

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
CONSTRUCTION INDUSTRY )  
LICENSING BOARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 96-5764  
 )  
JOHN V. McCRAVE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 29, 1997, in Inverness, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gary L. Asbell, Esquire  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

For Respondent: Michael T. Kovich, Esquire  
203 Courthouse Square  
Inverness, Florida 34450

STATEMENT OF THE ISSUE

The issue is whether Respondent's license as a certified general contractor and certified roofing contractor should be disciplined for the reasons cited in the Amended Administrative Complaint.

PRELIMINARY STATEMENT

This matter began on July 12, 1995, when Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board, issued an Administrative Complaint generally alleging that Respondent, John V. McCrave, a licensed general and roofing contractor, violated a number of provisions in Chapter 489, Florida Statutes, when he undertook a construction project in July 1987. More specifically, the complaint alleged that Respondent made fraudulent or dishonest representations in his practice, caused financial harm to the consumer, abandoned the project before completion, and committed fraud or deceit in the practice of contracting. On October 25, 1996, Petitioner filed an Amended Administrative Complaint which added a charge that Respondent failed to satisfy within a reasonable time the terms of a civil judgment obtained by the consumer in July 1994.

Respondent denied the allegations and requested a formal hearing under Section 120.57(1), Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on December 6, 1996, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated December 23, 1996, a final hearing was scheduled on March 13, 1997, in Inverness, Florida. After the case was temporarily abated at the parties' request, it was rescheduled to October 29, 1997, at the same location.

At final hearing, Petitioner presented the testimony of David Pillsbury, Jr., an architectural draftsman; Bruce H. DeKraker, a questioned document examiner for the Florida Department of Law Enforcement and accepted as an expert in handwriting analysis and forensic analysis of documents; Tony Apgar, an acquaintance of the consumer and Respondent; Joan D. Branca, the complaining consumer; and Richard Shumate, an agency investigator. Also, it offered Petitioner's Exhibits 1-14. All exhibits were received in evidence. Respondent testified on his own behalf and presented the testimony of Nicholas R. Burczyk, a handwriting examiner and accepted as an expert in handwriting analysis; James McIntire, a former employee; Phyliss McCrave, his wife; and Sharon J. Reed, his daughter. Also, he offered Respondent's Exhibits 1-12. All exhibits were received in evidence. Finally, pursuant to Petitioner's request, the undersigned took official recognition of Chapters 20, 49, 120, and 455, Florida Statutes; Section 726.101, Florida Statutes; former Rule 21E-12.018; and existing Rules 61G4-12.018 and 61G4-17.001 through 61G4-17.009, Florida Administrative Code.

The transcript of hearing (two volumes) was filed on November 24, 1997. Proposed findings of fact and conclusions of law were filed by Petitioner and Respondent on December 23, 1997, and January 2, 1998, respectively, and they have been considered by the undersigned in the preparation of this Recommended Order.

## FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. When the events herein occurred, Respondent, John V. McCrave, was licensed as a certified general contractor and certified roofing contractor having been issued license numbers CG C014083 and CC C056695 by Petitioner, Department of Business and Professional Regulation, Construction Industry Licensing Board (Board). Respondent was the licensed qualifying agent for American General Enterprises, Inc. (American General), a contracting firm with offices in Inverness, Florida. He has held a license since 1978.

2. In 1980, Joan D. Branca relocated from New Jersey to Inverness, Florida, where she purchased a mobile home. Around 1982 or 1983, she became acquainted with Respondent through church activities.

3. In 1987, Branca sold her mobile home and decided to build a new home in Inverness with the proceeds from the sale of her home in New Jersey and the mobile home. Because she was acquainted with Respondent, she selected him as the contractor.

4. On July 29, 1987, the parties entered into an Agreement Between Owner and Contractor wherein Respondent agreed to construct a "Home for Joan D. Branca" for a cost of \$79,900.00, "not counting land aquisition." Although the contract called for Branca to pay Respondent twenty percent at the time the contract

was signed, with four equal draws during the construction process, on or about September 29, 1987, she gave him a check in the amount of \$50,000.00, payable to American General Enterprises, Inc. Respondent was to hold that sum of money pending the construction of the new home.

