

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DCA Case No.: 1D14-2663
L.T. No.: 16-2009-CA-011183

TAYLOR MORRISON SERVICES, INC. f/k/a
MORRISON HOMES, INC.,

Appellant,

vs.

CAROL ECOS and SUSAN BESSING;

Appellees.

Appeal From A Final Judgment of The Circuit Court,
Fourth Judicial Circuit, in and for Duval County

APPELLEES' ANSWER BRIEF

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INTRODUCTION

References to the trial transcripts will be in the form of “(R ___T __/___),” referring to the transcript page/line. References to deposition transcripts will be in the form of “(R __:__, ll. __),” referring to the deposition line. All other references to the Record on Appeal will be in the form “(R __: __)”.

STATEMENT OF THE CASE

1. The Parties agreed to submit to a non-jury trial for “the Court to render a final judgment on Count IV of Plaintiffs’ Complaint after a review of all of the evidence.” (R 25:4847.)

2. Thereafter, the trial court held a two-day bench trial on Count IV of the complaint against Appellant (hereinafter “Morrison Homes”), which was a claim for negligence by an unlicensed contractor pursuant to section 768.0425, Florida Statutes, and Morrison Homes’ affirmative defense that it was not required to be licensed in order to construct the home. (R 26:5236.)

3. Prior to trial, the Parties stipulated that Morrison Homes was negligent in the construction of Appellees’ home and that Appellees (hereinafter collectively “Ecos”) were damaged by Morrison Homes’ negligence in the amount of \$200,000.00. (R 26:5236.)

4. Therefore, the only issue at trial was whether Morrison Homes was unlicensed as to the construction of the Ecos house and, if so, whether Morrison

Homes was required to be licensed as to the construction of the Ecos house. (R 26:5236.)

5. Ecos argued that Morrison Homes was unlicensed as to the construction of the Ecos house because the building permit was fraudulent, the licensed individual, Lisa Steiner, listed on the building permit did not work at Morrison Homes at the time the permit was submitted and that neither she nor any other licensed individual supervised, directed, managed or controlled the construction of the Ecos house. (R 30, T 18/14-22.)

6. Morrison Homes claimed at trial that its employee, Douglas Guy, was responsible for supervising the construction of the Ecos house. (R 30, T 22/1-23/13.)

7. After weighing the evidence submitted at trial, the trial court rejected Morrison Homes' claim and entered a final judgment making the following findings of fact and conclusions of law:

3. Defendant was the contractor of Plaintiffs['] house and under Florida law was required to be licensed.

4. In order to be licensed for the construction of Plaintiffs' house, Defendant had to have a primary or secondary qualifying agent who was charged with directing, supervising, managing, and controlling the construction of Plaintiffs' house.

5. Defendant was required to have the licensed individual who was charged with directing, supervising, managing and controlling the construction of Plaintiffs' house pull the building permit.

6. Defendant, through person or persons unknown, applied for and fraudulently obtained a building permit as the contractor of Plaintiffs' house by providing to the City of Jacksonville the name

and license number of a licensed contractor who did not work for Defendant, and made the application without that licensed contractor's permission.

7. Additionally, Defendant built Plaintiffs' house without the direction, supervision, management, and control of the licensed contractor listed on the building permit or any other licensed contractor.

8. Therefore, Defendant acted as an unlicensed contractor when it constructed Plaintiffs' house.

(R 26:5236-37.)

STATEMENT OF THE FACTS

1. Effective February 7, 2004, Ecos and Morrison Homes entered into a contract in which Morrison Homes agreed to construct and sell Ecos a home in the Bartram Springs subdivision in Duval County, Florida for \$341,000.00. (R 26:5239.)

2. Morrison Homes was the contractor for the construction as evidenced by the following:

a. The building permit application completed by Morrison Homes recites that Morrison Homes was the contractor. (R 28:5538.)

b. The Right-of-Way Permit Application completed by Morrison Homes recites that Morrison Homes was the contractor. (R 29:5703.)

c. The form of the subcontractor agreement prepared by Morrison Homes recites that Morrison Homes was the general contractor. (R 29:5704.)

d. Morrison homes admitted in its answer that it "constructed the

house.” (R 3:5749.)

3. Morrison Homes’ employee, Douglas Guy, signed the purchase and sale agreement on behalf of Morrison Homes as the Seller, and in his affidavit admitted he did so “in [his] capacity as its Operations Manager.” (R 27:5268.)

4. As Operations Manager (also referred to as vice president of operations) Mr. Guy was not responsible for supervising the construction of any houses that were being built. (R 3:585, ll. 14-17; 3:586, ll. 5-8.)¹ Instead, he was only responsible “for the profitability of the division in Jacksonville.” (R 3:585, ll. 11-13.)

5. Additionally, Mr. Guy was not listed with the DBPR as a qualifying agent for Morrison Homes on the effective date of the Contract (February 7, 2004); he was not listed as such until February 9, 2004. (R 27:5239; R 30, T, 44/16-21.)

6. On February 7, 2004, Morrison Homes was relying on the certification number of M. Lisa Steiner—a former Morrison Homes employee who had terminated her employment two weeks prior, on January 23, 2014—to qualify it as a contractor for the construction of the Ecos house. (R 27:5339; 28:5538; 29:5570, 5702.)

¹ Mr. Guy’s deposition was admitted into evidence at trial at R 27:5293-5338. Due to the difficulty of reading those pages as scanned into the record, however, for ease of review, Appellees cite to another portion of the record where Mr. Guy’s deposition was also filed.

7. However, as sworn to in her affidavit, Ms. Steiner told Morrison Homes upon her resignation that it “could no longer use me as a Secondary Qualifying Agent.” (R 27:5339.)

8. She testified in her deposition, “as a courtesy I left my license with [Morrison Homes] so that they could complete some things that were under construction.” (R 5:905, ll. 3-7.)²

9. She testified that she left her license registered with Morrison Homes because she wanted them to be able to continue construction without her:

A. I left it active because they had hundreds of homes under construction when I left. And at the time, they did not have a qualifier ready to take over that –that position.... If I had pulled my license the day I left, [Morrison Homes] would have been stranded.

