IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-1892
Lower Tribunal Nos: 5D09-1761
06-CA-1003
06-CA-8702

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

Petitioners,

v.

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

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Kimberly A. Ashby, Esq.
Florida Bar Number: 322881
AKERMAN SENTERFITT
Post Office Box 231
CNL Tower II, Suite 1200
450 South Orange Avenue
Orlando, FL 32802-0231
Phone: 407-423-4000
Fax: 407-843-6610
Email: kashby@akerman.com
Attorneys for Respondent

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STATEMENT OF CASE AND FACTS

T&G Corporation d/b/a T&G Constructors ("T&G") and Earth Trades, Inc. ("Earth Trades") entered into a subcontract agreement for the construction of a 3 story parking garage in Hialeah, Florida, for an owner known as Florida National College (the "Subcontract"). (Record "R". 86-109; 296-301; 302-325; 326-351; 396-413). T&G alleged that Earth Trades breached the subcontract by abandoning the job, failing to complete the work and by substandard performance which included the use of fill material that contained trash and muck and was rejected by the owner of the Florida National College Project. (Trial Trans. "T". 212-19). As a result of the increased costs to T&G for completion, repair and remediation of the work performed by Earth Trades, T&G alleged it incurred approximately $551,804.00 in damages. (R. 296-351). T&G brought a third party action against First Sealord Surety, Inc. (the "Surety"), as the performance and payment bond surety for Earth Trades. (R. 86-109; 296-351).

The Subcontract required Earth Trades to perform all site work which included the following: "all civil and site work" including, but not limited to, providing and installing all site and underground utilities work as described in the contract documents, providing all materials and work for water service, tie-ins for water service to an adjacent building, install storm drain lines, and other underground utility and excavation work. (R. 399-408; App. A). The work

required for the job was the same as the work described in section 489.105(2)(n), Florida Statutes, which requires a licensed "underground utility and excavation contractor". According to the Subcontract, Earth Trades was required to obtain all appropriate licenses for the scope of work as part of the contract obligations. (R. 1280-97;).

The Surety executed and issued the Subcontract Labor and Material Payment Bond and Performance Bond for the job. (R. 1298; 1299). Pursuant to the bonds, the Surety agreed to pay in full all claimants as defined in the bonds. (R. 396-413). Pursuant to the Payment and Performance Bond, the Surety was responsible to make payment to T&G for all sums recoverable under its contract with Earth Trades, Inc. for payments made to third parties, and for costs to complete and repair pursuant to the contract. (R. 396-413).

After T&G discovered Earth Trades was not licensed, T&G raised as a defense to Earth Trades' Subcontract claims that it was not licensed as an underground utilities contractor in Florida as required the scope of the work under the Subcontract. (R. 396-413). T&G alleged that Earth Trades' lack of a license rendered the Subcontract void pursuant to section 489.128, Florida Statutes. The Surety and Earth Trades replied that T&G knew it was dealing with an unlicensed contractor and was *in pari delicto*, citing *Castro v. Sangles,* 637 So. 2d 989 (Fla. 3d DCA 1994). (R. 467-469).

T&G moved for summary judgment as to all claims brought by Earth Trades and for all defenses upon which the Surety relied in defense of T&G's third party complaint against the Surety. (R. 481-88; 489-616). In support of the summary judgment motion, T&G provided record evidence that Earth Trades was required to carry an underground utility license for the scope of work on the project, but did not carry such a license. (R. 489-616). T&G provided evidence that at the time of the execution of the subcontract, through the date of the performance of the work by Earth Trades, was continuously unlicensed to perform the work required by the scope of the subcontract. (R. 489-616). Earth Trades' President, Todd Henderson, admitted Earth Trades did not hold any licenses at the time the work under the subcontract was performed. (R. 629-730). The Department of Business and Professional Regulation of the State of Florida, Construction Industry Licensing Board, also confirmed that no licenses were held by Earth Trades during the time period for the performance of the subcontract. (R. 625-27; 628; 679-730).

In response to the Motion for Summary Judgment, Earth Trades and Surety argued that T&G had knowledge that Earth Trades was not licensed and was "*in pari delicto* ". (R. 467-69). T&G replied that "*in pari delicto*" does not apply to this case because section 489.128, Florida Statutes, was amended in 2003 to eliminate this defense on behalf of the unlicensed party or its Surety. (R. 737-42).

