IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT COURT OF APPEAL

CONSOLIDATED CASE NOS: 3D22-2239, 22-2240, 22-2241
L.T. CASE NO.: 20-CA-00169-P

Incident365 Florida, LLC

Appellant

v.

Ocean Pointe V Condominium Association, Inc.

Appellee

An Appeal from the Circuit Court, 16th Judicial Circuit, Monroe County, Florida

ANSWER BRIEF

Scott J. Edwards, Esq.
scott@scottjedwards.com
Florida Bar No.: 40958
Scott J. Edwards, P.A.
150 E. Palmetto Park Road,
Suite 800
Boca Raton, FL 33432
Phone: 561-609-0760

Ryan A. Abrams, Esq.
rabrams@abrams-law.com
Florida Bar No.: 111323
Abrams Law Firm, P.A.
888 SE. 3rd Ave, Suite 400
Fort Lauderdale, FL 33316
Phone: 954-332-2358

Attorneys for Appellee, Ocean Pointe V Condominium Association, Inc.

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STATEMENT OF THE CASE AND FACTS

Hurricane Irma made landfall in the Florida Keys in September 2017. (R115).[1] Appellees, Ocean Pointe III Condominium Association, Inc., Ocean Pointe IV Condominium Association, and Ocean Pointe V Condominium Association, Inc. (collectively, the "Associations"), were damaged by Hurricane Irma. (R. 115). During all material times, Incident365 Florida, LLC is or was owned by a Pennsylvania company, and its principals, Scott Schaming and Stefan Schaming, are Pennsylvania residents who have never permanently resided in Florida. (R.731-32; R. 737); (R. 1097); (R. 1125).

Incident365 was created in January 2017, about nine months before Hurricane Irma struck the keys. It had never handled another project before the work at Associations' property. (R. 1122, R. 1159). Incident365 arrived on the Associations' property in September 2017 with eight to ten full-time employees. (R. 834). Incident365's scope of

[1] Incident365 filed three separate lawsuits, one against each condominium association. The trial court did not consolidate the cases; this Court consolidated the three appeals for appellate purposes, but each appeal has a separate record. For ease of reference, Incident365 cites to the record for Condo III, 3D22-2240 (R), but when necessary, will cite to the record for Condo V, 3D22-2239 (R2) and Condo IV, 3D22-2241 (R3).

work was to perform disaster mitigation, including water extraction activities. (R. 1056).

Incident365 employed between 25-35 third party laborers assigned from a staffing agency. (R. 826-28; R. 834; R. 838; R. 1098). Incident365 did not require the laborers to have any experience or background in mitigation-related work. (Id.)

There are five condominium buildings located at the Property and each building is represented by a different condominium association as shown by the individual contracts between Incident365 and each Association. (R. 1055; 1066; 1074). Incident365 performed disaster mitigation work on each building, each having varying degrees of damage; (R. 814); yet Incident365 split the invoices equally among the buildings. (R. 1007-8).

While performing its work on the Associations' property, Incident365 failed to accurately track where its full-time and temporary laborers worked among the five different condominium associations. (R. 812-13). Incident365 submitted its final bill to the Associations despite its failure to accurately track the amount of time its full-time and temporary laborers worked on each building. (R. 812-13). Neither Incident365 nor any of its employees or agents

possessed any license or government issued certification at any relevant time. (R. 1098).

Incident365 seeks recovery of money damages from the Associations based on amounts allegedly owed for the following scope of work, referenced in paragraph 1(f) of the agreements between Incident365 and the Associations ("Agreements"), labeled as "Disaster Recovery Tasks":

i. Water damage mitigation
ii. General dehumidification
iii. Structural dehumidification
iv. Structural removal of effected substrates
v. Disposal of removed materials off Property location;
vi. Anti-microbial application; and
vii. Mold remediation, as necessary.

(R. 1056, R. 1066, R. 1075).

Incident365 admits to have performed extensive "demolition" work on Association property, as detailed in the project notes provided by Incident365. (R. 1082-87). The project notes describe the work performed by Incident365 on Association property. (R. 1082-87; R. 774-75; R. 963).

The work included the removal of large sections of drywall using utility knives as well as reciprocating tools, hand saws, dremels, and small hand or power tools. (R. 829-30; R. 880-81; R. 1028).

Incident365 further removed kitchen cabinetry, as well as popcorn ceilings. (R. 850-51; R. 863-64; R. 958).

Incident365 filed its Second Amended Complaint ("Complaint") in the above matter on October 8, 2020. In the Complaint, Incident365 asserted four counts for relief: Breach of Contract (Count I); Open Account (Count II); Account Stated (Count III): and Unjust Enrichment (Count IV). (R. 114-39).

The Associations filed their Answer and Affirmative Defenses on or around October 8, 2020. The Affirmative Defenses included the defense of unlicensed contracting and unlicensed mold remediation as a complete bar to recovery. (R. 140-47).

Incident365 replied to the Associations' Affirmative Defenses, arguing that the scope of work outlined in the Agreements between the parties did not require a license and that no mold remediation work was performed. (R. 163-66).

On or around March 4, 2021, the Associations filed their Motions for Summary Judgment. (R. 541-67). On or around December 17, 2021, after Incident365's Motion for Continuance on the Summary Judgment Hearing was granted and after additional

discovery was conducted, the Associations filed their Amended Motions for Partial Summary Judgment. (R. 701-1335).

The Associations argued that the undisputed facts showed that the work performed by Incident365 consisted of significant interior demolition as well as repair/improvement work on the Associations' property – all work requiring a contractor's license under Florida law. *(Id.)* They argued that the "disaster mitigation" services are specifically recognized in F.S. 489.103(19) as subject to the licensure requirement. *(Id.)* The Associations also argued that Incident365 included mold remediation services within its scope of work under the Agreement in violation of F.S. 468.8419. (*Id.*) In light of Incident365's unlicensed contracting and unlicensed mold assessment and remediation, the Associations argued the Agreements were unenforceable as a matter of law and Incident365 could not recover any damages in law or equity. (*Id.*)

The Trial Court heard argument on the Motion on February 11, 2022. On August 8, 2022, the Trial Court issued its Order finding that Incident365 operated "substantially similar" to a "Building Contractor" under § 489.105(3)(b) Fla. Stat. and that the Agreements and services performed by Incident365 fell under the definitions of

"repairs" and "improvements" as enumerated in § 489.105(3). (R. 1907). Accordingly, the Trial Court granted the Associations Motions for Summary Judgment against Incident365, ordering that Incident365 "shall take nothing by this action and Defendant shall go hence without day." (R. 1910) This appeal followed.

SUMMARY OF ARGUMENT

Incident365's work on the Associations' property constituted unlicensed contracting under Florida law. The trial court thus properly granted the Associations' Motions for Summary Judgment. While Incident365 argues that the trial court erred in its statutory interpretation of Chapter 489 by relying on dictionary definitions of statutorily undefined words, the trial court did so with a proper understanding of Chapter 489 and legislative intent and reached a conclusion consistent with precedent.

