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Murthy v. N. Sinha Corp. - Does Florida's Construction Contracting Statute Create a Private Cause of Action Against Individual Qualifying Agents

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Murthy v. N. Sinha Corp.—Does Florida’s Construction Contracting Statute Create a Private Cause of Action Against Individual Qualifying Agents?

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I. INTRODUCTION

When the Murthys sought damages for injuries that chapter 489, Florida’s construction contracting statute, was enacted to prevent, the court had to decide whether the Legislature intended the statute’s expressed penalties and disciplinary enforcement provisions to be exclusive.¹ Because implied recovery or denial is attributable to the legislation, not to the court’s independent policy choice,² the Murthys’ claim stands or falls with the statute under which it was asserted: chapter 489.³ Still in the devastating aftermath of Hurricane Andrew,⁴ consumers such as the Murthys do not

1. See *Murthy v. N. Sinha Corp.*, 618 So. 2d 307, 309 (Fla. 3d Dist. Ct. App. 1993).

2. *Fischer v. Metcalf*, 543 So. 2d 785, 791 (Fla. 3d Dist. Ct. App. 1989) (en banc).

3. See *Murthy*, 618 So. 2d at 309.

4. See generally Alan T. Dimond, *Hurricane Andrew: From Devastation and Chaos to Rebirth and Renewal*, 17 NOVA L. REV. 1003, 1003-07 (1993) (describing the hurricane and its effect on South Florida).

care that the Construction Industry Licensing Board⁵ ("CILB") may discipline and penalize incompetent and unscrupulous contractors under the statute.⁶ It may be "cold comfort" to them that the wrongdoer will be disciplined if the discipline excludes liability for damages to injured consumers.⁷ The courts should not presume that legislative silence implies such a policy choice.⁸

The series of cases discussed in this comment debate the existence, within chapter 489, of an implicit private right of action against qualifying agents.⁹ Conflicting interpretations of the statute prompted the Third District Court of Appeal to request resolution from the Florida Supreme Court.¹⁰ Accordingly, in *Murthy v. N. Sinha Corp.*, the Third District Court of Appeal noted the conflict of its decision and the *Finkle v. Mayerchak*¹¹ decision with the decisions from the First and Fifth Districts and certified the following question to the Florida Supreme Court: "Does chapter 489, Florida Statutes (1991), the licensing and regulatory chapter governing construction contracting, create a private cause of action against the individual qualifier for a corporation acting as a general contractor?"¹²

Upon closer examination, however, a conflict exists only between the First and Third Districts. Specifically, the Third District Court of Appeal's decisions in *Finkle* and *Murthy*, conflict with *Gatwood v. McGee*,¹³ decided by the First District Court of Appeal. In the other two cases to which the *Murthy* court cites,¹⁴ *Hunt v. Department of Professional Regulation*,¹⁵ and *Alles v. Department of Professional Regulation*,¹⁶ the First and Fifth District Courts of Appeal held that, under chapter 489, a qualifying agent

5. FLA. STAT. § 489.107 (1991). The CILB, created within the Department of Professional Regulation ("DPR"), enforces the provisions of chapter 489. *Id.*; see *infra* note 84.

6. See *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840, 854 (Or. 1981) (Linde, J., concurring).

7. See *id.*

8. See *id.*

9. See *Murthy*, 618 So. 2d at 309; *Finkle v. Mayerchak*, 578 So. 2d 396, 397-98 (Fla. 3d Dist. Ct. App. 1991); *Gatwood v. McGee*, 475 So. 2d 720, 723 (Fla. 1st Dist. Ct. App. 1985).

10. See *Murthy*, 618 So. 2d at 309.

11. 578 So. 2d at 397-98.

12. See *Murthy*, 618 So. 2d at 309.

13. 475 So. 2d at 723.

14. See *Murthy*, 618 So. 2d at 309.

15. 444 So. 2d 997 (Fla. 1st Dist. Ct. App. 1983).

16. 423 So. 2d 624 (Fla. 5th Dist. Ct. App. 1982).

has a statutorily-imposed duty to supervise any construction project for which the qualifying agent is the licensee of record.¹⁷

Gatwood, *Hunt*, and *Alles* served to establish the decisional law construing the statute's legislative intent to impose a supervisory duty upon qualifying agents.¹⁸ By 1988, however, before *Finkle* and *Murthy* were decided, the Legislature codified the duty to supervise in section 489.1195 of the Florida Statutes, setting standards and procedures for qualifying agents.¹⁹ In other words, the statutory duty exists; the question becomes whether the qualifying agent's breach of the duty creates a private cause of action. Both *Hunt* and *Alles* involved contractors who appealed disciplinary actions taken by the Department of Professional Regulation²⁰ and thus, did not reach the issue of creating a private cause of action against the qualifying agents.²¹ While both *Finkle* and *Murthy* held the statute creates no private cause of action against qualifying agents individually,²² the *Finkle* court cites *Gatwood*, contradicting itself, to support a cause of action in common-law negligence against an individual qualifying agent.²³ Moreover, the *Murthy* court cites *Finkle* with no additional explanation, so too implying the *Gatwood* court's reasoning.²⁴

Both cases misapply *Gatwood*, *Finkle* directly and *Murthy* indirectly, because *Gatwood* implies a cause of action in negligence, under chapter 489, against individual qualifying agents.²⁵ The action lies for damages resulting from a breach of their nondelegable, statutorily-imposed supervisory duty.²⁶

It is likely that the Third District Court construed chapter 489 to mean it does not create a negligence per se action when a qualifying agent breaches the supervisory duty in violation of the statute.²⁷ In fact, by allowing a cause of action in common-law negligence the court begs the certified question. The more appropriate question may be whether chapter

17. 444 So. 2d at 999; 423 So. 2d at 626.

18. *Mitchell v. Edge*, 598 So. 2d 125, 129 (Fla. 2d Dist. Ct. App. 1992) (Hall, J., concurring).

19. FLA. STAT. § 489.1195 (Supp. 1988).

20. See *supra* note 5.

21. See *Hunt*, 444 So. 2d at 997; *Alles*, 423 So. 2d at 625.

22. See *Finkle*, 578 So. 2d at 397; *Murthy*, 618 So. 2d at 309.

23. See *Finkle*, 578 So. 2d at 398.

24. See *Murthy*, 618 So. 2d at 308.

25. See *Gatwood*, 475 So. 2d at 723.

26. *Id.*

27. See *Williams v. Youngblood*, 152 So. 2d 530, 532 (Fla. 1st Dist. Ct. App. 1963) (stating in dictum that an unexcused violation of a statutory standard is negligence per se, that is, negligence as a matter of law to be ruled by the court).

489 creates a private right of action in negligence per se, or whether its violation is merely prima facie evidence of negligence.²⁸

Although the *Finkle* court refers to the plaintiffs' negligence per se claim,²⁹ the court does not apply the negligence per se line of cases in its reasoning.³⁰ In *deJesus v. Seaboard Coast Line Railroad*, the Florida Supreme Court set forth rules applying the negligence per se doctrine, creating binding case law statewide.³¹ However, the *Finkle* court uses the judicial implication doctrine from *Fischer v. Metcalf*³² that is binding only in the Third District.³³ In order to analyze and evaluate *Murthy* and the certified question, one must understand both the *Gatwood* and *Finkle* decisions.

Part two explains the facts and disparate decisions of *Gatwood*, *Finkle*, and *Murthy*. Part three analyzes chapter 489 and applies the Third District Court of Appeal's rationale for declining a private right of action under the statute. The threshold analysis focuses on the judicial implication doctrine adopted by the Third District and applies the doctrine to *Murthy* using intrinsic and extrinsic aids to statutory construction to ascertain legislative intent.

Thereafter, part three suggests and applies an alternative judicial implication doctrine, negligence per se, not considered by either the First or Third Districts. Part three also considers extra-jurisdictional approaches

28. See *deJesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198, 201 (Fla. 1973) (holding that violations of statutes, other than those imposing a form of strict liability, may be either negligence per se or evidence of negligence).

29. See *Finkle*, 578 So. 2d at 397.

30. See *id.* at 397-98.

31. See *deJesus*, 281 So. 2d at 201.

32. See *Fischer*, 543 So. 2d 785, 788 (Fla. 3d Dist. Ct. App. 1989) (en banc). The court held that chapter 827, Florida Statutes (1979) does not provide a private right of action for violation of a statutory duty to report an alleged abuse. *Id.* at 787.

The court adopted the more restrictive United States Supreme Court doctrine, not binding on Florida district courts of appeal, *id.*, instead of controlling doctrine from *de Jesus*. See *deJesus*, 281 So. 2d at 201; see also *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983) (holding that an injured party should have an action where a statute gives a right, even though it has not expressly given a remedy).

The *Fischer* case involves minor children who brought an action against their father's psychiatrist, alleging the psychiatrist failed to report that he knew or suspected the father was physically and emotionally abusing the children, causing their injuries. 543 So. 2d at 786.

33. See *Finkle*, 578 So. 2d at 397-98. Although *Fischer* is controlling authority in the Third District, and therefore binding on the *Finkle* court, both courts ignored the Florida Supreme Court cases on judicial implication doctrine and negligence per se. See *deJesus*, 281 So. 2d at 201; *Smith*, 427 So. 2d at 184; see *supra* notes 28, 32.

which, when applied to *Murthy*, support a private remedy under chapter 489. Finally, part four discusses the likely ramifications of a private right of action against qualifying agents, then part five concludes that chapter 489 implicitly supports a private remedy.