(R 5:905, ll. 10-19.)

10. Even as late as April 30, 2004, when Morrison Homes applied for the building permit for the Ecos house, Douglas Guy did not sign the building permit application as a contractor. He signed it as agent of the owner in his capacity as vice president of operations. (R 28:5538.)

11. Morrison Homes certified in the building permit application that all of the information in the application was “accurate and that all work will be done in

² Ms. Steiner’s deposition was admitted into evidence at trial at R 27:5370-5387. Due to the difficulty of reading those pages as scanned into the record, however, for ease of review, Appellees cite to another portion of the record where Ms. Steiner’s deposition was also filed.

compliance with all applicable laws regulating construction...” (R 28:5538.)

12. Despite that affirmation, Morrison Homes used Ms. Steiner’s certification number and forged her signature on the application to represent to the City of Jacksonville that Morrison Homes was a licensed contractor although Ms. Steiner had terminated her employment with Morrison Homes three months earlier. (R 27:5340; 28:5538.)

13. Further, although it appears on the application that Ms. Steiner signed this document in front of a notary on April 30, 2004, Ms. Steiner swore in her affidavit that she did not sign the building permit application and does not know the notary who notarized her signature for the building permit application. (R 27:5340.)

14. Ms. Steiner swore in that affidavit that “I did not authorize anyone to use my construction license in order to apply for this” building permit. (R 27:5340.)

15. Ms. Steiner swore in that affidavit, “I never constructed or supervised the construction of the [Ecos] house... and I have never been to that address.” (R 27:5340.)

16. Ms. Steiner swore that, not only was the Ecos building permit application fraudulent, but also twelve other building permit applications, submitted to the City of Jacksonville after she resigned, wrongly recited that she

was the qualifying agent for Morrison Homes. (R 27:5340-41.)

17. Even when Ms. Steiner was employed for Morrison Homes, she testified in her deposition that she did not work in Jacksonville:

A. I worked for the Orlando division. What Jacksonville did, I have really no knowledge. It was a whole different purchasing person...— and group up there. I have no knowledge of what they purchased up there”

(R 5:917, ll. 20-25.)

18. Despite the fact that she worked in Orlando and had no knowledge of the Jacksonville division, she testified in her deposition that she agreed to qualify Morrison Homes in Jacksonville because they needed to “obtain some permits. They started a new division up there. They needed to obtain some permits, and they needed to use my license.” (R 5:921, ll. 17-20.)

19. During her employment, her only level of supervision for any construction for which Morrison Homes used her certification number in Duval County consisted of “some drive-bys through some of the neighborhoods.” (R 5:960, ll. 12-16.)

20. She never supervised any construction in Bartram Springs. (R 5:916, ll. 22-25.)

21. Mr. Guy confirmed in his deposition “Lisa Steiner was never in the Jacksonville division.” (R 4:617, ll. 17-18.)

22. Despite that, Charles Dennis, Morrison Homes’ vice president of

construction in Jacksonville in 2004, testified that Ms. Steiner was the licensed contractor for the construction of the Ecos house. (R 30, T. 131/24-132/4.)

23. On September 17, 2004, Mr. Guy wrote to Ms. Ecos introducing himself as “the Operations Manager for the Jacksonville Division.” In accordance with that role, he did not refer to himself as the contractor for the Ecos house or indicate he had any supervisory responsibility for the construction of the Ecos house. (R 27:5388.)

24. That is because he still did not have any responsibility for supervising any construction for Morrison Homes:

Q. While you were the vice president of operations in Jacksonville, did you do any direct supervisory work over the construction of the residential houses?

A. No.

(R 3:586, ll. 5-8.)

25. In December of 2004, Douglas Guy became the division president of the Jacksonville division of Morrison Homes. (R 27:5267.)

26. At that time, the construction was almost complete as Morrison Homes sold the house to Ecos on December 27, 2004. (R 27:5291.)

27. Mr. Guy admits that Morrison Homes did not contract with him to build the Ecos house. (R 30, T. 104/3-5.)

28. Mr. Guy admitted he did not actually supervise any construction for

Morrison Homes as the division president:

Q. And did you do any direct supervisory work over any residential houses in the Jacksonville area while you were division president?

A. No.

(R 3:586, ll. 20-23.)

29. When shown a map of the Bartram Springs development, Mr. Guy admitted he did not supervise any construction within the development:

Q. In looking at Exhibit Number 4, can you specifically identify any other house on here that you had any direct supervision of the construction?

A. I've never had any direct supervision of any construction.

(R 4:685, ll. 12-16.)

30. Instead, approximately forty employees answered to him, and his duties included control of employee management, the construction personnel and the organization of five or six large-scale residential developments, including Bartram Springs, for Morrison Homes. (R 30, T. 79/9-20; 83/14-18.)

31. In 2004 alone, Morrison Homes built and closed approximately 125 houses in five to six subdivisions in Jacksonville (R 3:587, ll. 12 - 588, ll. 9.), none of which were supervised by Mr. Guy:

Q. Of those 125 houses – and I understand that's an estimate – how many of those houses did you do direct supervisory work over?

A. None.

(R 3:589, ll. 10-13.)

32. Outside subcontractors performed the actual construction. (R 30, T. 52/2-5.)

33. Unlicensed subcontractors, such as the framer, were required to be supervised by Morrison Homes. (R 30, T. 95/13-21.)

34. Mr. Guy had no personal recollection of the construction of the Ecos house. (R 4:619, ll. 2-5.) A review of Morrison Homes' construction file shows not a single document reflecting that Mr. Guy ever conducted any on-site inspections at the Ecos house. Therefore, he could only testify as to Morrison Homes' business practices generally.

35. Mr. Guy testified that once he became division president it was Morrison Homes' business practice and his usual course of dealing to visit a house under construction once a week. Mr. Guy's explanation as to his practice as to the level of his supervision for any construction was that:

A. My level of supervision would have been, we were required as part of policy to walk homes weekly. So my level of supervision would have been, if there were questions – well, first of all, on top of just site visits, it would have been any issues that either the superintendent brought to the VP and the VP brought to me, or anything in particular on top of what I was looking for when I walked the homes, *in terms of cleanliness, you know, overall presentation, things of that nature*. So, I mean, that's my level of supervision when it comes to walking the sites weekly.