Moreover, the trial court's decision not to sever the contract was correct because to do otherwise would violate F.S. 489.128(1)'s mandate that "**contracts**…shall be unenforceable" by an unlicensed contractor if the "scope of the work" required a license. (emphasis added). The contract with Incident365 included a single scope of work – "disaster recovery tasks" – described in one provision of the contract, which the trial court properly determined required a license. Further, the trial court was bound by precedent that prohibits severance of essential terms from the contract. Within the scope of work, tasks such as "water damage mitigation" and "structural removal of affected substrates" were an essential part of

the scope. Individual tasks within a single scope of work – which goes to the essence of the contract – cannot be severed.

Finally, the *Amicus brief* submitted by the Restoration Industry Association relies on incorrect facts, the misapplication of established law, and advances dubious public policy arguments that are irrelevant to the issues on appeal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE SERVICES PROVIDED BY INCIDENT365 WERE REPAIRS OR IMPROVEMENTS REQUIRING A CONTRACTOR'S LICENSE UNDER FLORIDA LAW

Effective May 1, 2021, the Florida Supreme Court adopted "the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (together, the 'federal summary judgment standard')." *In re Amends. To Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192 (Fla. 2020). Under the new summary judgment standard, a Florida court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law." Id. (citing Anderson 477 U.S. at 251-51). Moreover, under the new Florida standard for summary judgment, provided there has been an "adequate time for discovery…summary judgment should be entered 'against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial'" *Id.* at 193 (citing *Celotex*, 477 U.S. at 322). Finally, the new standard on what constitutes a genuine issue of material fact turns on "whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (citing *Anderson*, 477 U.S. at 248).

Finally, "an order from the trial court granting summary judgment is reviewed de novo." *Ridenhour v. State*, 338 So. 3d 473, 475 (Fla. 1st DCA 2022) (citing *McNair v. Dorsey*, 291 So. 3d 607, 609 (Fla. 1st DCA 2020)).

A. The Trial Court Properly Construed the Purpose and Language of Chapter 489, Florida Statutes.

Incident365 contends that the work it was contracted to perform on the Associations' property did not involve repairs, alterations, demolition, or improvements to any building or structure. However, the Trial Court made the accurate determination that the work undertaken by Incident365 required a contractor's license under Section 489.105(3), *Florida Statutes*.

Extensive discovery between the parties, including project notes, work photographs, Incident365's billings to the Associations,

and depositions of Incident365's principals, provided the Trial Court with a comprehensive understanding of the undisputed material facts in this case. (R. 720-1335). Based on these facts, the Trial Court granted the Associations' Motions for Summary Judgment, correctly concluding that Incident365's work required a contractor's license and that the Agreements were unenforceable under Florida law. (R. 1909-10).

The Trial Court found that the work Incident365 performed on the Associations' property was "substantially similar to the work of a 'building contractor' as defined in § 489.105(3)(b), Fla. Stat." (R. 1905-06). This determination was reached by applying standard dictionary definitions of terms such as "remodel," "repair," and "improve" to interpret § 489.105(3)(b). (*Id.*)

"Where the legislature did not define the words in the statute, the language is to be given its plain and ordinary meaning, which may be derived from a dictionary." *Harrell v. Ryland Grp.*, 277 So. 3d 292, 294 (Fla. 1st DCA, 2019) (citing *Debaun v. State*, 213 So. 3d 747, 751 (Fla. 2017)). As a result, the trial court's interpretation of the statutory language followed established statutory construction principles that authorize the use of the plain and ordinary meanings

of undefined words when the legislature has not provided a specific definition.

Incident365 argues that the trial court erred by analyzing dictionary definitions for these terms. (Initial Brief 21-23). Instead, Incident365 argues that the trial court should have considered those terms "in the construction industry context."[2] (Initial Brief at 22). The amicus brief submitted by the Restoration Industry Association ("RIA") similarly argues that the trial court used the dictionary definitions of "repair" and "improvement" rather than defining those terms as they "are understood either within the restoration industry or in context of any of the standard maintenance jobs performed routinely by hundreds of potentially affected industries.)[3] (*Amicus* brief at 9-10).

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[2] It is noteworthy that Incident365 fails to provide an alternative definition of "remodel", "repair", and "improve." Nor does Incident365 otherwise argue that the method the trial court used to analyze the dictionary definitions of these terms was erroneous. Instead, it looks to this Court to supply alternative definitions within the "construction industry context." (Initial Brief at 22).

[3] For the Court's convenience, the Associations will address the arguments made by Amicus Curiae RIA that mirror Incident365's arguments together. Where appropriate, the Associations will address those arguments not raised by Incident365 separately.

To begin with, the doctrine of invited error prevents Incident365 and the RIA from arguing on appeal that the trial court erred by consulting dictionary definitions of the statutory terms at issue. Under the invited-error doctrine, a party may not make or invite error in the trial court, and then take advantage of the error on appeal. *Malha v. Losciales*, 306 So. 3d 1111, 1114 n.4 (Fla. 3d DCA 2020). A party cannot complain on appeal about an error that it is responsible for or invited the trial court to make. *Id.*

Incident365 argued on summary judgment that the trial court should look to the dictionary definition of "demolition" in determining whether Incident365 was an unlicensed contractor under Chapter 489, Fla. Stat. (T., 37-38; R. 1362). On appeal, Incident365 now argues that the trial court should not have looked to the dictionary definition or commonly understood meaning of the words "remodel," "repair," and "improve." (Initial Brief at 22). Incident365 cannot argue this issue on appeal, because any potential error was invited by Incident365's arguments on summary judgment.

On the merits, Incident365's argument that the statutory language should be interpreted with reference to "the construction industry context" (Initial Brief at 28) ignores precedent within this

State which dictates the terms of statutory construction. *Harrell*, 277 So. 3d at 294. A trial court cannot look to the "usage of the terms remodel, repair, or improve in the 'construction industry context.'" see *Martinez v. Iturbe*, 823 So. 2d 266 (Fla. 3d DCA 2002); (Initial Brief at 22). Nor could have the trial court chosen to define those terms as they are "understood within the restoration industry." (*Amicus* at 9-10). As noted above, if the Legislature has not specifically defined terms within the statute, courts are required to give that language "its plain and ordinary meaning, which may be derived from a dictionary." *Harrell,* 277 So. 3d at 294. Incident365 now asks this Court to circumvent precedent to bolster its incorrect position.

Section 489.105 itself helps explain the Legislature's intent *vis-à-vis* how it expects courts to interpret its language. In enacting Chapter 489, Florida Statutes, the Legislature took great care to define thirty-six distinct terms. *See* § 489.105, *Fla. Stat.* These definitions include specialized terms like "certification," (§ 489.105(11)), "arbitration," (§ 489.105(16)), and "tank" ((§ 489.105(18)). The Legislature provided these specific definitions to ensure that Chapter 489 was interpreted appropriately. The

Legislature intended for the defined terms used in the Chapter to be given their specialized meaning, and the non-defined terms their plain, everyday meaning. *Harrell,* 277 So. 3d at 294.

After reviewing the undisputed facts and considering the language of Chapter 489, Fla. Stat., the trial court determined that the work Incident365 conducted on the Associations' property amounted to the "repair" or "improvement" of the Associations' property and that the work made the condominiums on the Associations' property "'better' and restored the units to a 'sound or healthy state' after a natural disaster." (R. 1907). The trial court looked to the dictionary definitions of "remodel," "repair," and "improve" in making this determination. (R. 1907).

