

>> THE FINAL INDICATION IS EARTH
TRADES INC. VERSUS T&G
CORPORATION.

>> GOOD MORNING.
MAY IT PLEASE THE COURT, MY NAME
IS JOHN SHAHADY.
I REPRESENT EARTH TRADES.
YOUR HONORS, THE ISSUE BEFORE YOU
TODAY IS A CONFLICT THAT WAS
CREATED BY THE DECISION OF THE
5TH DISTRICT COURT OF APPEALS IN
WHICH BOTH THE TRIAL COURT AND
THE APPELLATE COURT FOUND THAT AS
A RESULT OF THE AMENDMENT, THE
FLORIDA STATUTE 49.128, A
SUBCONTRACTOR AND ITS SURETY,
WERE PRECLUDED FROM RAISING ANY
DEFENSES, SOLELY AS A RESULT OF
BEING UNLICENSED.
IT'S THE PETITIONER'S POSITION
THAT IS INCORRECT.
STARTING WITH THE BASIS FOR
FLORIDA STATUTE 49.128, THIS WAS
ORIGINALLY ENACTED AS A CONSUMER
PROTECTION STATUTE THAT
PROTECTED A CLASS OF CONSUMERS
AGAINST THE SHODDY WORKMANSHIP
OF UNLICENSED CONTRACTORS.
IN THE CASE THAT INTERPRETED THAT
ORIGINALLY, CASTRO, AND NUMEROUS
CASES DETERMINED THAT IF THE
HOMEOWNER DETERMINED
THAT -- EXCUSE ME, IF THE
CONTRACTOR WAS UNLICENSED, THEN
IT COULD NOT ENFORCE ITS CLAIM
AGAINST THE HOMEOWNER.
NOW, IN 2003 -- WELL, THERE ARE
MANY AMENDMENTS TO THE STATUTE,
BUT THE AMENDMENT WE'RE DEALING
WITH TODAY OCCURRED IN 2003.
AND THE IMPETUS WAS TWO
DECISIONS, ONE BY THE FEDERAL
COURT IN JOHN GOODMAN VERSUS THF
CONSTRUCTION AND THE SECOND WAS
CONSTRUCTION VERSUS AMERICAN
SAFETY CASUALTY.
BOTH THOSE CASES HELD THAT
UNLICENSED OF ONE SUBCONTRACTOR
INVALIDATED AN ENTIRE CONTRACT,
MEANING IF THERE WAS A CONTRACT
THAT INCORPORATED THE PRIME
CONTRACT, NOT ONLY WAS THE
SUBCONTRACT INVALID, THE PRIOR
PRIME ACCOUNT WAS INVALID.

AND THE ORDER IN THE JOHN GOODMAN CASE WAS AN ORDER DENYING A MOTION TO COMPEL ARBITRATION. WHAT THE COURT SAID WAS -- AND THE ARBITRATION WAS IN THE PRIME CONTRACT.

WHAT THE COURT SAID WAS BECAUSE THE UNLICENSURE OF THE PUB -- SUBCONTRACTOR -- THE NEXT CASE DEALT WITH A SURETY ISSUE AND THE COURT HELD THAT THE ENTIRE SUBCONTRACT, PRIME CONTRACT AND THE BONDS WERE INVALIDATED SOLELY AS A RESULT OF THE UNLICENSED CONTRACTOR.

AS A RESULT OF THAT, THE LEGISLATURE ADDRESSED THAT VERY ISSUE AND CHANGED 49.128 AND CHANGED IT ON TWO WAYS.

ONE, TO HOLD THAT ONLY THE UNLICENSED CONTRACTOR COULD NOT ENFORCE THE CONTRACT.

SECONDLY, A SURETY COULD NOT OPPOSE ITS LIABILITY UNDER A BOND SOLELY BECAUSE ITS PRINCIPLE WAS UNLICENSED.

AND THAT'S THE ESSENCE OF THE AMENDMENT.

THE AMENDMENT DO NOT GO ONE STEP FURTHER AND SAY, HOWEVER, THE UNLICENSED CONTRACTOR AND ESPECIALLY ITS SURETY HAD NO FURTHER DEFENSES, INCLUDING THE DEFENSE WHICH IS A COMMON LAW DEFENSE.

>> WHERE ARE WE IF WE DISAGREE WITH YOUR IN PARI DELICTO POSITION?

>> THE UNLICENSED CONTRACTOR WOULD NOT BE ABLE TO OPPOSE BY ANY MEANS A CONTRACT THAT IT ENTERED INTO.

IF THIS COURT ALLOWS THAT, IT COULD ALLOW GENERAL CONTRACTORS TO HIRE UNLICENSED CONTRACTORS KNOWING THEY'RE UNLICENSED ON A SITUATION WHERE -- I'M GOING TO EXPLAIN THE WORST POSSIBLE POTENTIAL, WOULD BE THE UNLICENSED CONTRACTOR COULD BE A SITUATION SUCH AS THIS, WHERE THE LICENSE IS PENDING.

THERE'S A CONFUSION ABOUT WHETHER THERE HAS TO BE A LICENSE.