(R 4:689, ll. 9-19.)(emphasis added).

36. He testified that on average this visit would only last, “a couple minutes a house, five minutes a house maybe, something like that.” (R 30, T. 86/24-25; 87/4-7.)

37. Due to this lack of supervision, Mr. Guy admits that he missed entire phases of the construction:

A. ...if visiting weekly, I may entirely miss that phase [the installation of hurricane tie rods]. For example, if a home gets inspected on a Friday and I’m out there on a Wednesday, and it gets covered up by insulation and drywall, by the time I come out on Wednesday, I may never know. I wouldn’t visually be able to see that.

(R 4:690, ll. 24-691, ll. 3.)

Q. ... if you did your visits once a week and they were pretty regular, isn’t it possible that there were certain times between your visits that structural work was done in that house and got covered up and you didn’t get to see it to inspect it?

A. Yes.

(R 30, T. 93/9-15.)

38. Instead of supervising the construction, Mr. Guy was removed from the actual construction by five levels due to Morrison Homes’ business structure as follows: (1) a vice president of construction reported to Mr. Guy; (2) several area managers reported to the vice president of construction; (3) the builders reported to an area manager; (4) assistant builders/superintendents reported to the site builders;

and (5) subcontractors who actually performed the work reported to the assistant builders and builders. (R 30, T. 46/18-50/1; 52/2-5.)

39. Mr. Guy testified that generally he obtained information regarding construction by the site builder reporting to the area manager, the area manager reporting the information to the VP of construction and then the VP of construction reporting to him. (R 30, T 84/8-24.)

40. In September 2004, Charles Dennis was hired as the Vice President of construction for Morrison Homes. (R 30, T. 117/21-25.)

41. Mr. Dennis reported to Mr. Guy. (R 30, T. 119/1-3.)

42. As the VP of construction he was responsible for “all construction activities...supervision of the area manager, builders, [and] assistant builders.” (R 30, T. 118/1-9.)

43. He was responsible for six subdivisions and 150 houses being constructed by Morrison Homes in the Jacksonville area at the same time the Ecos house was being constructed. (R 30, T. 155/1-5.)

44. Mr. Dennis was not a licensed contractor or a qualifying agent for Morrison Homes during the construction of the Ecos house. (R 30, T. 135/18-20.)

45. Mr. Dennis had several area managers reporting to him. As testified by Mr. Guy, each area manager was responsible for approximately two to three subdivisions. (R 30, T. 83/10-84/1.)

46. Morrison Homes did not require the area managers to be licensed contractors. (R 30, T. 81/21-23.) There is no evidence that the area manager for the Ecos construction was a licensed contractor or that the area manager for the Ecos construction was a qualifying agent for Morrison Homes.

47. Each area manager had several builders who reported to him. (R 30, T. 49/16-21.)

48. According to Mr. Guy, it was the builder/superintendent who had the responsibility to supervise the construction as the “field hand,” “or actually the person that would be underneath the site superintendent to handle day-to-day punch work, sign erection, [and] minor construction issues that occurred on that particular site.” (R 30, T. 48/22-49/3.)

49. From Mr. Guy’s testimony it is clear that Morrison improperly delegated to the builder/superintendent the supervisory duties that should have been undertaken by a qualifying agent:

A. [the superintendent’s] job description would be daily supervision of trades, scheduling, budgetary responsibility, *quality supervisions*, invoicing, walk-throughs, trade compliance, *code compliance*, those sign-offs from customers, warranty.

(R 4:608, ll. 11-15.)(emphasis added).

A. ... Then you have your site builder, your builder position. That person is daily – his daily responsibilities or her daily responsibilities would be the scheduling, the ordering of materials, *the selection of*

contractor, the monitoring of the home, the interactions with the homeowners, *quality control*. That would be from start to finish.

(R 30, T. 49/4-11.)(emphasis added).

50. Morrison Homes offered no evidence as to the identity of the specific builder/superintendent for the Ecos house, and Mr. Guy admitted there was no evidence that any of his subordinates that worked on the Ecos house were licensed contractors. (R 30, T. 93/16-94/4.)

51. This lack of supervision was not problematic according to Morrison Homes' licensing expert, Robert Koning, who testified that no supervision by the qualifying agent was required at all:

Q. ...But under your scenario and under your belief, if, in fact, Morrison Homes was going to build 255,893 homes one year, they could have one qualifying agent, could they not?

A. Of course they could.

Q. And he could build all 255,893 homes?

A. That's correct, and not even live in the state ...

Q. Would he have to pull the permit?

A. He or somebody licensed would have to pull the permit and it would have to be somebody licensed, he or she.

(R. 31, T. 196/10-16, 20-23.)

SUMMARY OF THE ARGUMENT

Morrison Homes relies on one sentence within section 489.128, Florida Statutes, in isolation, to justify its position, which ignores the established rules of statutory construction. In concluding, pursuant to section 768.0425, Florida

Statutes, that Morrison Homes was unlicensed as to the Ecos house, the trial court properly gave effect to all of the relevant statutes as a whole.

The plain language of chapter 489, which is referred to in section 768.0425, Florida Statutes, requires a business organization to have a certified/licensed individual agent who is responsible for the specific construction project, obtain the building permit for that project and actually supervise the construction for that project in order for that business organization to be licensed for that construction project.

Based on the plain language of chapter 489, courts have consistently determined the licensure status of a business organization by determining whether or not the business organization had a licensed individual who was responsible for the construction project on behalf of the organization, obtained the building permit for that project and actually supervised the construction of the project. The trial court's final judgment, therefore, applied the correct legal standard when it concluded as a matter of law:

4. In order to be licensed for the construction of Plaintiffs' house, Defendant had to have a primary or secondary qualifying agent who was charged with directing, supervising, managing, and controlling the construction of Plaintiffs' house.