II. SPLIT AMONG FLORIDA'S DISTRICT COURTS OF APPEAL

A. *Gatwood v. McGee*

Prior to 1979, Gatwood Enterprises, a home construction business, entered into an agreement with Glynquest, a third party builder, whereby Glynquest was employed to manage and supervise Gatwood Enterprises' home building operation.³⁴ Gatwood, a building contractor, was Gatwood Enterprises' president, sole stockholder and qualifying agent.³⁵ Gatwood, although involved in various aspects of Gatwood Enterprises' operations, had nothing to do with the actual construction of the homes.³⁶ He did, however, obtain the building permit for the home sold to the McGees in October 1979.³⁷ Within two months after the McGees bought and occupied the new home, they discovered that it had been constructed on a bed of muck, ten to twelve feet deep, which had been covered with a layer of fill sand.³⁸ The unstable ground caused substantial structural problems to the home.³⁹

The McGees filed suit in August 1980 against Gatwood individually, and Gatwood Enterprises, Inc., a dissolved corporation since June 1980.⁴⁰ The trial court entered judgment for damages against the corporation and Gatwood individually.⁴¹ Only Gatwood, individually, appealed the judgment.⁴²

The First District Court of Appeal held that Gatwood had a statutorily-imposed duty, as qualifying agent, to supervise construction pursuant to chapter 489, Florida Statutes (1979).⁴³ The court further held that breach-

34. *Gatwood*, 475 So. 2d at 721.

35. *Id.*

36. *Id.*

37. *Id.* at 722.

38. *Id.*

39. *Gatwood*, 475 So. 2d at 722.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 723.

ing the duty provides a basis for personal liability in a negligence action.⁴⁴ Specifically, the court stated that the “negligent performance of the qualifying agent’s statutorily imposed duty of supervision may support a cause of action for damages”⁴⁵ The court added that the qualifying agent’s duty of supervision is nondelegable;⁴⁶ the qualifier may not evade responsibility for negligent supervision by relying upon one who, even though a competent builder, is not the qualifying agent of record for the company pursuant to chapter 489.⁴⁷ The court emphasized that the cause of action was based upon negligence.⁴⁸ The court further stated that to recover, the plaintiffs must prove more than Gatwood improperly delegated his supervisory responsibility.⁴⁹ The McGees must prove that the construction defects could reasonably have been avoided if the qualifying agent executed his statutorily-imposed duty with due care.⁵⁰

B. *Finkle v. Mayerchak*

In early 1984, the Finkles met with Firestone, the owner of a construction company, MPF Enterprises, to negotiate a contract for the design and construction of their home.⁵¹ Firestone represented to the Finkles that he personally held a Florida general contractor’s license.⁵² Firestone did not inform the Finkles that Mayerchak was, in fact, the qualifying agent for MPF.⁵³

In 1987, the Finkles sued Mayerchak individually, as MPF’s qualifying agent, alleging that the house was not completed timely, economically, or free from defects.⁵⁴ The Finkles filed both common law negligence and negligence per se actions.⁵⁵ They claimed that Mayerchak was responsible for their damages pursuant to chapter 489, because the building permit was issued to him and because he allowed an unlicensed person to use his

44. *Gatwood*, 475 So. 2d at 723.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Gatwood*, 475 So. 2d at 723.

50. *Id.*

51. *Finkle v. Mayerchak*, 578 So. 2d 396, 397 (Fla. 3d Dist. Ct. App. 1991).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

license.⁵⁶ The trial court entered summary judgment in favor of Mayerchak on both the negligence and negligence per se claims.⁵⁷

On appeal, the Third District Court of Appeal affirmed the trial court's decision on the negligence per se claim and held that neither section 489.119 nor 489.129 of the Florida Statutes, regulatory and penal statutes, creates a private cause of action against Mayerchak as the individual qualifier for a corporation acting as a general contractor.⁵⁸ However, the district court reversed the trial court's ruling on the negligence claim.⁵⁹ Citing *Gatwood*, the court held that the Finkles' claim did state a cause of action against Mayerchak for common-law negligence.⁶⁰

C. *Murthy v. N. Sinha Corp.*

Prior to 1991, the Murthys entered into a contract with N. Sinha Corporation, a home construction business, for improvements to their home.⁶¹ Sinha was the president, sole stockholder, and qualifying agent for the corporation.⁶² According to the terms of the contract, the corporation could not require payment before the completion of a pre-defined phase, unless it was mutually agreed by both parties.⁶³ When the corporation requested payment before completing work on Phase III, the Murthys refused to pay until the corporation completed the Phase III work and satisfied the county building code requirements.⁶⁴ The corporation refused to correct the defects and abandoned the project.⁶⁵ The Dade County Building and Zoning Department later cited and red-tagged the Murthys' home for building code violations.⁶⁶ Further, N. Sinha Corporation's builders prematurely cut the overhang around the house and left it uncovered for weeks knowing that the Murthys were living there.⁶⁷ The

56. *Finkle*, 578 So. 2d at 397.

57. *Id.*

58. *Id.*

59. *Id.* at 398.

60. *Id.*

61. *Murthy v. N. Sinha Corp.*, 618 So. 2d 307, 308 (Fla. 3d Dist. Ct. App. 1993).

62. *Id.*

63. Initial Brief of Appellants at 2, *Murthy v. N. Sinha Corp.*, 618 So. 2d 307 (Fla. 3d Dist. Ct. App. 1993) (No. 92-01237).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Murthy*, 618 So. 2d at 308.

house flooded repeatedly and the ceiling collapsed causing property damage and personal injuries.⁶⁸

In May 1991, the corporation filed a claim of lien against the Murthys' home.⁶⁹ When the Murthys contested the lien, the corporation filed an action for breach of contract and to foreclose on the mechanic's lien.⁷⁰ Thereafter, the Murthys filed an amended third party complaint against Sinha, individually.⁷¹ The trial court granted the corporation's motion to dismiss the third party complaint, and the Murthys appealed.⁷²

Citing *Finkle*, the court held that neither section 489.119 nor 489.129, the regulatory and penal statutes, respectively, of chapter 489 creates a private cause of action against qualifying agents individually.⁷³ Again citing *Finkle*, and reversing the trial court, the district court held that the Murthys did state a cause of action against the qualifying agent, individually, for common-law negligence.⁷⁴ The court added that Sinha could not be held personally liable under the construction contract because he was not a party to the contract; the contract was between the Murthys and N. Sinha Corporation.⁷⁵

III. INTERPRETING FLORIDA STATUTES CHAPTER 489

A. *Implying a Private Cause of Action*

Chapter 489 makes no express provision for a qualifying agent's civil liability.⁷⁶ The threshold inquiry, therefore, concerns whether a cause of action should be judicially implied. Whether to imply a private cause of action from a statute is determined by legislative intent.⁷⁷ Legislative intent controls construction of statutes in Florida and that intent is determined primarily from the language of the statute.⁷⁸ The plain meaning of

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Murthy*, 618 So. 2d at 308.

73. *Id.* at 309.

74. *Id.* at 308.

75. *Id.* at 309.

76. See FLA. STAT. §§ 489.101-489.132 (1991).

77. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982).

78. *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982).

the statutory language is the first consideration.⁷⁹ This principle, known as the “plain meaning rule,” requires judicial determination of statutory ambiguity as a prerequisite for judicial interpretation.⁸⁰

Conflicting interpretations of chapter 489 among the First and Third District Courts of Appeal evidence the statute’s ambiguity.⁸¹ In its inconsistent and unclear interpretation of chapter 489,⁸² the Third District Court of Appeal has placed itself in direct conflict with the First District Court of Appeal.⁸³ Resolution of the controversy depends upon an analysis of the rationales applied in the Third and First Districts, respectively, together with the relevant sections of chapter 489,⁸⁴ and an alternative

79. *Id.*

80. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882 (Fla. 1983).

81. See *supra* text accompanying notes 11-24.

82. See *Murthy*, 618 So. 2d at 309; *Finkle*, 578 So. 2d at 397.

83. *Gatwood v. McGee*, 475 So. 2d 720, 723 (Fla. 1st Dist. Ct. App. 1985); see also *Mitchell v. Edge*, 598 So. 2d 125, 129 (Fla. 2d Dist. Ct. App. 1992) (Hall, J., concurring) (failing to exercise “due care” in carrying out qualifying agent’s statutorily-imposed supervisory duty has effect of lifting protection of corporate veil and rendering qualifying agent personally liable).

84. Florida Statutes, section 489.101 provides:

Purpose.

The Legislature recognizes that the construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services. Therefore, it is necessary in the interest of the public health, safety, and welfare to regulate the construction industry.

FLA. STAT. § 489.101 (1991). Florida Statutes, section 489.105(3) defines “contractor” as follows:

“Contractor” means the person who is qualified for and responsible for the entire project contracted for and means . . . the person who, for compensation, undertakes to, submits a bid to, or does himself or by others construct, repair, alter, remodel, add to, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others

. . . .

FLA. STAT. § 489.105(3) (1991). Florida Statutes, section 489.105(4) defines a “qualifying agent” 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 . . . construction activities on a job for which he 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.

FLA. STAT. § 489.105(4) (1991). Florida Statutes, section 489.107(1) provides in relevant part:

Construction Industry Licensing Board.

“To carry out the provisions of this part, there is created within the Department of Professional Regulation the Construction Industry Licensing Board”

FLA. STAT. § 489.107(1) (1991). Florida Statutes, section § 489.119(2)(a) provides in relevant part:

Business organizations; qualifying agents.

[A]pplicant[s] propos[ing] to engage in contracting as a . . . corporation . . . or other legal entity . . . must apply through a qualifying agent Such application must also 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 registration or certification, when issued upon application of a business organization, must be in the name of the qualifying agent, and the name of the business organization must be noted thereon

FLA. STAT. § 489.119(2)(a) (1991). Florida Statutes, section 489.1195(1) provides in relevant part:

Responsibilities.

“A qualifying agent is . . . 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.”

FLA. STAT. § 489.1195(1) (1991). Florida Statutes, section 489.129(1), (2) provides in relevant part:

Disciplinary proceedings.