THE LICENSE IS PENDING.
>> THAT GOES TO THE QUESTION OF
LICENSURE.
WHAT I'M TALKING ABOUT IS THE
DEFENSE OF PERI DILOCTO.
THE PERSON CONTRACTING WITH THE
CONTRACTOR.
IF WE SAY THIS TOOK OUT THAT
DEFENSE IN THIS CONTEXT, WHERE
ARE WE?
>> THE CONTRACTOR WOULD NOT BE
ABLE TO ENFORCE OR DEFEND ITS
CLAIMS.
THE SURETY HAS DIFFERENT
DEFENSES AND IT SHOULD BE ABLE TO
DEFEND BASED ON FRAUD.
THE SURETY HAS SEPARATE DEFENSES
AND THE SURETY SHOULD NOT BE IN
THE SAME POSITION.
>> EVEN IF THE SURETY KNOWS THAT
THE CONTRACTOR IS UNLICENSED.
>> THAT'S DIFFERENT, IF THE
SURETY KNOWS.
>> IT SHOULD BE REQUIRED THE
SURETY SHOULD KNOW.
>> THE SURETY DOESN'T MAKE THE
REPRESENTATION.
I UNDERSTAND YOU'RE SAYING THEY
SHOULD KNOW, BUT IN A CASE WHERE
THEY DON'T KNOW --
>> WHEN YOU UNDERWRITE BONDING
IT'S NOT THAT THEY GO IN AND SAY
WE DON'T KNOW ANYTHING.
THERE'S UNDERWRITING THAT GOES
INTO THIS BONDING REQUIREMENT
AND SO I'M MISSING THE POINT
HERE.
IN THE SURETYSHIP FIELD, SOMEHOW
THESE PEOPLE ARE JUST HEAR NO
EVIL, SEE NO EVIL, THAT KIND
OF -- I'M BLIND AND DUMB TO THIS.
SO I'M REALLY NOT WORRIED ABOUT
THAT.
I'M TRYING TO UNDERSTAND THE
LEGAL CONSEQUENCES OF WHERE IT
WILL TAKE US.
>> WELL, IT WILL TAKE WHERE
NEITHER THE UNLICENSED
CONTRACTOR NOR THE SURETY WILL
HAVE ANY DEFENSES, INCLUDING THE
DEFENSES SET OFF MODIFICATION OF
CONTRACT, WHERE THE UNLICENSED
CONTRACTOR WAS OWED \$180,000,
THEY'D BE LEFT WITH ABSOLUTELY
NOTHING.

AND THE FACT OF THE MATTER --
>> YOU'D HAVE TO AGREE IF A
CONTRACTOR COMES, CONTRACTS WITH
YOU, IS NOT LICENSED AND YOU MAYO
THEM \$180,000, BUT THE STATUTE
WOULD PRECLUDE THE CONTRACTOR
FROM RECOVERING FROM YOU.

>> WELL, YOUR HONOR --

>> IS THAT CORRECT?

THAT'S WHAT THE STATUTE DOES.

>> I DON'T BELIEVE SO BECAUSE IT
DOES NOT STATE THAT THE DEFENSE
DOES NOT APPLY.

>> WITHOUT THAT.

>> WITHOUT THAT, I AGREE WITH
YOU, YES.

>> OTHER THAN TRYING TO COLLECT
ON THE CONTRACT, WHICH THE
STATUTE PROHIBITS, COULD THERE
BE A CLAIM BY THE SUBCONTRACTOR
FOR UNJUST ENRICHMENT?

>> THE CASE LAW DOES NOT ALLOW
THAT.

AND THE STATUTE SAYS

(INAUDIBLE).

SO THERE'S NO -- I'M QUOTING WOOD
VERSUS BLACK, 1953 DECISION THAT
SAYS -- I THINK IT -- STRIKE
THAT.

I THINK IT WAS ALLOWED AND THEN
IT WAS OVERRULED N. THIS CASE THE
STATUTE SAYS IT.

SO NO THERE COULD NOT BE AN UNJUST
ENRICHMENT CLAIM.

>> THE STATUTE FOR AN UNLICENSED
CONTRACTOR IS EVEN IF THEY DO A
MILLION DOLLARS WORTH OF WORK FOR
A GENERAL CONTRACTOR, THE
GENERAL CONTRACTOR SAID, THANK
YOU VERY MUCH, HAVE A NICE DAY,
THEY KEEP IT, NO RESOURCE.

>> THEY'RE UNLICENSED, YOU'RE
OUT.

>> SO HERE'S -- WE WERE -- JUST
SPENT IN THE CASE BEFORE US
TALKING ABOUT -- WE'RE HERE ON
LEGISLATIVE INTENT, STATUTORY
CONSTRUCTION.