5. The contract also contained a handwritten provision that "[i]f property is not found by April 1, 1988, that is suitable to [illegible] the Deposit of \$50,000 shall be returned on demand with all interest at normal bank rate." As to this provision, Respondent's testimony that the contract would "die" on April 1, 1988, unless Branca secured a lot, was not contradicted and is hereby accepted. Therefore, Respondent was obligated to build a new home if Branca purchased a lot by April 1, 1988. Otherwise, he was simply required to return her money "on demand," including interest. Despite this self-executing provision, however, the parties continued to act as if there were a viable construction contract between them until at least the spring of 1990.

6. Branca did not own a lot for her new house when she signed the contract. The parties' understanding, however, was that Respondent would build the house when she secured a lot. Until she did so, Branca was offered a job (with free lodging) by Respondent as manager of an apartment complex in Ocala, which Respondent was then constructing. Branca accepted this offer and moved to Ocala in March 1988.

7. While living in Ocala, Branca did not actively search

for a lot since she was busy "managing apartments." Even so, Respondent was not authorized to use her money for any other purpose during this period of time since it was to be held strictly for the purpose of constructing her home.

8. Using \$5000.00 borrowed from her daughter, in September 1989, Branca purchased two vacant lots in Inverness, one on Diamond Street, the other on Apopka Street. It was her intention to have Respondent construct the new home on the Diamond Street lot. To this end, she made a rough sketch of the home to be constructed. Thereafter, at Respondent's suggestion, she had an architectural draftsman, David Pillsbury, finalize the plans. They were completed on October 14, 1989.

9. Because Branca had to borrow money from her daughter in September 1989 to purchase the two lots, she asked Respondent to return \$5,000.00 of her money. On November 29, 1989, Respondent returned \$5000.00 to Branca, leaving \$45,000.00 of her money still in his possession.

10. Within a few months, Respondent had the Diamond Street lot cleared as if construction were about to begin. When no construction began within a reasonable period of time, Branca asked Respondent if the building permits had been pulled. He replied that the permitting process took time. Finally, at Respondent's direction, on March 13, 1990, Branca filled out a Notice of Commencement form and filed it in the Citrus County public records. Even so, construction was never begun.

11. On March 14, 1990, Respondent unilaterally drew up another "Agreement Between Owner and Contractor" and presented it to Branca for her signature. It called for him to construct a new home within "within 120 days after permits are obtained" for a price of \$53,000.00. The agreement acknowledged that "Joan Branca has already payed [sic] \$45,000 towards the construction of this home." It further provided that "[t]he ballance [sic] of \$8,000.00 shall be after home is complete." At the same time, Respondent orally asked Branca to borrow another \$25,000.00 to complete the construction of the home. Respondent even carried her to a local bank in order for her to borrow the money. Branca became suspicious and declined to sign a new contract or borrow the money.

12. By May 1990, Branca had left Ocala and was living in Homosassa, Florida, with a friend. On the morning of May 4, 1990, Respondent visited Branca and tearfully reported to her that he had spent her \$45,000.00 on other construction projects. Because of this, on May 10, 1990, Branca drew up a "Legal Agreement" wherein Respondent acknowledged owing her \$45,000.00. He also promised to pay that amount by November 1, 1990. The agreement further provided that if he were late in making the payment, Respondent would be liable for a late charge of \$500.00 per day. As of May 10, 1990, Respondent had repaid Branca around \$6,500.00.

13. Between October 14, 1992, and September 1, 1993, Respondent made various payments to Branca by check and cash. As of September 1993, Branca had been repaid a total of \$15,255.00.

14. On June 15, 1993, Branca engaged the services of an attorney who prepared a promissory note which Respondent signed. It required Respondent to pay Branca the sum of \$44,000.00 at a rate of \$400.00 per month beginning on July 1, 1993, and various balloon payments so that the total debt would be retired by June 1, 2000.

15. When Respondent failed to repay the money as required by the parties' agreement, Branca filed suit in circuit court and on July 2, 1994, received a final civil judgment against Respondent in the amount of \$44,286.20. As of the date of hearing, or more than three years later, Respondent had failed to repay any money towards satisfaction of the civil judgment.