Similarly, the *Harrell* Court looked to the dictionary definitions of "construction" and "improvement" to determine whether the installation of a collapsing attic ladder fell under the statute of limitations relative to an action founded on the design, planning, or construction of an improvement to real property under § 95.11(b) Fla Stat. *Harrell,* 277 So. 3d at 295. The trial court correctly looked to the dictionary definition of undefined words within Chapter 489. *Harrell,* 277 So. 3d at 294; see also, *Martinez*, 823 So. 2d 266.

Incident365 also argues that *Florida Industrial Com. v. Manpower, Inc. of Miami*, 91 So. 2d 197 (Fla. 1956), suggests that courts are precluded from relying on the conventional definition of terms when engaging in the interpretation of statutes. (Initial Brief at 22-23). This argument, however, is not in alignment with the actual stance of the *Manpower* Court, which emphasized that courts should factor in the "actual conditions to which the act will apply, that is, the needs and usages of such activity." *Manpower, Inc. of Miami*, 91 So. 2d at 199.

The *Manpower* Court was charged with determining whether a business which provided various services to its customers on a part-time basis fell "within the purview of Ch. 449, Fla. Stat.1955, F.S.A." *Id.* at 197. In so doing, the Court found that while Manpower "'secures' or provides 'help' for its customers" within the meaning of those words under the statute, that "Manpower does not 'undertake' to secure help for its customers – it actually supplies them." *Id.* at 199. The *Manpower* Court looked to the common definition of "undertake" and found that the definition did not apply to Manpower, Inc. *Id.*

The same cannot be said of Incident365. It is undisputed that Incident365 contracted with the Associations to perform the following work:

> *i. Water damage mitigation*
> *ii. General dehumidification*
> *iii. Structural dehumidification*
> *iv. Structural removal of effected substrates*
> *v. Disposal of removed materials off Property location;*
> *vi. Anti-microbial application; and*
> *vii. Mold remediation, as necessary.*
> (R. 1056, R. 1066, R. 1075).

The trial court, like the *Manpower* court, correctly looked to the dictionary to find that such work constituted "repairs" or "improvements" as contemplated by Chapter 489 because such work was intended to make the Association property "better" and "restored … to a sound or healthy state." (R. 1907).

The *Manpower* Court further found that Manpower was not an "employment agency" and to conclude that it was "would be to extend the Act by judicial fiat." *Manpower, Inc. of Miami*, 91 So. 2d at 200. In so holding, the *Manpower* Court considered the "evils incident to private employment agencies" which the Act was enacted to address and found that Manpower, Inc.'s business operation was "susceptible

to none of the abuses…with the exception of No. 5, 'charging exorbitant fees'…" *Id.*

In short, the *Manpower* Court found that Manpower, Inc. was not an employment agency as defined under the statute because Manpower, Inc. did not "undertake" to secure help for its customers, and its business was not susceptible to the "evils incident to private employment agencies." *Id.* at 199-200.

The opposite must be said of Incident365 and Chapter 489. First, as noted above and found by the trial court, Incident365's work on Association property fell within the purview of Chapter 489 in that it repaired and improved Association property within the meaning of Chapter 489. (R.1907). Secondly, the type of work Incident365 allegedly performed on Association property was susceptible to the "evils incident" to the Construction Industry. *Id.* at 199-200.

In enacting Chapter 489, the Legislature determined it was "necessary in the interest of the public health, safety, and welfare to regulate the construction industry." § 489.101, Fla. Stat. The Legislature intended to protect the public from any person or entity who "remodels," "repairs," ***or*** "improves" buildings or structures without a license to protect consumers from substandard work. *Cent.*

Fla. Lumber Unlimited, Inc. v. Qaqish, 12 So. 3d 766, 770 (Fla. 2d DCA 2009) ("Section 489.128 was passed to aid homeowners who have hired unlicensed contractors who performed substandard work.").

Incident365 falls under the category of unlicensed contractors the Legislature enacted Chapter 489 to regulate because it conducted work that was substantially similar to "repairs" or "improvements" as defined by the Chapter. In enacting Chapter 489, the Legislature considered the "needs and usages" of the industry and the trial court properly carried out the Legislature's intent when it granted the Associations' Motion for Summary Judgment. *Id.*

Finally, Florida Courts have previously ruled consistent with the trial court. In *Sterner v. Phillips,* 721 So. 2d 450 (Fla. 5th DCA 1998), a factually analogous case to this matter, the Fifth District Court of Appeal found that improvements performed by a "handy-man" fell within the definition of a contractor under Section 489.105(3).

In *Sterner*, the appellant sought payment for work performed on appellee's property, including carpeting and painting. *Id.* at 451-52. There, the Fifth DCA affirmed the trial court's granting of summary judgment for the property owner, finding that appellant's "handy-

man" work amounted to unlicensed contracting under Chapter 489 and that Chapter 489 applied as appellant did not qualify for any of the exceptions. *Id*. at 452.

It is noteworthy that that the Legislature has amended Chapter 489 several times since the *Sterner* decision. Yet none of those amendments altered the language of Chapter 489 in a manner that would affect the *Sterner* decision. It is well settled that when the legislature amends a statute interpreted by a court, the legislature is presumed to adopt that construction. *Gulfstream Park Racing Ass'n* (citing *Deltona Corp. v. Kipnis*, 194 So. 2d 295 (Fla. 2d DCA 1966)) ("When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary."). Accordingly, the Legislature has approved of the proposition that those conducting "handy-man" type work like painting and carpeting are required to be licensed under Chapter 489 where no statutory exceptions apply. *Id.*; *see also*, *Sterner*, 721 So. 2d 451-52.

In this case, the undisputed evidence shows that Incident365's work on the Associations' property far exceeded the scope of general

"handy-man" work – including carpeting and painting. Here, the undisputed record evidence shows that Incident365 removed kitchen cabinetry, drywall, flooring, and popcorn ceilings from units within the Association. (R. 958, R. 965-66, R. 967-68, R. 969-970, R. 983-84, R. 1021, R. 1023-24, R. 1025-26, R. 1028). Accordingly, the trial court's finding that Incident365's work on the Associations' property constituted "repairs," and "improvements" adheres to precedent and should not be disturbed on appeal. (R. 1907); see also, Sterner, 721 So. 2d 451-52.

In sum, the trial court's finding that Incident365's work on the Associations' property was substantially similar to work requiring a contractor's license followed established Florida law. *Sterner*, 721 So. 2d at 452. Moreover, the trial court correctly looked to the commonly understood meaning of the terms "repair" and "improve" when it determined that the Legislature intended for Incident365's work on the Associations' property to fall under Chapter 489. *Harrell,* 277 So. 3d at 294. That the Legislature intended for courts to look to the commonly understood meaning of "repair" and "improve" is further evidenced by the Legislature defining thirty-six distinct terms within Chapter 489. *See* Section 489.105, *Florida Statutes*. For these

reasons, the trial court correctly ruled on the Associations' Motions for Summary Judgment and that ruling should not be disturbed on appeal.