NOT OUR POLICY OF WHAT WE THINK
SHOULD BE, WHAT'S FAIR OR NOT.
THE INTRODUCTORY STATEMENT OF
THE STATUTE IS SO BROAD, IT SAYS
AS A MATTER OF PUBLIC POLICY,
CONTRACTS ENTERED INTO ON OR
AFTER 1990 BY AN UNLICENSED

CONTRACTOR SHALL BE
UNENFORCEABLE IN LAW OR IN EQUITY
BY THE UNLICENSED CONTRACTOR.
NOW, THE ISSUE ON THIS ISSUE IS
WHAT I THOUGHT YOUR DEFENSE WAS
WAS THAT THE CONTRACTOR KNEW THAT
THE UNLICENSED
CONTRACTOR -- THAT THE
SUBCONTRACTOR WAS UNLICENSED.
>> THAT'S CORRECT.
>> BUT WHAT I UNDERSTAND ABOUT IN
PARI DELICTO, IF THE VIOLATION IS
I CAN'T ENTER INTO CONTRACTS OR
DO WORK IN THE STATE OF FLORIDA
UNLESS I'M LICENSED, HOW IS THAT
EVER GOING TO BE THE FACT THAT
THEY ALSO KNEW -- AND THAT'S THE
ALLEGATION -- THAT THAT IS
ENOUGH TO DEFEAT THE CLAIM?
>> WELL, THE CASE LAW THAT I'VE
DESCRIBED AND THE OTHER CASES
I'VE DESCRIBED SAY THAT VERY
THING, THAT IF THE HOMEOWNER OR
THE CONTRACTING PARTY KNEW ABOUT
THE UNLICENSED, THEY'RE LEFT
THEIR OWN WAY.
NEITHER OF THEM CAN ENFORCE THE
CONTRACT.
>> IT SEEMS LIKE, AGAIN, THIS
WOULD BE SOMETHING THAT IF THE
LEGISLATURE INTENDED TO ALLOW
THAT TYPE OF DEFENSE, THAT THEY
WOULD HAVE INCLUDED IT IN THIS
STATUTE.
>> WELL, RESPECTFULLY, JUSTICE
PARIENTE, I DISAGREE.
THE CASES I CITED, SPECIFICALLY
THE ESSEX INSURANCE CASE, SAYS
THE OPPOSITE.
SAYS WHEN THERE IS A COMMON LAW
DEFENSE, A COMMON LAW CAUSE OF
ACTION.
WHERE THERE IS A STATUTE THAT IS
IN CONFLICT WITH THAT COMMON LAW
DEFENSE, IT MUST SPECIFICALLY
DESCRIBE HOW IT ABOLISHING THE
COMMON LAW.
>> BUT THE COMMON LAW DEFENSE
HERE IS IN PARI DELICTO.
THERE MAY BE DELICTO, BUT IT'S
NOT PARI.
I CAN FIND SOMETHING THAT MIGHT
BE DESCRIBED AS INCOHERENT IN THE
CASE LAW.
WOULD YOU DISAGREE WITH THAT?

>> INCOHERENCE?
>> YES.
>> NO, I WOULD NOT.
>> WOULD YOU WOULD NOT
DISAGREE --
[OVERLAPPING SPEAKERS]
>> I'M NOT TALKING ABOUT OUR
CASES.
I'M TALKING ABOUT THE DISTRICT
COURT'S CASES.
>> AGAIN, THEY ALL STATE
THAT -- THIS IS AN INTERESTING
CONCEPT YOU'VE BROUGHT UP.
THEY DON'T GO INTO DELECTO.
IF YOU KNOW, YOU'RE BARRED.
THE CASES ARE ALL CLEAR ON THAT.
>> WE'VE GOT TO LOOK AT THE
STATUTE THAT WE'VE GOT NOW.
AND IF I UNDERSTAND THE STATUTORY
SCHEME NOW, WHEN THE
SUBCONTRACTOR, WHO IS
UNLICENSED, ENTERED THIS
CONTRACT AND DID THE WORK, THAT
WAS A CRIME.

>> YES.
POTENTIALLY A CRIME, YES.
MISDEMEANOR.
>> NOW, IT WAS NOT A CRIME FOR THE
CONTRACTOR.
AT LEAST THERE'S NOTHING THAT
EXPLICITLY MAKES THAT A CRIME.
PERHAPS IT'S A CIVIL OFFENSE
INVOLVED IN THAT.
BUT, AGAIN, IT'S NOT A CRIME.
AND THE LEGISLATURE IN ALL THE
HISTORY OF THIS STATUTE SEEMS TO
HAVE MADE PRETTY CLEAR THAT THEY
DON'T WANT THE BAR, THE PARTY TO
A CONTRACT OTHER THAN THE
UNLICENSED CONTRACTOR, FROM
HAVING SOME ABILITY TO ENFORCE
THE CONTRACT, RIGHT?
>> WELL --
>> I MEAN, I DON'T KNOW HOW ELSE
YOU COULD EXPLAIN THE WAY THIS
STATUTE HAS DEVELOPED.
>> BY THE CASES I CITED.
THE GOODMAN CASE, THAT WAS THE
IMPETUS, THE LEGISLATIVE INTENT
FOR THAT.
THE LEGISLATOR DIDN'T WANT A
SITUATION WHERE THE ENTIRE PRIME
CONTRACT WAS INVALIDATED --
>> WELL, THE STATUTE DOESN'T SAY

ANYTHING ABOUT THAT.

THAT'S ALL KIND OF A GLOSS AND
THAT'S NOT FROM THE -- WE CANNOT
FIGURE THAT OUT FROM LOOKING AT
THE TEXT OF THE STATUTE AND THE
WAY THAT TEXT HAS EVOLVED.

I MEAN, THAT'S EXTRANEEOUS TO THAT
ENTIRELY.

AND SPECULATIVE.

>> NO, IT'S NOT.

AND, AGAIN, I'M USING PERSUASIVE
AUTHORITY.