(1) The board may revoke, suspend, or deny the issuance or renewal of the certificate or registration of a contractor, require financial restitution to a consumer, impose an administrative fine not to exceed \$5,000, place a contractor on probation, require continuing education, assess costs associated with investigation and prosecution, or reprimand or censure a contractor if the contractor, or if the business organization for which the contractor is a primary qualifying agent . . . responsible under s. 489.1195, is found guilty of any of the following acts:

. . . .

(d) Willfully or deliberately disregarding and violating the applicable building codes or laws of the state or of any municipalities or counties thereof.

. . . .

(f) . . . When a certificateholder or registrant allows his certificate or registration to be used by one or more business organizations without having any active participation in the operations, such act constitutes prima facie evidence of an intent to evade the provisions of this part.

. . . .

(h) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer

. . . .

(m) Committing fraud or deceit or gross negligence, incompetency, or misconduct in the practice of contracting.

rationale not applied by any of the district courts in the context of the certified question.⁸⁵

The Third District Court of Appeal, in *Finkle v. Mayerchak*, was the first to hold that neither section 489.119 nor 489.129 of the Florida Statutes, the regulatory and penal statutes governing construction contracting, creates a private cause of action against the individual qualifier for a corporation acting as a general contractor.⁸⁶ The *Finkle* court relied on *Fischer v. Metcalf*, looking to legislative intent rather than what it termed the "class benefitted" factor to determine whether the statute creates a private right of action.⁸⁷ The *Finkle* court found no evidence of legislative intent to create a private remedy on behalf of individuals.⁸⁸ The *Murthy* court cited *Finkle* without explanation to deny the plaintiffs a statutory cause of action against the qualifying agent,⁸⁹ and to permit a common-law negligence action against the qualifier.⁹⁰ Neither court revealed its analyses of the statute, legislative intent, or cases upon which its conclusions were based.

However, the *Finkle* and *Murthy* courts' reasoning can be reconstructed by applying the *Fischer* court's rationale to *Murthy*. Prior to *Fischer*,⁹¹ the Third District Court of Appeal applied the common-law tradition from *Rosenberg v. Ryder Leasing, Inc.*,⁹² which set forth a relatively simple test. The test provides that, where a penal statute imposes a duty to benefit a class of individuals, a right of action accrues to a class member injured through breach of the duty.⁹³ The cause of action arises by virtue of the duty created by the statute.⁹⁴

.....

(2) If a contractor disciplined under subsection (1) is a qualifying agent for a business organization . . . the board may impose an additional administrative fine not to exceed \$5,000 against the business organization or any partner, officer, director, trustee, or member if such person . . . knew or should have known . . . and failed to take reasonable corrective action.

FLA. STAT. § 489.129(1), (2) (1991).

85. See *supra* notes 31-33 and accompanying text.

86. See *Finkle*, 578 So. 2d 396, 397 (Fla. 3d Dist. Ct. App. 1991); see also FLA. STAT. §§ 489.119, 489.129 (1989).

87. *Finkle*, 578 So. 2d at 397.

88. *Id.* at 398.

89. *Murthy*, 618 So. 2d 309.

90. *Id.* at 308.

91. 543 So. 2d 785, 788 (Fla. 3d Dist. Ct. App. 1989) (en banc).

92. 168 So. 2d 678, 680 (Fla. 3d Dist. Ct. App. 1964) (adopting test originating federal implication doctrine from *Texas & Pacific Railway v. Rigsby*, 241 U.S. 33, 39 (1916)).

93. *Id.*; *Fischer*, 543 So. 2d at 788.

94. *Fischer*, 543 So. 2d at 788.

The *Fischer* court found the United States Supreme Court's rationale in *Cort v. Ash*⁹⁵ compelling and adopted the *Cort* test while receding from the common law tradition in *Rosenberg*.⁹⁶ The *Fischer* court stated that, in the Third District, "the 'class benefitted' factor would no longer be the sole determinative" in implying a private right of action for violation of a penal statute.⁹⁷ The court set forth the United States Supreme Court doctrine using its test to determine whether a private remedy should be implied in a statute not expressly providing one.⁹⁸ The *Fischer* court's criteria focused on discerning the legislative intent behind enacting the statute under review.⁹⁹

First, the plaintiff must be one of the class for whose "especial" benefit the statute was enacted.¹⁰⁰ Second, a court must consider any explicit or implicit intent to create or deny a private remedy.¹⁰¹ Third, judicial implication must be consistent with the underlying purposes of the legislative scheme.¹⁰²

The first step in applying the *Fischer* test to *Murthy* is to decide if the plaintiff is one of the class for whose "especial" benefit the statute was enacted.¹⁰³ In other words, a statute that merely makes a provision to secure the safety or welfare of the public as an entity should not be construed as establishing civil liability.¹⁰⁴ However, whether the liability is

95. 422 U.S. 66, 78 (1975). The Supreme Court's reluctance to imply civil liability from federal statutes is partly because damage actions are normally a question of state law. *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840, 853 (Or. 1981) (Linde, J., concurring). Unlike Congress, however, state legislators know that judicial recognition of implicit tort liability does not involve such jurisdictional questions. *Id.*

96. *Fischer*, 543 So. 2d at 789.

97. *Id.*

98. *Id.* at 788.

99. *Id.*

100. *Id.*

101. *Fischer*, 543 So. 2d at 788.

102. *Id.*

103. *See id.*

104. *Grand Union Co. v. Rocker*, 454 So. 2d 14, 16 (Fla. 3d Dist. Ct. App. 1984) (violating minimum building code is not negligence per se because purpose of statute is to protect general public). The *Rocker* court ignored section 553.84 of the building construction standards statute which states: "any person . . . damaged as a result of a violation of . . . the State Minimum Building Codes, has a cause of action in any court . . . against the person or party who committed the violation." FLA. STAT. § 553.84 (1979); *see also* Byron G. Petersen & Steven S. Goodman, *Section 553.84: Remedy Without a Cause?*, 17 NOVA L. REV. 1111, 1121 n.48 (1993) (noting that a violation of the building code translates into failure to meet the minimum standards of proper construction, which is more like a formulation of negligence per se than mere evidence of negligence).

exclusively of a public character depends on the nature of the duty imposed and the benefits to be derived from its performance.¹⁰⁵

The Legislature enacted chapter 489 to regulate the construction industry "in the interest of the public health, safety and welfare."¹⁰⁶ The Legislature "recogniz[ed] that the construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services."¹⁰⁷ Although the stated purpose of chapter 489 uses the broad term "public," the statute functions to protect consumers of contractors' services: a specific class of persons.

Furthermore, the nature of the qualifying agent's duty is absolute responsibility for the project.¹⁰⁸ The qualifying agent must supervise all operations of the business organization, the field work at all sites, and financial matters of the corporation and each specific job.¹⁰⁹ The character of the qualifying agent's duty is private not public because a specific consumer derives the primary benefits from its performance.

The statute defines a contractor as one who "undertakes to . . . construct, repair, alter, remodel . . . or improve any building or structure for others or for resale to others . . ." ¹¹⁰ The "others" for whom contractors provide services are a distinct, specific group of consumers. Thus, the statute was enacted for the "especial" benefit of the consumers of contractors' services. It follows that Murthy, a consumer who contracted for services from a business organization acting as a contractor, N. Sinha Corporation, is a member of the class for whom the statute was enacted.¹¹¹

105. *Frontier Steam Laundry Co. v. Connolly*, 101 N.W. 995, 996 (Neb. 1904). If the duty imposed is clearly intended for the benefit of individuals or their property, the plaintiff may recover; but where the duty imposed is plainly for the public at large, then an individual acquires no new rights by virtue of the statute. *Id.* See generally 49 FLA. JUR. 2D *Statutes* § 223 (1984) (discussing rights of action predicated on violation of statutory duty); *cf.* *Lake v. Ramsay*, 566 So. 2d 845, 847 (Fla. 4th Dist. Ct. App. 1990) (stating that qualifying agents have a duty to their employers and a further duty of competence and professional responsibility to the public).

106. FLA. STAT. § 489.101 (1991); see *supra* note 84.

107. *Id.*

108. FLA. STAT. §§ 489.105(4), 489.1195 (1991); see *supra* note 84.

109. FLA. STAT. § 489.1195 (1991). *But see* ch. 93-166, § 14, 1993 Fla. Laws 1015, 1036 (amending FLA. STAT. § 489.1195 (Supp. 1992) to allow corporation to designate "financially responsible officer," in addition to qualifying agent, responsible for all its financial aspects).

110. FLA. STAT. § 489.105(3) (1991); see *supra* note 84.

111. See *Mallock v. Southern Memorial Park, Inc.*, 561 So. 2d 330, 333 (Fla. 3d Dist. Ct. App. 1990) (implying right of action from statute based on *Fischer* test).

Moreover, the *Finkle* court based its holding on “no evidence of . . . legislative intent . . .” rather than the “class benefitted factor.”¹¹² The court’s statement invites the reasonable inference that the plaintiff satisfied the class benefitted factor.¹¹³ Notwithstanding the court’s omission, the facts of *Murthy* satisfy the first requirement of the *Fischer* test.¹¹⁴

The second prong of the *Fischer* test requires discerning any explicit or implicit legislative intent to create or deny a private remedy.¹¹⁵ While the statute does not expressly create a private remedy on behalf of individuals, and the courts are under no compulsion to apply the statute,¹¹⁶ the absence of an express provision for civil liability does not negate a legislative intent that the statute will affect private rights.¹¹⁷

The *Finkle* and *Murthy* courts held that there was no evidence of a legislative intent to create a private remedy on behalf of individuals.¹¹⁸ The courts did not discuss their reasoning or whether the referenced lack of intent was explicit or implicit. Nor did they address legislative intent to deny a private remedy on behalf of individuals. The ensuing analysis applies rules of statutory construction to determine a legislative intent to either create or deny a private remedy against individual qualifiers.¹¹⁹

First, penal statutes and highly regulatory laws are usually subject to strict construction in favor of the violator, and should not be extended by

112. *Finkle v. Mayerchak*, 578 So. 2d 396, 397-98 (Fla. 3d Dist. Ct. App. 1991).