5. Defendant was required to have the licensed individual who was charged with directing, supervising, managing and controlling the construction of Plaintiffs' house pull the building permit.

In applying that legal standard, the trial court correctly found, based on

substantial, competent evidence, that Morrison Homes was not properly licensed because:

6. Defendant, through person or persons unknown, applied for and fraudulently obtained a building permit as the contractor of Plaintiffs' house by providing to the City of Jacksonville the name and license number of a licensed contractor who did not work for Defendant, and made the application without that licensed contractor's permission.

8. Additionally, Defendant built Plaintiffs' house without the direction, supervision, management, and control of the licensed contractor listed on the building permit *or any other licensed contractor*. (Emphasis added).

Additionally, the trial court properly disregarded Morrison Homes' affirmative defense that it was not engaged in "contracting." The relevant inquiry pursuant to section 768.0425, Florida Statutes, was whether or not Morrison Homes was a "contractor" who was required to be licensed by the State when it constructed the Ecos house. The substantial, competent evidence proved it was the contractor and, therefore, was required to be licensed for the construction of the Ecos house. Whether or not it was also engaged in "contracting" has no impact on that analysis.

Finally, the public policy behind the statutory regulation of contractors demands that the trial court's judgment be upheld. Section 489.101, Florida Statutes explicitly states that chapter 489 was enacted because "[t]he Legislature deems it necessary *in the interest of the public health, safety, and welfare* to regulate the construction industry." (emphasis added). It would be a complete

disregard of the health, safety and welfare of the citizens of the State of Florida—for whose protection the statutes were enacted—if Morrison Homes could be considered a licensed contractor for the Ecos construction simply because it had a licensed individual on its payroll with no requirement that the licensed individual actually supervise the construction of the Ecos house. In effect, that would allow Morrison Homes to have rented a license to construct the Ecos house, which is illegal. Therefore, the trial court’s final judgment must be affirmed.

STANDARD OF REVIEW

The standard of review to be applied is not de novo as argued by Morrison Homes but is a mixed standard. The trial court had to make factual findings based on the evidence presented and then determine whether the facts established that Morrison Homes was unlicensed as it pertained to the construction of the Ecos house, which required an interpretation of statutes and an application of the law to the facts. *See Murphy v. Murphy*, 2013 WL 5927542, *3 (Fla. 3d DCA 2013).

Thus, this Court should:

review the trial court’s factual findings to determine whether they are supported by competent substantial evidence; the trial court’s interpretation and application of the law should be reviewed de novo; and the exercise of the trial court’s discretion should be reviewed for an abuse of discretion. *Id.*

ARGUMENT

I. In Order to be certified by the State, a Business Organization must have a Qualifying Agent who is Responsible for the Construction, Obtains the Building Permit and Actually Supervises the Construction.

Morrison Homes improperly relies on portions of section 489.128(1) in isolation to argue the trial court erred in its conclusion that Morrison Homes was an unlicensed contractor. Standard rules of statutory construction mandate:

[a] subsection of a statute cannot be read in isolation; instead, it must be read within the context of the entire section in order to ascertain legislative intent for the provision and each statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts. The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.

Lamar Outdoor Advertising--Lakeland v. Florida Dept. of Transp., 17 So.3d 799, 802-803 (Fla. 1st DCA 2009)(internal citations omitted).

Therefore, the trial court was required to harmonize section 768.0425 with section 489.128, Florida Statutes, as they relate to the same subject matter—penalties for unlicensed contractors. In order to do that, portions of 768.0425 and 489.128 cannot be read in isolation but must be read within the context of all of Part I of chapter 489, Florida Statutes, which was enacted to protect the public health, safety, and welfare of the citizenry of Florida. § 489.101, Fla. Stat.

The trial court properly harmonized sections 768.0425 and 489.128 and

properly read those sections within the greater context of Part I of chapter 489 and the policy behind Part I of chapter 489 when it determined that in order for Morrison Homes to be certified as a contractor by the state for the construction of the Ecos house it had to have a licensed qualifying agent, responsible for the construction, obtain the building permit and actually supervise the construction allowed by that permit.

A. The Plain Language of Section 768.0425 and Chapter 489 required the Trial Court to Inquire about Responsibility, Permitting and Actual Supervision to determine whether or not Morrison Homes was a Licensed Contractor.

Section 768.0425(2), Florida Statutes, which was formerly found in chapter 489, awards treble damages to a person damaged by a contractor's negligent construction if the contractor is unlicensed:

In any action against a contractor for injuries sustained resulting from the contractor's negligence, malfeasance, or misfeasance, the consumer shall be entitled to three times the actual compensatory damages sustained in addition to costs and attorney's fees if the contractor is neither certified as a contractor by the state nor licensed as a contractor pursuant to the laws of the municipality or county within which she or he is conducting business.

In order for a contractor to be certified by the state, the contractor must comply with the requirements of chapter 489. The terms “certified” and “licensed” are used interchangeably within chapter 489. *Full Circle Dairy, LLC, v. McKinney*, 467 F.Supp.2d 1343, 1349, n. 7 (M.D. Fla. 2006).

In order for a business organization to be licensed as a contractor, a

qualifying agent must be responsible for the construction, must obtain the building permit and must actually supervise the fieldwork. §§ 489.101-146, Fla. Stat. This is because pursuant to chapter 489, Part I, Florida Statutes, a business organization is unlicensed if the organization does not have a primary or secondary qualifying agent who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit.

Section 489.128(1)(a), Florida Statutes, recites:

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 requirement that a business organization have a qualifying agent “in accordance with this part” means that qualifying agent must meet the requirements of sections 489.101-146, which constitutes “Part I” of chapter 489. The terms “Primary qualifying agent” and “Secondary qualifying agent” are defined in Part I as follows:

“Primary qualifying agent” *means a person* who possesses the requisite skill, knowledge, and experience, and has the responsibility, to supervise, direct, manage, and control the contracting activities of the business organization with which he or she is connected; *who has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained the building permit*; and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the department.”

§ 489.105(4), Fla. Stat. (emphasis added).

“Secondary qualifying agent” *means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, direct, manage, and control construction activities on a job for which he or she has obtained a permit, and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the department.*”

§ 489.105(5), Fla. Stat. (emphasis added).