HE WENT THROUGH IN DETAIL THE
LEGISLATIVE INTENT IN THOSE TWO
CASES.

TO THE EXTENT THE COURT WANTS TO
AGREE OR DISAGREE WITH THE
AUTHORITY OF MR. LIEBY, BUT
THAT'S WHAT HE EXPLAINED WAS THE
REASON AND THE IMPETUS FOR THE
CHANGE.

>> WELL, HE'S NOT IN THE
LEGISLATURE.

I DON'T KNOW HOW -- WHAT SOME
COMMENTATOR SAYS BECOMES
PERSUASIVE.

THAT ESCAPES ME.

HE MIGHT BE RIGHT.

>> I LOOKED THROUGH ALL THE
LEGISLATIVE HISTORY AND WASN'T
ABLE TO DISCERN ANYTHING MORE
THAN WHAT HE SAID.

BUT AGAIN WE'RE TALKING ABOUT THE
FACTS THAT THE CONCEPT HAS NOT
BEEN SPECIFICALLY APOLISHED BY
THE STATUTE.

>> THAT ARGUMENT ABOUT WHERE THE
LEGISLATURE HAS RATED, KNOWING
YOU'RE USING AN UNLICENSED
CONTRACTOR, WHICH WE DON'T WANT
TO HAVE PEOPLE DO, AND THAT
SUBJECTS YOU TO A FINE, FOR BEING
UNLICENSED AND DOING WORK, WHICH
SUBJECTS YOU TO CRIMINAL
PENALTIES.

>> YES.

>> JAIL POTENTIALLY.

AS A MATTER OF LAW, WITHOUT MORE,
HOW CAN THAT BE EQUAL TO DEFEAT
THE CLAIM?

>> WELL, I WOULD JUST ASSERT THAT
EACH -- EVERY CASE I'VE CITED
STATES THAT.

IT IS EQUAL TO DEFEAT THE CLAIM.

SO THE CASE LAW THAT HAS BEEN
INTERPRETED --
>> BUT NONE OF OUR CASES.
>> THAT'S CORRECT.
>> AND IT DOESN'T REALLY -- DOES
IT GO AWAY WITH -- BECAUSE THAT'S
DIFFERENT THAN UNCLEAN HANDS,
RIGHT?
UNCLEAN HANDS MEANS --
>> IS AN EQUITABLE DEFENSE, YES.
>> WE'RE TALKING ABOUT IT BEING
EQUAL.
SO HERE IF THE CONTRACTOR HAD
SAID, LISTEN, I KNOW YOU DON'T
HAVE YOUR LICENSE, BUT I
CAN -- YOU CAN -- YOU KNOW, I'LL
PAY YOU HALF OF WHAT YOUR RATE IS,
YOU KNOW, BECAUSE I NEED TO GET
THIS DONE, AND THE GUY'S SAYING,
NO, NO, I CAN'T DO IT.
NO, NO.
I'LL -- WHATEVER.
I'LL PAY YOU DOUBLE.
WHATEVER IT'S GOING TO BE.
NOW WE'RE GETTING INTO
ENCOURAGING SOMEBODY TO COMMIT A
CRIME OR -- BUT THAT'S NOT THESE
FACTS.
>> WELL, THE FACTS ARE THAT THE
GENERAL CONTRACTOR --
>> YOU AGREE THAT WOULD
BE -- THAT'S --
>> THAT'S A CASTRO CASE, BUT IN
THIS CASE THE AFFIDAVIT -- IT'S
BEEN OBJECTED TO SAYING IT'S NOT
TRUE, BUT THE AFFIDAVIT IS THAT
THE GENERAL CONTRACTOR NOT ONLY
DO, BUT SUBMITTED
RECOMMENDATIONS FOR THE
SUBCONTRACTOR AND KNEW HE WAS
UNLICENSED.
>> AGAIN WE'RE GOING BACK TO
KNOWING HE'S UNLICENSED SUBJECTS
HIM TO FINES.
I'M SAYING --
>> I UNDERSTAND.
AND I UNDERSTAND WHAT YOU'RE
SAYING IN THE LAW THAT I'VE CITED
DOESN'T MAKE THAT DISTINCTION.
>> I'M CONCERNED ABOUT THE OWNER.
THE LEGAL PRINCIPLES WILL APPLY
TO OWNERS, GENERAL CONTRACTORS,
AND SUBS, BUT ALSO TO OWNERS, AND
THIS TO ME -- JUST BECAUSE AN
OWNER MAY BE AWARE OF THAT,

THEY'RE IN NO POSITION TO PROTECT
THEMSELVES.

THE STATUTE DOES NOT DRAW THAT
DISTINCTION.

COULD HAVE EASILY SAID EXCEPT
GENERAL CONTRACTORS IF THAT'S
WHAT THEY HAD WANTED TO DO.

THIS COULD HAVE ENORMOUS IMPACT
ON HOMEOWNERS FOLLOWING A
HURRICANE, FOR EXAMPLE.

THIS IS THE KIND OF THING THAT
COMES OUT OF THESE KINDS OF
THINGS.

AND THAT CAME OUT OF HURRICANE
ANDREW, FOR EXAMPLE.

>> EXACTLY.

>> IN 1990.

I UNDERSTAND.