B. THE TRIAL COURT DID NOT INVADE THE PROVINCE OF THE LEGISLATURE.

Incident365 and the RIA both argue that the trial court overstepped its authority and impermissibly invaded the province of the Legislature by entering summary judgment. (Initial Brief at 24; *Amicus* Brief at 10). According to Incident365 and the RIA, the Order inappropriately created a new category of licenses required for disaster mitigation services. (*Id.*). Both Incident365 and the RIA rely heavily on *Cepcot Corp. v. Dept. of Bus. & Pro. Reg.* to support its argument. 658 So. 2d 1092 (Fla. 2d DCA 1995). Incident365's reliance on *Cepcot Corp.*, however, is misguided.

The *Cepcot Corp*. Court was tasked with determining whether a pool cleaning company fell within the category of "Contractor" as defined by Section 489.105, *Florida Statutes*. *Id*. at 1093. The *Cepcot Corp*. court found that typically, "an employee of the pool cleaning division empties skimmer baskets and the pump strainer baskets, cleans the tile and filter, brushes the walls, skims the surface of the pool, and vacuums the pool." *Id*. at 1093. The *Cepcot Corp.* court further found that "[n]o repair or replacement work is done on the pool, tile, pumps, or other pool equipment. This division simply

performs the regular maintenance that many homeowners routinely perform themselves." *Id.*

In light of these facts, the *Cepcot Corp.* court found that Cepcot Corp. was not required to hold a Contractor's License under Chapter 498. *Id.* at 1095. The Court was influenced by "the omission of any concept of 'maintenance' or 'cleaning' within the definition of a contractor." *Id.* The Court was also influenced by the fact that "the definition of a 'swimming pool/spa servicing contractor' is written with emphasis upon repair, replacement, reinstallation, and reconstruction." *Id.* Accordingly, the Court found that "the legislature has not addressed [whether pool cleaners require licensure under Chapter 489] in the existing statutes." *Id.* at 1096.

The facts in the *Cepcot Corp.* case, however, differ significantly from this case. Most notably, despite Incident365's argument to the contrary, there was nothing "routine" about Incident365's work on the Associations' property. In working on the Associations' property, Incident365 was not "simply perform[ing] the regular maintenance that many homeowners routinely perform themselves." *Id.* at 1093. Likewise, Incident365 was not performing tasks comparable to

"residential maids, janitors, or residential cleaning companies." *Id.* at 1095.

Instead, it is undisputed that Incident365 was engaged in large scale post-disaster mitigation work which included the removal of significant portions of drywall, ceilings, and kitchen cabinetry throughout multiple units within the individual Associations' property. (R. 1083-91, R. 829-830, R. 851-52, R. 864-65, R. 880-81, R. 958, R. 1028).

Despite Incident365 and the RIA's argument to the contrary, the work performed by Incident365 cannot reasonably be compared to the work being performed by Cepcot Corp. *Cepcot Corp.* 658 So. 2d at 1093. In *Cepcot Corp.* the Court noted that "[m]any of the provisions in Chapter 489 describe activities that *significantly change the physical nature of the structure* as compared to activities that maintain the status quo." *Id.* at 1095 (emphasis supplied). The undisputed evidence supplied to the trial court made clear that Incident365 was engaged in more than mere clean-up comparable to pool cleaning. Incident365 performed work on the Associations' property that "significantly change[d] the physical nature of the

structure" of the Associations' property. *Id.*; (R. 1083-91, R. 829-830, R. 851-52, R. 864-65, R. 880-81, R. 958, R. 1028).

The *Cepcot Corp.* court was clear in its ruling that "pool cleaning, *in the absence of other repair or replacement activity*" is not contracting. *Id.* at 1096 (emphasis supplied). Incident365's work, on the other hand, is most analogous to the work performed in *Sterner*, although on a much greater scale. 721 So. 2d at 452.

And given the rationale of the *Cepcot Corp.* court, it would be difficult to imagine the Court ruling for *Cepcot Corp.* if the Court found that Cepcot Corp. pool cleaning employees were tasked not just with pool cleaning, but also with the removal of large sections of pool tile or, more aptly, significant portions of drywall, ceilings, and kitchen cabinetry. This would constitute a change in the character of the service Cepcot Corp. provided to its customers from standard pool cleaning (i.e. maintaining the status quo) to repair or improvement (i.e. work that "significantly change[s] the physical nature of the structure"). *Cepcot Corp.* 658 So. 2d at 1093.

In this case, the trial court determined that, unlike Cepcot Corp., Incident365 was engaged in "repairs" and "improvements" to the Associations' property which required a contractor's license

under Chapter 489, rather than simple "maintenance" and "cleaning." *Id.* at 1095; (*See also*, R. 1907-08). The trial court's determination followed *Cepcot Corp.* as well as the intent of the Legislature as evidenced by the language of Chapter 489 itself. § 489.128, Fla. Stat.

That the Legislature intended for companies performing work similar to Incident365 on the Associations' property to fall under Chapter 489 is further evidenced by the exemption provisions of the Chapter. (*See* § 489.103, Fla. Stat.). Section 489.103(19) includes 24 distinct exceptions to the general prohibition on unlicensed contracting contained within Chapter 489. § 489.103(19) Fla. Stat. This includes a specific exemption for "disaster recovery mitigation organization[s]" that meet certain criteria – meaning that organizations meeting the criteria are exempt from the licensure requirements of Chapter 489. § 489.104(19), Fla. Stat.

Subsection 19 reads as follows:

"(19) A disaster recovery mitigation organization or a not-for-profit organization repairing or replacing a one-family, two-family, or

three-family residence that has been impacted by a disaster when such organization:

(a) Is using volunteer labor to assist the owner of such residence in mitigating unsafe living conditions at the residence;

(b) Is not holding itself out to be a contractor;

(c) Obtains all required building permits;

(d) Obtains all required building code inspections; and

(e) Provides for the supervision of all work by an individual with construction experience."

Id.

Here, it is undisputed that Incident365 does not meet the criteria necessary to qualify for the exemption provided for in § 489.103(19). Incident365 argues that § 489.103(19) does not require disaster recovery mitigation organizations to be licensed unless they are repairing or replacing residences. (*See* Initial Brief at 29 n.8).

This argument, for one, ignores the fact that Incident365's work on the Associations' property falls under the commonly understood meanings of "repair" and "improve." (R. 1907). Perhaps more importantly, Incident365 fails to address why, if the Legislature never intended to require disaster mitigation companies like Incident365 to obtain a license, section 489.103(19) was included in the Chapter at all. If, as Incident365 contends, the Legislature intended to exempt disaster mitigation organizations from the licensure requirements of Chapter 489 it would not have exempted only those disaster

mitigation organizations meeting the above listed specific criteria from the licensure requirement. Section 489.104(19), *Florida Statutes*.

In enacting § 489.103(19), the Legislature carved out a narrow exception to the requirement that a "disaster recovery mitigation organization" be licensed. *Id*. By including this narrow exception, the Legislature made clear its intent to require licensure for disaster recovery mitigation organizations that do not qualify for exception. *See D.M.T. v. T.M.H.,* 129 So. 3d 320, 333 (Fla. 2013); ("Under the canon of statutory construction expressio unius est exclusion alterius, the mention of one thing implies the exclusion of another." (quoting *State v. Hearns,* 961 So. 2d 211, 219 (Fla. 2007)).

