

**IN THE SUPREME COURT OF FLORIDA**  
**Case No. SC10-1892**  
**Fifth DCA Case No. 5D09-1761**  
**9<sup>th</sup> Judicial Circuit Case No. 06-CA-1003 and 06-CA-8702**

---

Upon Petition for Discretionary Jurisdiction Review  
Of A Decision Of The Fifth District Court of Appeal

---

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

Petitioners,

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

Respondent.

---

**PETITIONERS' BRIEF ON JURISDICTION**

---

John J. Shahady, Esq.  
Fla. Bar #998990  
Thomas R. Shahady, Esq.  
Fla. Bar #092893  
Christopher Jallo  
Fla. Bar # 0072555  
Attorney for Petitioners  
ADORNO & YOSS LLP  
350 East Las Olas Boulevard  
Suite 1700  
Fort Lauderdale, FL 33301  
(954) 763-1200  
[jshahady@adorno.com](mailto:jshahady@adorno.com)

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	ii
PREFACE .....	iii
STATEMENT OF THE FACTS AND THE CASE .....	1,2
SUMMARY OF ARGUMENT .....	2,3
ARGUMENT .....	3
I.    THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL CONFLICTS WITH ESTABLISHED LAW .....	3
A. Basis for Jurisdiction .....	3
B. The Amendment to Florida Statute § 489.128 Does Not Overrule the <i>In Pari Delicto</i> Defense.....	4
C. The Surety Had Separate Defenses .....	6
D. The Decision’s Interpretation of the 2003 Amendment Would Encourage the Hiring of Unlicensed Contractors, and Restrict the Surety’s Right to Access to the Courts .....	7-10
CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	11
CERTIFICATE OF COMPLIANCE .....	12

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Castro v. Sangles</i> , 637 So.2d 989 (Fla. 3d DCA 1994) .....	5
<i>Current Builders of Florida, Inc. v. First Sealord Surety, Inc.</i> , 984 So.2d 526 (Fla. 4th DCA 2008) .....	7
<i>Earth Trades, Inc. v. T&amp;G Corporation</i> , 42 So. 3d 929 (Fla. 5 <sup>th</sup> DCA 2010).....	2
<i>First Sealord Surety, Inc. v. Suffolk Construction Co., Inc.</i> , 995 So. 2d 609 (Fla. 3d DCA 2008) .....	7
<i>John Hancock-Gannon Joint Venture II v. McNully</i> , 800 So. 2d 294 (Fla. 3d DCA 2001) .....	5
<i>Kvaerner Construction, Inc. v. American Safety Casualty Insurance Company</i> , 847 So.2d 534 (Fla. 5th DCA 2003).....	5,6,7
<i>Poole and Kent Co. v. Gusi Erickson Const. Co.</i> , 759 So.2d 2 (Fla. 2d DCA 1999).....	8,9
<i>Powell v. Beatty</i> , 147 So. 845 (Fla. 1933) .....	7
<i>Promontory Enterprises, Inc. v. Southern Engineering &amp; Cont., Inc.</i> 864 So.2d 479 (Fla. 5th DCA 2004).....	6
<i>Swain v. Curry</i> , 595 So.2d 168 (Fla. 1st DCA 1992) .....	9
 <b><u>Other Authorities:</u></b>	
Fla. Stat. § 489.128 .....	2, 3,4,6,8,9,10
Article V Section (3)(b)(3) Florida Constitution .....	2,4
Fla.R.App.P. 9.030(a)(2)(A)(iv) .....	4
Fla.Stat.Ann. § 489.128 (Amended Notes 2007).....	6
FL LEGIS 2003-257 .....	6

## **PREFACE**

EARTH TRADES, INC. was the-Plaintiff/Counter-Defendant below and will be referred to in this brief as “EARTH TRADES” or “Sub- Contractor”. FIRST SEALORD SURETY, INC. was a Counter-Defendant below and 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, was the Defendant/Counter-Plaintiff below and will be referred to in this brief as “T&G” or “General Contractor”.

## **STATEMENT OF THE FACTS AND THE CASE**

In December 2004, EARTH TRADES entered into a contract with T&G, a general contractor to perform certain site work for a parking garage. FIRST SEALORD provided a Payment and Performance Bond for this Project. At all relevant times, EARTH TRADES was not licensed to perform the work under the contract. EARTH TRADES alleges that T&G was aware of the unlicensure when the contract was entered into. T&G terminated its contract with EARTH TRADES and both parties sued the other for breach of contract.

During the pendency of the lawsuit, the Trial Court entered summary judgment in favor of T&G precluding both EARTH TRADES and FIRST SEALORD from raising as an affirmative defense that the contract was unenforceable because of T&G's knowledge of EARTH TRADES lack of license. After a non-jury trial, T&G prevailed on its breach of contract claim against EARTH TRADES, and on its breach of bond claim against FIRST SEALORD.

