IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

TAYLOR MORRISON SERVICES, INC., f/k/a MORRISON HOMES, INC., a foreign profit corporation,

Appellant,

Case No. 1D14-2663

vs.

CAROL ECOS and SUSAN BESSING,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT IN
AND FOR DUVAL COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

STATEMENT OF THE CASE AND OF THE FACTS

Introduction

Taylor Morrison Services, Inc., appeals a final judgment in favor of Carol Ecos and Susan Bessing in this construction defect case. Taylor Morrison is a large-scale developer and homebuilder. In early 2004 during the housing boom, Ecos and Bessing contracted with Taylor Morrison to purchase a completed home. Taylor Morrison was to build the home on a lot that it owned.

On the date of the contract, Taylor Morrison employed a number of licensed contractors who served as its qualifying agents in Florida. A qualifying agent is a licensed contractor whose affiliation with a construction company permits the business organization to engage in contracting. § 489.119(3)(a), Fla. Stat. (2003). As defined by statute, the qualifying agent is a person with the requisite knowledge, skill, and experience to supervise, direct, manage, and control the contracting activities of the business organization and the responsibility to supervise, direct, manage, and control an entity's construction activities. § 489.105(4), (5), Fla. Stat. (2003). Taylor Morrison's qualifying agents supervised its homebuilding operations, including the construction of this home.

Unhappy with their home, Ecos and Bessing filed this lawsuit in 2009 alleging construction defects. The parties ultimately stipulated to an amount of damages to correct the defects. But in addition to those stipulated damages, Ecos

and Bessing sought treble damages and attorneys' fees based on their theory that Taylor Morrison was acting as an unlicensed contractor when it built the home.

Under section 489.128(1), Florida Statutes (2003), a business organization like Taylor Morrison is an unlicensed contractor only "if the business does not have a primary or secondary qualifying agent in accordance with this part concerning the scope of work to be performed under the contract" on the effective date of the contract. It was undisputed that on February 13, 2004, the effective date of this contract, Taylor Morrison had numerous qualifying agents. In fact, Taylor Morrison had a qualifying agent, Douglas Guy, a licensed contractor who signed the contract and was responsible for the construction of the house.

Despite that undisputed evidence, the trial court ruled that Taylor Morrison was an unlicensed contractor and liable for treble damages and fees. The trial court based its ruling on the argument made by Ecos and Bessing that Taylor Morrison was "unlicensed" because the person who signed the permit application for the home (1) was no longer employed with Taylor Morrison and did not authorize the use of her name or license for this new construction; and (2) did not provide direct, onsite supervision over the construction, nor did any other licensed contractor.

The trial court erred as a matter of law. Under the plain language of section 489.128(1), Taylor Morrison was a licensed contractor. Ecos and Bessing's complaints about permitting and supervision did not change the fact that Taylor

Morrison met the statutory test for a licensed contractor because it had qualifying agents on the date of the contract. Such post-contract complaints, meritorious or not, do not retroactively transform a licensed contractor into an unlicensed one and support an award of three times the amount of any construction defect damages. No court has ever approved such a ruling. The trial court erred when it imposed new requirements for licensing that are not in the statute.

The trial court's ruling is also irreconcilable with another statute that precluded a finding that Taylor Morrison was unlicensed. Under section 489.105(6), an entity like Taylor Morrison that is selling a completed home situated on its own property is not engaged in contracting so long as it retains the services of a qualified certified contractor to construct the house. Again, Taylor Morrison undisputedly had licensed, qualified contractors, including one with specific responsibility for the construction of this house.

The judgment is not only at odds with the controlling Florida statutes, it is also potentially devastating to Florida's recovering residential construction industry. If affirmed, the trial court's reasoning could transform virtually any standard construction defect case into an unlicensed contractor case. Homebuilders would be exposed to treble damages and attorneys' fees if the homeowner could simply point to perceived irregularities in the construction process. The judgment should be reversed.

Ecos and Bessing contract with Taylor Morrison to buy a completed home on a lot owned by Taylor Morrison.

Taylor Morrison is a large-scale developer and builder that builds homes across the state of Florida and in many other states. R17:3414; T42-45. In 2004, the year of the events giving rise to this lawsuit, Taylor Morrison and its affiliates closed on over 6,500 homes across the country. R17:3414. That same year, Taylor Morrison closed on as many as 125 homes in Jacksonville, where the home at issue is located. R3:587.

To meet housing demand, Taylor Morrison employs multiple licensed contractors who serve as its qualifying agents and supervise its homebuilding operations. R27:5260. Those licensed contractors supervise Taylor Morrison employees and superintendents who are onsite daily during construction, and perform weekly site visits themselves. T47-50. Taylor Morrison does not actually construct all of the different parts of a home. R4:658-60. Instead, it handles the hiring and oversight of various subcontractors who provide the materials and services necessary. R4:658-60.