113. See *Fischer*, 543 So. 2d at 788. The court did not specify whether the statute must meet all three criteria to justify judicially implying a private right of action. The inference assumes the *Finkle* court applied the criteria conjunctively. *Id.* at 792 (Baskin, J., dissenting) (explaining that *Cort* directs the court to consider *all* relevant factors).

114. *But see id.* at 790 (legislating a private right of action to include so many, by implication only, strained the court’s credulity).

115. *Id.* at 788.

116. See RESTATEMENT (SECOND) OF TORTS § 286(d) (1964).

117. *Smith v. Piezo Tech. & Prof. Adm’rs*, 427 So. 2d 182, 184 (Fla. 1983) (holding that an injured party should have an action where a statute gives a right, even though it has not expressly given a remedy); see *supra* note 32; *Girard Trust Co. v. Tampashores Dev. Co.*, 117 So. 786, 787 (Fla. 1928); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (effecting purpose of statute justifies implementing it beyond its text).

118. *Finkle*, 578 So. 2d at 398; *Murthy v. N. Sinha. Corp.*, 618 So. 2d 307, 309 (Fla. 3d Dist. Ct. App. 1993).

119. *Fleischman v. Department of Prof. Reg.*, 441 So. 2d 1121, 1123 (Fla. 3d Dist. Ct. App. 1983) (instructing that “[e]very 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.”).

interpretation.¹²⁰ A penal statute commands or prohibits acts imposing penalties for their violations in order to enforce obedience to the law and punish its violation.¹²¹ However, the penal character of a statute will not prevent imposition of civil liability.¹²² Moreover, the rule of strict construction does not apply to those portions of a statute that are not penal.¹²³

Chapter 489 is penal in nature because it imposes penalties such as fines and license revocation for most violations.¹²⁴ Section 489.127 classifies a violation of subsection (1) a misdemeanor punishable according to a cross-referenced criminal statute.¹²⁵

However, the sections of chapter 489 within the scope of the certified question involve the qualifying agent's positive duty to competently supervise construction projects.¹²⁶ Moreover, section 489.129 subsection (1) authorizes the licensing board to require the qualifying agent to pay financial restitution to a consumer for violations under that subsection.¹²⁷ The remedial nature of this part of the statute disciplining the qualifying agent removes it from a strictly penal category.¹²⁸ Thus, courts may liberally interpret the statute because the rule of strict construction does not apply here.¹²⁹

120. *Federgo Discount Ctr. v. Department of Prof. Reg.*, 452 So. 2d 1063, 1066 (Fla. 3d Dist. Ct. App. 1984); *Fischer*, 543 So. 2d at 788; *Dotty v. State*, 197 So. 2d 315, 318 (Fla. 4th Dist. Ct. App. 1967).

121. *Dotty*, 197 So. 2d at 318.

122. *Cort v. Ash*, 422 U.S. 66, 79 (1975); *Rosenberg v. Ryder Leasing, Inc.*, 168 So. 2d 678, 679 (Fla. 3d Dist. Ct. App. 1964); *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So. 2d 1367, 1369 n.3 (Fla. 4th Dist. Ct. App. 1981).

123. *Lee v. Walgreen Drugstores Co.*, 10 So. 2d 314, 316 (Fla. 1942).

124. *See* FLA. STAT. §§ 489.127, 489.129, 489.132 (1991) (enumerating prohibitions, penalties, and disciplinary proceedings of licensed and unlicensed principals); *see also supra* note 84.

125. FLA. STAT. § 489.127 (1991) (referencing FLA. STAT. §§ 775.082-775.083 (1991), for criminal penalties and fines).

126. *Id.* §§ 489.1195, 489.129; *accord* *Viking Pools, Inc. v. Maloney*, 770 P.2d 732, 735 n.4 (Cal. 1989) (en banc) (explaining that Contractors' State Licensing Law is nonpenal in nature because its purpose is to protect consumers not punish individuals). The court added that the statute's nonpenal nature allows a broader interpretation. *Id.*

127. FLA. STAT. § 489.129(1) (1991); *Boneski v. Department of Prof. Reg.*, 562 So. 2d 441, 443 (Fla. 4th Dist. Ct. App. 1990) (stating the 1988 amendment authorizing DPR to order financial restitution to a consumer may not be applied retroactively).

128. *Collins v. Kidd*, 38 F. Supp. 634, 637 (E.D. Tex. 1941) (holding that a statute containing both penal and remedial parts should be considered penal when it is sought to enforce the penalty, and remedial when it is sought to enforce the remedy).

129. *Maloney*, 770 P.2d at 735 n.4; *see supra* note 126.

Second, the courts may not supply an omission that to all appearances was not in the minds of the legislators when the law was enacted.¹³⁰ To imply a private remedy here, the court may supply the omission because the express statutory language reveals the legislators contemplated a civil action and inserted a provision that justifies implication.¹³¹ Specifically, section 489.129(1)(m) provides a penalty for “[c]ommitting fraud . . . deceit . . . gross negligence, incompetency, or misconduct in the practice of contracting.”¹³² Notwithstanding the language in section 489.129 subsection (1), authorizing financial restitution to a consumer, chapter 489 contains no language explicitly creating or denying a private remedy.¹³³ While the restitution clause may provide a remedy to a consumer, it does not qualify as a private right of action because it is available only upon the DPR’s prosecution of the contractor or qualifying agent.¹³⁴

While the Legislature intended to protect the class of persons of which the plaintiff is a member, it has not manifested an intention to achieve this protection by imposing a private right of action against qualifying agents.

130. *Special Disability Trust Fund v. Motor & Compressor Co.*, 446 So. 2d 224, 226 (Fla. 1st Dist. Ct. App. 1984).

131. Telephone interview with Wellington H. Meffert, Chief Construction Attorney, Department of Professional Regulation, (Aug. 24, 1993) [hereinafter Meffert Interview]. Mr. Meffert, a former contractor, and prosecutor for the DPR, was the primary drafter of the 1993 amendments to chapter 489. He contributed to the 1991 and 1992 revisions as well. Mr. Meffert said the drafters contemplated a civil suit against qualifying agents and they envisioned that section 489.129(1)(m) would support judicial implication; however, he will “wait and see what the Florida Supreme Court decides, to find out [what they really intended].” *Id.* See generally Robert M. Rhodes & Susan Seereiter, *The Search for Intent: Aids to Statutory Construction in Florida—An Update*, 13 FLA. ST. U. L. REV. 485, 508-09 (1985) (noting that postenactment statements are disfavored as indicia of legislative intent). *But see* Osterndorf v. Turner, 426 So. 2d 539, 545 (Fla. 1982) (admitting a legislator’s affidavit as an expression of legislative intent).

132. FLA. STAT. § 489.129(1)(m) (1991); see *supra* note 84. In 1992, the Legislature subdivided the provision into three parts:

- (m) Committing fraud or deceit in the practice of contracting.
- (n) Being found guilty of incompetency or misconduct in the practice of contracting.
- (o) Being found guilty of gross negligence, repeated negligence, or negligence resulting in a significant danger to life or property.

FLA. STAT. § 489.129(1) (Supp. 1992). In 1993, the Legislature changed the wording in subsections (n) and (o) from “[b]eing found guilty of” to “[c]ommitting.” Ch. 93-166, § 18, 1993 Fla. Laws 1015, 1043 (amending FLA. STAT. § 489.129(1) (Supp. 1992)).

133. See FLA. STAT. §§ 489.101-489.132 (1991); see *supra* note 84.

134. See FLA. STAT. § 489.129(1) (1991). The “board may . . . require financial restitution to a consumer” *Id.* (emphasis added).

The only remedies involving qualifying agents that the statute provides are disciplinary or penal proceedings.¹³⁵

Admittedly, the Legislature could have conferred a private right of action against qualifying agents who breach their statutorily-imposed duties in the same manner as it has done in other statutes.¹³⁶ In 1988, section 768.0425, formerly numbered 489.5331, was transferred from chapter 489 to chapter 768 entitled "Negligence."¹³⁷ Section 768.0425 expressly provides civil treble damages in actions against unlicensed contractors for injuries sustained from negligence, malfeasance, or misfeasance.¹³⁸ Subsequent versions of chapter 489 of the Florida Statutes, including the 1993 revisions, do not include a cross reference to the renumbered statute.¹³⁹

Even though the statute was originally enacted as part of chapter 489, the same legislative act, tending to support the conclusion that it is part of a single statutory scheme, the lack of a continuing relationship indicates otherwise. The legislators probably transferred the provision from the contracting chapter to the negligence chapter because they intended no private remedy against contractors within chapter 489. Because contractors

135. *Id.* § 489.129; *see supra* note 84. The qualifying agent who breaches the duty to supervise is not subject to criminal penalty, only discipline by the CILB. FLA. STAT. § 489.129 (1991); *see supra* note 84. The legislators identified one remedy to benefit the consumer directly, and according to the general statutory construction principle, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another. *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). However, it is more likely the Legislature avoided the question because it is controversial. *See Fischer*, 543 So. 2d at 789. Nevertheless, the Restatement of Torts states:

The fact that a statute . . . provides for . . . the payment of a sum of money to the injured person as a penalty [for its violation], does not in itself prevent the imposition of tort liability through the adoption by the court of the standard of conduct required by the legislation or regulation.

RESTATEMENT (SECOND) OF TORTS § 287(a) (1964).