I LIVED THROUGH IT.

>> AND I UNDERSTAND THAT IN A
CONSUMER CONTEXT.

AND THAT'S MY NEXT POINT.

MY NEXT POINT IS THIS REALLY
SHOULDN'T APPLY IN THE GENERAL
CONTRACTOR ARENA.

>> BUT IT DOESN'T SAY THAT.

>> I UNDERSTAND THAT BUT THE TWO
CASES I'VE CITED STATE FOR THAT
POLICY.

LET ME EXPLAIN TO YOU WHY THE
PETITIONER URGES THAT THIS COURT
CONSIDER THAT.

THIS IS NOT A SITUATION WHERE A
HOMEOWNER IS NOT QUALIFIED TO
PERFORM PROFESSIONAL SERVICES
AND REQUESTS PROFESSIONAL
SERVICES FROM A PROFESSIONAL.

THESE ARE TWO PROFESSIONALS THAT
ARE DEALING AT ARM'S LENGTH WITH
EACH OTHER.

IN THIS CASE, THE CONTRACTOR KNEW
THE SUBCONTRACTOR FROM WORKING
AT A PRIOR JOB.

HE RECOMMENDED THIS

SUBCONTRACTOR TO THIS NEW JOB.

THE LICENSING WAS NOT AN ISSUE.

HE RELIED ON THE SUBCONTRACTOR'S
EXPERIENCE AND ALSO MADE A
RECOMMENDATION TO HIM.

THIS IS NOT A SITUATION WHERE
THERE'S A HOMEOWNER THAT'S
RELYING --

>> THEY ONLY RELIED ON HIM NOT
PUTTING THE FILL IN WITH THE
GARBAGE IN IT, TOO.

>> THERE ARE QUESTIONS ABOUT THAT.
>> THERE HAVE BEEN FACTUAL DETERMINATIONS MADE ABOUT THAT BY THE TRIAL COURT.
>> THERE ARE.
THE SUBCONTRACTOR POSITION IS IT PAID IN EXCESS OF \$300,000 TO PUT CRUSHED LIME IN THAT WAS BEYOND THE SCOPE OF THE CONTRACT.
ARM'S LENGTH TRANSACTIONS, NUMEROUS CASES STATE THAT A LICENSING STATUTE SHOULD NOT APPLY IN A GENERAL CONTRACTOR/SUBCONTRACTOR RELATIONSHIP.
THAT SHOULDN'T APPLY.
OWNER IS ONE THING.
BUT GENERAL CONTRACTOR/SUBCONTRACTOR IS TOTALLY DIFFERENT, WHERE THESE PARTIES KNOW THEIR ABILITIES, KNOW THEIR REPUTATION AND ENTER INTO CONTRACTS.

>> COUNSEL, YOU'VE EXHAUSTED HALF YOUR REBUTTAL TIME.
IF YOU WANT TO KEEP GOING, YOU MAY.
>> VERY SIMPLY, EVEN IF THIS COURT DETERMINES AN UNLICENSED CONTRACTOR HAS NO DEFENSES, THE SURETY HAS SEPARATE DEFENSES, INCLUDING LACK OF NOTICE AND OTHER DEFENSES THAT ARE PERSONAL TO THE SURETY TO ALLOW THIS STATUTE TO SOMEHOW OBVIATE THE SURETY'S DEFENSES WOULD BE UNCONSTITUTIONAL.
>> I'M MISSING THAT ARGUMENT BECAUSE AS I UNDERSTAND SURETY LAWS, YOU CARRY WITH YOU BOTH THE BENEFITS AND THE DETRIMENTS OF WHOMEVER YOU ARE SUBJECT TO PROTECTING.
>> UNDERSTOOD.
BUT THERE ARE SEPARATE DEFENSES. FOR EXAMPLE, NOTICE UNDER THE BOND.
IF THERE'S NO NOTICE UNDER THE BOND, DOES NOT MATTER IF THE CONTRACTOR'S UNLICENSED OR NOT.
>> THAT'S NOT AN ISSUE HERE, IS IT?
>> THE RULING BY THE 5TH DISTRICT

WOULD ENCOMPASS THAT AND SAY
THERE'S NO DEFENSES.
>> THAT'S NOT AN ISSUE IN THIS
CASE.
>> BUT IT WOULD ENCOMPASS THIS
RULING --
>> THE ONLY THING AT ISSUE IN THIS
CASE IS THE DEFENSE.
>> AND THE INABILITY TO PROVE ANY
OF ITS CONTRACTUAL DAMAGES
LEAVING A DEFAULT AGAINST
SURETIES.
>> I GOT TO ASSUME IF SOMEBODY
DIDN'T PAY THE PREMIUM ON THE
BOND -- ARE YOU SUGGESTING THAT
THAT IS ENCOMPASSED WITHIN THE
RULING HERE, THAT A SURETY COULD
NEVER DENY OBLIGATIONS FOR ANY
REASON?
I'M MISSING IT.
>> WELL, WHAT THE 5TH
DISTRICT -- THE OPINION IS
STATING -- IT CANNOT SAY BECAUSE
THE CONTRACTOR IS UNLICENSED
THERE ARE NO OTHER DEFENSES AND
AS FAR AS I'M CONCERNED IT WILL
COMPLETELY TAKE THAT ANY
DEFENSES THAT THE SURETY WOULD
HAVE --
>> INCLUDING NONPAYMENT OF BOND,
PREMIUM, ALL OF THOSE THAT EVEN
GO TO THE EXISTENCE OF THE BOND
ITSELF.
>> AND THE OPINION DIDN'T TAKE IT
INTO ACCOUNT.
I'D LIKE TO RESERVE A LITTLE MORE
REFOR REBUTTAL IF I MAY.