On February 13, 2004, plaintiffs Ecos and Bessing entered into an agreement for Taylor Morrison to sell them a completed home on a piece of real property in Jacksonville that Taylor Morrison owned. R24:4848; R25:4965; R26:5239-59. Under the terms of that contract, Taylor Morrison would build the home before the

sale, then sell it upon completion to Ecos and Bessing for $334,204. R24:4848; R26:5239-59.

Taylor Morrison builds the Ecos and Bessing home with the oversight of a licensed general contractor.

Douglas Guy signed the contract on behalf of Taylor Morrison. R26:5239-59. Guy was a certified building contractor and a qualifying agent for Taylor Morrison. R3:470; R25:4983; R27:5260. Taylor Morrison had at least two other qualifying agents at that time, Michael Storey and Marek Bakun. R3:470, R27:5260. A fourth licensed contractor, Maria Steiner, had resigned her employment with Taylor Morrison in mid-January 2004, a couple of weeks before this contract was signed. But she remained a qualifying agent for Taylor Morrison with the Department of Business and Professional Regulation (DBPR) for another two years, until 2006. R3:470; R5:942; R27:5260.

Before she resigned in January 2004, Steiner had acted as a qualifying agent for Taylor Morrison in the Jacksonville area. R5:901, 916, 922-25. In that capacity, Steiner often signed blank permit applications at her office in Maitland and sent them to the Jacksonville division to be filled out by employees there. R5:929; T451-55. Steiner explained this was a "common practice in the industry" because companies like Taylor Morrison employ permit expediters who gather all of the information required by the municipality and submit the previously signed application. R5:929-30; T451-55.

When Steiner resigned, she told Taylor Morrison that they could continue to use her as a qualifying agent as necessary to transition any ongoing construction to a new qualifier. R5:943. But Steiner also told two employees at Taylor Morrison that she did not want the company to use her license to pull any new permits after she left. R5:905. Despite that, when the permit application for the Ecos and Bessing home was submitted dated April 30, 2004, it was signed by Steiner as "licensed contractor" and Guy (in his capacity with Taylor Morrison) as "owner or agent." R3:513; R27:5343. When Steiner learned about the permit application years later in this lawsuit, she was unable to say for sure whether she had signed this specific application in blank before she left Taylor Morrison. R5:931-32; R33:450-51. She acknowledged it was possible she had. R5:931-32; R33:450-51.

The building permit for the Ecos and Bessing home was issued in June 2004. R27:5343. Between then and December 2004, Taylor Morrison oversaw the construction of the home. R25:4982-86, 5009-10. Guy acknowledged that he and Taylor Morrison's other qualifying agents were responsible for the construction of this home, and Guy was the qualifying agent with specific oversight and responsibility for this construction project. R4:612-14, 680; R25:4982-86, 5009-10. At that time, he was also the president of Taylor Morrison's Jacksonville division. R3:585.

The structure at Taylor Morrison for construction operations started with "builders" or "superintendents" who were onsite daily and did everything from scheduling, to ordering materials, to quality control. R3:586; R26:4987-90. The builders reported directly to the vice president of construction, in this case Charles Dennis, who was onsite almost daily to identify any construction issues. R25:4989-90. Dennis then reported any issues directly to Guy. R25:4989-90.

In addition to conferring regularly with Dennis, Guy would visit each construction site weekly to check on the homes under construction. R4:617. He would walk through the homes to follow up on issues that a superintendent or vice president might have reported to him and to look for defects and safety issues. R4:617. Although Guy might have missed a week of site visits from time to time due to vacations or sick days, it was part of his regular weekly routine to visit each home site—including the Ecos and Bessing site. R4:692; R26:5062-63. He also routinely conferred with Dennis about issues involving the homes in this subdivision, and specifically about the Ecos and Bessing home. R25:4989-92.

During the course of construction, Ecos and Bessing complained about some of the timing and workmanship. R6:1198-1200. Dennis and Guy, as well as other Taylor Morrison employees, worked with Ecos and Bessing to try to resolve those issues. R26:4993-97, 5059-66. In light of Ecos and Bessing's complaints, just before closing Guy offered in writing to release Ecos and Bessing from their

contract and return their deposits in full. R8:1475; R32:310. But by that point, the home had increased in value. R6:1200; R32:310. Knowing that there was equity in the home and that Taylor Morrison provided a two-year blanket warranty on construction and a ten-year structural warranty, Ecos and Bessing rejected that offer and closed on the home on December 27, 2004. R24:4848; R32:310.

After closing, Taylor Morrison tries to repair construction defects identified by Ecos and Bessing, but Ecos and Bessing order all remedial work to stop and file suit.

After the sale, Ecos and Bessing reported certain construction issues to Taylor Morrison and sought repair under the terms of the warranty. R1:1-12. Taylor Morrison was able to resolve many of Ecos and Bessing's complaints. R1:1-12. But issues consisting primarily of defectively installed stucco and missing hurricane rods remained. R1:1-12.