The trial court granted summary judgment on the issue of whether T&G had prior knowledge that Earth Trades was unlicensed (R. 878-80). T&G separately moved for summary judgment on damages which was denied the case proceeded to trial on T&G's claims for breach of the subcontract and against the Surety on the payment and performance bonds. (R. 881-937).

At trial, T&G presented evidence that Earth Trades left the site when there was still a significant amount of contract work to be done. (T. 29-40; 83-106; 212-19). The general scope of the work was to prepare the site with compacted fill and install the underground utilities. (R. 1280-97). The site contained a significant amount of existing muck which required replacement fill to be compacted sufficiently to withstand the completion of the project which was to construct a three story parking garage. (T. 29-40; 212-18). The project engineer had required a compaction of the fill to 120 proctor and required a certain type of fill that would reach that compaction standard. (T. 35).

According to the evidence, Mr. Henderson brought several types of sample fill to the site and was unable to get any of them approved by the engineer because they did not have a sufficient proctor rating. (T. 35-40; 74-76). The engineer required Earth Trades to install the fill in lifts, and compacted in stages such that the engineer could test the compaction at designated points during the progress of the work. (T. 35-40; 74-76). Instead, Earth Trades performed a great deal of the fill

installation on a weekend installing several lifts without having the engineer approve the fill. (T. 212-18).

When T&G, the owner, and the engineer discovered the installation done by Earth Trades without inspection, they found the fill to be contaminated with construction debris, including actual garbage in black garbage bags. (T. 212-218). The owner's engineer required T&G remove all of the fill and further required T&G to excavate down to a level where he could be certain that all of the contaminated fill had been removed from the site. (T. 212-218). This included the removal of existing soil below where the fill was laid because of the introduction of trash by Earth Trades. (T. 212-18). To the extent this required removal of more dirt and muck than would have been required originally, T&G's witnesses testified that this was the only way they could decontaminate the site to the satisfaction of the owner's engineer and to accomplish the compaction which was necessary for the large structure. (T. 29-40; 212-18). At trial the evidence showed that Earth Trades abandoned the job after the contaminated fill was discovered, and never returned. (T. 90-91).

T&G, through its President and CFO, established the damages that T&G sustained as a result of Earth Trades' abandonment of the job and failure to complete the work by Earth Trades, and for the contamination by the trash laden fill and other problems created by Earth Trades on the job. (T. 83-106). Earth

Trades had failed to complete the storm pipe runs, storm utility installations, catch basins, control structures, French-drains, fire hydrants, tapping sleeves, valve alternates and fire lines to the building pads. (T. 36-37). The expense to T&G completely to re-clear and fill the site resulted in damages of over $200,000 in payments to Earth Trades' subsubcontractors and materialmen. (R.1133-1141) T&G also sustained damages as a result of hiring a replacement underground utility subcontractor. (R. 1133-1141). Also, T&G had to revise its contract with the owner of the project to absorb the costs to the owner up to that point. (T. 39; 212-18).

T&G requested judicial notice be taken the Internet website for the Surety, and Petitioners never opposed this request. (R. 867-77). On the website, the Surety represented that part of the service it provides to purchasers of performance and payment bonds, such as T&G, is that it provides the bond underwriting in which it confirms that the principal on the bond is appropriately licensed. (R. 867-77). The evidence showed, however, the Surety issued bonds, and performed underwriting on Earth Trades which had no license whatsoever. (R. 743-45). At no time did First Sealord provide any information, indication or disclosure to T&G that it was dealing with an unlicensed subcontractor. (T. 192-98).

The issue of what knowledge T&G had of Earth Trades' failure to hold a license was not tried below, and thus, the record does not have T&G's evidence that it had no knowledge of Earth Trades' lack of licensure.

To ensure the Court is not misguided in believe that T&G concedes it had any knowledge, a recitation of the evidence Petitioner's presented on the issue of knowledge is recited here to clarify what was, and was not presented below. In his affidavit, Mr. Henderson avers that he told T&G employees that he was in the process of getting his license at the time there were negotiations for the earlier ABC Jacksonville job which did not require a license and was demolition. (R. 743-45). Mr. Henderson *does not include any dates* for when he claims to have told T&G he was unlicensed and from the context of the affidavit it implies all of these conversations were part of the negotiations for the T&G project and not the Florida National College. Most telling is the last paragraph of Mr. Henderson's affidavit, which states as follows:

"9. AFFIANT provided T&G with a proposal for the FNC Project, and shortly thereafter, Affiant met with Rick Gonzales, President of T&G, during which Affiant made mention of the licensing status of Earth Trades." (R. 745).