Consequently, in order to have a qualifying agent “in accordance with this part,” the responsible individual must supervise, direct, manage, and control the construction of any home the entity builds for which that person obtained the building permit. The statutes do not define the words “supervise, direct, manage, and control,” so they are given their plain meaning. *Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management*, 122 So.3d 440, 444 (Fla. 1st DCA 2013). The plain meaning of these words is as follows:

Supervise: To oversee and direct; to superintend; to inspect.

Direct: To point or aim at; to show the right course to; to conduct; to order; to instruct.

Manage: To wield; to direct in riding; to conduct or administer; to have under command; to treat with judgment.

Control: To restrain; to regulate.

New Webster’s Dictionary (1993 ed.)

Alles v. Dep’t of Professional Regulation, Const. Industry Licensing Bd.,

423 So.2d 624, 626 (Fla. 5th DCA 1982) explains this statutory scheme:

[a]n examination of the statutory scheme providing for qualifying agents shows that it was the legislative intent that such agents have the authority to, *and do*, supervise the project entered into under their name and by use of their contractor's license. ... The only way a company may be a contractor is by obtaining an individual licensed as a contractor as its “qualifying agent. ... Subsection (2) of section 489.119 indicates that the application for a contractor to become a qualifying agent of a company must show “that the qualifying agent is legally qualified to act for the business organization in all matters connected with its contracting business and that he has authority to supervise construction undertaken by such business organization.”

The *obvious purpose* of these statutes allowing a company to act as a contractor through a licensed contractor is to insure that projects undertaken by a company *are to be supervised by one certified and licensed by the board*. To allow a contractor to be the “qualifying agent” for a company without placing any requirement on the contractor to exercise any supervision over the company's work done under his license would permit a contractor to loan or rent his license to the company. This would completely circumvent the legislative intent that an individual, certified as competent, be professionally responsible for supervising construction work on jobs requiring a licensed contractor. ... (emphasis added).

This explanation is further supported by section 489.127(4)(a), Florida Statutes, which makes it a crime to allow a licensed contractor to loan or rent his/her certification number to a business organization.

These requirements have been confirmed by the Construction Industry Licensing Board (“CILB”), which has disciplinary power over such individuals. The CILB has made it clear that a licensed individual cannot delegate his statutory responsibility to supervise, direct, manage, and control to anyone. In *In Re: The*

Petition for Declaratory Statement of Paul J. Del Vecchio, (CILB Opinion DS2011-082), the Board was asked whether the act of construction management, a service that oversees the management of construction activities on a given project, was the exclusive purview of a licensed contractor or whether it could be performed by an unlicensed individual or entity (such as occurred with the construction of the Ecos house). The Board, after conducting a hearing, issued a declaratory statement rejecting just such a business plan stating the following:

Construction Management as a service that oversees the management of construction activities on a given project is the exclusive purview of a licensed contractor. Further, construction management, as described herein, cannot be performed by an unlicensed individual or entity.

Id.

Consistent with the reasoning that entities can only operate and perform construction activities when overseen by a licensed individual, building permit applications must be signed by the actual individual who is to be responsible for that work:

Each 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*. Each city or county building department shall require, as a precondition for the issuance of the building permit, that the contractor taking out the permit must provide verification giving his or her Construction Industry Licensing Board registration or certification number.

§ 489.119, Fla. Stat. (emphasis added).

Therefore, it is clear that the plain language of chapter 489 requires a business organization to employ a licensed individual who is responsible for the construction, who obtains the building permit and who actually supervises the fieldwork in order for that business organization to be licensed. The trial court's ruling appropriately recited that standard in its final judgment:

4. In order to be licensed for the construction of Plaintiffs' house, Defendant had to have a primary or secondary qualifying agent who was charged with directing, supervising, managing, and controlling the construction of Plaintiffs' house.
5. Defendant was required to have the licensed individual who was charged with directing, supervising, managing and controlling the construction of Plaintiffs' house pull the building permit.

Therefore, the trial court's final judgment correctly interpreted and applied the statutory framework and it must be upheld.

B. The Determination of Whether or Not a Business Organization is Licensed Hinges on Responsibility, Permitting and Actual Supervision of Construction.

Based on the requirements of chapter 489, Florida Statutes, explained above, courts have determined that

the best method for determining whether [an entity] should be considered licensed is to determine whether [the entity] had a qualified contractor *who was responsible for the* [construction] project *beginning* with the effective date of the contract.”

Lake Eola Builders, LLC v. Metropolitan at Lake Eola, 416 F.Supp.2d 1316, 1319 (M.D. Fla. 2006)(emphasis added).

The use of the words “beginning with” makes it clear that, in order to be licensed,

a business organization needs a licensed individual who is actually responsible for the construction at the time the contract is entered into and who maintains that responsibility throughout the construction. This interpretation comports with the stated policy of protecting the public. In *Lake Eola*, therefore, the court examined the evidence to determine if a licensed individual was responsible for the construction, obtained the building permit and supervised the construction for the business organization to determine whether or not the business organization was licensed for the construction performed pursuant to the contract at issue. *Id.*

In *Boatwright Const., LLC v. Tarr*, 958 So.2d 1071, 1072-73 (Fla. 5th DCA 2007) the court reasoned and clarified that *actual* supervision by the individual listed as the qualifying agent on the permit was required for the entity to be licensed for the specific project. Consequently, based on the factual finding that the licensed individual who had obtained the building permit “had not performed any supervisory duties at the job site,” the court determined the entity was unlicensed as to the unsupervised work at issue on that project. *Id.* at 1072.

The trial court in this case relied on the same factors as *Lake Eola* and *Boatwright* finding that Morrison Homes was not licensed because Morrison Homes:

6. ...through person or persons unknown, applied for and fraudulently obtained a building permit as the contractor of Plaintiffs’ house by providing to the City of Jacksonville the name and license number of a licensed contractor who did not work for Defendant, and

made the application without that licensed contractor's permission.