Taylor Morrison continued its efforts to repair the construction defects until Ecos and Bessing ordered it to stop. R10:1855-57, 1923. Two years later, Ecos and Bessing sued Taylor Morrison. R1:1-12. They alleged claims for breach of contract, fraud, disgorgement, negligence by an unlicensed contractor, violation of the Florida Building Code, and violation of Florida Deceptive and Unfair Trade Practices Act (FDUTPA) R1:1-12. The FDUTPA and fraud claims were dismissed before trial and are not involved in this appeal. R16:3195-96. The parties ultimately stipulated that the home had certain construction defects and that Taylor

Morrison would pay compensatory damages of $200,000 for the defects. R24:4847-48.

The trial court rules that despite having three or more qualifying agents on the date of the contract, Taylor Morrison was an unlicensed contractor when it built Ecos and Bessing's home.

The main dispute throughout this litigation—and the primary issue on appeal—is Ecos and Bessing's theory that Taylor Morrison was an unlicensed contractor. Ecos and Bessing took this position even though the DBPR records showed that Taylor Morrison had at least three qualifying agents at the time the contract was executed and that a licensed contractor oversaw all of its Jacksonville construction, including the construction of this home.

Early in the litigation, Taylor Morrison sought partial summary judgment on this point. R1:183-88. Taylor Morrison argued that under the plain language of section 489.128(1), it could not be deemed an unlicensed contractor unless it had no primary or secondary qualifying agent for the scope of the work to be performed on the date the contract was executed. R1:183-88. The DBPR's undisputed records showed that Taylor Morrison had four qualifying agents who were licensed contractors on the date it entered into the contract with Ecos and Bessing. R27:5260. Based on that undisputed fact, Taylor Morrison argued that it could not possibly be deemed an unlicensed contractor under section 489.128(1). R1:183-88; R3:469-74.

In further support of its summary judgment motion, Taylor Morrison provided the affidavit of Guy. R1:189-92. Guy confirmed he was a licensed contractor and primary qualifying agent for Taylor Morrison on the date the contract was signed. R1:189-92. He also stated that in addition to being kept informed of the construction process by subordinates, he made "frequent trips" to the job site to personally observe and inspect the house. R1:189-92.

Ecos and Bessing filed a competing motion for partial summary judgment on the unlicensed contactor issue. R3:507-12. They argued that Taylor Morrison was an unlicensed contractor because it submitted a post-dated permit application from Steiner after she no longer worked for Taylor Morrison and after she told Taylor Morrison not to apply for new permits under her name as a qualifying agent. Ecos and Bessing also pointed out that as she was no longer employed by Taylor Morrison, Steiner did not personally supervise, direct, manage, and control the construction under that permit. R3:508. According to Ecos and Bessing, because Steiner was named as the licensed contractor on the building permit, only Steiner could be Taylor Morrison's qualifying agent for this house, and Steiner had to personally supervise its construction. R3:511-12. And if she did not, Ecos and Bessing asserted, then Taylor Morrison had to be deemed "unlicensed." R3:511-12.

The trial court sided with Ecos and Bessing. R13:2482-85. It denied Taylor Morrison's motion for partial summary judgment and granted Ecos and Bessing's. The trial court stated summarily: "The Court finds as a matter of fact and law that [Taylor Morrison] was an unlicensed contractor[.]" R13:2482-85.

Taylor Morrison moved for reconsideration. R13:2567-89. It relied on the plain language of section 489.128(1). It also argued that under section 489.105(6), business entities like Taylor Morrison that sell completed residences on their own property are not engaged in "contracting" and therefore cannot be deemed unlicensed contractors. R13:2572-73 (referred to as the "developer's exception" to contracting). The trial court denied reconsideration, but permitted Taylor Morrison to amend its affirmative defenses to add this defense. R13:2590-2600; R15:3065-73; R16:3177.

Ecos and Bessing then moved for summary judgment on the affirmative defense Taylor Morrison had added. R19:3851-53. They argued that although Taylor Morrison may have sold the completed house, it was also engaged in contracting because it agreed to build the Ecos and Bessing home. R19:3851-53. The trial court denied Ecos and Bessing's motion. R23:4583.

Following these pretrial rulings and the parties' stipulations, a bench trial was held on the limited issue of whether Taylor Morrison's actions fell within the "developer's exception" to contracting in section 489.105(6). The trial court also

entertained additional argument and evidence on the issue of whether Taylor Morrison was unlicensed under section 489.128(1).