For whatever reason, Mr. Henderson did not testify that he told Mr. Gonzales that Earth Trades was unlicensed. (R. 745). Instead, he "made mention of the licensing status." (R. 745). Additionally, Mr. Henderson testified that he had

applied for a general contractor's license and apparently has never applied for or held an underground utilities license. (T. 153). There is no evidence that T&G knew Earth Trades was unlicensed when it performed the work for T&G. The testimony at trial showed Earth Trades had installed none of the underground utility and there was still a substantial amount of fill to be installed and compacted (T. 29-40; 83-106).

SUMMARY OF ARGUMENT

The Final Judgment should be affirmed because the Fifth District properly determined that the doctrine of "*in pari delicto*" did not apply to this case since the 2003 amendment to section 489.128, Florida Statutes, made it clear the Florida Legislature did not intend this statute to apply to any party other than the unlicensed party. "*In pari delicto*" was used in considering an earlier version of section 489.128 which stated a non-offending party could not proceed under the contract at all if any party was unlicensed, and was left to pursue 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*". This is because the earlier version of section 489.128 rendered the contract void as to all parties. When the Florida Legislature amended the statute 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. In the present case, T&G brought contract claims against Earth Trades and its Surety.

The Surety is attempting to use its own failure to check its principal's licensing as a defensive weapon to prevent it from having to pay any claims made on its bonds. The amendment to section 489.128 also contemplated, and specifically prohibits such an attempt by the Surety. In fact, if the Surety prevailed, the result would actually encourage construction bond sureties to find and bond unlicensed principals, take the premiums, forego any underwriting, and never have to pay any claim. Such a result is polar opposite of the legislative intent expressed in the legislative history of section 489.128.

STANDARD OF REVIEW

The standard of review is de novo for rulings on motions for summary judgment. *See Landis v. Allstate Insurance Co.*, 546 So. 2d 1051 (Fla. 1989).

ARGUMENT

POINT I: THE FIFTH DISTRICT PROPERLY EXCLUDED THE DEFENSE OF "*IN PARI DELICTO*" BECAUSE NO EQUITABLE RELIEF WAS SOUGHT BY APPELLEE AND THE 2003 AMENDMENT TO SECTION 489.128, FLORIDA STATUTES, ELIMINATED THE APPLICATION OF THIS EQUITABLE DEFENSE

A. 2003 AMENDMENT CLEARLY EXPRESSES LEGISLATIVE INTENT

Section 489.128, Florida Statutes (2004) renders void a contract only against an unlicensed contractor so "*in pari delicto*" does not apply. There is no dispute

Earth Trades was an unlicensed subcontractor. The Surety bonded Earth Trades by issuing Payment and Performance Bonds assuring the timely, proper and complete performance by Earth Trades. Earth Trades' claims were invalid and Petitioners do not dispute this. The Surety stands in the same shoes as its principal. *See C. A. Oakes Construction Co., Inc. v. Ajax Paving Industries*, 652 So.2d 914 (Fla. 2d DCA 1995). Petitioners do not dispute this either. This is not some unforeseen unfortunate event for the Surety. The Surety marketed for sale the underwriting, investigation and review process of its principal Subcontractor, including making sure that the Subcontractor had the licenses it needed to perform the work.

The Surety acknowledged that it had reviewed the subcontract agreement, including the scope of the work, and wrote bonds insuring the performance. Instead of acknowledging its responsibility for the failure of its principal to perform, the Surety argues to the Court that it should be exonerated because it represented its principal was bonded, when, in fact, it was not.

Petitioners argue that 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, Florida Statutes, does not so provide and the Florida Legislature has made it clear the contract is "unenforceable in law or in equity by the unlicensed contractor." An earlier version of the statute

made the contract unenforceable as to both parties, and the Florida legislature charged that.

Because the subcontract was entered into in December 2004, the 2004 version of section 489.128 applies. It should be noted Petitioners make reference to Respondent's webpage which was not in the record. *See Initial Brief* at p. 2, footnote 1. In the Fifth District, Petitioners did not contest entry of summary judgment against Earth Trades on its claims, but argued that they should be able to defend against T&G's breach of contract and bond claims with an "*in pari delicto*" defense. Specifically, they rely on *John Hancock-Gannon Joint Venture II v. McNully*, 800 So.2d 294 (Fla. 3d DCA 2001) and *Castro v. Sangles*, 637 So.2d 989 (Fla. 3d DCA 1994). Neither of these cases apply because they construed a pre-2004 version of section 489.128 which materially varied the statute's application.

