IN THE SUPREME COURT OF FLORIDA

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

Case No. SC10-1892

vs.

T&G CORPORATION d/b/a
T&G CONSTRUCTORS,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

Respondent T&G Corporation ("T&G") and Petitioner Earth Trades, Inc. ("Earth Trades") entered into a subcontract agreement in December, 2004 for the performance of site work to build a parking garage. *Earth Trades, Inc. v. T&G Corp.* 42 So. 3d 929 (Fla. 5th DCA 2010) (the "Opinion"). T&G brought suit against Earth Trades for breach of contract for failing to complete the work and against First Sealord Surety, Inc. ("Surety"), its performance and payment bond surety. *Id.* It was undisputed Earth Trades was not licensed to perform the work required under its contract. *Id.* The trial court granted partial summary judgment on Petitioners' defense the contract was unenforceable by T&G because T&G allegedly had knowledge that it was unlicensed; T&G denied any knowledge. *Id.* A non-jury trial was held on the other defense relating to Earth Trades' breach of contract and Surety's liability on the bonds. *Id.* The court found that Earth Trades breached the contract by failing to perform. *See Id.* The Fifth District found Petitioners' remaining arguments to be without merit, without further comment.

SUMMARY OF ARGUMENT

The Court should deny the Petition because Petitioners cannot show there is express and direct conflict with respect to the construction of section 489.128, Florida Statutes, as amended effective June 25, 2003. The cases upon which Petitioners rely were decided on contracts which were executed before the

effective date of the amendment. Section 489.128 reflects the stated *public policy* that it shall only apply to the unlicensed contractor and not to any other party, including and especially its own surety. Prior versions of the statute rendered the subcontract between the all of the parties void. Petitioners rely on cases which dealt with these prior versions of section 489.128 and do not apply to contracts which were executed after the amendment. The 2003 amendment to section 489.128 made it clear the statute was not intended to apply to any party other than the unlicensed party. The defense of "*in pari delicto*" was considered when applying earlier versions of section 489.128 when no party could not recover under the contract if any party was unlicensed, and leaving only equitable remedies. In those earlier cases, the parties opposing the unlicensed party could only pursue equitable remedies if they were not "*in pari delicto*". When the statute was amended to exclude its application to anyone other than the unlicensed party, "*in pari delicto*" no longer applied because the parties were not proceeding in equity.

The trial court properly weighed the other defenses to on T&G's contract claim, the Fifth District found all other trial issues to be without merit, and the Opinion does not expressly address them. Respondent does not concede that the other issues Petitioners argue in their brief were raised below or properly preserved.

Petitioners contend section 489.128 is unconstitutional because it improperly restricts their access to the courts. This is untrue. The only restriction is to subcontractors which are unlicensed and against the insurance sureties which underwrite them. The amendment to section 489.128 in 2003 did nothing to further restrict access and only narrowed the statute's application. It would be illogical, and against the clearly stated public policy, to find the unlicensed subcontractor is prohibited from seeking relief on its contract but its surety had those rights. This does not square with the express language of section 489.128 when it was amended in 2003 to provide in pertinent part:

"*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."*

The primary basis for the existence of performance and payment bond sureties is to guarantee the performance of their principals. Florida law should encourage sureties to perform their own investigation and confirm their principals are licensed before accepting the payment of bond premiums, and then seeking to shirk the responsibility for performance under their bonds by claiming the principal was unlicensed. This is quite likely why the Florida Legislature enacted the amendment in 2003. For all of these reasons, the Petition should be denied and the Court should deny the request for jurisdiction.

ARGUMENT/POINT I: THE FIFTH DISTRICT'S DECISION DOES NOT CONFLICT WITH ESTABLISHED LAW.

A. ***Standard of Review.***

This Court does not have jurisdiction to review the Fifth District's opinion because it does not "expressly and directly" conflict with a decision of this Court or another district court on the same question of law. *Fla. Const.* art. V, § 3(b)(3); *Fla. R. App. P.* 9.030(a)(2)(A)(iv); *Persaud v. State*, 838 So. 2d 529, 532-33 (Fla. 2003). No conflict appears "within the four corners" of the district court's decision, and the asserted conflict cases address different facts and issues. *Id. at* 532-33; *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Review of the constitutionality of a statute is governed by Article V, Section (3)(b)(3), Florida Constitution.