7. Additionally, Defendant built Plaintiffs' house without the direction, supervision, management, and control of the licensed contractor listed on the building permit or any other licensed contractor.

(R 26:5236-37.)

Therefore, the trial court applied the correct legal standard when it considered who obtained the building permit and who actually supervised the work to determine that Morrison Homes was not licensed as to the construction of the Ecos house.

C. Substantial Competent Evidence Demonstrates that there was no Licensed Individual Responsible for the Construction of the Ecos house as of the effective date of the contract or at any other Time and that Morrison Homes engaged in Fraud to obtain the building permit.

Whether or not Morrison Homes was licensed as it pertained to the construction of the Ecos house depended on the trial court's resolution of the disputed facts and evaluation of the veracity of the witnesses regarding whether or not Morrison Homes had any licensed qualifying agent supervise, direct, manage and control the construction of the Ecos house. The factual finding that no licensed individual performed those functions is supported by substantial, competent evidence and, therefore, the final judgment should be affirmed. *DeBiasi v. S&S Builders, Inc.*, 593 So. 2d 314, 315 (Fla. 4th DCA 1992)(holding whether or not appellee was operating under a valid license was dependent upon a factual finding

made by the trial court, which ruling would not be reversed since it was supported by competent evidence).

Based on the trial court's findings of fact, it is clear the trial court rejected Morrison Homes' claim that Doug Guy bore responsibility for the construction of the Ecos house. The overwhelming evidence revealed that Morrison Homes was illegally relying on the certification number of an individual no longer associated with its business, Ms. Steiner, and not Mr. Guy, to construct the Ecos house. Additionally, the overwhelming evidence also proved it was Morrison Homes' business practice that *no* licensed individual was *ever* responsible for the direction, supervision, management, and control of construction of the Ecos house either on the effective date of the contract or at any other time.

The evidence showed that Morrison Homes was illegally relying on the certification number of an individual who was no longer associated with Morrison Homes from January 24, 2004 (Ms. Steiner's termination date) through at least April 30, 2004 (the date of the building permit application). The submission of the building permit application was a crime as Morrison Homes made a false statement with the intent to mislead a public servant. § 837.06, Fla. Stat. Morrison Homes falsely represented to the City of Jacksonville building department that Ms. Steiner would act as the licensed qualifier with the intent that the public servants of Jacksonville would believe Morrison Homes had a licensed individual who would

ensure “that all work will be done in compliance with all applicable laws regulating construction.” At the time it made those statements, Morrison Homes knew Ms. Steiner was no longer an employee and was never going to take any steps to ensure the construction complied with any law, nor did they take any steps to have any licensed individual ensure that the Ecos construction was done in compliance with the law. Ms. Steiner testified that she left her license with Morrison Homes because otherwise they would not be able to continue construction. There was no way, nor did Ms. Steiner have any intent at any time, for Ms. Steiner to be responsible for or supervise the construction of the Ecos house since she quit January 24, 2004, two weeks prior to the effective date of the contract, February 7, 2004. There would have been no need for her to leave her certification number with Morrison Homes after her termination if Morrison Homes was already relying on Mr. Guy to be responsible for construction. There would have been no need for her to be listed as the licensed qualifier on the twelve other building permit applications falsely submitted to the City of Jacksonville if Morrison Homes was relying on Mr. Guy.

Moreover, the evidence was clear that Mr. Guy was not responsible for any construction for Morrison Homes as of the effective date of the contract. His certification number was not associated with Morrison Homes until February 9, 2004. His job duties did not include any responsibilities regarding construction

until December 2004. Even as late as the date of the building permit application—April 30, 2004—Mr. Guy had not been assigned any responsibility for any construction; he was still only responsible for purchasing. Finally, he signed the building permit as the “Owner” not as the licensed individual two inches from Ms. Steiner’s “signature” as the licensed qualifier, further undermining any contention that Morrison Homes was relying on him to properly supervise the Ecos construction.

Furthermore, the evidence demonstrated that at no point during the construction did any licensed individual supervise the work. Even when Mr. Guy was purportedly assigned responsibility for construction in Jacksonville—in December of 2004—he never asserted any supervisory responsibility over the construction of the Ecos house. Morrison Homes sold the Ecos house on December 27, 2004—leaving little time for Mr. Guy to have supervised any of the Ecos construction. Additionally, Mr. Guy admitted that he never actually supervised any construction in Bartram Springs. He admitted when he visited any site under construction, he only visited for a few minutes a week, not to supervise, direct, manage, and control the construction activities but rather to review the “cleanliness” of the construction operation. In so doing, he improperly allowed Morrison Homes to delegate and remove him from his non-delegable statutory responsibility to supervise, direct, manage, and control the construction of the Ecos

house by five levels of unqualified, unlicensed employees and subcontractors and essentially, illegally, rented his license to Morrison Homes.

Finally, it is clear from Ms. Steiner's testimony that as a business practice Morrison Homes placed no obligation on its qualifying agents to supervise any construction. Ms. Steiner testified that while she was employed, Morrison Homes relied on her license for construction in Jacksonville even though she lived and worked in Orlando and had no knowledge regarding what was happening in Jacksonville.

Therefore, the evidence substantially and competently supports the trial court's rejection of Morrison Homes' claim that Mr. Guy was responsible for the construction of the Ecos house and the trial court's determination that no licensed individual was responsible for the construction of the Ecos house on behalf of Morrison Homes at any time.

II. The Trial Court Properly Determined that Morrison Homes was the Contractor for the Ecos House and, therefore, had to be licensed.

Morrison Homes argues that it "was not engaged in 'contracting' at all, which means it could not be liable for 'unlicensed contracting'." *Initial Brief*, p. 31. "Unlicensed contracting" is not a defined term in chapter 489 nor is it used in section 768.0425, Florida Statutes. Nor is the term "contracting" used in chapter 489 or section 768.0425, Florida Statutes, to determine whether or not a contractor is licensed or certified by the State. Instead, liability pursuant to the applicable

statute, section 768.0425, Florida Statutes, depends on a determination of who was the “contractor,” not whether or not Morrison Homes was “contracting”. Whether or not Morrison Homes was engaged in “contracting,” therefore, had no relevance to the trial court’s analysis. The trial court properly dispensed with Morrison Homes’ affirmative defense finding Morrison Homes “was the contractor of Plaintiffs[’] house and under Florida law was required to be licensed.”