In *Castro*, the Third District construed the 1991 version of section 489.128. This earlier version of the statute rendered void a contract as to all parties if any party failed to have the appropriate license. In 1991, section 489.128 provided:

> "**489.128 Contracts performed by unlicensed contractors unenforceable.** - 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 his license in accordance with this part shall be unenforceable in law, and the court in its discretion may extend this provision to equitable remedies. However, in the event the contractor obtains or reinstates his license the provisions of this section shall no longer apply."

Under the prior version of section 489.128, a residential owner argued the application of the statute against him was unfair because it automatically declared the subcontract "unenforceable in law" as to both parties, and claimed an equitable remedy. *Castro, at 989-92*. Mr. Castro's request for equitable relief was necessary in 1991 because he had no legal right to enforce the contract. *Id.* at 989-9. The 3d DCA examined the homeowner's claim for equitable relief to determine if the trial court was correct in denying it. Because the contract was deemed completely void at law, it was appropriate for the Court to exercise its discretion to decide whether equitable relief could be given the homeowner. The Third District surmised that equitable relief might be available to an owner who had "unclean hands", but not to one who was *"in pari delicto"* with the unlicensed contractor. The *Castro* court held the homeowner 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. In so doing, the Third District held the unlicensed contractor cannot even "interpose defenses which are clearly prohibited by statute." *Id.* at 296. McNully, the contractor, attempted to use the contract as a weapon to wield defenses to the owner's statutory claims under section 553.84, Florida Statutes, (cause of action for building code violations) and section 768.0425(2) (owner recovery for injuries sustained resulting from contractor's negligence). *Id.* at 296-

98. The Third District concluded the unlicensed contractor should not be able to use the contract in its defense since it was declared void.

Petitioners rely heavily on *Kvaerner Construction, Inc. v. American Safety Casualty Insurance Co.*, 847 So.2d 534 (Fla. 5th DCA 2003) which was also decided under a prior version of section 489.128. *Kvaerner* cannot serve as a basis for conflict jurisdiction in the Court as this also is a case from the Fifth District. Additionally, a review of the facts and applicable version of section 489.128 show why the Fifth District properly disregarded it. In 1999, section 489.128 provided:

> "**489.128 Contracts performed by unlicensed contractors unenforceable**. – 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. However, in the event the contractor obtains or reinstates his or her license, the provisions of this section shall no longer apply."

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."

The new statute passed after the publication of *Castro, John Hancock* and *Kvaerner*.

The 1999 version of section 489.128, which applied in *Kvaerner*, continued to render the contract "unenforceable in law or in equity" as to all parties. Thus, if the work called for under the contract required a license, it was unenforceable in

law and equity. Under this old version of the statute, Kvaerner, the contractor, could not enforce its contract with the unlicensed subcontractor. The *Kvaerner* opinion addressed the record evidence surrounding the issue of whether the contract required the subcontractor to have a license. The equitable argument, made under the prior statute, was whether the contractor actively participated in selecting and using an unlicensed subcontractor and was therefore *"in pari delicto"* with the subcontractor which had no license. The Fifth District in *Kvaerner* 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 relevant to the earlier version of section 489.128 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 2003 version of section 489.128 does not render the contract unenforceable as to any party other than the unlicensed contractor.

To the extent Petitioners argue the result reached by the Fifth District unduly encourages contractors to select unlicensed subcontractors to save money or for other unexplained reasons, the facts of this case support and demonstrate the exact opposite conclusion. Earth Trades and its Surety represented that Earth Trades held an underground utility license, which is defined by section 489.105(n), Florida Statutes, and Earth Trades would be qualified to pull the necessary

underground utility permits and complete the work in accordance with the Subcontract.

In this case, the project included the complete excavation, dewatering, fill and compaction of replacement material, and installation of the underground utilities. The underground installation requires a permit to be pulled by a licensed contractor. When Earth Trades got to that part of the job that required the installation of the underground utilities, it abandoned the job and defaulted. T&G was forced to hire a replacement subcontractor and incur all of the expenses which were the subject of the trial. This does not suggest a model for encouragement of contracting with unlicensed contractors.

