

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

ROBERSON BUILDERS, INC.,

Plaintiff/Counter-Defendant-Appellant,

Docket No. 132363

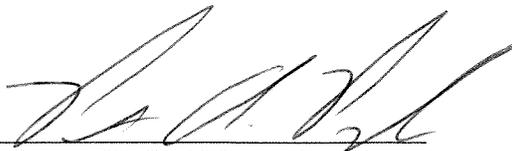
v

JAMES LARSON,

Defendant/Counter-Plaintiff-Appellee.

BRIEF ON APPEAL-APPELLANT

ORAL ARGUMENT REQUESTED


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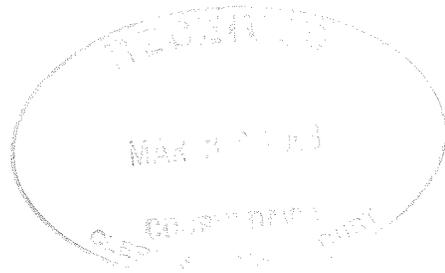


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STATEMENT OF THE BASIS OF JURISDICTION

On or about October 30, 2007, Roberson Builders, Inc., filed with this Court an application for leave to appeal the unpublished Court of Appeals Opinion, dated September 19, 2006, Docket No. 260039, which affirmed in part and reversed in part a December 8, 2004, final judgment entered upon a jury verdict in this action involving claims of breach of contract and violation of the Michigan Consumer Protection Act, MCL 445.901 et seq. which stemmed from work performed by an unlicensed builder on a residence. This Court granted leave in an order dated February 1, 2008. Jurisdiction is therefore, pursuant to MCR 7.301(2).

STATEMENT OF QUESTIONS INVOLVED

1. CAN A CLAIM FOR SETOFF OR RECOUPMENT BE BOTH A COUNTER-CLAIM AND AN AFFIRMATIVE DEFENSE?

Appellant says the answer is "Yes."

Appellees would answer "No."

2. DOES THE ASSERTION OF A CLAIM FOR SETOFF OR RECOUPMENT AS A DEFENSE TO ANOTHER PARTY'S CLAIM CONSTITUTE THE "BRINGING OR MAINTAINING" OF AN ACTION FOR "COLLECTION OF COMPENSATION" UNDER MCL 339.2412 (1)?

Appellant says the answer is "No."

Appellees would answer "Yes."

3. DOES THIS COURT'S OPINION IN *LISS V LEWISTON-RICHARDS*, 478 MICH 203; 732 NW2d 514 (2007), RESOLVE THE QUESTION WHETHER THE MICHIGAN CONSUMER'S PROTECTION ACT (MCPA) MCL 445.901 ET SEQ, APPLIES TO APPELLANT?

Appellant says the answer is "Yes."

Appellees would answer "No."

4. IF THE MCPA APPLIES, DID THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE QUESTION WHETHER ROBerson'S CONDUCT CONSTITUTED A FAILURE TO PROVIDE THE PROMISED BENEFIT CONSTITUTE ERROR?

Appellant says the answer is "No."

Appellants would answer "Yes."

SUMMARY OF PROCEEDINGS AND ARGUMENT

This lawsuit was initiated by Roberson Builders, Inc. (hereinafter Roberson) against Defendant/Counter-Plaintiff-Appellee, James Larson (hereinafter, Larson) to collect monies due and owing on a written contract between the parties for the remodeling of Larson's summer home.

However, prior to the commencement of trial, Roberson admitted that although, David Roberson, the principal and sole owner of the corporation, held a valid builder's license, Roberson, the Corporation-Plaintiff, did not. The court concluded that the Residential Builder's Act, MCL 339.2412 (hereinafter, RBA), precluded Roberson from directly recovering on its claim against Larson, but found Roberson was entitled to assert the remaining sums owed under the contract as a defense or offset to Larson's counter-claim for breach of contract and violation of the MCPA (September 8, 2004, Trial Transcript I, pp 4-8, see Appendix pp. 18a-35a).

The matter was tried before a jury. The jury was sent to deliberate with a detailed verdict form that asked the jury to determine: 1) whether Roberson "breached the construction contract by failing to perform the contract work skillfully, carefully, diligently and in a workmanlike manner;" 2) the specific damages for the several alleged breaches; 3) the value of any "extra" work Roberson performed for Larson; and 4)

whether Roberson's conduct constituted a "failure of the other party to the transaction to provide the promised benefit?"¹ (A copy of the Jury's verdict form is attached, see Appendix pp.49a-51a).