In short, the existence of Section 489.103(19) itself shows that the Legislature intended to require disaster mitigation companies that conduct work substantially similar to Incident365's work on the Associations' property be licensed. *Id*. As a result, the trial court could not have "invaded the province of the Legislature" by entering summary judgment for the Associations. (Initial Brief at 24). To the

contrary, the trial court's Order was consistent with the Legislature's intent. *D.M.T.*, 129 So. 3d at 333; see also § 489.103(19).

The trial court's ruling on the Associations' Motions for Summary Judgment adhered to precedent, including *Cepcot Corp.*, as well as with the intent of the Legislature as shown by its inclusion of § 489.103(19) within Chapter 489. As such, the trial court's Order did not "interfere with the legislature's role in establishing public policy" (Initial Brief at 26; citing Doe *v. Dept. of Health*, 948 So. 2d 803, 809 (Fla. 2d DCA 2007). Instead, the trial court's summary judgment simply applied the law to the facts of this case and came to the appropriate conclusion. Accordingly, the trial court's Order was proper and should not be disturbed on appeal.

C. THE TRIAL COURT DID NOT IMPOSE A BUILDING CONTRACTOR'S LICENSE REQUIREMENT ON WATER REMOVAL COMPANIES

As noted above, the RIA submitted an *Amicus* brief in support of Incident365 and with a clear goal of protecting the RIA's own interests. (*Amicus* Brief at 2). No brief in support of the Associations, however, will be filed because the Associations stand in the shoes of Florida homeowners generally, who are not organized into a trade or other group that the Associations could look to for support. Nonetheless, the brief submitted by the RIA fails to advance Incident365's position in any meaningful way.

The RIA's brief argues that the trial court imposed a licensure requirement on "every individual who makes even the smallest 'improvement' to a property…" (*Amicus* Brief at 12-13). First, it is important to address the RIA's erroneous contention that the trial court ruled that "even the slightest 'improvement'" requires licensure. (*Amicus* at 12-13). This is a mischaracterization of the trial court's ruling.

After a review of the undisputed evidence showing the work Incident365 performed on the Associations' property, the trial court found that Incident365's work was "substantially similar to the job

scope of a 'building contractor.'" (R. 1908). Despite the RIA's contention to the contrary, the trial court did not issue an order mandating that all organizations offering disaster recovery services must obtain Chapter 489 licensure. (R. 1907-08).

In support of its argument, the RIA points to the Florida Department of Business and Professional Regulation ("DBPR") website and notes that the DBPR does not include license types that include "water mitigation, drying techniques, or the use of drying equipment." (*Amicus* at 13). Even so, the DBPR makes clear that "*The list is not all inclusive*." (http://www.myfloridalicense.com/dbpr/services-requiring-a-dbpr-license/ (last visited November 27, 2023); (emphasis in original).

Even if the DBPR website were instructive on whether Incident365 required a license for the work to be performed, the Florida Constitution prohibits courts from deferring to an administrative agency's interpretation of a state statute. Art. V, § 21, *Fla. Const.* Instead, a court must interpret a statute de novo. *Id.* The Florida Constitution requires a court to undertake an independent interpretation of a statute. *See Julien v. United Prop. & Cas. Ins.,* 311 So. 3d 875, 879 (Fla. 4th DCA 2021). The courts are just as capable

of reading a statute as an administrative agency, which may well have its own agenda in interpreting a statute in a particular way. *Hous. Opportunities Project v. SPV Realty, Inc.*, 212 So. 3d 419, 425 n.9 (Fla. 3d DCA 2016).

The DBPR is not a judicial body and cannot engage in statutory interpretation that is binding on the judiciary. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). It is the duty and province of the Judiciary, including the trial court, to engage in statutory interpretation. When judicial interpretations conflict with Executive interpretations, the Executive must give way. *Id.*

Moreover, the exclusion of licensure categories for "water mitigation, drying techniques, or the use of drying equipment" on the DBPR website does not exclude organizations that perform those tasks and, like Incident365, also engage in "repairs" or "improvements" as defined under Chapter 489 from licensure requirements. § 489.105(3); see also *Cepcot Corp*, 721 So. 2d at 452 ("We reverse the order to the extent that it holds pool cleaning, in the absence of other repair or replacement activity, to be

contracting."). Incident365's work, on the other hand, is most analogous to the work performed in *Sterner*, although on a much greater scale. *Sterner*, 721 So. 2d at 452. Accordingly, the character of Incident365's work (that it constituted "repairs" and "improvements" within the meaning of Chapter 489) was properly identified by the trial court. (R. 1907).

The RIA erroneously argues that the trial court's judgment will hurt Floridians by limiting their access to disaster mitigation companies in times of need. (*Amicus* Brief at 14). Again, the RIA mischaracterizes the judgment by interpreting it to require all disaster mitigation organizations to license up. Even if this is what the judgment required, which it does not, such a requirement is not in the purview of the RIA, the DBPR, or even this Court. As noted above, the Legislature specifically excluded those disaster mitigation organizations that meet certain criteria from Chapter 489 licensure requirements. As argued *infra*, this exclusion evidences the Legislature's intent to require those disaster mitigation organizations not meeting the exclusionary criteria must be licensed. *D.M.T.*, 129 So. 3d at 333. As such, the RIA's problem is not with the trial court, but with the Legislature.

Moreover, licensure requirements, while potentially burdensome, were enacted by the Legislature to protect Floridians from unqualified contractors. § 489.128(a). By requiring licensure, the Legislature made a policy decision that favors homeowners and burdens contractors. *Cent. Fla. Lumber Unlimited, Inc.*, 12 So. 3d at 770. This ensures that homeowners are relying on organizations that are qualified to provide relief following disasters.

The trial court's summary judgment was consistent with Chapter 489 and Legislative intent. If this Court were to hold that disaster recovery organizations are not subject to Chapter 489, this Court would be impermissibly making blanket policy decisions that are more appropriately the purview of the Legislature. *Devin v. Hollywood*, 351 So. 2d 1022, 1023-24 (Fla. 4th DCA 1976) ("It is not the function of the judicial branch to supply omissions of the legislature.").

II. INCIDENT365'S CLAIMS FAIL UNDER F.S. § 469.8419

Although the Associations argued on Summary Judgment that Incident365's claims were also barred by F.S. § 469.8419, the trial court found that its ruling on the Associations' unlicensed contractor argument made a ruling under section 469.8419 unnecessary. (R.1910). While the trial court was correct to do so, the Associations restate their argument here if this Court finds that Incident365's work did not amount to "repair" or "improvement" within the meaning of § 489.105.

A trial court's ruling will be upheld on appeal if there is any theory or principle of law in the record that can support the ruling. *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644–45 (Fla. 1999).

Section 469.8419 prohibits a person from performing, or offering to perform, any mold assessment "unless the mold assessor has documented training in water, mold, and respiratory protection under § 468.8414." § 489.8419, Fla. Stat. Here, Incident365 made mold assessment an inseverable component of the contract and benefit of the bargain by including "mold remediation, as necessary" under the "Scope of Work" section of the contracts. (R. 122).