B. ***The Defense Of "In Pari Delicto" Did Not Apply Because No Equitable Relief Was Sought By Petitioners; 2003 Amendment To Section 489.128, Florida Statutes, Eliminated Application Of This Equitable Defense***.

Section 489.128, Florida Statutes (2004), renders void a contract only against an unlicensed contractor so "*in pari delicto*" does not apply. There was no dispute that summary judgment was appropriately entered against Petitioners. Petitioners argue the trial court improperly ruled that there was no defense of *"in pari delicto"* against the claims of T&G. They argue if T&G had knowledge that Earth Trades was unlicensed then the subcontract claims should be void as to T&G as well. However, section 489.128 does not so provide and the amended statute is

clear the contract is only "unenforceable in law or in equity by the unlicensed contractor."

Petitioners rely on three cases in support of the Court's jurisdiction. The Third District's 1994 opinion in *Castro v. Sangles*, 637 So. 2d 989 (Fla. 3d DCA 1994), does not apply because it construed a pre-2004 version of section 489.128 which is materially different. In *Castro*, the Third District construed the 1991 version of section 489.128 which rendered void a contract *as to all parties* if any party failed to have the appropriate license. Under this prior version of section 489.128, the owner argued the statute's application against him was unfair because it declared the contract "unenforceable in law" as to both parties; he therefore claimed damages pursuant to an equitable remedy. *Id. at 989-92*. The owner's request for equitable relief was necessary in 1991 because he had no legal right to enforce the contract. *Id.* at 989-9. The Third District examined whether equitable relief would be available to an owner who had "unclean hands", or *"in pari delicto"* with the unlicensed contractor. Under the general principles applicable to a court in equity, the Third District held the owner could not recover *in equity* if he himself had unclean hands.

In *John Hancock-Gannon Joint Venture II v. McNully*, 800 So. 2d 294 (Fla. 3d DCA 2001), the Third District reviewed another case under the prior version of section 489.128. The Court held the unlicensed contractor cannot "interpose

defenses which are clearly prohibited by statute." *Id.* at 296. The contractor attempted to use the contract as a weapon to wield defenses to the owner's statutory claims under sections 553.84 and 768.0425(2), Florida Statutes, (cause of action for building code violations) (owner recovery for injuries sustained resulting from contractor's negligence). *Id.* at 296-98. The Third District concluded the unlicensed contractor could not use the contract in its defense since it was void.

Petitioners rely on *Kvaerner Construction, Inc. v. American Safety Cas. Ins. Co.*, 847 So. 2d 534 (Fla. 5th DCA 2003) which was also decided under the 1999 version of section 489.128. In 2003, the Florida Legislature amended section 489.128 to read as follows:

> "As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable by 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)

The new statute was enacted after the decisions of *Castro, John Hancock* and *Kvaerner*. The 1999 version of section 489.128, applied in *Kvaerner,* continued to render the contract "unenforceable in law or in equity" *as to all parties*. Thus, if the contract work required a license, it was unenforceable in law and equity. Under this old version of the statute, the contractor could not enforce its contract

with the unlicensed subcontractor. The Fifth District noted the claim against the surety failed because the underlying construction contract was unenforceable as to all parties. *Id.* The *Castro* issue of *"in pari delicto"* was germane because Kvaerner attempted to argue it could recover on the bond notwithstanding the unenforceability of the underlying contract. *Id.* None of these cases apply here because the ***2004*** version of section 489.128 does ***not*** render the contract unenforceable as to any party other than the unlicensed contractor. Further, *Kvaerner* cannot be a conflict since it is a Fifth District case as well as the present one.

Petitioners cite upon *Promontory Enterprises, Inc. v. Southern Engineering & Cont., Inc.*, 864 So. 2d 479 (Fla. 5th DCA 2004) to argue the Legislature meant only to clarify existing law. However, the holding was merely that the 2000 amendment should apply prospectively. Importantly, the Fifth District noted the 2003 amendment did apply retroactively to contracts executed as of October 1, 2000. *Id.* at 484, n.1.

To the extent Petitioners suggest the result here unduly encourages contractors to select unlicensed subcontractors to save money, the facts of this case support the opposite conclusion. Earth Trades' failure to be duly licensed created problems for the contractor in pulling the necessary permits for the specialty work, especially on a project which included the site work for a parking garage. Further,

the surety does not address the very purpose of performance bonds in the industry, the justifiable reliance that the contractor has that the surety will guaranty the performance of the contract and will perform any necessary investigation on its own principals, before accepting payment for the bonds.