136. *See* FLA. STAT. § 553.84 (1991) (providing private cause of action against anyone violating minimum building codes); *see also supra* note 104; FLA. STAT. § 772.11 (1991) (providing civil remedy for theft); *id.* § 681.11 (providing consumer remedies for violation of motor vehicle sales warranty statutes). The preceding statutes exemplify a few, but not all of those expressly providing private rights of action.

137. H.R. COMM. ON CONSTRUCTION CONTRACTING REGULATORY REFORM, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT OF 1988, Section 23 at 4 (April 18, 1988) (transferring language on damage actions by consumers against contractors to chapter 768, Florida Statutes).

138. FLA. STAT. § 768.0425 (1991).

139. *See* FLA. STAT. §§ 489.101-489.131 (Supp. 1992); ch. 93-166, §§ 1-23, 1993 Fla. Laws 1015, 1055 (amending FLA. STAT. §§ 489.101-489.131 (Supp. 1992)).

must be privy to a contract with a consumer under section 768.0425,¹⁴⁰ and qualifying agents are not usually parties to the construction contract, the transfer indicates no deliberate legislative intent to preclude a remedy against qualifying agents.

Third, when scrutinizing the history of legislation to determine legislative intent, it is appropriate to consider acts passed at subsequent sessions.¹⁴¹ In addition, the courts may consider extrinsic aids to statutory construction.¹⁴² Florida courts frequently cite committee reports to assess legislative intent, especially staff analyses.¹⁴³

Review of the statute's history indicates the Legislature has repeatedly amended chapter 489 since its enactment in 1979. In the most recent revision, during the aftermath of Hurricane Andrew, the Legislature substantially amended chapter 489, effective July 1993.¹⁴⁴ While the drafters did not add a private right of action against qualifying agents, they reaffirmed prior legislative intent by maintaining the qualifying agent's absolute duty to supervise each project.¹⁴⁵ The Legislature recognized that consumers needed more protection from incompetent and unscrupulous contractors.¹⁴⁶ Legislative intent derived from committee reports, staff analyses, staff materials and the revised text of the 1993 amended provisions focused on more consumer protection.¹⁴⁷

In the 1993 amendments to chapter 489, the Legislature reformed various elements of existing provisions and added several elements designed

140. FLA. STAT. § 768.0425 (1991). The statute states: “[f]or purposes of this section only, the term ‘contractor’ means any person who *contracts* [with a consumer] to perform any construction” (emphasis added).

141. *Watson v. Holland*, 20 So. 2d 388, 393 (Fla. 1944), *cert. denied*, 325 U.S. 839 (1945).

142. *Rhodes & Seereiter*, *supra* note 131, at 488.

143. *Id.* at 495.

144. Ch. 93-166, §§ 1-23, 1993 Fla. Laws 1015, 1055 (amending FLA. STAT. §§ 489.101-489.131 (Supp. 1992)).

145. *Id.* § 14 (amending FLA. STAT. § 489.1195(1)(a) (Supp. 1992)).

146. See H.R. COMM. ON BUSINESS AND PROFESSIONAL REGULATION, FINAL BILL ANALYSIS AND ECONOMIC IMPACT STATEMENT, STAFF DATA AND MATERIALS ON CONSTRUCTION AND ELECTRICAL CONTRACTING OF 1993, at 3, Summary (Apr. 8, 1993) [hereinafter H.R. COMM. ON CONSTR. REFORM].

147. H.R. COMM. ON CONSTR. REFORM, *supra* note 146, at 2-12; WELLINGTON H. MEFFERT, DEP'T OF PROF. REG., SYNOPSIS OF CONSTRUCTION REFORM BILL CH. 93-166 AND 93-154, LAWS OF FLA. (1993); ch. 93-166, §§ 1-23, 1993 Fla. Laws 1015, 1055 (amending Fla. Stat. §§ 489.101-489.131 (Supp. 1992)).

to protect the consumer.¹⁴⁸ The revised statute establishes a recovery fund for homeowners to recover monies lost in dealing with a licensed contractor.¹⁴⁹ Although the 1993 amendments do not apply to *Murthy*, the Legislature acknowledges the hardships consumers such as Murthy faced under the 1991 and 1992 versions of the statute.¹⁵⁰ Prior to the 1993 revisions, there was no recourse for consumers who suffered financial damage from dealing with licensed contractors if those contractors were insolvent, “judgment proof,” or had simply disappeared.¹⁵¹ If the contractors were available, the consumer could have initiated a disciplinary process which may have penalized the consumer.¹⁵² Alternatively, the consumer could have filed a civil suit against the contractor.¹⁵³ However, in many cases, neither the disciplinary action nor the civil suit resulted in reimbursement for the consumer’s losses.¹⁵⁴

Concededly, the Legislature has had ample opportunity to broaden the penalty for a qualifying agent’s breach of a statutory duty by adding a companion civil remedy. However, the unchanged nature of the penalties

148. H.R. COMM. ON CONSTR. REFORM, *supra* note 146, at 3. Major consumer-oriented changes included requiring state certification for all municipal or county building personnel, revising and enhancing disciplinary measures, requiring all contractors to maintain a \$10,000 surety bond, and establishing a Construction Industries Recovery Fund. In addition, local jurisdictions that do not provide discipline must cease to issue local construction contractor licenses. *Id.*

149. Ch. 93-166, § 21, 1993 Fla. Laws 1015, 1050 (to be codified at FLA. STAT. § 489.140); H.R. COMM. ON CONSTR. REFORM, *supra* note 146, § 22, at 7.

150. *See* H.R. COMM. ON CONSTR. REFORM, *supra* note 146, at 3.

151. *Id.*

152. If a consumer allowed the statute of limitations to run on a civil suit while waiting for the DPR to complete its investigation, and the DPR decided not to prosecute [the contractor], the consumer loses. Meffert Interview, *supra* note 131. Consumers encounter other disadvantages if they file a complaint with the DPR in lieu of a civil suit. First, the DPR must meet a higher standard of proof (clear and convincing), than the plaintiff in a civil action (preponderance). Hence, the consumer is more likely to prevail in a civil action. Second, the consumer is not a party to any action the DPR takes; thus, consumers relinquish decision-making control that they would maintain in a civil action with their own attorneys. *Id.*

153. The civil suit is usually on the contract, not a statutory action. *See, e.g.,* Smith v. Mark Coleman Constr., Inc., 594 So. 2d 812, 813 (Fla. 2d Dist. Ct. App. 1992). Moreover, the qualifying agent is not privy to the contract therefore unreachable via an action on the contract. *See* Murthy v. N. Sinha Corp., 618 So. 2d 307, 308 (Fla. 3d Dist. Ct. App. 1993); Mitchell v. Edge, 598 So. 2d 125, 127 (Fla. 2d Dist. Ct. App. 1992); Finkle v. Mayerchak, 578 So. 2d 396, 397 (Fla. 3d Dist. Ct. App. 1991); Gatwood v. McGee, 475 So. 2d 720, 722 (Fla. 1st Dist. Ct. App. 1985).

154. H.R. COMM. ON CONSTR. REFORM, *supra* note 146, at 3.

in the face of repeated revisions may imply that, rather than a deliberate omission, the legislators avoided the question because it was controversial or they simply did not have a civil suit in mind.¹⁵⁵

In summary, chapter 489 reveals no explicit legislative intent, using intrinsic or extrinsic aids to statutory construction, to create or deny a private right of action against qualifying agents.¹⁵⁶ However, the statute's expressed purposes and penalties supply an implicit intent to support a private remedy which overrides any implicit intent to deny one.¹⁵⁷ Without question, the Legislature recognizes the need for and intends to provide consumer protection against the risk of harm from incompetent and unscrupulous contractors, including qualifying agents.¹⁵⁸ While the Legislature's expressed intent is to provide that protection through regulation, the court would further the general purpose of the statute by implying a private right of action.

Finally, the third prong of the *Fischer* test requires that judicial implication must be consistent with the underlying purposes of the legislative scheme.¹⁵⁹ An implied civil remedy is consistent with the underlying purposes of the legislative scheme. The thrust of the legislation indicates intent to protect consumers of contractors' services, of which qualifying agents are a subset, and to discourage dishonest and incompetent contractors from harming those who employ their services, whether by criminal prosecution, CILB discipline or by civil lawsuit.

Chapter 489 satisfies each prong of the *Fischer* test. Therefore, its application should not operate to "close the courthouse doors to litigants seeking private redress" for violations of the qualifying agent's statutory duty.¹⁶⁰ While the legislators may not have forecasted a situation in which a contractual remedy would not apply,¹⁶¹ they have supplied sufficient

155. See Meffert Interview, *supra* note 131; see also *supra* note 117.

156. See FLA. STAT. §§ 489.101-489.132 (1991).

157. See *id.*; see *supra* note 84.

158. FLA. STAT. § 489.101 (1991).

159. *Fischer v. Metcalf*, 543 So. 2d 785, 788 (Fla. 3d Dist. Ct. App. 1989) (en banc).

160. *Id.* at 789.