After trial, the trial court issued a final judgment. The trial court did not mention Taylor Morrison's licensing status as of the *contract* date. R26:5236-38. Instead, it found Taylor Morrison "acted as an unlicensed contractor *when it constructed* [Ecos and Bessing's] house." R26:5236-38 (emphasis added). The trial court recited two reasons for its ruling: (1) that Taylor Morrison "through person or persons unknown, applied for and obtained a building permit as the contractor of [Ecos and Bessing's] house by providing to the City of Jacksonville the name and license number of a licensed contractor who no longer worked for [Taylor Morrison], and made the application without that licensed contractor's knowledge or permission"; and (2) that Taylor Morrison "built Plaintiffs' house without the direction, supervision, management, and control of the licensed contractor on the building permit or any other licensed contractor." R26:5236-38. Based on these findings, the court trebled the stipulated compensatory damages of $200,000 and awarded Ecos and Bessing attorneys' fees. R26:5236-38.

SUMMARY OF THE ARGUMENT

Florida law has a straightforward and precise rule in section 489.128(1) to determine when a construction entity is unlicensed. Under that statute, such an entity is unlicensed *only* if it does not have a qualifying agent on the date of the contract for the work to be performed. In this case, the undisputed evidence showed that Taylor Morrison had multiple qualifying agents on the date of its contract with Ecos and Bessing, all of whom were certified to perform residential construction. Under the plain terms of the statute, Taylor Morrison was not an unlicensed contractor.

The trial court failed to follow the statute or apply its simple, bright-line test when it found Taylor Morrison was an unlicensed contractor. To reach this result, the trial court ruled that proper permitting and adequate supervision are prerequisites for licensing, even though neither is found in section 489.128(1). And to compound its error, the trial court overlooked the one and only date on which licensing status is determined—the date of the contract.

Permitting and supervision have nothing to do with whether an entity is properly *licensed*. These requirements are not in the unlicensed contracting statute. The trial court's addition of these requirements is not only unprecedented, it directly conflicts with section 489.128(1)(c). Under section 489.128(1)(c), the determination of whether a contractor is unlicensed must be made on the date of

the contract. But the new requirements the trial court imposed involved matters that did not arise until *after* the determinative date, the day the contract was signed.

No Florida case has held that issues such as improper permitting or inadequate supervision that arise during the construction process—and not on the date of the contract—can cause a licensed contractor to become unlicensed. The trial court's unwarranted and dramatic expansion of the unlicensed contractor statute poses potentially far-reaching problems for the Florida construction industry as well as unnecessary complications in litigation involving ordinary construction defect disputes. Under the trial court's ruling, a contractor who met the requirements of the licensing statute and *is* licensed can later be treated as "unlicensed" if the dissatisfied homeowner can point to an error in permitting, a perceived lack of adequate supervision, or perhaps other violations of construction codes, rules, or statutes. With the inducement of treble damages plus fees, there will be a strong motivation for homeowners and their lawyers to treat garden-variety construction defect cases as unlicensed contracting cases. This result is neither intended nor permitted under the plain language of section 489.128(1).

Alternatively, the trial court erred when it failed to apply section 489.105(6) to the undisputed facts in this case. Section 489.105(6) states that an entity is not engaged in "contracting" if it sells a completed home on property that it owns, as long as the entity retains the services of a qualified contractor to build the home.

That was precisely the situation presented here. Taylor Morrison undisputedly sold Ecos and Bessing a completed home on property owned by Taylor Morrison. Taylor Morrison also employed a qualified contractor, Douglas Guy, to construct the home. As such, the unlicensed contracting provisions did not apply to the contract Taylor Morrison and Ecos and Bessing made, which was to sell a completed home. The ruling that Taylor Morrison was an unlicensed contractor when it built this home should be reversed.

STANDARD OF REVIEW

This appeal challenges the trial court's interpretation of sections 489.128(1) and 489.105(6) and their application to certain undisputed material facts. Issues of statutory interpretation are reviewed *de novo*. See Alachua Cnty. Sch. Bd. v. Office of the State of Fla., Chief Fin. Officer for the Dep't of Fin. Servs., Div. of Worker's Comp., 138 So. 3d 480, 482 (Fla. 1st DCA 2014) ("We review statutory interpretation issues *de novo* and interpret unambiguous statutes according to their plain and obvious meaning."). Similarly, when the law has been applied to undisputed facts, the standard of review is *de novo*. See Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010); see also Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956) ("A finding which rests on conclusions drawn from undisputed evidence . . . does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion.").

ARGUMENT

I. The trial court erred when it ruled Taylor Morrison was an unlicensed contractor.

A business entity like Taylor Morrison is a licensed contractor under section 489.128(1) if it has a qualifying agent on the date it enters into the construction contract for the scope of the work to be performed. In this case, the undisputed evidence showed that Taylor Morrison had a qualifying agent on the date of the contract to build the Ecos and Bessing home. For that reason, Taylor Morrison was a licensed contractor. See Lake Eola Builders, LLC v. Metro. at Lake Eola, LLC, 416 F. Supp. 2d 1316, 1319 (M.D. Fla. 2006) ("Thus, to determine whether LEB may enforce its contract with Metropolitan, the Court must decide whether LEB should be considered 'licensed' as of [the contract date]—and, more particularly, whether LEB had a primary or secondary qualifying agent in accordance with Chapter 489 as of that date."). The trial court's ruling to the contrary cannot be squared with section 489.128(1). It is erroneous as a matter of law and should be reversed.