The jury returned a verdict finding that Roberson: 1) breached the construction contract and the amount of damages stemming from the breach; 2) completed "extras," or work outside the contract and the dollar value of the work; and 3) that Roberson's conduct did not constitute a "failure of the other party to the transaction to provide the promised benefit."²

Larson filed an appeal with the Court of Appeals. A panel of that court held that the trial court erred in permitting Roberson to use his performance under the contract defensively in order to offset the damages claimed by Larson; that the MCPA is applicable to residential builders; and that the trial court erred in submitting to the jury the question whether Roberson's conduct constituted a "failure of the other party to the transaction to provide the promised benefit" under the MCPA.³

Roberson filed an application for leave to appeal the Court of Appeal's decision to this Court which was granted by Order dated February 1, 2008. In addition to granting Roberson's application for leave, the Order indicated the Court's desire that the parties address the questions whether a claim for setoff is a counterclaim or an affirmative defense and whether asserting a claim for a setoff as a defense to another party's claim amounts to the "bringing or maintaining" an action for the "collection of compensation" under MCL 339.2412(1).

¹ Michigan Consumer Protection Act, MCL 445.903(y).

² See Appendix, pp. 49a-51a

³ A copy of the opinion is attached hereto, see Appendix, pp.55a-58a .

On appeal to this Court Roberson contends that a claim for setoff or recoupment can be both a counterclaim and an affirmative defense and that when asserted defensively against another party's claim, giving meaning to the plain language of the statute, it does not constitute the "bring[ing] or maintain[ing]" of an action for the "collection of compensation" under MCL 339.2412 (1).

Roberson also contends that the trial court and the Court of Appeals improperly determined that the MCPA applied to Roberson, a residential builder, where despite his licensing failure, his conduct, the building of residences, was regulated under the Michigan Occupational Code, MCL 339.601 et seq (hereinafter MOC) and the RBA. This Court recently decided this issue in *Liss, supra*, wherein it stated that "building a residential home is 'specifically authorized' under the MOC and the relevant regulations" and is therefore a transaction that is exempt from the MCPA. *Id at 215*.

Finally, Roberson contends that assuming, without admitting, that the MCPA applied to Roberson, the trial court did not err in submitting the question whether Roberson's conduct constituted a failure to provide the promised benefit where the question constituted a question of fact no different from the question whether Roberson breached the construction contract which was also submitted to the jury.

STATEMENT OF FACTS

This matter arose out of a dispute between a homeowner and a builder. The suit was initiated by Roberson Builders, Inc. against James Larson to collect monies due and owing on a written contract between the parties for the remodeling of Larson's summer home. The initial complaint alleged that, based on various change orders and extras,

Larson owed Roberson the sum of \$35,439.55.⁴ Larson filed a counter-claim alleging Roberson's breach of the construction contract, breach of express and implied warranties of the merchantability of goods and the provision of services in a good and workmanlike manner and a violation of the Michigan Consumer Protection Act, MCL 445.903 et seq.⁵

Sometime before trial, the significance of the fact that David Roberson, rather than Roberson Builders, Inc., held the builder's license became known to the parties.⁶ Thus, because the contract was between Larson and Roberson Builders, Inc., rather than between Larson and Roberson individually, the court determined that Roberson Builders, Inc. could not proceed against Larson on its complaint for breach of contract, quantum meruit, and unjust enrichment.

Although Roberson's complaint was dismissed, the case proceeded to trial on Larson's counterclaims of breach of contract, warranty and a violation of the MCPA. The court held Roberson was permitted to defend against Larson's action by presenting evidence of his performance under the contract, including work that Roberson contended was added as "extras" to the contract.⁷

At the conclusion of the presentation of evidence, Roberson filed a motion for directed verdict on Larson's claim under the MCPA arguing, as it during trial, that the MCPA did not apply to Roberson because the corporation was subject to regulation under

⁴ See Plaintiff's Complaint, Appendix, pp. 2a-10a.

⁵ See Defendant's Answer and Counter-Complaint, Appendix, pp. 11a-17a.

⁶ Under the Michigan Occupational Code and Residential Builders Act, a residential builder, whether an individual or a corporation, is required to be licensed. Absent such a license, the builder is prohibited from *bringing or maintaining* an action for the collection of compensation for the performance of an act or contract involving residential building. MCL 339.601(1), MCL 339.2401(a), MCL 339.2412(1).