16. Respondent offered into evidence an addendum to the original contract dated September 30, 1987. The addendum reflects the purported signature of Branca. In addition, it carries the signature of Respondent, and the signatures of his wife and sister, Phyllis McCrave and Sharon McCrave, and a subcontractor, James McIntire, as witnesses. According to the addendum, Branca agreed that "[n]o work [would] be done" on the project, all previous agreements regarding the \$50,000.00 were "null and void," her deposit would be held by American General "to protect it from any claims or liens against it, that might



develop, due to the actions of her son, Jim Branca," and Branca's money would be returned "upon her request." As noted below, however, the authenticity of Branca's signature is in dispute.

17. Both sides presented expert testimony on the issue of whether the signature on the addendum dated September 30, 1987, is actually that of Branca. Although the experts sharply disagreed on the genuineness of Branca's signature, the testimony of Petitioner's witness DeRaker is accepted as being the most credible on this issue. Therefore, it is found that the purported signature of Branca has been simulated to appear as her own, and that Branca did not sign the addendum.

18. At hearing, Respondent contended that Branca had entrusted her to keep the \$50,000.00 as a result of Branca's seventeen-year-old son being involved in an automobile accident in 1987. According to Respondent, Branca feared that she might be sued and forced to pay a judgment on behalf of her son and therefore wished to hide her assets. Therefore, he asserted that Branca never intended to have him construct a home, and that the contract was simply a way to hide the money. Branca denied this, saying that the wrecked automobile was in her son's name, and not her name, and he had insurance covering the accident. Her explanation is accepted as being the most credible on this issue.

19. Respondent also contended that he offered to return Branca's money in April 1988 but she declined the offer. In May 1989, Respondent claims that he again offered to return the money

but Branca wanted Respondent to use the money as an investment in an apartment project in Daytona Beach, Florida. Respondent then says that he used \$40,000.00 of Branca's money, but lost it after the project was later abandoned. While Respondent presumably used Branca's money for other purposes, his testimony that he offered to return the money, but that she encouraged him to invest it in other ventures, is not accepted.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.569, Florida Statutes (1997).

21. Because Respondent's licenses are at risk, Petitioner bears the burden of proving by clear and convincing evidence that the allegations in the complaint are true. See, e.g., Ferris v. Turlington, 510 So. 2d 292 (Fla. 1982).

22. The complaint, as amended, alleges that Respondent:  
(a) violated Section 489.129(1)(c), Florida Statutes (1993), by violating Section 455.227(1)(a), Florida Statutes (1993), which prohibits a licensee from making misleading, deceptive, untrue or fraudulent representations in the practice of contracting (Count I); (b) committed "mismanagement or misconduct in the practice of contracting" as proscribed by Section 489.129(1)(h), Florida Statutes (1989) (Count II); (c) "abandoned a construction project in which the contractor is engaged or under contract as a contractor" in contravention of Section 489.129(1)(k), Florida

Statutes (1989)(Count III); (d) violated Section 489.129(1)(m), Florida Statutes (1989), by "being found guilty of fraud or deceit or of gross negligence, incompetency, or misconduct in the practice of contracting" (Count IV); and (e) violated Section 489.129(1)(r), Florida Statutes (1995), by "failing to satisfy within a reasonable time, the terms of a civil judgment obtained against the licensee relating to the practice of the licensee's profession" (Count V).

23. As to Count I, Petitioner has established by clear and convincing evidence that Respondent made misleading, deceptive, or fraudulent representations in the practice of contracting by preparing a document which contained the simulated signature of a consumer (Branca). This is true whether the preparation of the addendum occurred before July 1, 1994, when Section 455.227(1)(a) was amended in minor respects, or after the new law became effective. Therefore, this charge has been sustained.

24. As to Count II, Petitioner has established by clear and convincing evidence that Respondent committed mismanagement or misconduct in the practice of contracting that caused financial harm to a customer in violation of Section 489.129(1)(h)2., Florida Statutes (1989). In reaching this conclusion, the undersigned has considered the established fact that to the consumer's detriment, Respondent utilized the \$50,000.00 deposit given by Branca for purposes other than constructing her home.

25. The third count has been sustained. Notwithstanding

the provision in the contract which nullified the agreement if Branca did not find suitable property by April 1, 1988, the parties continued to act as if there were a viable contract through at least the spring of 1990. Indeed, the established facts show that Branca purchased a lot in September 1989; plans for the new house were drawn in October 1989; the lot was cleared by Respondent a few months later; and Respondent instructed Branca to prepare and file a Notice of Commencement in March 1990. By failing to construct the home as contemplated by the parties, Respondent has abandoned a project without just cause within the meaning of Section 489.129(1)(k), Florida Statutes (1989).