Both EARTH TRADES and FIRST SEALORD appealed the Final Judgment, alleging that the Trial Court improperly precluded Petitioner's from raising the affirmative defense that T&G had knowledge of EARTH TRADES unlicensure. On August 27, 2010, the Fifth District Court of

Appeal affirmed the Trial Court in *Earth Trades, Inc. v. T&G Corporation, d/b/a T&G Constructors*, 42 So. 3d 929 (Fla. 5<sup>th</sup> DCA 2010) (the Decision), attached as Appendix “A”, holding that the June 25, 2003 Amendment to Florida Statute § 489.128 provided that a contract with an unlicensed contractor was unenforceable only by the unlicensed contractor. As such, the Decision left both the subcontractor and its surety without the ability to raise any of its affirmative defenses to the general contractor’s claims.

### **SUMMARY OF THE ARGUMENT**

There is a split amongst the District Courts of Appeal in the State of Florida with respect to whether Florida Statute § 489.128 precludes any defenses by an unlicensed sub-contractor or its surety, either in law or in equity, thereby unconstitutionally restricting the sub-contractor and its surety’s right of access to the courts. *See* Article V Section (3)(b)(3), Florida Constitution.

The Courts of this State, including the Fifth District have specifically held that a general contractor’s knowledge of a sub-contractor’s unlicensure creates an absolute defense on behalf of the surety. The 2003 amendment to Florida Statute § 489.128 does not change this analysis; however, the Fifth District Court Decision in this case creates conflict.

Even assuming that the amendment to Florida Statute § 489.128 precludes any defenses by an unlicensed sub-contractor, the Surety had separate defenses and should be entitled to assert same. 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.

If this Court were to decline to accept jurisdiction, the Decision would encourage a general contractor to knowingly contract with unlicensed contractors, receive compensation from the owner for the sub-contractor's work, then refuse to pay or purposely breach the contract with the subcontractor and recover a default judgment against the sub-contractor and its surety. This sort of application cannot be harmonized with decades of public policy and would unconstitutionally restrict a sub-contractor and a surety's right of access to the courts.

## **ARGUMENT**

### **I**

#### **THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL CONFLICTS WITH ESTABLISHED LAW**

##### **A. Basis for Jurisdiction**

This Court has discretionary jurisdiction to review a district court decision where that decision expressly and directly conflicts with a decision

of another district court of appeal on the same question of law. Article V, Section 3(b)(3), Florida Constitution; Fla.R.App.P. 9.030(a)(2)(A)(iv). Further, this Court may review a district court decision which otherwise expressly declares valid a state statute. *Id.*

**B. The Amendment to Florida Statute § 489.128 Does Not Overrule the *In Pari Delicto* Defense**

The Decision conflicts with numerous opinions governing the construction, interpretation and validity of Florida Statute § 489.128, which states in pertinent part:

As a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain a license in accordance with this part shall be unenforceable in law or in equity *by the unlicensed contractor.*

The 2003 amendment to Fla.Stat. §489.128 added the italicized portion above and also included the following language in Fla.Stat. §489.128(3):

*This section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien or bond remedies.*

The Decision construed this statute to affirm the General Contractor's argument that it could still enforce a contract against a Sub-Contractor and the Sub-Contractor's Surety despite its knowledge of the Sub-Contractor's



unlicensure. This Decision conflicts with other Court's of this State which have specifically held that under such a scenario, the General Contractor's claims against the Surety fail. See *Kvaerner Construction, Inc. v. American Safety Casualty Insurance Company*, 847 So. 2d 534 (Fla. 5th DCA 2003); *John Hancock-Gannon Joint Venture II v. McNully*, 800 So.2d 294 (Fla. 3d DCA 2001); *Castro v. Sangles*, 637 So.2d 989 (Fla. 3d DCA 1994).

In *Castro*, the Third District affirmed a dismissal of a homeowner's complaint based on a finding that the homeowner was aware that the contractor was unlicensed. *Id.* at 991-992. In doing so, the Third District determined that the homeowner was *in pari delicto* with the unlicensed contractor, so recovery was barred. *Id.* Similarly, in *John Hancock-Gannon*, the Third District re-affirmed its prior ruling in *Castro* in reversing a summary judgment in favor of an unlicensed contract on the basis that the unlicensed contractor cannot utilize **contract** defenses. *John Hancock-Gannon*, at 297. Notwithstanding the foregoing instruction and interpretation, upon remand, the Third District cautioned the trial court 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. *Id.* Accordingly, the

Third District confirmed the *in pari delicto* exception to Florida Statute § 489.128.

In direct and express conflict with the Third District's prior rulings, the Fifth District held that *in pari delicto* is not an exception to § 489.128 based upon a "clarifying" amendment to the foregoing statute. However, in amending Fla.Stat. § 489.128 in 2003, the legislature intended the new version to be remedial in nature and to clarify existing law, not to overturn existing law. FL LEGIS 2003-257; *See also* Fla.Stat. Ann. § 489.128 (Amended Notes 2007); *Promontory Enterprises, Inc. v. Southern Engineering & Cont., Inc.*, 864 So.2d 479 (Fla. 5th DCA 2004). Neither the statute nor the legislature's intent states that the *in pari delicto* defense no longer applies as a defense to a general contractor's claims.