161. When a qualifying agent controls the project that results in the plaintiffs' injuries, a contractual remedy does not apply. See *A.R. Moyer, Inc., v. Graham*, 285 So. 2d 397, 399 (Fla. 1973). Currently, the qualifying agent is accountable to the contractor, who is bound by the contract, and to the DPR which can discipline and penalize the qualifying agent. FLA. STAT. §§ 489.127, 489.129 (1991). However, without judicial implication, the plaintiff is without a private remedy against the responsible party, the qualifying agent. See *id.* *But cf.* *Montgomery v. Chamberlain*, 543 So. 2d 234, 235 (Fla. 2d Dist. Ct. App. 1989) (holding licensed contractor of record liable for implied warranty claims based on principles of agency

specifications to provide a discernible frame of reference within which to imply a private right of action against qualifying agents. Without ignoring the plain purpose and language of the statute, the court should not be reluctant to provide civil liability for an unlawful breach of a statutory duty that the Legislature envisioned as necessary to protect unwary homeowners¹⁶² and deter unscrupulous and incompetent contractors.¹⁶³

B. *What Type of Action to Imply*

In Florida, violation of a statute is either evidence of negligence or negligence per se.¹⁶⁴ In a negligence per se action, the measure of the legal duty is fixed by statute, so that the violation becomes conclusive evidence of negligence, or negligence per se.¹⁶⁵ In a common-law negligence action, the duty is determined by common-law principles.¹⁶⁶ In either case, failure to perform the duty, whether imposed by common law or by statute, constitutes negligence.¹⁶⁷

The issues of common-law negligence parallel the issues in the negligence per se claim. Pleading a negligence per se claim differs from a common-law negligence claim only in that the plaintiff must allege a statutory violation.¹⁶⁸ More important, the primary difference between them is how they are proved. Negligence per se results from the violation of a statute;¹⁶⁹ thus, the jury must determine only whether the actor

law).

162. *Simmons v. Owens*, 363 So. 2d 142, 143 (Fla. 1st Dist. Ct. App. 1978). The court stated:

The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet purchaser[s] make[] the biggest . . . investment [of their] li[ves] . . . on a limited budget The careless work of contractors, [formerly] insulated from liability, must cease or they must accept financial responsibility for their negligence.

Id.

163. *See Fischer*, 543 So. 2d at 793 (Baskin, J., dissenting).

164. *deJesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198, 201 (Fla. 1973).

165. *Id.*; RESTATEMENT (SECOND) OF TORTS § 286(d) (1964).

166. RESTATEMENT (SECOND) OF TORTS § 282 (1964). “[T]he care which the actor is required to exercise to avoid being negligent . . . is that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.” *Id.* § 298.

167. *deJesus*, 281 So. 2d at 201; RESTATEMENT (SECOND) OF TORTS § 285 (1964).

168. 57A AM. JUR. 2D *Negligence* § 729 (1989).

169. *Tamiami Gun Shop v. Klein*, 116 So. 2d 421, 423 (Fla. 1959) (stating the court rules negligence per se, as a matter of law); *Williams v. Youngblood*, 152 So. 2d 530, 532 (Fla. 1st Dist. Ct. App. 1963).

committed or omitted the specific act prohibited or required.¹⁷⁰ The jury must find common-law negligence from the evidence.¹⁷¹

The Florida Supreme Court, in *deJesus*, stated that not all violations of statutes are negligence per se; for some, a violation may be only evidence of negligence.¹⁷² Violations of statutes, other than those imposing a form of strict liability, may be either negligence per se or evidence of negligence.¹⁷³ The court divided statutory violations into three categories: (1) violation of a strict liability statute designed to protect a particular class of persons who are unable to protect themselves, constituting negligence per se; (2) violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular injury or type of injury, also constituting negligence per se; and, (3) violation of any other kind of statute, constituting mere prima facie evidence of negligence.¹⁷⁴

For actionable negligence per se, based on a statute other than the strict liability type, plaintiffs must first meet the statutory purpose test on the issue of negligence.¹⁷⁵ Plaintiffs must prove that they are of the class the statute was intended to protect, that they suffered injury of the type the statute was designed to prevent, and that the Legislature intended to create a private liability as distinguished from one of a public character.¹⁷⁶ Plaintiffs also must prove a causal connection between the statutory violation and the injury.¹⁷⁷ They must establish that the conduct constituting the violation was the cause in fact and the legal or proximate cause of the injury.¹⁷⁸ Plaintiffs must satisfy these tests for the defendant's statutory violation to

170. *Klein*, 116 So. 2d at 423. If the court deems a statutory violation negligence per se, the plaintiff will have established a conclusive presumption of duty and breach, two of the four elements necessary for actionable negligence. *Id.*

171. *Id.* (stating that the jury weighs all four elements of negligence when a statutory violation is held to be merely evidence of negligence). Here, the plaintiff must prove all four elements of actionable negligence: (1) duty, (2) breach, (3) proximate cause, and (4) damage.

172. *See deJesus*, 281 So. 2d at 200-01.

173. *Id.* at 201.

174. *Id.*

175. *Id.*

176. *Id.*; RESTATEMENT (SECOND) OF TORTS § 288(b) (1964); *see supra* note 105 and accompanying text.

177. *deJesus*, 281 So. 2d at 201 (holding that in a negligence per se action, plaintiff must still prove proximate cause).

178. *Id.*

amount to negligence per se or even to be considered as evidence of negligence in a common-law action.¹⁷⁹

While a qualifying agent's violation of a statutory duty falls outside the parameters of the strict liability category, violations are within the second type of negligence per se category¹⁸⁰ because, as has been demonstrated,¹⁸¹ the statute establishes the qualifying agent's duty to take precautions to protect a particular class of persons (consumers of the contractor's and qualifying agent's services) from a particular type of harm (bodily harm, financial harm, or property damage).¹⁸² Alternatively, violations are at least prima facie evidence of negligence.¹⁸³ Nevertheless, the plaintiff still must prove proximate cause and the other elements of actionable negligence.¹⁸⁴

The *Finkle* and *Murthy* courts ignored the line of cases implying a private cause of action in negligence per se.¹⁸⁵ The *Finkle* court referred to the claims as negligence per se or common-law negligence theories.¹⁸⁶ However, the court did not cite to any binding case law on negligence per se.¹⁸⁷ Instead, the court relied on *Fischer* for judicial implication doctrine and *Gatwood* for common-law negligence theory.¹⁸⁸ While *Finkle* asserts that the statute creates no private cause of action against the qualifying agent, the court relied on *Gatwood*, the only case holding otherwise.¹⁸⁹ The *Finkle* court cites *Gatwood* to support an action in common-law negli-

179. *Id.* (holding that contributory negligence is a defense to negligence per se if violation is not of strict liability statute); *Alford v. Meyer*, 201 So. 2d 489, 491 (Fla. 1st Dist. App. 1967), *cert. denied*, 209 So. 2d 671, 671 (Fla. 1968) (stating that negligence or negligence per se rules apply to statutes, ordinances, and administrative rules or regulations); *see generally* RESTATEMENT (SECOND) OF TORTS § 288A (1964) (listing situations in which a statutory violation may be excused).

180. *See supra* notes 169-70 and text accompanying note 174.

181. *See supra* text accompanying notes 103-11.

182. FLA. STAT. §§ 489.101, 489.129(1)(d), (h), (m) (1991); *see supra* note 84. The statute's stated purpose to protect the "public" from "incompetent or dishonest contractors [who] provide unsafe, unstable, or short-lived products or services," functions effectively to protect those who employ the contractor's services from personal injury, property damage, and financial harm. *See supra* text accompanying notes 103-11.

183. *deJesus*, 281 So. 2d at 201.

184. *Id.*

185. *See Finkle v. Mayerchak*, 578 So. 2d 396, 397-98 (Fla. 3d Dist. Ct. App. 1991); *Murthy v. N. Sinha Corp.*, 618 So. 2d 307, 308-09 (Fla. 3d Dist. Ct. App. 1993).

186. *Finkle*, 578 So. 2d at 397.

187. *See id.* at 397-98.

188. *Id.*

189. *Id.*

gence.¹⁹⁰ However, *Gatwood* stands for the propositions that the statute creates a private right of action against qualifying agents, and that the cause of action for breach of the qualifying agent's statutory duty is negligence.¹⁹¹ According to *Gatwood*, the plaintiff must prove the construction defects could reasonably have been avoided if the qualifying agent performed his statutorily-imposed supervisory duty with "due care."¹⁹² Even though *Gatwood* does not mention negligence per se or the Florida Supreme Court's test set forth in *deJesus*, the facts of the case fit into the second category of negligence per se.¹⁹³ Applied to *Murthy*, the plaintiffs are members of the class the statute is intended to protect (consumers of contractors' and qualifying agents' services) and they suffered the particular type of harm the statute was designed to prevent (bodily harm, financial harm and property damage).¹⁹⁴ Additionally, in order to prevail, the Murthys must establish that the qualifying agent's violation of the statute proximately caused their injuries.¹⁹⁵

C. *Guidance from Other Jurisdictions*

Authority from other jurisdictions supports extending chapter 489 to allow a private right of action against qualifying agents. For example, in *Brown v. Transcon Lines*,¹⁹⁶ the Supreme Court of Oregon recognized a public policy that supported a civil action for damages for wrongful discharge by a worker discharged for applying for such benefits.¹⁹⁷ The court explained that it was not "creating" a new cause of action based upon a statutory violation, but was holding only that the employee had an existing common-law cause of action for wrongful discharge.¹⁹⁸ The court characterized *Brown* as an extension of an existing common-law cause of action, rather than a creation of a new cause of action.¹⁹⁹

190. *Id.* at 398.

191. *Gatwood v. McGee*, 475 So. 2d 720, 723 (Fla. 1st Dist. Ct. App. 1985).

192. *Id.*

193. *See id.* at 721-22; *see also supra* notes 169-70 and text accompanying note 174.

194. *See supra* text accompanying notes 65-68.

195. *See deJesus*, 281 So. 2d 198, 201 (Fla. 1973).

196. 588 P.2d 1087 (Or. 1978) (en banc).

197. *Id.* at 1094.

198. *Id.* at 1092-95.

199. *Id.* The court also used a violation of a statutory duty as the basis for finding liability under an existing common-law cause of action for negligence per se. *Id.* *See Davis v. Billy's Con-Teena, Inc.*, 587 P.2d 75, 78 (Or. 1978) (en banc) (holding that violation of statute prohibiting sale of liquor to minors is negligence per se).