Although not explicitly included within the scope of work, the language necessarily includes mold assessment. Without an assessment, how would Incident365 know if remediation were necessary? Incident365 could not have remediated any mold found on the Associations' property without first performing an assessment of whether mold was present.

Accordingly, the contracts and transactions clearly violate F.S. § 468.8414(2). As such, the contract is unenforceable because it violates state law. *Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp.* 261 So. 3d 613 (Fla. 3d DCA 2018) ("where a contract violates state law…such contract is void"). Nor is a contract that violates state law enforceable in equity. *Local No. 234 of United Ass'n of Journeyman v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 823 (Fla. 1953) ("The cases are legion that a contract against public policy may not be made the basis of any action either in law or equity…Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties."); *see also Fraga v. Department of Health and Rehab. Servs.*, 464 So. 2d 144 (Fla. 3d DCA 1984).

For these reasons, the Associations argue in the alternative that, even if this Court finds that the work Incident365 did not amount to repairs or improvements within the meaning of sec. 489.105, the trial court's Order should still be affirmed because Incident365's work required licensure because it included mold assessment work under Section 469.8419.

III. THE CONTRACTS WERE NOT SEVERABLE.

Incident365 and the RIA also argue that even if portions of Incident365's work required a contractor's license, it should still be able to sever and enforce claims for work not requiring a license. They thus argue that was for the jury to determine which work required a license and to award Incident365 damages for work that did not require a contractor's license. (Initial Brief at 32); (*Amicus* at 19-20).

As an initial matter, it is well accepted that "there are no severable, or salvageable, parts of a contract found illegal and void under Florida law." *Vacation Beach, Inc. v. Charles Boyd Constr., Inc.*, 906 So. 2d 374 (Fla. 5th DCA 2005) (quoting *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 864 (Fla. 2005) (reversed on unrelated grounds)).

Incident365 incorrectly relies on A-*1 Quality Corp. v. Oak Park Terrace, Inc.*, 32 So. 3d 166 (Fla. 4th DCA 2010), to claim that it is a question for the jury to determine severability of the licensed and unlicensed portions of the scope of work. (Initial Brief pgs. 32-33). However, *A-1 Quality* does not support that claim. The *A-1 Quality* Court merely held that the contract's scope of work was ambiguous, raising a triable issue of fact. *Id.* at 166–67. Here, the contract

unambiguously sets forth a scope of work that includes "structural removal of affected substrates"[4] and "water damage mitigation". (R. 1056, R. 1066, R. 1075).

When considered with the undisputed evidence of Incident365's repairs and improvements, the trial court correctly found that the contracted scope of work required a license, rendering the entire contract unenforceable as mandated by F.S. 489.128(1) ("**contracts**…shall be unenforceable" by an unlicensed contractor if the "scope of the work" required a license) (emphasis added). (R. 1909)

Incident365 also relies heavily on a federal trial court case, *Full Circle Dairy, LLC. v. McKinney*, 467 F. Supp. 2d 1343, 1354 (M.D. Fla. 2006), to support its argument that the scope of work should be severed at trial. In *Full Circle*, the district court found that McKinney contracted with Full Circle Dairy to construct "commodity barns, a mechanic's shop, a fuel depot, a milling center, four barns and two

[4] Incident365 incorrectly defines "substrate" in footnote 3 of its Initial Brief. In fact, the dictionary definition, pursuant to Merriam Webster, is "an underlying support: Foundation" such as "the material of which something is made…." https://www.merriam-webster.com/dictionary/substratum (last checked: Nov. 28, 2023 at 4:40 p.m.)

travel lanes." *Id.* at 1345. After a dispute arose, Full Circle cancelled the contract and McKinney filed suit to collect $900,000 allegedly owing. *Id.* Full Circle Dairy defended, arguing that the contract was unenforceable because McKinney "performed the construction work without a proper license." *Id.*

After both parties filed motions for summary judgment, the *Full Circle* Court found that McKinney was a roofing contractor as defined under Chapter 489. *Id.* at 1354-55. However, the Court could not determine on the record what portion of the $900,000 was attributable to legal work (not requiring a roofer's license) and illegal work (unlicensed roofing contracting work). *Id.* at 1354-55. The Court noted that "'a bilateral contract is severable where the illegal portion of the contract does not go to its essence and, where, with the illegal portion eliminated, there still remain valid legal promises on one side which are wholly supported by valid legal promises on the other.'" *Id.* at 1354 (citing *Gold, Vann & White, P.A. v. Friedenstab,* 831 So. 2d 692, 696 (Fla. 4th DCA 2002)). The *Full Circle*'s Court's holding stems from the unique facts of that case, which were too limited for the Court to decide the issue as a matter of law. *Id.* at 1354 ("While it is true that the essential purpose of the contract was to build completed

structures…the Court is unable *on this record* to determine that…defendants are not entitled to [any] remuneration") (emphasis added).

Though *Full Circle* is not binding on this Court, the limited record of that case can easily be contrasted with the well-developed record in this case. The trial court decided as a matter of law that the contracted scope of work required a license based on a detailed, undisputed factual record. (R. 1909-10). That the *Full Circle* Court did not have a sufficient record and deferred its decision to a jury is irrelevant here.

Moreover, the trial court does not have discretion to sever the illegal from the legal portions of the agreement under F.S. 489.128(1). (T, 58-59: 16-16). For example, in *Earth Trades, Inc. v. T&G Corp.*, 108 So. 3d 580 (Fla. 2013), the Florida Supreme Court held that the defense of *in pari delicto* was not a defense available to an unlicensed contractor under Chapter 489, even when the other party to the contract knew the contractor did not hold a license as required by Chapter 489.

In so finding, the Florida Supreme Court noted that "as a matter of state policy, the Legislature has imposed a substantial penalty on

the unlicensed contractor as the wrongdoer with regard to a construction contract. Under the amended Section 489.128, the unlicensed contractor has *no rights or remedies for the enforcement of the contract.*" *Id.* at 586 (emphasis supplied).

Incident365 also relies on *ABA Interior, Inc. v. Own Grp. Corp.*, 338 So. 3d 264 (Fla. 4th DCA 2022) to support its argument. *ABA Interior* is distinguishable because it involved the interpretation of a county ordinance on licensure requirements. The work at issue did not require a state license, but required a certificate of competency from Palm Beach County. *Id.* at 265–67. As a result, the *ABA Interior* court did not examine whether an unlicensed contractor could seek a partial recovery on a claim governed by Chapter 489. Accordingly, the *ABA Interiors* decision does not address the issues in this case.

Incident365 also relies on *SG 2901, LLC. v. Complimenti, Inc.*, 323 So. 3d 804 (Fla. 3d DCA 2021), to support its contention that contracts deemed unenforceable under Chapter 489 are severable. (See Initial Brief at 30). Incident365 notes that the *SG 2901* court cited with approval *Full Circle Dairy's* "two-pronged analysis for determining whether a party qualifies as a 'contractor' to determine if the party provided unlicensed services proscribed by Section

489.128(1).”; (See also Initial Brief at 30). The *SG 2901* opinion, however, does not discuss *Full Circle Dairy’s* ruling allowing legal portions of the contract may be severed from illegal portions and enforced. [5] *SG 2901, LLC.*, 323 So. 3d at 804. As such, *SG 2901* is irrelevant to whether work not requiring a license can be severed from an illegal contract entered into by an unlicensed contractor under Chapter 489.

