who will

> be enriched at the unlicensed party's expense by a court's refusal to enforce the contract…

If this Court agrees with the interpretation of the Fifth District Court of Appeals, then general contractors could be encouraged to select subcontractors with licensing difficulties, and allowed a general contractor to keep a subcontractor's money and be awarded damages **solely** on the basis of non-licensure, even if there are no other legitimate claims against the subcontractor. Such an interpretation would create an absurd conclusion that was not intended by the legislature.

C. Florida Statute § 489.128 Should Not Apply To Members Of The Same Profession

Even assuming this Court determines that "*in pari delicto*" no longer applies as a result of the 2003 amendment, this Court should address the concerns raised in *Poole and Kent Co. vs. Gusi Erickson Const. Co.*, 759 So. 2d 2 (Fla. 2d DCA 1999) and *MGM Constr. Servs. Corp. v. Travelers Cas. & Surety Co. of Am.*, 57 So.3d 884 (Fla. 3d DCA 2011) regarding the applicability of Florida Statute § 489.128 in contractor-subcontractor disputes. The policy behind Florida Statute § 489.128--to protect the public from shoddy workmanship--does not apply where the unlicensed party is a subcontractor hired by a general contractor. Because licensing statutes are intended to protect the general public from persons who are not qualified to render a professional service rather than to protect those who are

qualified to render such professional service, an unlicensed member of a profession or trade has been permitted recovery for services rendered to a licensed member of the same profession or trade. *MGM Constr. Servs. Corp. v. Travelers Cas. & Surety Co. of Am.,* 57 So.3d 884 (Fla. 3d DCA 2011)**,** citing *Dow v. United States for Use & Benefit of Holley*, 154 F.2d 707, 710-11 (10th Cir. 1946) (the ordinary rule that contracts entered into by unlicensed parties are unenforceable does not apply where the unlicensed party seeks to recover from a licensed member of the same profession); *accord, Costello v. Schmidlin*, 404 F.2d 87 (3d Cir.1968); *Edmonds v. Fehler & Feinauer Constr. Co.,* 252 F.2d 639 (6th Cir.1958); *Kennoy v. Graves,* 300 S.W.2d 568, 570 (Ky.App.1957); *Alcoa Concrete & Masonry, Inc. v. Stalker Bros.,* 191 Md. App. 596, 993 A.2d 136, 143–44, *cert. granted,* 415 Md. 41, 997 A.2d 791 (2010); *Christenberry Trucking & Farm, Inc. v. F & M Mktg. Servs., Inc.*, 329 S.W.3d 452 (Tenn. App.), *appeal denied,* (Tenn. Oct. 21, 2010). The reason for the rule denying enforceability does not exist when persons engaged in the same profession or trades are dealing at arm's length with each other.

The Owner in this case entered into a contract with the General Contractor, which was properly licensed. This afforded the members of the general public some protection. When the Contractor entered into two contracts with the Subcontractor, it did so with knowledge of the Subcontractor's reputation and

ability of 18 years in the construction industry. The General Contractor's website under "Subcontractor Qualifications" states that every Subcontractor selected must provide at a minimum, proof of contractor's and business license. This protects the Owner from the consequences of an unlicensed subcontractor being on the job.

Moreover, in the instant case, there was never an allegation that the Subcontractor's work was defective as a result of non-licensure; to the contrary, the General Contractor prepared and provided a letter of recommendation on behalf of the Subcontractor which was required by and submitted to the DBPR. Accordingly, this Court should align itself with the cases cited above and hold that Florida Statute § 489.128 does not apply to members of the same profession, allow the Subcontractor to enforce its Contract claim for $182,500.00 and allow the Subcontractor and Surety to defend the General Contractor's claims.

II.

THE FIFTH DISTRICT'S INTERPRETATION OF FLORIDA STATUTE § 489.128 IMPROPERLY RESTRICTS A SURETY'S VESTED RIGHT TO ASSERT DEFENSES

A. The Surety Had Separate Defenses

Even if this Court would determine that the Subcontractor was barred from asserting any defenses as a result of the 2003 amendment, the Decision improperly bars the Surety's separate defenses including knowledge or concealment. The Surety's liability is commensurate with that of the principal, See, *First Sealord Surety, Inc. v. Suffolk Construction Co., Inc.*, 995 So.2d 609 (Fla. 3d DCA 2008). However, the Surety has separate defenses under its Bond, and may be found not liable based on its own separate defense even if its principal is liable. See, *Current Builders of Florida, Inc. v. First Sealord Surety, Inc.*, 984 So.2d 526 (Fla. 4th DCA 2008). Under the Fifth District's interpretation of Florida Statute § 489.128, a surety would forfeit any defenses under its Bond if its principal is unlicensed. This conflicts with the traditional rule in Florida that has been that a surety cannot be called on to perform, or pay damages for the non-performance of an illegal contract. See, *Powell v. Beatty*, 147 So. 845 (Fla. 1933) (fraud, illegality or mistake, which may rescind the contract of the principal, induces the discharge of the sureties.) In *Kvaerner Cons., Inc. v. American Safety Cas. Ins. Co.*, 847 So. 2d 534 (Fla. 5th DCA 2003), the court quoted the common law of suretyship that a

general contractor's knowledge that the subcontractor is unlicensed will obviate the surety's liability.