Additionally, the record reveals the Surety fully reviewed, approved and endorsed the subcontract prior to its issuance of the performance and payment bonds. Unlike *Kvaerner* where it was debatable whether the contract required a license to be performed, the defined scope of work in the Earth Trades Subcontract clearly fell within the confines of section 489.105(n), Florida Statutes. Petitioners have not argued that either of them had uncertainty about whether a license was required.

Petitioners argue the 2003 Amendment was "remedial in nature" and enacted "to clarify existing law." Indeed, both of these statements are completely consistent with the Fifth District's opinion here. The statutory amendment was

"remedial" to the extent the statute no longer voids the contract rights of the parties who are not the ones unlicensed. The Florida Legislative unequivocally established that "this section shall not affect the rights of parties other than the unlicensed contractor to enforce contract lien or bond remedies." The 2003 amendment came after *Kvaerner* was published. There is no dispute the 2003 version did not apply to the *Kvaerner* decision.

Boatwright Construction, LLC v. Tarr, 958 So.2d 1071 (Fla. 5th DCA 2007) is cited by Petitioners in support of their argument, however, they neglect to point out that the contract at issue there was entered into as October 23, 2000 and thus a pre-2003 version of the Statute applied. *Id.* at 1072; *See Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA 2004). (Section 489.128 applies prospectively to contracts as of the date of execution.) The opinion reflects no argument was brought to the 5th District to review and determine the propriety of an "i*n pari delicto*" argument. The Court ruled the contract was void because of the failure to get a license.

Petitioners contend that without the application of "in pari delicto," section 489.128 is void as against public policy. Preliminarily, this overlooks the fact that the statute itself is an expression of public policy. *See Fla. Stat. §489.128* (the legislation expressly states it is a matter of public policy). When section 489.128 was amended in 2003 it would have been a simple matter for the Florida

Legislature to include language that the contract was void as to a another party who had knowledge of the absence of the appropriate construction license. In fact, the legislature moved in the other direction by amending the statute such that it was no longer void as to the other party and had the effect of rendering void 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 filled the site with trash. Since T&G had no other subcontractor available to pull the permits for the underground utility work, it is unclear why these facts present a scenario of encouraging contractors to hire and maintain unlicensed subcontractors. Under the present facts, T&G was forced to find and retain a replacement subcontractor who was licensed to complete the work, and bore the expense of the additional costs for doing so.

Petitioners also cite to *Austin Building Co. v. Rago, Ltd.*, 63 So. 3d 31 (Fla. 3d DCA 2011), which refers to *Castro* in footnote 2. This case presented to the Third District from a summary judgment entered against the general contractor in favor of the subcontractor and its surety based upon the argument that the *general contractor was not licensed. Id.* The Third District reversed finding there were issues of fact precluding summary judgment because the timing of the assignment of the general contractor to this appellant may have been subject to the savings

clause in the 2009 amendment to section 489.128. *Id.* at 33-34. On the cross appeal of summary judgment entered against the subcontractor, the court reversed as well, finding there were factual issues as to the status of the subcontractor's qualifying agent, which influenced the legal decision of whether the subcontractor was licensed or not. *Id.* In the dicta the court included in footnote 2, reference was made to *Castro,* however, it does not appear from the opinion that either party argued that the holding in *Castro* was eliminated by the 2004 amendment to the statute.

B. THE LEGISLATIVE HISTORY OF 489.128 DEMONSTRATES THE ELIMINATION OF 'IN PARI DELICTO' APPLICATION TO THE UNLICENSED CONTRACTOR AND ITS SURETY

Petitioners reference an unreported case of the Middle District as having the influence on the Florida Legislature in making the 2003 amendment, citing to *L. Leiby, Florida Construction Law Manual §2:2. See John B. Goodman Limited Partnership v. THF Construction, Inc.,* Case No. 8:01-cv-2406-T-26MAP, *rev.* 321 F. 3d 1094 (11th Cir. 2003). This argument instead makes the case for the Respondent on the reason and purpose for the statutory amendment. In *THF,* the Middle District was asked to determine the effect of the arbitration clause contained in the general contract. The court decided the general contract was void because it was undisputed the general contractor had hired an unlicensed subcontractor to perform steel work on the project. If this case was part of the

impetus for the change in the statute, the different result which would have occurred with the 2003 Amendment would be that *THF*, the general contractor, would have been able to enforce its contract rights under the general contract. The legislature did not amend the statute to exempt out contractors who know of the non-licensure or are somehow complicit with the lack of license.