Despite the plain language of section 489.128(1), the trial court concluded Taylor Morrison was unlicensed. It did so based on factors not found in the statute. According to the trial court, Taylor Morrison was unlicensed because of improper permitting and inadequate construction supervision. But issues involving permitting and supervision arise during the construction process, and not

on the date of the contract. And neither permitting nor supervision are factors to be considered under the unlicensed contracting statute. The trial court erred when it relied on these factors to hold Taylor Morrison was unlicensed.

A. Taylor Morrison was a licensed contractor under the plain language of section 489.128.

Section 489.128(1)(a) defines unlicensed contracting. It provides:

> For purposes of this section, an individual is unlicensed if the individual does not have a license required by this part concerning the scope of the work to be performed under the contract. *A business organization is unlicensed if the business organization does not have a primary or secondary qualifying agent in accordance with this part concerning the scope of the work to be performed under the contract*.

(Emphasis added.) The above definition of an unlicensed contractor focuses entirely on the licensing process itself: Does the individual contractor have a license for the type of work to be performed? Does the business entity have a primary or qualifying agent for the type of work to be performed? If so, the contractor is licensed.

In addition, section 489.128(1)(c) states that the determination of whether a contractor is licensed for a specific construction project must be made on one dispositive date, the date of the contract. The statute provides that an individual or entity is considered unlicensed "*only if*" that individual or entity was unlicensed on

"the effective date of the original contract for the work" or "the date the last party to the contract executed it[.]"[1] (emphasis added).

Taking both sections of the statute together, whether an entity is licensed under section 489.128 turns on the answers to three simple questions. What is the date of the contract? Did the entity have one or more qualifying agents on that date? Were any of the qualifying agents licensed for the work to be performed under the contract? If the answer to either of the last two questions is "no" on the date of the contract, the entity was unlicensed. If the answer to both of the last two questions is "yes" on the date of the contract, then the entity was licensed.

In this case, the parties agreed that for purposes of this statute, the appropriate date was February 13, 2004, the date the last party signed the contract. R26:5239; R24:4848. It is undisputed that on that date, Taylor Morrison had *four* qualifying agents on record with the DBPR. R27:5260. All four were licensed to construct two-story residences like the Ecos and Bessing home. See R27:5260; § 489.105(3)(b), (c).[2]

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[1] Section 489.128(1)(c) also provides that when a contract is undated, the date for licensure determination is the date labor, services, or materials are first furnished. But here the parties stipulated to the applicable contract date, so this additional provision is not implicated.

[2] Two of Taylor Morrison's qualifying agents were certified building contractors and two were certified residential contractors. R27:5260. Individuals holding either certification are qualified to build single-family residences. See § 489.105(3)(b), (c).

That Taylor Morrison had four qualifying agents on the date of the contract for the scope of the work it would perform under the contract is dispositive.[3] Taylor Morrison was licensed as a matter of Florida law. The trial court's ruling that Taylor Morrison was an unlicensed contractor should be reversed.

The legislature has not imposed any other qualifications, restrictions, factors, or conditions affecting a construction entity's licensure status other than having a qualifying agent on the contract date for the type of work to be performed. There are other statutes that define and regulate the *duties* of *licensed* contractors and qualifying agents, and impose penalties on *licensed* contractors who violate those duties. See, e.g., § 489.119 (describing duties of individuals and entities engaged in contracting); § 489.1195, Fla. Stat. (2003) (defining responsibilities of qualifying agents); § 489.127, Fla. Stat. (2003) (providing civil and criminal penalties for prohibited acts); § 489.129, Fla. Stat. (2003) (allowing Construction Industry Licensing Board to sanction licensed contractor or entity for certain practices). But none of these provisions address the question of whether an individual or entity is unlicensed in the first place. Only section 489.128—under

[3] Even if Steiner (the qualifying agent who had recently left the employment of Taylor Morrison) is excluded from this list, Taylor Morrison still had three other qualifying agents. R27:5260. But there is also no legal basis to exclude Steiner from the list. By statute, a qualifying agent must notify the DBPR when she no longer wishes to qualify an entity. See § 489.119(3)(a). Steiner remained a qualifying agent for Taylor Morrison until 2006, when she informed the DBPR that she would no longer act in that capacity.

which Taylor Morrison *was* a licensed contractor—does that. The trial court erred when it declined to follow section 489.128 and imposed new, unheralded requirements. Taylor Morrison was licensed.

B. The trial court's unlicensed-contractor ruling hinges on facts involving permitting and supervision, which are irrelevant to licensing requirements in section 489.128.