Section 768.0425(1) defines a “contractor” as “*any person who contracts to perform any construction or building service* which is regulated by any state or local law, including, but not limited to, chapter 489.” (emphasis added). Morrison Homes stipulated in the pre-trial statement that it entered into an agreement with Ecos “under which [Morrison Homes] would construct a home.” Additionally, Morrison Homes admitted in its answer that it “constructed the house.” Therefore, Morrison Homes admitted it contracted to construct a house and did construct the house, which is a service regulated by chapter 489. Based on those admissions alone, the trial court could properly conclude that Morrison Homes “was the contractor of Plaintiffs house...” The only remaining inquiry pursuant to section 768.0425, Florida Statutes, was for the trial court to determine whether or not Morrison Homes was “certified as a contractor by the state” as it pertained to the construction of the Ecos house, which, as explained in detail above, the trial court properly found Morrison Homes was not.

Even if the definition of “contracting” did apply to the analysis, that definition does not exempt Morrison Homes from the statutory obligations it also had to meet to qualify as a licensed “contractor” since it—and not another contractor—actually constructed the Ecos house.

The Legislature, in section 489.103, Florida Statutes, specifically exempts certain construction circumstances from the licensure requirements. For example, an individual owner of a piece of property can act as his own contractor, without a license, under specific circumstances—but developers who are also acting as contractors are *not* exempted in section 489.103.

Instead, developers are referenced in the section that defines *contracting*:

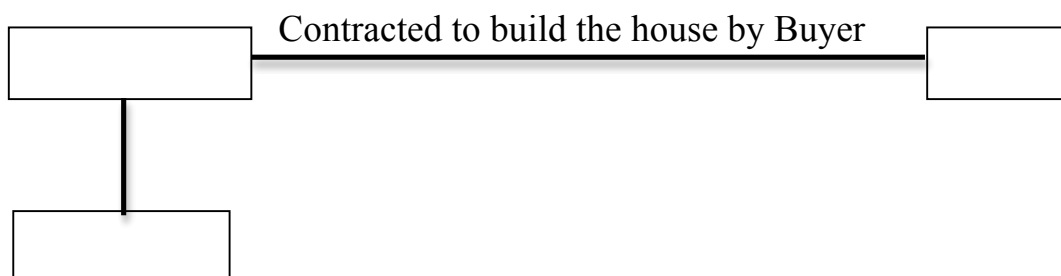
“Contracting” means, except as exempted in this part, engaging in business as a contractor and includes, but is not limited to, performance of any of the acts as set forth in subsection (3) which define types of contractors. The attempted sale of contracting services and the negotiation or bid for a contract on these services also constitutes contracting. If the services offered require licensure or agent qualification, the offering, negotiation for a bid, or attempted sale of these services requires the corresponding licensure. 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, or to the individual or business entity that offers to sell or sells manufactured or factory-built buildings that will be completed on site on property on which either party to a contract 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 or completing such residences.

§ 489.105(6), Fla. Stat.

Contractor*

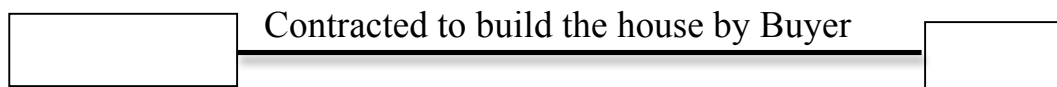
The proviso to the definition of “contracting,” which Morrison Homes argues creates an exemption for its actions in constructing the Ecos house, simply clarifies that if a developer (i.e. a corporation that offers to sell completed residences on property in which the corporation has a legal interest) retains a contractor *other than itself* to build a house, then the hired contractor is the one engaged in contracting and not the developer. This makes sense because the contractor is the one actually building the house. The following diagrams depict this distinction:

Developer Engaged in Developing Property but *NOT* Engaged in Contracting



- ^^contracted with contractor to build house
- *pulls building permit
- *builds house
- *compensated by developer for building house

Developer Engaged in Developing Property *AND* Engaged in Contracting



- ^^contracted with Buyer to build house
- ^^pulls building permit
- ^^builds house
- ^^compensated by Buyer for building house

Morrison Homes did not retain the services of a qualified contractor for the purpose of constructing the Ecos house. Substantial, competent evidence including Morrison Homes’ Answer, the Pre-Trial Stipulation, the building permit application, the right-of-way permit application, the building permit, the subcontract agreements and the testimony of Morrison Homes’ employees demonstrated that Morrison Homes—not some other contractor—was the contractor and built the Ecos house. There is no contract between Morrison Homes and Mr. Guy retaining Mr. Guy to construct the house. Mr. Guy admitted he did not contract with Morrison Homes to build the Ecos house. Instead, Mr. Guy was an employee of Morrison Homes who acted as an agent of Morrison Homes, on behalf of Morrison Homes, during the construction of the Ecos house, and claimed at trial to constitute a qualifying agent for Morrison Homes. Therefore, the trial court properly rejected Morrison Homes’ affirmative defense by concluding that Morrison Homes “was the contractor of [The Ecos] house and under Florida law was required to be licensed” for that construction.

III. The Public Policy Behind the Licensure Requirements Mandates Affirming the Trial Court’s Ruling in this Matter.

“The Legislature deems it necessary *in the interest of the public health, safety, and welfare* to regulate the construction industry.” § 489.101, Fla. Stat. (emphasis added).

Therefore, the purpose of 768.0625 and chapter 489, Florida Statutes is to

protect the public from the harms that follow from unlicensed, negligent construction. The legislative goal is to attain compliance with minimum buildings standards and thereby protect the public health, safety, and welfare by ensuring that homes are built correctly in the first instance:

It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established in law. Fines and other penalties are provided in order to ensure compliance; however, *the collection of fines and the imposition of penalties are intended to be secondary to the primary goal of attaining compliance with state laws and local jurisdiction ordinances...*

§ 489.113(4)(d), Fla. Stat. (emphasis added). The public policy of protecting the health, safety, and welfare of the public is so important and supervision by licensed individuals is so integral to that goal that the law punishes unlicensed contractors by making their contracts unenforceable in law and equity (thus prohibiting even claims under quantum meruit) (§489.128, Fla. Stat.) and by awarding treble damages for their negligence. §768.0425, Fla. Stat.