Conversely, in *Bob Godfrey Pontiac, Inc. v. Roloff*,²⁰⁰ the Supreme Court of Oregon analyzed violations of statutory duties and when such violations give rise to a private right of action.²⁰¹ The *Roloff* court declined to create a private cause of action for conduct by attorneys who violate duties imposed by the Code of Professional Responsibility.²⁰² The court denied recovery for damage to the attorneys' reputations or for attorney's fees incurred in the defense of a civil action.²⁰³ However, the court's rationale turned on the fact that there was no underlying common-law cause of action.²⁰⁴

Applied to *Murthy*, the *Roloff* and *Brown* analyses support a private action arising from chapter 489 because an underlying action exists at common law. Neither *Murthy*, *Finkle* nor *Gatwood* conflict as to whether a common-law cause of action against qualifying agents exists under chapter 489.²⁰⁵ Each case so holds. Additionally, the circumstances surrounding *Murthy* are similar to those in *Brown*.²⁰⁶ In both cases three other conditions are satisfied. A civil action is: 1) consistent with the legislative provision; 2) appropriate for promoting the statute's policy; and 3) needed to assure its effectiveness.²⁰⁷

Applying the Supreme Court of Oregon's analysis to *Murthy*, the Florida Supreme Court would have to recognize a private right of action under chapter 489. A civil remedy would promote the statute's policy and it would be consistent with legislative intent to protect consumers from exploitation by incompetent and unscrupulous contractors. Moreover, in the wake of Hurricane Andrew, a civil remedy is needed to assure the statute's effectiveness.

In *Colberg v. Rellinger*,²⁰⁸ a case factually similar to *Murthy*, the Supreme Court of Arizona rejected the plaintiffs' claim against the qualifying agent for failing to supervise the construction work on their residence.²⁰⁹ The court rejected the claim on the basis that the statute

200. 630 P.2d 840 (Or. 1981).

201. *Id.* at 842-51.

202. *Id.*

203. *Id.* at 851.

204. *Id.*

205. See *Murthy v. N. Sinha Corp.*, 618 So. 2d 307, 308 (Fla. 3d Dist. Ct. App. 1993); *Finkle v. Mayerchak*, 578 So. 2d 396, 398 (Fla. 3d Dist. Ct. App. 1991); *Gatwood v. McGee*, 475 So. 2d 720, 723 (Fla. 1st Dist. Ct. App. 1985).

206. See *Brown v. Transcon Lines*, 588 P.2d 1087, 1096 (Or. 1978).

207. See *Roloff*, 630 P.2d at 847.

208. 770 P.2d 346 (Ariz. Ct. App. 1988).

209. *Id.* at 352.

pertaining to the qualifier's obligations contained no language contemplating a private cause of action for an injured party against a qualifying agent.²¹⁰ Thus, the court concluded that the Legislature intended no private right of action against qualifying agents.²¹¹ However, the court noted that the Arizona contracting statute "may contemplate a private claim against contractors" because the statute permits consumers to recover from the contractors' recovery fund when they obtain a judgment against a contractor who violates the statute.²¹²

The *Colberg* analysis applied to *Murthy* supports the notion that a private right of action against qualifying agents logically flows from chapter 489. The *Colberg* court rejects the action against qualifiers because it assumes that statutory silence means it excludes civil recovery.²¹³ This view assumes the Legislature fosters a hostile policy toward making whole the intended beneficiaries of a statutory duty imposed for their protection.²¹⁴ *Colberg* is distinguishable from *Murthy* because chapter 489 does contain language that indicates the Legislature contemplated such a private claim.²¹⁵ Further, the *Colberg* court weighs consumers' ability to recover from the contractors' recovery fund in favor of judicially creating a private remedy.²¹⁶ Section 489.129 of the 1991 Florida Statutes provides a restitutional remedy to consumers, which comports with the *Colberg* analysis that the Legislature contemplated a private right of action; therefore, it should be allowed.²¹⁷ Moreover, Florida Statutes section 489.140 creates a Construction Industries Recovery Fund analogous to that referenced by the *Colberg* court.²¹⁸ Although section 489.140 was added to chapter 489 in 1993, it provides evidence that the legislators again contemplated a private remedy.²¹⁹ Accordingly, applying the *Colberg* analysis, the Florida Supreme Court would necessarily recognize a private right of action against qualifying agents under chapter 489 because the statute contains both language and remedial provisions indicating the legislators contemplated a private action.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Colberg*, 770 P.2d at 351.

214. *See Roloff*, 630 P.2d at 854 (Linde, J., concurring).

215. *See supra* text and accompanying notes 84, 127, 130-31.

216. *Colberg*, 770 P.2d at 352.

217. *See* FLA. STAT. § 489.129 (1991); *see also supra* notes 84, 127.

218. *See* ch. 93-166, § 21, 1993 Fla. Laws 1015, 1050-52 (to be codified at FLA. STAT. § 489.140).

219. *See id.*

In *Donnelly Construction Co. v. Oberg/Hunt/Gilleland*,²²⁰ the Supreme Court of Arizona provided an instructive analysis supporting a negligence action against a design professional, individually, for purely economic loss.²²¹ The *Donnelly* court held that a negligence action may be maintained if the plaintiffs prove that the design professional owed them a duty, that the duty was breached, and that the breach proximately caused an injury that resulted in damages.²²² The *Donnelly* court stated that design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services.²²³ The court further concluded that the duty extends to those with whom the design professional is in privity as well as to those with whom he is not.²²⁴

The *Donnelly* analysis applies to qualifying agents such as Sinha, Mayerchak, and Gatwood who, like design professionals, had a duty to use ordinary skill, care, and diligence in rendering service to the Murthys, Finkles, and McGees, respectively. Therefore, the *Donnelly* decision supports two propositions applicable to *Murthy*. First, a negligence action against individual qualifying agents under chapter 489 is appropriate and second, the action against those not in privity precludes application of the economic loss rule.²²⁵

IV. PRACTICAL EFFECTS OF THE MURTHY DECISION

If the Florida Supreme Court reverses *Murthy*, thus agreeing that chapter 489 supports a private right of action against qualifying agents, Florida residents will reap five significant benefits: (1) qualifying agents will be more likely to comply with the statute, affording consumers more protection; (2) consumers will have a private right of action against the culpable party; (3) consumers will be required to meet less of a burden to establish negligence if the court rules the statutory violation is negligence per se; (4) consumers probably would not be limited to claims of property damage and personal injury because the economic loss rule should not

220. 677 P.2d 1292 (Ariz. 1984) (en banc).

221. See *id.* at 1294; accord *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 402 (Fla. 1973); see generally RESTATEMENT (SECOND) OF TORTS § 906(b) (1979) (stating that compensatory damages may include compensation for harm to property which also includes physical impairment of anything that is the subject of ownership).

222. *Donnelly*, 667 P.2d at 1295.

223. *Id.*

224. *Id.*; accord *Graham*, 285 So. 2d at 402.

225. See *infra* text accompanying notes 232-38.

apply; and finally, (5) consumers may be allowed to claim exemplary damages.

First, if qualifying agents are subject to personal liability for violating chapter 489, they are more likely to comply with their statutorily-imposed duties. Qualifying agents will receive a clear signal that they will be held accountable for their negligence. Second, consumers will have a right of action against the culpable party. A right of action against qualifying agents comports with the basic function of tort law; that is, to “shift the burden of loss from the injured plaintiff to one who is at fault . . . or to one who is better able to . . . prevent its occurrence.”²²⁶ Where the qualifying agent is also a corporate officer and stockholder of the corporate entity with whom the consumer contracts,²²⁷ a *Murthy* reversal would reduce contractors’ ability to evade liability for their negligence. The statute may effectively pierce the corporate veil that heretofore has insulated them.²²⁸

Commonly, in such cases, consumers are without a remedy even when they prevail in a civil action on the contract.²²⁹ The corporation may be dissolved or bankrupt. Consequently, the corporation fails to satisfy the judgment, and the consumer loses.²³⁰ Hence, a statutory action against the qualifying agent, the individual responsible under chapter 489, will avail consumers of a remedy against the culpable party.

Third, if the court rules that the statutory violation is negligence per se, consumers will have an added advantage because they will be required to

226. *Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993) (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891, 935 (1989)).

227. *See Murthy v. N. Sinha Corp.*, 618 So. 2d 307, 308 (Fla. 3d Dist. Ct. App. 1993); *Mitchell v. Edge*, 598 So. 2d 125, 126 (Fla. 2d Dist. Ct. App. 1992); *Gatwood v. McGee*, 475 So. 2d 720, 721 (Fla. 1st Dist. Ct. App. 1985).

228. A statutory remedy would function effectively to pierce the corporate veil when the qualifying agent is also an officer of the corporation with whom the consumer contracts. *E.g.*, *Mitchell v. Edge*, 598 So. 2d 125, 129 (Fla. 2d Dist. Ct. App. 1992) (Hall, J., concurring) (stating that the statute has the effect of lifting the protection of the corporate veil, rendering the qualifying agent personally liable). *But cf. Roberts’ Fish Farm v. Spencer*, 153 So. 2d 718, 721 (Fla. 1963) (holding that the corporate entity’s purpose is to limit liability and serve a business convenience). The *Spencer* court further stated that those who do business in the corporate form have every right to rely on the rules of law that protect them against personal liability. *Id.*

229. *Mitchell*, 598 So. 2d at 127 (holding action against qualifying agent not barred because prior judgment against contracting corporation not satisfied).