Notwithstanding the foregoing, in its Decision, the Fifth District ruled that *in pari delicto* was barred as a result of the amendment thereby validating § 489.128, Fla.Stat., for a proposition other than its intended purpose and in contradiction to the clear and unambiguous reading of same.

### **C. The Surety Had Separate Defenses**

Even if it could be determined that the amendment to § 489.128, Fla.Stat. barred the Sub-Contractor from asserting any defenses, the Decision conflicts with established law regarding the Surety's defense of

knowledge or concealment. While the Surety agrees that its 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)) 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 found liable. *See Current Builders of Florida, Inc. v. First Sealord Surety, Inc.*, 984 So.2d 526 (Fla. 4th DCA 2008).

The traditional rule in Florida 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.) The law regarding suretyship as explained by in *Kvaerner* is that fraud or misrepresentation by the principal in inducing the surety to enter into the contract will not affect the liability of the surety **unless there is knowledge or participation by the creditor.** The Decision conflicts with this long standing precedent.

**D. The Decision's Interpretation of the 2003 Amendment Would Encourage the Hiring of Unlicensed Contractors, and Restrict the Surety's Right to Access to the Courts**

If this Court were not to accept jurisdiction, then the Decision will encouraged general contractors to knowingly contract with unlicensed

contractors, receive compensation from the owner for the sub-contractor's work, then refuse to pay or purposely breach the contract with the subcontractor and recover a default judgment against the sub-contractor and its surety. This would require sureties to perform unlicensed contracts which cannot be harmonized with decades of public policy recognizing that such a requirement would result in indirect ratification of unlawful conduct. A holding setting a precedent that an unlicensed contractor cannot raise any defenses including the defense of knowledge sets a far reaching precedent that will surely be taken advantage of by contractors to get out of paying a legitimate debt and continue to reap the benefits of its unlawful conduct.

While it is the public policy of this state that Florida Statute § 489.128 was created and amended to assist homeowners, it is doubtful that this statute was intended to benefit general contractors in contract disputes. The General Contractor in this case should not have been able to profit from its knowledge by having all the Sub- Contractor and Surety's defenses precluded.

This specific concern was addressed 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)

The erroneous 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. The Florida Constitution guarantees to every person the right to free access to the courts on claims of injury, free of unreasonable burdens and restrictions. *See Swain v. Curry*, 595 So. 2d 168 (Fla. 1st DCA 1992). Moreover, Florida Statute § 489.128 does not deny the "unlicensed contractor" its right to assert defenses, either in law or in equity. In fact, § 489.128, as well as all case precedent discussing same, only assert that the unlicensed contractor is barred in law and in equity from enforcing a contract when seeking compensation thereunder. § 489.128, Florida Statute ("unenforceable in law or equity"); In the present action, Petitioners only seek the ability to assert

its constitutional right to defend themselves in the courts of this State, which is not precluded by the law of this state or the legislative record before this Court.

Traditional construction, in cases where ambiguities exists, should be in favor of and not in restriction of access to the courts. *Id.* Based upon a clear denial of the Surety's access to the courts, coupled with an ambiguity as to whether a general contractor can benefit from the strict construction of the statute, creates an irreconcilable conflict.

### **CONCLUSION**

Based upon the express and direct conflict between the Decision in this case and the decisions of the other Florida District Courts of Appeal, including the Fifth District's improper interpretation and validation of Florida Statute § 489.128, Petitioners respectfully requests that this Court exercise its discretionary jurisdiction to review the Fifth District's Opinion and resolve the conflict.

**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 T&G, this 11th day of October, 2010.

s/John J. Shahady \_\_\_\_\_  
John J. Shahady, Esq.  
Fla. Bar #998990  
Thomas R. Shahady, Esq.  
Fla. Bar #092893  
Christopher Jallo  
Fla. Bar # 0072555  
Counsel for Petitioner  
ADORNO & YOSS LLP  
350 East Las Olas Boulevard  
Suite 1700  
Fort Lauderdale, FL 33301  
(954) 763-1200  
[Jshahady@adorno.com](mailto:Jshahady@adorno.com)

## **CERTIFICATE OF COMPLIANCE**

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

s/John J. Shahady

John J. Shahady, Esq.

Fla. Bar #998990

Thomas R. Shahady, Esq.

Fla. Bar #092893

Christopher Jallo

Fla. Bar # 0072555

ADORNO & YOSS LLP

Attorney for Petitioner

350 East Las Olas Boulevard

Suite #1700

Fort Lauderdale, FL 33301

(954) 763-1200

(954) 766-7800 Facsimile

[JShahady@adorno.com](mailto:JShahady@adorno.com)