The *Earth Trades* decision, however, helps explain this issue. 108 So. 3d 580. The *Earth Trades* Court noted that provisions of Chapter 489 show the Legislature’s intent to preclude those who engage in unlicensed contracting from enforcing any aspect of the underlying illegal contract. *Id.* at 585. There, the Florida Supreme Court noted that “two other subsections added to Section 489.128 in 2003 emphasize the comparative disadvantage of the unlicensed contractor under the statute:

> (2) Notwithstanding any other provision of law to the contrary, if a contract is rendered unenforceable under this section, no lien or bond claim shall exist in favor of the unlicensed contractor for any

[5] It is noteworthy that the trial court’s order also relied on a two-prong approach substantially similar to that employed by the *Full Circle Dairy* Court to determine whether Incident365’s work fell under the statutory definition of “contractor.” (R. 1905-06).

labor, services, or materials provided under the contract or any amendment thereto.

(3) This section shall not affect the rights of parties other than the unlicensed contractor to enforce contract, lien, or bond remedies. This section shall not affect the obligations of a surety that has provided a bond on behalf of an unlicensed contractor. It shall not be a defense to any claim on a bond or indemnity agreement that the principal or indemnitor is unlicensed for purposes of this section."

Id.

As the Florida Supreme Court noted, unlicensed contractors cannot enforce "*contract, lien, or bond remedies*." *Id.*, citing Fla. Stat. § 489.128(2)-(3); (emphasis supplied). This, according to the Florida Supreme Court, means that "[u]nder the amended section 489.128, the unlicensed contractor has no rights or remedies for the enforcement of the contract." *Id*. at 586.

The Florida Supreme Court makes an important observation that Incident365 ignores. *Id*. If, as Incident365 contends, Chapter 489 allows courts to sever and enforce the legal portions of a contract from the illegal portions, why would the Legislature prohibit unlicensed contractors from enforcing "liens for any labor, services, or materials provided under the contract or any amendment thereto."? § 489.128(2), Fla. Stat.

Because of this statutory language, an unlicensed contractor is forbidden from enforcing any part of a contract. Section 489.128(2),

as amended in 2003, precludes enforcement of liens by unlicensed contractors even for materials. § 489.128(2) Fla. Stat. Accordingly, an unlicensed contractor could not enforce a lien for timber, or nails purchased for a project from a materials supplier. § 489.128(2) Fla. Stat. This is true even though purchasing materials is generally not considered unlicensed contracting – it does not go to "the scope of work to be performed under a contract" which requires licensure under Chapter 489. § 489.128(1)(a) Fla. Stat.

This makes sense when viewed in the light of Chapter 489, which provides that "[a]s a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor." § 489.128 Fla. Stat. And as the Legislature made clear by including subsection (2), even those portions of the contract (like purchasing materials for a project) that do not require a showing of minimum skill necessary to demonstrate competence in construction are not enforceable. § 489.128(2) Fla. Stat. This reflects the Legislature's intent that unlicensed contractors seeking to enforce contracts be completely barred from doing so and *not* that the Legislature intended the legal portions of those contracts unenforceable under Chapter

489 to be severed from the illegal. *Earth Trades, Inc.* 108 So. 3d at 585.

That the Legislature intended to prevent unlicensed contractors from enforcing contracts is well settled. See *Brock v. Garner Window & Door Sales, Inc.*, 187 So. 3d 294, 296 (Fla. 5th DCA 2016) ("Section 489.128 precludes an unlicensed contractor from enforcing a contract. It does not preclude an unlicensed contractor from defending against an action to enforce a contract by the owner."); *Earth Trades, Inc.*, 108 So. 3d 586 ("Under the amended Section 489.128, the unlicensed contractor has *no rights or remedies for the enforcement of the contract.*"); See also *Sterner*, 721 So. 2d 450 (upholding the trial court's finding that the plaintiff could not recover the cost of materials nor enforce a contract consisting primarily of handyman work such as painting and carpeting).

These rulings are consistent with the intent of the Legislature as shown by language of Chapter 489 itself, which, again, reads: "As a matter of public policy, contracts entered into on or after October 1, 1990, by an unlicensed contractor shall be unenforceable in law or in equity by the unlicensed contractor." § 489.128 Fla. Stat. Had the Legislature intended those portions of a contract not deemed to

be illegal under the Chapter be enforceable, it would have said so. Instead, in adopting Chapter 489 and its amendments, the Legislature did not include such language and made a policy decision to prohibit the enforcement of contracts deemed unenforceable under Chapter 489. *Earth Trades, Inc.*, 108 So. 3d at 586.

Even if the Legislature intended that legal portions of a contract found to be illegal under Chapter 489 be enforceable, which it did not, the contract in this case still would not be enforceable under Florida law.

It is true that in some cases "a bilateral contract is severable where the illegal portion of the contract does not go to its essence and, where, with the illegal portion eliminated, there still remain valid legal promises on one side which are wholly supported by valid legal promises on the other." *Full Circle Dairy, LLC.*, 467 F. Supp. 2d at 1354. That said, "a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement. *Loc. No. 234, United Ass'n of Journeymen & Apprentices v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953); citing *Hyde & Gleises v. Booraem & Co.*, 41 U.S. 169, 172 (1842). In other words, "[w]hether a contract is entire or divisible depends upon the

intention of the parties." *Id.*; citing *Ireland v. Craggs*, 56 F.2d 785 (5th Cir. 1932).

Here, Incident365 contracted to perform disaster mitigation for the Associations. The scope of work contemplated was:

i. Water damage mitigation
ii. General dehumidification
iii. Structural dehumidification
iv. Structural removal of effected substrates
v. Disposal of removed materials off Property location;
vi. Anti-microbial application; and
vii. Mold remediation, as necessary.

(R. 1056, R. 1066, R. 1075).

Incident365 and the RIA's arguments that the contracts be severed are contrary to Florida law because the above scope of work is not divisible. *Loc. No. 234, United Ass'n of Journeymen & Apprentices*, 66 So. 2d at 821.

Here, all the work conducted by Incident365 on the Associations' property was done for a singular purpose – disaster recovery and mitigation. (R. 1056, R. 1066, R. 1075). According to Stefan Schaming, Incident365's Mitigation Manager onsite at the

Associations' property, the removal of drywall, ceilings, etc. was necessary to effectuate the stated goal of the contract.[6]

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[6] "The drywall that we took down was heavily impacted. There would have been some walls that may have required a utility blade to remove. I mean, what we do is we're trying to assess each individual unit based on how to properly maintain and stabilize the relative humidity. And if there is non-salvageable materials to a certain extent, not all non-salvageable materials, we would take them down *to promote our end unification*." (R. 1482)(emphasis supplied).