Case law makes this public policy clear: “[s]ection 489.128 was enacted to protect the public from the activities of incompetent contractors.” *Kvaerner Const., Inc. v. American Safety Cas. Ins. Co.*, 847 So.2d 534, 536 (Fla. 5th DCA 2003). “The legislative history suggests that the statute is intended to address the problems that consumers and the public face due to shoddy work by unlicensed, unqualified contractors.” *Poole and Kent Co. v. Gusi Erickson Const. Co.*, 759

So.2d 2, 6 (Fla. 2d DCA 1999).

Additionally, compliance with state law includes strict compliance with the Florida Building Code. Ch. 553, Fla. Stat. The primary purpose of the building code—to protect the health, safety, and welfare of the public—is achieved when homes are built to the minimum standards of safety and durability contemplated by Florida’s detailed and highly specific building codes.

The purpose and intent of this act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code, to be called the Florida Building Code, which consists of a single set of documents that apply to the design, construction, erection, alteration, modification, repair, or demolition of public or private buildings, structures, or facilities in this state and to the enforcement of such requirements and which will allow *effective and reasonable protection for public safety, health, and general welfare for all the people of Florida* at the most reasonable cost to the consumer.

§ 553.72(1), Fla. Stat. (emphasis added).

It is the intent of the Legislature that local governments shall have the power to inspect all buildings, structures, and facilities within their jurisdictions *in protection of the public health, safety, and welfare* pursuant to chapters 125 and 166.

§ 553.72(2), Fla. Stat. (emphasis added).

It is the intent of the Legislature that the Florida Building Code be interpreted by building officials, local enforcement agencies, and the commission in a manner that *protects the public safety, health, and welfare* at the most reasonable cost to the consumer by ensuring uniform interpretations throughout the state and by providing processes for resolving disputes regarding interpretations of the Florida Building Code which are just and expeditious.

§ 553.775, Fla. Stat. (emphasis added).

The Legislature finds that knowledge and understanding by persons licensed in the design and construction industries of the importance and need for complying with the Florida Building Code is *vital to the public health, safety, and welfare of this state, especially for mitigating damage caused by hurricanes to residents and visitors to the state*. The Legislature further finds that the Florida Building Code can be effective only if all participants in the design and construction industries *maintain a thorough knowledge of the code and additions thereto which improve construction standards to protect against storm and other damage*. Consequently, the Legislature finds that there is a need for a program to provide ongoing education and outreach activities concerning compliance with the Florida Building Code and hurricane mitigation.

§ 553.841, Fla. Stat. (emphasis added).

The optimal words in the above paragraph are “*vital*” and “*mitigating damage caused by hurricanes*.” By using these words, the Legislature is conveying how important compliance with the construction statutes is because proper construction will mitigate damage resulting from one of Florida’s most significant dangers—hurricanes. Key to implementing the effectiveness of these very important statutes is proper supervision during construction by licensed contractors. A building process such as the one employed by Morrison Homes does not and cannot achieve these goals if unlicensed individuals are permitted to construct a home without the direct supervision of a licensed individual, who is the person who has been tested and is charged with knowing the Florida Building Code requirements.

With the statutory scheme, the Legislature is sending a strong message to the

construction industry to build homes correctly in the first place. Protecting the public health and safety includes the protection of neighboring buildings that would otherwise be damaged from debris blow off of defectively constructed buildings.

Morrison Homes' cavalier attitude towards the regulations is the exact reason for the enactment of these statutory penalties. Morrison Homes' claimed through Mr. Koning at trial that chapter 489 allows them to employ one licensed individual to construct 255,893 houses in a single year. There is no way to ensure the health, safety and welfare of the people if no licensed individual is required to supervise the critical phases of construction. This position suggests that somehow employment of a licensed individual, without requiring that individual to supervise, is somehow different then renting the certification of a licensed contractor, which is explicitly prohibited by law.

The construction regulations were created by the legislature for the safety of the public. If Morrison Homes' logic were adopted they would only exist to give the illusion of safety. Morrison Homes stipulated the Ecos house, which had been purchased for \$341,000.00 (including the land) had \$200,000.00 in damages due to negligently caused construction defects. Presumably, had Morrison Homes complied with chapter 489 requiring the licensed qualifier to supervise the construction, these defects would have been avoided and the public policy of

constructing safe houses would have been fulfilled.

CONCLUSION

The trial court correctly interpreted and applied the relevant statutes. The testimony of the parties provided substantial, competent evidence upon which the trial court could and did base its decision that Morrison Homes was not certified as a contractor by the State as it pertains to the construction of the Ecos house; thereby justifying the award of treble damages. It was not an abuse of discretion for the trial court to make findings consistent with that evidence. To reverse the ruling would condone the perpetration of Morrison Homes' fraud. Consequently, the trial court's findings must not be reversed and the final judgment entered against Morrison Homes Services, Inc. f/k/a Morrison Homes, Inc. should stand. Appellees therefore respectfully request that the final judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2014, I electronically filed the foregoing with the Clerk of the Court and electronically served the same on Neal A. Sivyer and J. Carlton Mitchell, *Attorneys for Appellant*, by email at nsivyer@sbwlegal.com, nasassistant@sbwlegal.com, cmitchell@sbwlegal.com, and jcmassistant@sbwlegal.com and on Stuart Markman and Kristin Norse, *Co-Counsel for Appellant*, by email at smarkman@kmf-law.com, knorse@kmf-law.com, and plawhead@kmf-law.com through the eDCA E-Filing Portal, if available, or by email directly.



Attorney

CERTIFICATE OF COMPLIANCE

Counsel for Appellees, Carol Ecos and Susan Bessing, hereby certifies that this Answer Brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2).



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