>> THANK YOU.
>> I'LL GIVE YOU AN ADDITIONAL
MINUTE.
>> MAY IT PLEASE THE COURT, MY
NAME IS KIMBERLY ASHBY.
I REPRESENT THE RESPONDENT.

>> WE TRIED THIS CASE NONJURY FOR
A FULL DAY ON THE CHALLENGES TO
THE DAMAGES ON WHETHER WHAT WAS
DONE BY THE GENERAL CONTRACTOR TO
COMPLETE THE WORK WAS REASONABLE
AND WITHIN THE SCOPE OF THE
ORIGINAL CONTRACT OR WAS
THERE -- WE TRIED ALL THOSE
ISSUES.
>> THE UNLICENSED CONTRACTOR WAS

ALLOWED TO DEFEND.

>> YES.

>> IT'S NOT THAT ISSUE.

AND THE SURETY ALSO, WERE THEY THERE DEFENDING?

>> YES.

THEY WERE DEFENDED BY THE SAME COUNSEL AND JOINT DEFENSE AND THERE WAS NO PERSONAL ISSUE TO THE SURETY RAISED OTHER THAN ON APPEAL THEY SAID FOR THE FIRST TIME WE THINK OUR PRINCIPAL HAS COMMITTED A FRAUD ON US AND I DIDN'T REALLY KNOW HOW TO RESPOND TO THAT, BUT THIS ISN'T --

>> THAT ISSUE, IS THAT PRECLUDED BECAUSE THEY CAN'T BRING A SEPARATE CLAIM?

>> IT IS.

AND THAT -- THAT'S PROBABLY THE HARSHTEST THING I HAVE TO DEAL WITH.

YOU SAY IF THEY DID WORK ON THIS OTHER JOB, THE JACKSONVILLE JOB, ALSO REQUIRING A LICENSE, THEY DIDN'T HAVE ANY LICENSE.

SO THAT'S AN EASY CALL.

IT WAS ABOUT \$100,000.

THE EXPENSES THAT T&G INCURRED, THEY SPENT OVER \$200,000 JUST PAYING THE PEOPLE BEHIND EARTH TRADES THAT DIDN'T GET PAID THAT WE HAD TO PAY.

AND WE'RE LOOKING TO THE BOND, THE PAYMENT BOND, THAT WE PAID A PREMIUM FOR.

PLEASE, WOULD YOU TAKE CARE OF THESE PEOPLE.

SO THAT WAS A BIG CHUNK OF EVEN WHAT YOU WOULD CONSIDER FOR THE SET-OFF DAMAGES.

AND THEN THE PERFORMANCE WE HAD TO GO IN AND THE GARBAGE, THERE WERE GARBAGE BAGS.

I MEAN, WHEN THEY DID A BACKHOE, THE VISUAL WAS STUNNING.

THE TRIAL JUDGE HEARD ALL OF THIS TESTIMONY.

>> BUT EARTH TRADES, THEIR POSITION WAS -- THEY SAY THEIR DEFENSE AND ALL YOUR CLAIMS GO AWAY?

THAT'S THEIR POSITION.

>> YES.

>> AM I WRONG?

>> YES.
THAT IS THEIR CLAIM.
AND --
>> AND THEY SAY IN PARI DELICTO.
THEY KNEW OF THE UNLICENSED
STATUS.
IT BARS ANY CLAIM BY THE
CONTRACTOR.
>> THAT'S WHAT THEY SAY AND THIS
CASE IS A POSTER CHILD FOR WHY
THIS ISN'T A FLOOD GATE THAT IS
GOING TO ENCOURAGE GENERAL
CONTRACTORS TO GO OUT AND HIRE
UNLICENSED --
>> LET ME ASK YOU A QUESTION ON
THAT.
CERTAINLY THIS STATUTE DOES NOT
DRAW A DISTINCTION BETWEEN AN
OWNER CONTRACTING AND A GENERAL
CONTRACTOR CONTRACTING WITH THE
SUB.
BUT COUNSEL ARGUES THAT OTHER
STATES, OTHER COURTS, OTHER HIGH
COURTS HAVE CARVED OUT AN
EXCEPTION, THAT THIS STATUTE OR
ONE THAT SAYS THE SAME THING, HAS
DRAWN I GUESS OUT OF WHOLE CLOTH
AN EXCEPTION FOR GENERAL
CONTRACTORS ALLOWING A DIFFERENT
APPROACH.
DO YOU AGREE WITH THAT, DISAGREE
WITH THAT?
>> I DIDN'T SEE THAT ARGUED.
AND IT CERTAINLY ISN'T IN THE
CONSTRUCT OF WHAT 489.128 IS
EITHER NOW OR IN ANY OF ITS
ITERATIONS.
>> BUT HE'S SAYING OTHER STATES,
OTHER JURISDICTIONS, DRAW THAT
DISTINCTION.
DO YOU AGREE?
DISAGREE?
>> I DON'T KNOW OF ANY SPECIFIC
INSTANCES WHERE THAT DISTINCTION
HAS BEEN DRAWN AND CERTAINLY IT
ISN'T PRESENT IN 489.128.
>> I UNDERSTAND BECAUSE I AGREE
WITH THAT.
I'M TRYING TO UNDERSTAND HOW
OTHER COURTS WOULD CUT OUT OF WHOLE
CLOTH --
>> THAT'S ASKING --
>> I UNDERSTAND.
>> THAT'S ASKING THIS COURT TO
LEGISLATE AND I CERTAINLY WON'T