Additionally, and most importantly, Mr. Leiby agrees with Respondent's position that the effect of the *Kvaerner* case on the legislature was to "[make it] clear that a surety may not take advantage of the principal not being licensed." *Leiby, 2:2, p.* 41. As indicated above, Respondent agrees that the *Kvaerner* case has no further application after 2003 Amendment, which was a clear sign from the legislature that sureties should not profit from the lack of its principal having a license.

Petitioners contend that the 2003 Amendment is not intended to change the common law, and that the "in pari delicto" defense remains because the statute does not say otherwise, relying on *Essex Insurance Co. v. Zota,* 985 So. 2d 1036 (Fla. 2008) and *Thornber v. City of Ft. Walton Beach,* 568 So. 2d 914 , 918 (Fla. 1990). Yet, Petitioners' argument contorts the plain language of the statute, and discredits its own basis for this argument, i.e. the legislature is presumed to know the existing law when a statute is enacted. *See Crescent Miami Center, LLC v. Fla. Dept. of Revenue,* 903 So. 2d 913, 918 (Fla. 2005). In the 2003 Amendment, the

legislature changed section 489.128 *such that it only applied to the unlicensed party.* Therefore, the statute renders invalid only to the unlicensed party, and to conclude otherwise is to remove the amendment in its entirety and go back to applying the earlier iteration of the statute. Petitioners' syllogism is that the legislature intended the statute to render void only those contracts of unlicensed parties *except when the other party is complicit with the unlicensed party.* If *Kvaerner* is the basis for the change as Petitioners suggest, the facts of that case point to the legislative knowledge that unclamping the application of section 489.128 such that it would cease to apply to the licensed party. In *Kvearner,* the general contractor *escorted the subcontractor* to the permitting authority to discuss whether and to what extent a license was required, and subsequently engaged the subcontractor which was later determined to be unlicensed. Under these circumstances, the legislature did not negate the general contractor's rights, and instead excised all of the invalidation to it as the licensed party.

Poole & Kent Co. v. Gusi Erickson Const. Co., 759 So. 2d 2 (Fla. 2d DCA 1999) dealt with the Second District's affirmance of a private arbitration award in favor of the subcontractor whose licensure was challenged. The issue in *Poole & Kent* was 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).* In *Poole & Kent*, the qualifier for the business failed to have his license placed at the time of signing the contract but did place his license a couple of months after execution. There is no indication in the opinion whether the work actually began before the license was placed. *Id.* The 1995 version of section 489.128 provided:

> 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 his license in accordance with this part shall be unenforceable in law or in equity. *However, in the event the contractor obtains or reinstates his licenses, the provisions of this section shall no longer apply.* (emphasis added)

Therefore, the issue before the 2d DCA in *Poole & Kent* was whether there was a basis for overturning the arbitration award against the subcontractor which became licensed during the job and had fully performed the work. The earlier version of the statute contained the savings clause which addressed the scenario in which a license error was cured during the work.

In the present case, the 1995 version of the statute does not apply. Even if it did, there was no dispute that Earth Trades did not have an underground utilities license, and never subsequently acquired one. Earth Trades verified in the subcontract that it was duly licensed, and maintained a website indicating it was licensed to perform underground utilities work. The Surety agreed to bond the

work after performing the due diligence and underwriting on the contract. All of these facts and circumstances greatly distinguish *Poole & Kent* from this case.

Petitioners' contention that there is an "open door for abuse" if the Fifth District's opinion is affirmed is entirely incorrect. The "abuse" portended is the encouraged use of an unlicensed contractor by another party, be that an owner, general contractor or subcontractor. However, an examination of the likely outcomes totally belies this assertion. In the present case, Respondent required the Subcontractor maintain all necessary licenses with express language in the contract, and in the guarantees by the Surety when it issued the Performance and Payment Bonds. Notwithstanding this, Respondent learned later that the Subcontractor and the Surety had misrepresented this fact, causing Respondent massive damages in having to repair and remediate the site abandoned by the Subcontractor. When Earth Trades abandoned when it did, Respondent was faced with the portion of the underground utilities work which required the underground permit be pulled, and no one to pull it.