230. *See id.*; *see also supra* notes 148-54 and accompanying text.

prove only two instead of the four elements of actionable negligence.²³¹ Fourth, if the court implies a private right of action under the statute, the economic loss rule should not apply.²³² A consumer's action on the contract, against the corporation, may prove fruitless if the consumer's damage is purely economic loss without an accompanying physical injury or property damage.²³³ For example, if the Finkles were not afforded a cause of action under the statute against the qualifying agent,²³⁴ Mayerchak, they would have been remediless because the Third District Court of Appeal affirmed the trial court's judgment for MPF Enterprises, on their contract claim.²³⁵ The court reasoned that without property damage or personal injury, the economic loss rule precluded their remedy.²³⁶

The rationale of the economic loss rule is that parties who have bargained for the distribution of risk should not be permitted to circumvent their bargain after loss occurs to property that was the subject of the

231. See *Tamiami Gun Shop v. Klein*, 116 So. 2d 421, 423 (Fla. 1959); see also *supra* note 169 and accompanying text.

232. *Gatwood v. McGee*, 475 So. 2d 720, 722 (Fla. 1st Dist. Ct. App. 1985) (affirming a statutory action for damages against a qualifying agent where builders constructed the home on a bed of muck, and "unstable ground . . . caus[ed] substantial problems to [part of] . . . the home."); see also *Mitchell*, 598 So. 2d at 126, 127 (holding that action against qualifying agent was not barred where homeowners claimed that the builders' workmanship was inferior, improper, unsound, and untimely completed). *Contra Finkle v. MPF Enters., Inc.*, 618 So. 2d 307, 307 (Fla. 3d Dist. Ct. App. 1993) (affirming judgment for builders based on economic loss rule where homeowners claimed their house was not completed timely, economically, or free from defects).

233. *Finkle*, 618 So. 2d at 307; see also *Casa Clara Condominium Ass'n*, 620 So. 2d at 1248 (holding that economic loss rule applies to home purchasing); *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180, 181 (Fla. 1987) (holding that for services, there can be no independent tort flowing from a contractual breach without personal injury or property damage). *But see Barnes v. Mac Brown & Co.*, 342 N.E.2d 619, 621 (Ind. 1976) (rejecting the argument that injury in addition to the defective product is necessary). In *Barnes*, the court reasoned that when consumers are personally injured from a defect, they recover mainly for their economic loss. *Id.* The court further stated:

If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?

Id.

234. *Finkle v. Mayerchak*, 578 So. 2d 396, 398 (Fla. 3d Dist. Ct. App. 1991) (holding no statutory action allowed, but then allowed one); see *supra* text accompanying notes 22-23.

235. *Finkle*, 618 So. 2d at 307.

236. *Id.* (citing *AFM Corp.*, 515 So. 2d at 181); see *supra* note 232-33 and accompanying text.

bargain.²³⁷ Here, the privity requirement triggering the economic loss rule would not be satisfied,²³⁸ because no contract exists between the individual qualifying agent and the consumer. In fact, the tort action would not flow from a contractual breach.²³⁹ Rather, the plaintiffs would raise a fresh question when a qualifying agent violates the statute. The economic loss rule would “work a mischief” here, where the culpable party is not privy to the contract but injury to third parties is reasonably foreseeable.²⁴⁰ Indeed, qualifying agents are at fault for negligence because they are responsible for the construction work.²⁴¹ Therefore, when consumers sustain foreseeable injuries as a result of qualifying agents’ statutory violations,²⁴² a negligence action under the statute would preclude application of the economic loss rule without contravening it.

Finally, because a statutory action against the qualifying agent would not flow from a contractual breach, exemplary damages may be allowed over and above actual or compensatory damages.²⁴³ The Florida Supreme Court noted in *Casa Clara Condominium Ass’n*, that plaintiffs prefer tort remedies because they often permit recovery of greater damages.²⁴⁴ However, the court will allow exemplary damages only as a deterrent to others if the plaintiff proves malice, moral turpitude, wantonness, or outrageousness of the tort.²⁴⁵

Alternatively, two deleterious effects may result if the court recognizes a private right of action against qualifying agents under chapter 489. First,

237. *Casa Clara Condominium Ass’n*, 620 So. 2d at 1248 (Shaw, J., concurring in part and dissenting in part).

238. See *AFM Corp.*, 515 So. 2d at 181; *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 399 (Fla. 1973) (approving recovery for economic losses without personal injury or property damage because plaintiff was not beneficiary of underlying contract). The *Graham* court explained that “[p]rivacy is a theoretical device . . . that recognizes limitation of liability commensurate with compensation for contractual acceptance of risk.” *Id.* Moreover, “[s]uch liability cannot be reasonably anticipated . . . when there is no privity between the parties . . .” *Id.* at 403 (Dekle, J., concurring in part, dissenting in part).

239. See *AFM Corp.*, 515 So. 2d at 181.

240. See *id.*; FOWLER V. HARPER ET AL., THE LAW OF TORTS § 7.6, at 404 n.3 (2d ed. 1986) (explaining that the economic harm likely to result from negligence is finite and easily predictable in some cases).

241. See FLA. STAT. § 489.1195(1) (1991).

242. See *Murthy*, 618 So. 2d at 308; *Mitchell*, 598 So. 2d at 127; *Finkle*, 578 So. 2d at 397; *Gatwood*, 475 So. 2d at 722.

243. *Rosenberg v. Ryder Leasing, Inc.*, 168 So. 2d 678, 680 (Fla. 3d Dist. Ct. App. 1964).

244. 620 So. 2d at 1245.

245. *Rosenberg*, 168 So. 2d at 680.

the cost of litigation may propel consumer prices upward. Qualifiers may be unwilling to risk incurring personal liability and may become scarce. In turn, corporate contractors who remain in the market may have to purchase additional insurance coverage to indemnify their qualifying agents, or the qualifiers themselves may necessarily incur the expense. Consequently, the pace of development would probably decelerate because construction costs would accelerate; thus, consumers may bear the cost of higher priced homes.

Second, an implied private remedy under the statute would add to the Florida courts' "ever-greater burden" of litigation.²⁴⁶ Notably, the *Fischer* court adopted the more restrictive federal implication doctrine from *Cort v. Ash*, rather than that which was controlling in Florida under *deJesus* or *Smith*, when it confronted the issue of creating a private right of action under a statute.²⁴⁷ The court adopted the more restrictive doctrine to manage the burden of discerning legislative intent from increasingly complex legislation and to contain the growing volume of litigation.²⁴⁸

In striking a balance between the positive and potentially negative effects of creating a private remedy, the scales tip to ensure the intended beneficiaries of the legislation, the consumers, the full measure of protection their needs may warrant.²⁴⁹

V. CONCLUSION

We live in a society which values every person's right to pursue a grievance in court.²⁵⁰ Our jurisprudence rests on the principle that absent compelling, countervailing public policies, a remedy exists for every wrong.²⁵¹ Chapter 489 clearly imposes a duty upon qualifying agents to perform their statutory obligations with due care.²⁵² Therefore, the statute confers by implication every particular power necessary to insure the performance of that duty;²⁵³ *viz.* the power to pursue a private right of

246. *Fischer v. Metcalf*, 543 So. 2d 785, 789 (Fla. 3d Dist. Ct. App. 1989) (en banc).

247. *Id.* at 789 (adopting doctrine from *Cort v. Ash*, 422 U.S. 66 (1975)).

248. *See id.* at 788-89.

249. *See id.* at 789.

250. *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840, 851 (Or. 1981).

251. FLA. CONST. art. I, § 21; *Holland ex. rel. Williams v. Mayes*, 19 So. 2d 709, 710 (Fla. 1944); *Casa Clara Condominium*, 620 So. 2d at 1248 (Barkett, J., concurring in part, dissenting in part).

252. *See* FLA. STAT. § 489.1195 (1991); *see also supra* note 84.

253. *Smith v. Piezo Tech. & Prof. Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983).

action in a court of competent jurisdiction.²⁵⁴ Although the Legislature did not explicitly provide for a civil action, that is not determinative.²⁵⁵ Moreover, the Legislature has explicitly recognized consumer hardship at the hands of incompetent and dishonest contractors.²⁵⁶ In fact, the Florida lawmakers have systematically manifested their intent to provide more consumer protection each time they revised the statute, most notably with the victims of Hurricane Andrew in mind, in the 1993 amendments.²⁵⁷ In the face of legislative faltering or uncertainty, the court should not relinquish its task of judicial implication.²⁵⁸ To do so the court would sacrifice a balance.

Mindful of the pitfalls of loose legislative drafting, Justice Frankfurter once told a story in which one legislator said to his colleagues, "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means."²⁵⁹ Similarly, when the Florida Supreme Court decides *Murthy* and answers the certified question, so too will the Florida legislators know what chapter 489 means.²⁶⁰

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254. See *id.* at 184 n.1. *Contra* Wilson C. Barnes & Larry R. Leiby, *The Role of the Qualifying Agent in a Corporate Structure*, 45 (1993) (available at Florida International University, Dep't of Constr. Mgmt.) (recommending that Legislature add language stating no private right of action is created by failure to perform statutory duties under chapter 489).

255. *Smith*, 427 So. 2d at 184; *accord* *Mascarenas v. Jaramillo*, 806 P.2d 59, 62 (N.M. 1991) (determining legislative intent requires looking not only to the language of the statute, but also to the object sought to be accomplished and the wrong to be remedied).

256. See *supra* text and accompanying notes 147-54.

257. See Meffert Interview, *supra* note 131. George Stuart assumed responsibility for the Department of Business and Professional Regulation, formerly called the Department of Professional Regulation, in January 1991. According to Mr. Meffert, Secretary Stuart undertook a mission to reorient the Department from a "peer group regulatory agency" to a "consumer regulatory agency." The consumer-focused changes to chapter 489 reflect the new mission. In fact, Hurricane Andrew was a "catalyst" for those changes. *Id.*

258. See *Fischer*, 543 So. 2d at 789.

259. Rhodes & Seereiter, *supra* note 131, at 514 (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947)).

260. See Meffert Interview, *supra* note 131.