A surety's loss of these vested rights could expose the surety industry to abuse by obligees who could secure contracts with unlicensed contractors to take advantage of a surety's obligations and its lack of defenses to a bond claim. Effectively, an oblige could enter into a contract with an unlicensed bonded contractor, and immediately upon having the contractor execute the contract, declare the bonded contractor in default and assert a claim under the performance bond. In such a scenario, a surety would have no defense to the bond claim, and would be required to complete its principal's work.

B. The Decision's Interpretation Of The 2003 Amendment Would Unconstitutionally Restrict The Surety's Right To Access To The Courts

The Decision's improper construction of Florida Statute § 489.128 completely precludes the Surety's right to its defenses, leaving it with the equivalent of a default judgment against it. Such an application restricts the Surety's access to the courts, which would be unconstitutional. A plain reading of Florida Statute § 489.128 does not deny the "unlicensed contractor" or its surety the right to assert defenses, and only asserts that the unlicensed contractor is barred in law and in equity from enforcing a contract, as Florida Statute § 489.128 states that a contract is unenforceable in law or equity.

The Fifth District's interpretation of Florida Statute § 489.128 leaves the Surety without the common law defenses of fraud and knowledge as defined by this Court almost 80 years ago in *Powell v. Beatty*, 147 So. 845 (Fla. 1933). This Court has defined the constitutional limitations on the Legislature's ability to abolish common law causes of action in *Kluger v. White,* 281 So.2d 1, 4 (Fla.1973), which holds that where a cause of action has been provided by statutory or common law which predated the adoption of the Declaration of Rights of the Florida Constitution, the access to courts clause prevents the Legislature from abolishing that right of action without either: "providing a reasonable alternative to protect the rights of the people of the State to redress for injuries" or showing that there was "an overpowering public necessity for the abolishment of such right" and that "no alternative method of meeting such public necessity can be shown." *Id.* at 4. The legislature has shown no reason to abolish the Surety's common law remedies, as none exists.

III.

NEW TRIAL REQUIRED ON ALL ISSUES

The Trial Court's rulings left the Petitioners with no defense at trial except to contest damages. See *Kaplan v. Morse*, 870 So.2d 934 (Fla. 5th DCA 2004) (A defaulting party has a right to contest damages caused by the party's wrong, but no other issues). Accordingly, if this Court were to determine that the Fifth District improperly interpreted Florida Statute § 489.128, Summary Judgment on both the Subcontractor's claims and the Subcontractor and Surety's defense to the General Contractors claim will be reversed, entitling the Petitioners to a new trial on all issues so they can properly assert and prove their claims and affirmative defenses.

CONCLUSION

This Court is confronted with two competing needs in interpreting Florida Statute §489.128. First is the need to shield the general public from shoddy workmanship. Second is the need to protect unlicensed parties from being preyed upon by unscrupulous owners and general contractors. Unfortunately, the Fifth District Court of Appeal Decision fails to address either of those needs. The Decision does not address any basis for protecting the general public from shoddy workmanship in a subcontractor/general contractor dispute and actually encourages unlicensed parties and their surety to be potentially preyed upon by owners and general contractors.

In light of the foregoing, Petitioners EARTH TRADES, INC. and FIRST SEALORD SURETY, INC. respectfully requests that this Court reverse the Decision of the Fifth District Court of Appeal, find that an unlicensed subcontractor can enforce and defend its claims against a general contractor, especially when the general contractor knew of the unlicensure, allow the subcontractor's surety to defend its bond claims, and determine that the "*ín pari delicto"* defense is not barred by Florida Statute §489.128.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed by U. S. Mail to KIMBERLY A. ASHBY, ESQ., P.O. Box 231, Orlando, FL 32802-0231, Atty for Respondent, T&G Corporation, d/b/a T&G Constructors, this 15th day of November, 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that he has complied with the format requirements of the Rules of Appellate Procedure. This Initial Brief on the Merits was prepared using Times New Roman 14 point font.

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