If an owner engages an unlicensed contractor, and either knows or comes to know that there is a lack of licensure by the contractor, the owner risks the work halted, "red tagged" and ordered to be removed. *See Fla. Stat. §125.56(4).* If a subcontractor engages an unlicensed subsubcontractor, even though that fact no longer automatically invalidates the subcontract as to the subcontractor, it would

face the same remediation hurdles the Respondent had in this case. The potential is then present for the "complicit party" to have to remove and re-install the work of the unlicensed party, accelerate the work at greater cost, hire replacement contractors at even more expense. If the licensed work requires a permit, as most construction work does, the permit application generally requires the demonstration of the appropriate license which would thwart the attempt to use unlicensed contractors at all.

Citation to *MGM Construction Services Corp. v. Travelers Cas. & Surety Co. of America,* 57 So. 3d 884, 889 (Fla. 3d DCA 2011) by Petitioners is not supportive of their arguments either. The Third District decided a case in which the trial court had granted summary judgment against a subcontractor because it failed to have a local Miami-Dade County license for installation of drywall and stucco. As the Third District concluded, the trial court apparently overlooked the 2009 amendment to section 489.128 which excluded the application of the statute to local licenses, and which amendment was retroactive such that it applied to the subcontract at issue. The Third District made passing reference to whether the other parties had knowledge of the lack of licensure, although no party seemed to have argued this issue, and the reference had no bearing on the legal issue of whether the lack of "local license" had any application under the amended form of

section 489.128. Thus, this opinion does not conflict with the Fifth District's Opinion at all and was decided on different facts and legal issues.

Petitioners next argue that section 489.128 should have no effect as to actions by unlicensed parties seeking to recover from a licensed member of the same profession. The only Florida law cited in support of this contention is *MGM* which in turn relies entirely upon non-Florida cases, many of which well pre-date the enactment of section 489.128, and none of which discuss the statute. In *Dow v. United States for the benefit of Holley,* 154 F. 2d 707, 710-11 (10th Cir. 1946), the 10th Circuit reviewed a 1943 Utah statute which made it illegal to work as a contractor without a license. The opinion is less than clear on the facts but it appears that the licensed contractor finished the work of the unlicensed subcontractor, calling into question whether the subcontractor actually needed a license, or could have worked under the general contractor's license. In any event, the opinion has no application to this case in which the specialty trade of underground utility installation was needed, and not afforded by Earth Trades, necessitating Respondent to acquire replacement underground utility contractors to perform the work. The remaining cases cited by Petitioner on this point are equally distinguishable for the same reason. *See Costello v. Schmidlin*, 404 F.2d 87 (3d Cir. 1968)(engineers consulting with license in New York but not New Jersey); *Edmonds v. Fehler & Feinauer Construction Co., Inc.,* 252 F. 2d 639 (6th Cir.

1958)(Kentucky real estate sales manager not barred from bringing suit against employer as a "regular employee" under the Kentucky statute); *Kennoy v. Graves,* 300 S.W. 2d 568 (Ky. 1957)(consulting engineer in privity with another engineer); *Alcoa Concrete & Masonry, Inc. v . Stalker Bros., Inc.* 191 Md. App. 596, 993 A.2d 136 (Md. Spec. App. 2010)(Maryland statute only voided payment if the subcontractor was unlicensed at the time of payment, and not at the time of contracting and performance); *Christenberry Trucking & Farm, Inc. v. F&M Marketing Services, Inc.,* 329 S.W. 3d 452 (Tn. 2010)(49 U.S.C. s. 13102(2) does not prohibit recovery for a broker without a license).

Respondent agrees that the general public was protected in this case- because the Respondent and Owner could look to the Performance and Payment Bonds in the event of a default by its principal, the Subcontractor. The fact that Earth Trades and its Surety both held this Subcontractor out as qualified to perform the site and underground utility work is the distinguishing point. Respondent did not ultimately pull the permit, and did not undertake the underground utility work. The parties did not share a common trade and skill. The new theory of Petitioners that section 489.128 should not apply to similar trades has never been previously argued, was not preserved below, and for good reason, because the facts do not support such a theory.

POINT II: THE SURETY AND SUBCONTRACTOR PRESENTED ALL OF THE DEFENSES TO RESPONDENT'S SUBCONTRACT CLAIM EXCEPT *IN PARI DELICTO*

The Surety argues that there is a separate "fraud" issue that should have been part of the trial issues. Curiously, the alleged fraud espoused by the Surety is purportedly between Respondent and the Surety's co-Petitioner, Earth Trades. None of the cases cited by the Surety support this argument. A review of the cases cited, and other Florida law, supports an affirmance of the trial court. Petitioners jointly argue that T&G somehow "fraudulently" convinced them that Earth Trades was licensed when in fact it was not. It should be noted that Earth Trades did not plead any fraud as an affirmative defense. (R. 259-61; 266-72) At the trial court, Petitioners counsel did not argue this as a separate issue from *in pari delicto* but even if it had been argued, it would have not be sustainable. (T. 1250-77).