BE A PARTY TO THAT.
>> I UNDERSTAND.
WE'RE TALKING PAST ONE ANOTHER.
I'M TRYING TO DETERMINE HAVE SOME
OTHER COURTS DONE THAT?
>> NOT TO MY KNOWLEDGE.
>> THAT'S FAIR ENOUGH.
>> I'M SORRY.
I DIDN'T MEAN TO BE EVASIVE.
ON THE NOTICE ISSUE, YOUR HONOR,
THIS IS REALLY WHERE THE RUBBER
HITS THE ROAD.
That and the hands of the
contractor and, I mean,
contractors in the state are
trying to get transaction and
it's all the jobs that are now
becoming available they think
they are going to want bonding.
they're either bonds because
there are so little captivation
left.
you have to do.
We're telling the securities.
you get a free pass if you can
show any of the dozens of the
employees that you have or that
you ever had during the context
of the timing.
they knew I don't have to pay
you anything.
>> for example, you do agree if
they don't pay premium that's a
different story.
>> yes, sir.
>> you're arguing --
I want to make sure.
does earth trades are they the
one that filed this initially.
>> yes.
>> that nobody is arguing that
case was not to be dismissed.
I don't think that's being
argued.
>> right.
>> now we've got the lawsuit the
counter claim, and if we --
are you saying that could never
be a defense but just knowledge
alone is not *pari delicto*.
>> it is not B.
using the licensure as a
defense.
that's the big umbrella or
whether I knew it or should have

known it.
that's the subsets of that being
an umbrella.
>> you could envision a
situation, which we don't have
here which could be equal or
worse that the contractor
creates the sub contractor, the
shell of the --
I mean I don't know all of the
possible things that could
happen.
I'm sure and I think of
hurricane Andrew lofts things.
we're not barring it once and
for all.
we're simply say no knowledge of
the lack of licensure that
cannot brought to be defeat a
claim.
>> at this point, yes.
>> the other question.
I want --
we were talking about setoff.
they had a chance to to any
damages that they incur in this
job, that is your client.
they had an opportunity to say
no they weren't reasonable.
again, we're not talking due
process so you're not being
heard.
you're defaulted out.
is the --
if any, they said, if but if
they were old --
owed money from the job and
whatever the damages were.
we had this much damages but
some part of the job done fine.
they don't get a right to
recover on the job at all?
>> the they don't get a right to
recover on the contract which
requires the license and they
didn't have one.
>> oh.
I think you might have
understand.
there's not even an setoff under
where there's the equity as
well.
>> that's right.
>> the penalty is huge.
you're subject to misdemeanor.

>> right.
>> and you could have done a
million dollars worth of work.
you are not going to get that
money.
>> that's right.
>> because the state's policy so
overriding in preventing
contractors --
sub contractors or contractors
from not being licensed.
>> that's right.
>> what if both the general and
the sub were --

>> if the general is unlicensed.
then the general doesn't have
any right any contract rights
either.
>> they don't have any rights
against each other?
>> right.
>> it's the perfect crime then.
>> the what?
>> perfect crime.
>> right.
>> and, you know, from the --

>> the homeowners except for
them.
>> I do look at the cases even
though this is a commercial case
and say --
what this course does affects
everyone.
the statute doesn't distinguish
even though over the years we
have trying to get the lien
commercial --
in this case okay my homeowners
has an unlicensed general
contractor.
maybe they didn't know to ask.
I've done home improvements and
I've done it.
I'm on camera and I'm admitting
that.
if you get the cab driver you
ask them are you licensed?
really, there are times when you
the innocent homeowners think
you know what you know and you
don't.
you know what you could be
looking at and I don't know you

see as draconian in the
homeowner setting.
it that Building was constructed
by unlicensed contractors
throughout, you're looking at
getting it raised.
that Building come down.
that certainly could be red
tagged and all the
repercussions.
most people are refinance, the
construction and the bank are
trying to figure out whether or
not they're going to
foreclosure.
there's a mass amount of things
that something can go wrong when
somebody is unlined.
ground zero is unlicensed.
the current version of the
statute took out 489.128 from
the local certificates.
that was making everybody crazy.
do I need a certificate in
Hernando county to put up dry
wall.
that was starting to slam the
door in too many faces.
the legislature has removed that
--
we're not worried whether I need
to have a wood finish contract
to put up the very levelly bench
that you sit at.
we're looking at this is a
underground utility contract.
I'm tieing into the sewer
system.
there's no question that the
required an underground license.
>> let me ask you this.
as I understood your answer to
the previous question, that
there could be no set off if you
actually part of the contract
was performed correctly and they
owed three reciprocally money
for the portion of it.
what the --
if that's the case and you get
can't a set you up against what
they end up having to pay your
client, that means that this
statute says you cannot bring a
plain offensively and you cannot

defend --

>> that it's --

I mean.

if you can't get any kind of
setoff.

anything to me that you can't
defend the claim either.