Petitioners argue the 2003 Amendment was "remedial in nature" and enacted "to clarify existing law" which is completely consistent with the Opinion. The 2003 amendment was remedial to the extent the statute no longer negates the contract rights of the parties who are appropriately licensed. It further clarified existing law because it unequivocally established that "this section shall not effect the rights of parties other than the unlicensed contractor to enforce contract lien or bond remedies." As the Fifth District has already noted, the 2003 amendment was expressly made retroactive which belies the argument that it was merely to clarify. The *Kvaerner* opinion was filed shortly before the 2003 amendment. It is logical to conclude the amendment was made *because* of *Kvaerner*.

C. ***Petitioner Surety's Claim That It Had Separate Defenses Is Not Properly A Basis For The Court's Discretionary Jurisdiction.***

Surety contends it had separate defenses, although it concedes that its liability is commensurate with Earth Trades, its principal. *See C. A. Oakes Construction Co., Inc. v. Ajax Paving Industries*, 652 So. 2d 914 (Fla. 2d DCA 1995)(surety stands in the shoes of its principal). There is nothing contained in the Opinion about separate defenses of fraud purportedly perpetrated by its co-

Petitioner, the Opinion does not conflict with existing law in any way as to the relationship between principals and sureties. *Powell v. Beatty*, 110 Fla. 3, 147 So. 845 (1933) does not express any holding that conflicts with the Opinion and the facts of this suit on a note and surety are completely divergent to the present case.

D. ***There Is No Denial Of Access To The Courts Or Logic That The Opinion Will Encourage Hiring Unlicensed Subcontractors Which Are Bonded By A Performance Bond Surety.***

Petitioners contend section 489.128 is unconstitutional because it improperly denies access to the courts. When section 489.128 was amended it been easy to include language that the contract was void as to a another party who had knowledge of the absence of the appropriate construction license. The Legislature moved in the other direction by amending the statute such that it negated the contract only as to the unlicensed party. Petitioners claim that the fact Earth Trades was unlicensed should excuse it and its surety from having to pay for the damages Earth Trades caused when it failed to perform and breached the contract. Petitioners were not restricted from defending the claims against them. T&G's knowledge of the lack of license, if it were true, is not a breach of the subcontract. It would only apply if Earth Trades was seeking equitable relief. Since in these circumstances the contractor was forced to suffer damages, as affirmed by the Fifth District, it is unclear why this encourages contractors to hire unlicensed subcontractors. Under these facts, the contractor is forced to retain a replacement

subcontractor who is licensed to complete the work, and bear the expense of the additional costs for doing so.

Poole & Kent Co. v. Gusi Erickson Const. Co., 759 So. 2d 2 (Fla. 2d DCA 1999) dealt with the timing of the licensed qualifier for the business actually transferring his license to the business. Pursuant to an earlier version of section 489.128, not applicable here, there was a savings clause if the contracting business failed to perfect its license at the time of contract execution but remedied that situation during the performance of the contract. *Fla. Stat. § 489.128 (1995).* The qualifier failed to place the license at contract execution, but later cured. The issue before the 2d DCA was whether to reverse an award against the subcontractor which cured the license issue and fully performed the work, and not whether the general contractor had an incentive to hire an unlicensed subcontractor.

There is a simple solution to the problem the Surety poses here as creating an unconstitutional denial of access to the courts; it can confirm that its principal is duly licensed to perform the construction work before issuing the bonds and accepting the premiums. If Surety had done that investigation, there would be no issue to decide here.

CONCLUSION

For all of the reasons stated herein, the Court should deny the Petition and find there is no jurisdiction to review this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and Federal Express this 5th day of November, 2010 to: John J. Shahady, Esquire and Thomas R. Shahady, Esquire, Adorno & Yoss, LLP, Attorneys for the Appellants, 350 East Las Olas Boulevard, Suite 1700, Fort Lauderdale, FL 33301.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Brief of Respondent, T&G CORPORATION d/b/a T&G CONSTRUCTORS, complies with the requirements of Rule 9.210, Fla. R. App. P., and is printed in Times New Roman 14-point font.

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