Petitioners first rely on *Kvaerner* in support of this point. It is important to note that in *Kvaerner* the parties seemed to be confused about whether a license was required, and if so, what kind of license was needed. That is not the case here. Instead, the issue is whether Earth Trades perpetrated a fraud on its own Surety. Whether Earth Trades did, or did not, perpetrate such a fraud on the Surety does not affect the Surety's liability to Respondent, according to the holding of *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Robuck,* 203 So. 2d 204 (Fla. 1st DCA 1967). In *Robuck*, the 1st DCA held the principal's fraud on its own

surety did not vitiate the surety's responsibility to the claimants under the payment bond. This holding supports the conclusion reached by the trial court in this case.

Petitioners made no such separate fraud contention in the trial court, i.e. that Earth Trades had perpetrated a fraud on the Surety, and it is difficult to understand how Petitioners' counsel could ethically represent them both if such an allegation been made.

POINT III: PETITIONERS WERE ENTITLED, AND DID DEFEND, ON ALL REMAINING ISSUES PLED

Petitioners claim in Point III that they were prevented from arguing any defenses at trial except to contest damages. A review of the trial transcript reveals that the trial court did not restrict the evidence in any other way other than according to the allegations of *in pari delicto,* i.e. alleging that Respondent knew Earth Trades was unlicensed when it signed the Subcontract. The trial court received all manner of evidence from Petitioners on all of the remaining defenses. Petitioners did *not* challenge the trial court's ruling that Earth Trades could not go forward on its affirmative claim, that it was properly licensed, or that somehow section 489.128 did not apply to Earth Trades. The only issue which did not go to trial is whether Respondent was "*in pari delicto,*" and if there is a remand ordered this would be the only remaining issue.

Although the Surety contends that its rights have been cut off in error, the Fifth District followed the unambiguous language of section 489.128 which

specifically addresses the bar to a surety using the lack of licensure as a defense to a contractor's claim on the contract. *Fla. Stat. §489.128(3).* It is difficult to conceive of more precise language which the legislature could have used than what it did: "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." *Id.*

The 1933 decision of the Court in *Powell v. Beatty*, 110 Fla. 3, 147 So. 845 (Fla. 1933) is unavailing because the Florida legislature has established the public policy of the State and done so with clarity and direction that has superseded the holding in *Powell* that the extinguishment of the principal's obligation also extinguishes the surety's. Further, the Court held that the surety may not rely on a defense of the incompetency of the supposed principal in any event.

The Surety contends that sureties in Florida will be abused if claimants to a bond may claim the lack of licensure and declare a default. However, it is the surety industry which exists to guarantee the performance of the work by its principal and it is difficult to conceive of such an industry setting on a course of insuring principals without investigating the license. In fact, as the Surety advertised, it is the very service of determining that all of the appropriate licenses are held which justifies the payment of the premium, purchasing the bonds, and drives the construction surety bond market in the first place.

Additionally, there is not a denial of access to the courts as is suggested, relying upon *Kluger v. White,* 281 So. 2d 1 (Fla. 1973). The Surety brought no affirmative claims and has not cited to any that it would have brought but for the rulings of the trial court. No cause of action has been denied to the Surety.

CONCLUSION

For all of the reasons stated herein, the Court should affirm the Final Judgment and the decision of the Fifth District. Alternatively, the Court should decline to accept jurisdiction because Petitioners failed to demonstrate a direct and express conflict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished via U.S. Mail this _____ day of December, 2011 to John J. Shahady, B.C.S, Thomas R. Shahady, Esq. and Christopher Jallo, Esq., 200 S.W. 1st Avenue, Suite 1200, Ft. Lauderdale, FL 33301.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Respondent's Answer Brief on the Merits complies with the requirements of Rule 9.210, Fla. R. App. P., and is printed in Times New Roman 14-point font.

Kimberly A. Ashby, Esquire
Florida Bar Number: 322881
AKERMAN SENTERFITT
Post Office Box 231
255 South Orange Avenue
Orlando, FL 32802-0231
Phone: (407) 843-7860
Fax: (407) 843-6610
Email: kashby@akerman.com
Attorneys for Respondent