26. As to Count IV, by clear and convincing evidence Petitioner has established that Respondent engaged in misconduct in the practice of contracting within the meaning of Section 489.129(1)(m), Florida Statutes (1989). This conclusion is based on the established fact that Respondent used Branca's money for a purpose other than constructing her home.

27. As to the final count, the evidence is clear and convincing that Respondent failed to satisfy within a reasonable time the terms of a civil judgment obtained against the licensee relating to the practice of the licensee's profession in violation of Section 489.129(1)(r), Florida Statutes (1995).

28. Because the violations in Counts I through IV occurred when former Rule 21E-17.001, Florida Administrative Code, was in

effect, the suggested penalties contained therein should apply to those violations. For a violation of Section 455.227(1)(a), Florida Statutes, paragraph (3)(a) calls for a fine in the range of \$500.00 to \$1,500.00. For a violation of Section 489.129.(1)(h), Florida Statutes, paragraph (10) of the rule calls for a penalty ranging from \$750.00 to \$1,500.00. For a violation of Section 489.129(1)(k), Florida Statutes, paragraph (12) calls for a penalty of between \$500.00 and \$2,000.00. Finally, paragraph (19)(b) calls for a penalty ranging from \$500.00 to \$1,500.00 for a violation of Section 489.129(1)(m), Florida Statutes. All of the foregoing penalties may be increased or diminished if aggravating or mitigating circumstances are present. In this case, however, none were shown to be present.

29. As to the violation in Count V, prior to October 1, 1996, neither former Rule 21E-17.001 or its successor, existing Rule 61G4-17.001, Florida Administrative Code, contained a specific provision for the fine or penalty for violating Section 489.129(1)(r), Florida Statutes. However, since November 2, 1993, or before the violation in Count V occurred, Rule 61G4-17.001(21), Florida Administrative Code, has provided that "[t]he absence of any violation from this Chapter shall be viewed as an oversight, and shall not be construed as an indication that no penalty is to be assessed." The rule goes on to provide that "[t]he guideline penalty for the offense most

closely resembling the omitted violation shall apply." Because paragraph (10) of the rule imposes a \$500.00 violation for a material violation of any provision of Chapter 489, Florida Statutes, that penalty is found to be appropriate.

30. Because the parties have not cited any aggravating or mitigating circumstances, except as to Count V, the approximate mid-point of each suggested range of penalties is appropriate. Therefore, the following penalties are recommended: Count I - \$1,000.00; Count II - \$1,000.00; Count III - \$1,250.00; Count IV - \$1,000.00; and Count V - \$500.00, or a total of \$4,750.00.

31. In addition, as authorized by Section 489.129(1), Florida Statutes, the Board may require the licensee to make "financial restitution to a consumer for financial harm directly related to a violation of a provision of [Chapter 489]." Accordingly, Respondent should be required to pay restitution to Joan Branca in the amount of \$44,286.20, or satisfy the judgment entered against him on July 2, 1994. It is further noted that Petitioner has not recommended that any action be taken against Respondent's license at this time.

32. Finally, Petitioner has submitted an affidavit reflecting that it incurred \$3,703.16 in costs while investigating and prosecuting this action. Because Section 455.227(3), Florida Statutes, provides that the assessment of costs is discretionary with the Board, no action has been taken with respect to this request. Petitioner's counsel may renew his

request when the Board convenes to take final action in this matter. Before a decision is made, however, Respondent should have an opportunity to review and verify those costs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Construction Industry Licensing Board enter a Final Order finding that Respondent is guilty of the violations described in Counts I through V of the Amended Administrative Complaint. As to those violations, it is recommended that Respondent be fined \$4750.00 to be paid by such date as may be determined by the Board, and that he be required to either pay Joan Branca \$44,286.20, or that he satisfy the civil judgment entered against him on July 2, 1994, in Citrus County, Florida.

DONE AND ENTERED this 30th day of January, 1998, in Tallahassee, Leon County, Florida.

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DONALD R. ALEXANDER  
Administrative Law Judge  
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Filed with the Clerk of the  
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Construction Industry Licensing Board.