"So demolition is a term that is used in the -- in our industry that just kind of means the removal of a material. It's not anything that is -- when I consider demolition, you know, it's not a Dudding, it's not, you know, major action. It is -- when I use the word "demolition" in my notes -- and I think I -- we -- there was a follow up to this that I stated was that -- it's referring to like when drywall or building material becomes so saturated that the -- that it's either dislodged or we have to -- it's being removed for a safety issue to mitigate the -- *to mitigate the loss* and to assist in, you know, preserving the property and *to enhance our dehumidification*." (R. 1490) (emphasis supplied).

Q. "What was your standard when the moisture level was beyond that acceptable level?"

A. "If we thought that the area is -- was a safety concern, the building material was a safety concern in a smaller area, we would remove the material that was -- that we would deem a safety issue. And then we would move on. We -- our main focus is to control the relative humidity." R. 1493-94, 156-57: 23-5.

Because, according to Incident365, the work conducted, including the removal of drywall, was done to "promote [Incident365's] end unification", and "to mitigate the loss and assist in…preserving the property and to enhance [Incident365's] dehumidification" and for safety concerns, it is clear that all of the work was done to advance the disaster mitigation. In other words, the work was necessary to achieve the stated goal of the contract.

Accordingly, the contract is indivisible under Florida law because "the entire fulfillment of the contract [was] contemplated by the parties as the basis of the arrangement." *Loc. No. 234, United Ass'n of Journeymen & Apprentices*, 66 So. 2d at 821. Here, the parties, especially the Associations, would not have entered into the Contracts if Incident365 refused to engage in work that constituted "repairs" and "improvements" to the Associations' property because such work was necessary "to promote [Incident365's] end unification." (R. 1482). The entire scope of work, as outlined in the Agreements, were critical to the essence of the Agreements. Therefore, if those illegal portions are severed, there would no longer be "valid legal promises on one side which are wholly supported by

valid legal promises on the other." *Full Circle Dairy, LLC.*, 467 F. Supp. 2d at 1354.

Here, even if the Legislature intended that contracts sought to be enforced by unlicensed contractors may be severed, the Agreements between the Associations' and Incident365 may not be severed because the entire scope of work goes to the essence of the Agreements. *Id.*

In sum, the Agreements are not severable because the Legislature intended those contracts sought to be enforced by an unlicensed contractor be indivisible. § 489.128 Fla. Stat.; see also *Earth Trades, Inc.*, 108 So. 3d at 586; see also *Sterner*, 721 So. 2d 450. Even if the Legislature had not intended that such agreements be indivisible, established law in Florida does not allow a court to sever these agreements because their "terms, nature, and purpose" are "interdependent and common to one another and to the consideration." *Ass'n of Journeymen & Apprentices*, 66 So. 2d at 821. Accordingly, the trial court's decision not to sever the Agreements should not be disturbed on appeal.

IV. THE INDEMNITY PRINCIPLE OF INSURANCE WAS NOT BEFORE THE TRIAL COURT AND THE RIA MAKES ITS CLAIM WITHOUT FACTUAL SUPPORT.

The RIA claims that the Associations violated the "indemnity principle of insurance and unjustly enriched themselves by retaining insurance proceeds while depriving Incident365 of payment for its services." (*Amicus* Brief at 16). The RIA makes this claim without factual support. No citations to the record are provided by the RIA to support this erroneous claim. This is because the RIA's contention that the Associations unjustly enriched themselves by, essentially, pocketing insurance proceeds paid to the Associations by their insurers is completely false.

This issue was not before the trial court and, as such, cannot be argued on appeal. *Steinhorst v. Wainwright*, 477 So. 2d 537, 539 (Fla. 1985) ("an appellate court will not consider arguments of legal error not raised before the trial court.").

Moreover, as noted above, Chapter 489 precludes unlicensed contractors from enforcing contracts found unenforceable under the Chapter. § 489.128 Fla. Stat. The Legislature did not carve out any exceptions for those unlicensed contractors whose customers received insurance payments. *Id.* This argument is a red herring, is

unsupported by the record, and is legally irrelevant. Although its contention that the Associations pocketed insurance proceeds that were rightfully owing to Incident365 is incorrect, even if such a statement were factually accurate, it would be irrelevant to the issues on appeal because Chapter 489 prohibits unlicensed contractors from enforcing contracts in law *or equity*. § 489.128(a), (emphasis supplied).

CONCLUSION

The trial court correctly granted summary judgment for the Associations against Incident365. The trial court appropriately employed the dictionary definitions of the words "repair" and "improvement" to accurately conclude that Incident365's work was substantially similar to that of a Contractor as defined by Chapter 489, and thus required licensure. In so doing, the trial court did not invade the province of the Legislature. Instead, the summary judgment followed the intent of the Legislature, evidenced by the plain language of Chapter 489 and consistent with precedent.

Moreover, Chapter 489 does not allow this Court to sever the illegal portions of the contract from the legal portions thereof. Even if severance were permissible under Chapter 489, the contract was indivisible because Florida law does not allow for severance when such severance would be inconsistent with the intent of the parties and frustrate the purpose of the contract. Finally, the RIA's self-serving brief relies on inapplicable statements of law, incorrect facts, and misguided statements of public policy and is of no use to this Court.

Respectfully submitted,

/s/ Scott J. Edwards
Scott J. Edwards, Esq.
scott@scottjedwards.com
Florida Bar No.: 40958
Scott J. Edwards, P.A.
150 E. Palmetto Park Road,
Suite 800
Boca Raton, FL 33432
Phone: 561-609-0760

/s/ Ryan A. Abrams
Ryan A. Abrams, Esq.
rabrams@abrams-law.com
Florida Bar No.: 111323
Abrams Law Firm, P.A.
888 SE. 3rd Ave, Suite 400
Fort Lauderdale, FL 33316
Phone: 954-332-2358

CERTIFICATE OF SERVICE

I certify that a copy of this document has been served via the Florida E-Filing portal on November 29, 2023, to:

Ira Libanoff, Esq., Ferencick, Libanoff, Brandt, Bustamante & Goldstein, P.A., 791 S.W. 6th Ct., Suite 300, Plantation, FL 33324, ilibanoff@flbbwlaw.com

Hala Sandridge, Esq., Buchanan Ingersoll, & Rooney, P.C., 401 E. Jackson St., Suite 2400, Tampa, FL 33602, hala.sandridge@bipc.com

Scott C. Black, Esq., Vernis & Bowling of the Florida Keys, 81990 Overseas Highway, 3rd Floor, Islamorada, FL 33036, sblack@florida-law.com, keysfiling@florida-law.com

Ryan A. Abrams, Esq., Abrams Law Firm, P.A., 888 S.E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33316, rabrams@abrams-law.com, admins@abrams-law.com

/s/ Scott J. Edwards
Scott J. Edwards, Esq.
scott@scottjedwards.com
Florida Bar No.: 40958
Scott J. Edwards, P.A.
150 E. Palmetto Park Road,
Suite 800
Boca Raton, FL 33432
Phone: 561-609-0760
Attorney for Appellee, Ocean Pointe V Condominium Association, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font and word count requirements set forth in Florida Rules of Appellate Procedure 9.045 and 9.210. The brief is presented in Bookman Old Style, 14-point font.

/s/ Scott J. Edwards
Scott J. Edwards, Esq.