As noted, the trial court concluded Taylor Morrison was unlicensed for two reasons that are not related to the requirements of section 489.128. According to the trial court, Taylor Morrison was unlicensed because:

> (1) Taylor Morrison "through person or persons unknown, applied for and obtained a building permit as the contractor of [Ecos and Bessing's] house by providing to the City of Jacksonville the name and license number of a licensed contractor who no longer worked for [Taylor Morrison], and made the application without that licensed contractor's knowledge or permission"; and
>
> (2) Taylor Morrison "built Plaintiffs' house without the direction, supervision, management, and control of the licensed contractor on the building permit or any other licensed contractor."

R26:5236-38.

As explained, these findings do not support the trial court's ruling on unlicensed contracting. Under section 489.128, proper permitting and adequate supervision are *not* prerequisites to licensing, or factors used to determine whether an entity is unlicensed. Nor could they be. The statute specifically states that licensing is determined as of the date of the contract. Permitting and supervision

occur on dates other than the contract date. The consideration of such matters contravenes the plain language of the statute.

Here, the trial court's unlicensed-contractor ruling erroneously confuses the parts of chapter 489 that deal with the *duties* of licensed contractors with section 489.128, the *only* section that details the very narrow situation in which a contractor is deemed *unlicensed*. For example, Ecos and Bessing argued that Taylor Morrison was unlicensed because Steiner, a qualifying agent and licensed contractor, pulled the permit for the construction but did not personally supervise the construction of the home. According to Ecos and Bessing, the definition of "qualifying agent" in section 489.105(4) means that a contractor like Taylor Morrison is not *licensed* for a particular construction project unless the qualifying agent who obtained the building permit also personally and directly supervises all of the construction. R33:549. The trial court appears to have been persuaded by this argument. R29:5736-38.

But the trial court misapprehended the controlling statute. It is true that section 489.105(4) defines a primary qualifying agent as a person with requisite skill, knowledge, and experience who has "the responsibility to supervise, direct, manage, and control the contracting activities of the business organization with which he or she is connected" and "the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the

building permit." See also § 489.1195(1)(a) ("All primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job.").[4] But nothing in chapter 489 states that if a primary qualifying agent fails or falls short in providing supervision, direction, management, or control of a job for which she pulled a permit, the business entity can then be deemed "unlicensed"—much less that this result would follow when the business entity has multiple other primary qualifying agents that have responsibility for the same job.

Similarly, section 489.119(6)(a) requires that a "registered or certified contractor shall affix the number of his or her registration or certification to each application for a building permit and on each building permit issued and recorded." But chapter 489 does not state that the failure to do this, or any other anomaly in the permitting process, amounts to unlicensed contracting.[5]

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[4] The difference between a primary and secondary qualifying agent is that a secondary qualifying agent is responsible for supervision only on projects for which he or she pulls the permit, while a primary qualifying agent is responsible for supervising all of an entity's projects, regardless of whether he or she pulls the permit. See § 489.105(4), (5). Taylor Morrison only had primary qualifying agents, so all of its qualifiers were responsible for all of its projects. R26:5168-69.

[5] It is important to note that the record shows that Ecos and Bessing filed a complaint with the DBPR regarding the permit application process for their house. R32:307-08. The DBPR found no probable cause. R27:5265.

The issues the trial court focused on in this case (improper permitting and lack of supervision) are not factors for licensing under section 489.128. Instead they are infractions that may lead to specific penalties for *licensed* contractors—penalties that are often imposed through the Construction Industry Licensing Board (CILB). Specifically, section 489.129 permits the CILB to discipline a contractor by placing the licensee on probation, suspending or revoking the license, requiring restitution, or imposing a fine. None of these sanctions would be available if the contractor were not a *licensee*. And the statute specifically permits discipline of a licensed contractor for the types of misconduct alleged in this case: Allowing "his or her certificate or registration to be used by one or more business organizations without having any active participation in the operations, management, or control of such business organizations," "[c]ommitting mismanagement or misconduct in the practice of contracting that causes financial harm to a customer," and "[c]ommitting incompetency or misconduct in the practice of contracting." § 489.129(1)(e), (g), (m). By statute, these sorts of improprieties are penalized with sanctions. They are not penalized by deeming the licensee "unlicensed."

Section 489.129 also provides for sanctions against business organizations and persons associated with business organizations when the licensed contractor being sanctioned is a qualifying agent. See § 489.129(2). In fact, the CILB has

revoked the licenses of qualifying agents who fail to supervise construction projects and those revocations have been upheld by appellate courts. See Hunt v. Dep't of Prof'l Regulation, 444 So. 2d 997 (Fla. 1st DCA 1983); Alles v. Dep't of Prof'l Regulation, 423 So. 2d 624 (Fla. 5th DCA 1982). But *no* case in Florida has ever ruled that an individual or entity was *unlicensed* due to improper permitting or a lack of supervision.