>> it's the concept of games.

if I'm performing a work without
a license, I can't recover on
that affirmatively in a main
claim, a setoff as a defense as
a counter claim, that's how the
things tend to go is main claim,
counter claim.

you just can't recover.

now if I want to separate out a
contract that's part of the work
that doesn't require a license,
and then take my shot.

I'm not --

obviously the legislature has
made it a strong point.

as a matter of public policy.

>> it seems that if you did the
work well, at least you're not
going to be slammed if you are
able to defend and say, no,
these are damages.

it's not like the legislature
has completely neutered the
unlicensed contractor.

that could be maybe --

that could be draconian.

you can't even defend yourself.

>> two things come to mind --

>> again.

we have already --

they had the full right to
defend the affirmative relief
being sought by your client by
saying no, these were
unnecessary expenses.
they weren't occasioned by our
work.

our work was excellent even
though we were unlicensed.

>> correct.

>> yes.

>> the two things that come to
mind, one, if had I a department
of business professional
regulation or the CILB with me

today they would be jumping up
and down because their whole
existence is to regulate, you
know, put everybody through the
same process.
and make sure there is a
standard by which you have to
meet because these are buildings
that we live in.
there is a life safety issue.
nothing else.
I'll pick on the Florida bar.
unlicensed to practice law.
this court sees a lot of it.
you can say, you won the case,
you should get paid.
no, you shouldn't.
it you don't have a license to
practice law and you're supposed
to.
you shouldn't get paid a nickel.
actually, I think this the Court
shorts you should be subject to
what you've already collected.
you did something you weren't
supposed to do.
these licenses are really
important.
this isn't --
I was making fun of the maybe a
wood finished certificate like I
said.
going forward, I think we're not
going to see those kinds of
cases where boy, that gives you
heart burn over somebody losing
money.
that's what the case was about.
they couldn't figure out what
the local license requirements
were they never did.
>> they got the license --
I think they fit in the case and
applied for the license.
>> yes.
thank you for raising that, your
honor.
what he applied for was the CTC.
>> what?
>> the certified general
contractors license.
that's what we have.
he didn't apply for a
underground unities license.
he never did.

never did.
>> but, okay.
but what would --
if he had --

>> if he had --

>> applied for the appropriate
license.
>> right.
>> and the license was at some
point issued after some
of the work was done.
>> you know what?
what the reality is we never
would have known.
because when he left the job, he
hadn't to pull any of the
permits for the underground
work.
you still working on the site
and water and everything.
we never got to the point where
he was actually required to go
down and put the license number
in.
>> that's what I was about to
ask that.
I get this.
again, the local municipality
requires license if you --
>> yeah.
>> if you put up a wall.
and we're talking --

>> I have no more respect inty
of it.
>> out here it wasn't never they
got to the point of the work
where they would have to pull
the license.
>> same thing in the
Jacksonville job.
that's why T&G never knew.
we didn't raise it at the outset
of the lawsuit.
when you found do you think I
would have raised legislature if
I was going to subject my
license to aiding and abetting
if we thought we knew?
hopefully I've addressed the
questionings that the Court has
today.
I appreciate the opportunities.

>> thank you.
just to answer to your question
to couple.
page 21 in the initial brief,
there is eight cases and two or
three pages that discuss the
distinction between homeowner
and general contractors and sub
contractors.
it was explained in detail in
the initial brief.
those cases had a statute like
we're talking about here.
>> yes, sir.
>> high courts in other states
have written an exception
without one in the statute.
>> yes.
>> on what basis?
>> the basis this is not a
homeowner situation where a
homeowner is relying on the
expertise of licensed
professional.
it's where two professionals in
the same trade are deal anything
arm's length.
they're not relying on a
licensure issue.
They're relying on
recommendation and past work.
the Courts are saying that the
punitive nature of the statute
should not apply.
batters are dealing at arm's
length and is not a homeowner.
>> then it sounds like those
courts are in engaging what is
called legislating from the
bench.
if the statute couldn't be
clearing.
you're telling me that the
statute in the cases are
identical to Florida?
>> I'm not saying identical.
they're saying they're
unlicensed.
they're barred from recovery.
I'm not saying it's verbatim.
it's the same theory.
secondly, I want to make sure
we're clear the issue of
knowledge here.

cases don't make an exception of the issues of knowledge in pari delicto.

and we're talking about whether the general contractor knew or didn't know.

that really suspect the issue. the issue is can the defense be raised determining they didn't know about it.

that's not the issue.

the PARI DELICTO without being able to determine that trial if there was knowledge or if there wasn't.

>> was allowed to be raised and they found you had knowledge, then your argument would be it would defeat the entire claim of the respond?

>> if the general contractor had knowledge.

>> yes, sir.

>> that's all.

>> in the case law that all of the case law in Florida sports that up to this point.

thank you.

>> all right.

we thank you both for your argument.

that's the last case on the today's docket.

adjourned.

>> all rise.