In the trial court, Ecos and Bessing relied on Boatwright Construction, LLC v. Tarr, 958 So. 2d 1071 (Fla. 5th DCA 2007), to support their argument that lack of supervision during construction of their home required a finding that Taylor Morrison was unlicensed. R33:557-59. But Boatwright supports reversal, not affirmance. In that case, the Fifth District's conclusion that Boatwright was not a licensed contractor had nothing to do with the qualifying agent's supervision, or lack thereof. Id. at 1072. Rather, Boatwright was unlicensed under section 489.128 because—unlike Taylor Morrison—it *had no qualifying agent at the time it entered into the contract*. Id. Boatwright did not even attempt to get a qualifier until the month *after* it entered into the construction contract. Id. For that reason, the Fifth District held that "pursuant to section 489.128, Florida Statutes (2000), the initial contract between Boatwright and GMRI was unenforceable because Boatwright was not a licensed contractor." Id. at 1074. This conclusion was correct and followed the requirements of section 489.128(1). Boatwright was not

deemed unlicensed because of problems with permitting, supervision, or any other issues arising after the contract was executed and construction was underway.[6] Again, unlike Boatwright, Taylor Morrison undisputedly had qualifying agents when it entered into the contract with Ecos and Bessing.

C. The trial court's unlicensed-contractor ruling directly conflicts with section 489.128(1)(c) because it focuses on dates other than the date of the contract.

The trial court's ruling in this case was erroneous for the additional reason that it directly conflicts with section 489.128(1)(c). This subsection provides that the determination of whether an individual or business entity is an unlicensed contractor is based "only" on whether it was unlicensed on a specific date—here, the date the last party signed the contract. In this case, the trial court failed to focus on the specific date required by the statute, February 13, 2004. Instead its unlicensed-contractor ruling was based on circumstances that arose well after the date of the contract: the date the permit was applied for (April 30, 2004), and the

[6] The Boatwright court did analyze supervision on the project, but only in the context of determining the validity of the contract between the construction entity and the person it untimely retained to be its qualifying agent. See id. at 1073. The court concluded the contract between the construction entity and the qualifying agent was unenforceable—*not* the contract between the construction entity and the owner—because the qualifying agent's contract "did not contemplate" that the qualifying agent would actually perform the statutorily-required duties, including the "legal obligation to supervise the field work." Id. But supervision, or the lack thereof, played no part in the court's unlicensed-contractor analysis. As shown, the unlicensed-contractor analysis hinged entirely on the fact that the entity had *no qualifier* when it entered into the construction contract.

date the permit was issued (June 7, 2004). The ruling also erroneously focused on the dates the project was supervised, which took place for at least the next six months. The trial court's ruling and judgment never mention the one date that is determinative of licensing status under the statute, the contract date of February 13, 2004.

Ultimately, the trial court's ruling reaches an unworkable and unintended result. It holds that a homebuilder can be both licensed to build homes and unlicensed to build homes at the same time. The final judgment states that Taylor Morrison "*acted as* an unlicensed contractor *when it constructed* Plaintiffs' house." R26:5236-38. It is this very language, which focuses on Taylor Morrison's *actions when it constructed* the house rather than focusing on Taylor Morrison's *status as of the contract date*, that most plainly signals the trial court's error. Under the trial court's reasoning, Taylor Morrison could be retroactively considered unlicensed for building the home in this case but licensed for building another home, *even under a virtually identical contract entered into on the same day*, so long as no issues involving permitting or supervision arose during the construction of the other home. No statute or case law supports such a result.

Left uncorrected, the trial court's ruling and the rationale behind it will have far-reaching and potentially disastrous effects never intended by the legislature. Any case involving construction defects could become an unlicensed contractor

case requiring treble damages and attorneys' fees if the plaintiff alleges inadequate supervision, a defect in the permitting process, or some other construction shortcoming.

For example and as shown, unrefuted evidence in this case showed that Taylor Morrison had a licensed contractor, Guy, who supervised the construction of this home. Guy not only supervised and conferred with construction professionals who were at the job site every day, he also paid weekly visits to the job site himself to see the progress of the construction, check for any problems or defects, and confer about any construction issues that had arisen. R4:617; R25:4991. Ecos and Bessing could point to no law that requires a qualifier or contractor like Guy to be onsite every day or to carry out specific tasks to comply with his general responsibility to supervise construction. In fact, the trial court heard expert testimony that given the number of permits pulled in 2004 when this home was built (255,893) versus the number of licensed contractors (22,800), it would have been impossible for every home to have the type of direct and daily onsite supervision by a licensed contractor that Ecos and Bessing claimed was required. R26:5143-45. Despite that, the trial judge sided with Ecos and Bessing. It ruled that Taylor Morrison's level of supervision was insufficient and the company was therefore unlicensed.

Under the trial court's interpretation, the legislature's simple "yes or no" test for licensing on the date of the contract is discarded in favor of an analysis that would vest circuit courts with the power to determine licensing on a project-by-project basis. Whether a contractor is unlicensed for each construction project will hinge on each court's subjective view of whether supervision was adequate or whether errors in permitting (or perhaps the overall construction process) were serious enough to deem the contractor "unlicensed" in hindsight. Indeed, taken to its logical conclusion, the trial court's ruling would not only require a project-by-project analysis, but virtually a day-by-day one for each project. In the real world, levels of supervision may change during the course of a single construction project. The ruling here makes it possible for a construction entity to be considered licensed one day, but unlicensed the next should a qualifying agent miss a phase of construction for something as benign as a vacation or personal or medical emergency. Neither the law nor common sense supports such a result.

No other case has been cited or found that permits trial judges to impose their own opinions on what level of construction supervision is necessary for a contractor who is "licensed" to become "unlicensed." Claims that contractors are unlicensed due to lack of supervision will abound if this case is not reversed, as there are not enough licensed contractors to ensure that a qualifying agent is constantly onsite as Ecos and Bessing contended was necessary. Even in minor

construction defect cases, licensed contractors and homebuilders alike will be left to guess exactly how much supervision is adequate to avoid being labeled "unlicensed" and left with an unenforceable contract or hit with treble damages and attorneys' fees. Left uncorrected, this ruling will drastically increase the costs of construction and significantly delay the completion of projects, if it does not dissuade construction companies from taking on such projects in the first place.

In short, the trial court's unlicensed-contract ruling overlooks the plain language of section 489.128(1). It imposes extra-statutory licensing requirements on contractors that are both unsupported by the law and unworkable in the real world. Taylor Morrison was licensed because it had the required qualifying agents for the scope of the contract on the date the contract was signed. That should be the end of this appeal.

II. The trial court erred when it ruled that Taylor Morrison was engaged in "contracting."

At trial, Taylor Morrison argued in the alternative that it could not be held liable as an unlicensed contractor because the statutory definition of "contracting" does not apply to what Taylor Morrison did in this case: Selling a completed home on property it owned. The trial court's judgment does not address this valid defense.

Section 489.105(6) defines "contracting." It expressly excludes from that term circumstances in which an entity sells a completed residence on property that it owns. The statute states:

> However, the term "contracting" shall not extend to an individual, partnership, corporation, trust, or other legal entity *that offers to sell or sells completed residences on property on which the individual or business entity has any legal or equitable interest,* if the services of a qualified contractor certified or registered pursuant to the requirements of this chapter have been or will be retained for the purpose of constructing such residences.

§ 489.105(6) (emphasis added).

In this case, the parties stipulated that Taylor Morrison owned an equitable interest in the property at the time it entered into the contract with Ecos and Bessing and was the owner of the property on the date it sold them the completed residence. R24:4848; R25:4965. The parties also stipulated that Guy was employed by Taylor Morrison from September 16, 2003 (well before the February 2004 contract date), until May 11, 2007 (well after the home was completed and sold), and that he was a "duly licensed Certified Building Contractor throughout his employment." R24:4849. The latter, which was confirmed by DBPR records, satisfies the definition of "certified contractor" or "registered contractor." See R27:5260; § 489.105(8) (defining "certified contractor" as "any contractor who possesses a certificate of competency issued by the department and who shall be allowed to contract in any jurisdiction in the state without being required to fulfill

the competency requirements of that jurisdiction"); § 489.105(10) (defining "registered contractor" as "any contractor who has registered with the department pursuant to fulfilling the competency requirements in the jurisdiction for which the registration is issued"). As shown, Guy's testimony that he was in charge of Taylor Morrison's operations in the Jacksonville area and oversaw the construction of this home was undisputed. R25:4982-90.

The plain language of section 489.105(6) controls. Taylor Morrison sold a completed residence on land that it owned. It retained the services of a qualified contractor to construct the home. Under these circumstances, Taylor Morrison was not engaged in "contracting" at all, which means it could not be liable for "unlicensed contracting."

Ecos and Bessing argued below that section 489.105(6) applies only when a property owner retains a third-party entity or another individual not associated with the owner to sign the permit application, enter into subcontracts, and complete the construction. R33:562-64. But no authority has been cited by Ecos and Bessing or found by the undersigned to support that argument. The language of the statute itself refutes it. The judgment that Taylor Morrison was an unlicensed contractor when it built the Ecos and Bessing home should be reversed.

CONCLUSION

Undisputed evidence showed that Taylor Morrison was a licensed contractor under section 489.128(1). The final judgment that ruled Taylor Morrison was unlicensed should be reversed.

Respectfully submitted,

s/ J. Carlton Mitchell

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 2014, the Appellant's Initial Brief was e-Filed with the Court's eDCA, which will send a copy to:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I HEREBY CERTIFY that Appellant's Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2). Appellant's Initial Brief has been prepared using Times New Roman, 14-point font.

s/ J. Carlton Mitchell
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