⁷ September 8, 2004, Trial Transcript I, pp 4-8, 86-87; see Appendix, pp. 18a-35a.

the RBA.⁸ The trial court denied Roberson's motion and the matter was submitted to the jury.⁹

The jury was instructed on the law, including substantive instructions on the definitions relevant to the case; the Identification of Parties and Relation of Claims; and a section entitled "Michigan Consumer Protection Act."¹⁰ The jury verdict form asked the jury to determine: 1) whether Roberson materially breached the construction contract by failing to perform the contract work skillfully, carefully, diligently, and in a workmanlike matter and if so, what damages were related to each breach; 2) whether aside from the alleged breaches, Roberson performed each of the other tasks required by it to earn the contract price, and if not, a reasonable dollar amount associated with performing those tasks; 3) the dollar value of any services performed by Roberson for which Larson waived the writing requirement; and 4) whether Roberson's conduct constituted a "failure of the other party to the transaction to provide the promised benefit."¹¹

The jury determined that Roberson materially breached the construction contract and that damages arising from the breach with regard to the siding, roofing, fascia and unfinished work totaled \$25,504.00. It also determined that the value of the extra items performed by Roberson was \$6,378.00.¹²

The trial court entered a judgment upon the verdict on December 8, 2004. The judgment included the damages awarded Larson for Roberson's breach, plus costs and

⁸ See the September 8, 2004, Trial Transcript I, pp 120-129, wherein the trial court permitted the parties to address on the record the issues that had been previously raised and decided with regard to the posture of the case. Larson claimed Roberson was precluded from defending against the action with evidence of his performance and that the question whether Roberson violated the MCPA should not be submitted to the jury. Roberson argued that the MCPA did not apply to the case at all; Appendix, pp. 18a-35a.

⁹ Roberson's motion was denied by notation on a letter sent by the trial court's law clerk in response to Larson's recommendations regarding the proposed jury instructions (See Appendix, pp.40a-41a).

¹⁰ A copy of the jury instructions is attached hereto; see Appendix, pp. 42a-48a).

¹¹ See Appendix, pp. 49a-51a.

¹² Id.

interest, less the amount the jury found was the value of the "extras" performed by Roberson¹³

Larson appealed from the judgment claiming the trial court erred in permitting Roberson to offset the value of his performance of the "extras" against the damages found attributable to its breach. Larson also claimed error in the trial court's submission to the jury of the question whether Roberson's conduct constituted a failure to provide the promised benefit under the MCPA.¹⁴

The Court of Appeals agreed with Larson and issued the opinion from which this Court has granted Roberson leave to appeal. The Court of Appeals held that: 1) the trial court erred in permitting Roberson a setoff against the damages awarded to Larson; 2) a plaintiff who establishes a breach of an implied warranty has, as a matter of law, established a "failure to provide the promised benefits" under the MCPA; 3) the question whether Roberson's conduct constituted a failure to provide the "promised benefit" was a question of law rather than of fact and should not have been submitted to the jury; 4) based on prior precedent, the MCPA applies to residential builders; and 5) Roberson's status as an unlicensed builder would have nonetheless precluded it from exemption from the statute.

ARGUMENT

I.

A CLAIM FOR SETOFF OR RECOUPMENT MAY BE BOTH A COUNTERCLAIM AND AN AFFIRMATIVE DEFENSE.

A. Standard of Review

¹³ A copy of the December 8, 2004, judgment is attached; See Appendix, pp. 52a-54a.

¹⁴ See the September 19, 2006, Court of Appeals opinion attached; Appendix, pp. 55a-58a.

Generally, setoff is a matter in equity. A trial court's decision whether to grant equitable relief is reviewed de novo on appeal. *Walker v Farmers Insurance Exchange*, 226 Mich App 75; 572 NW2d 17 (1977).

B. Preservation of Issue

This Court in its order granting leave to appeal specifically requested that the parties address this issue. It is therefore preserved.

C. Analysis

Outside the clear statement that a setoff is a matter in equity, this writer has been unable to locate precedent which would definitively conclude that a setoff must be considered either a counterclaim or an affirmative defense, one to the exclusion of the other. Instead, in keeping with general equitable principles, it appears that setoffs have been coined affirmative defenses, counterclaims or recoupments as appropriate to the particular case before the court. Nonetheless, Roberson contends that regardless of the descriptor used, the authority cited below suggests a setoff is more in the nature of a defense than a counterclaim.

An affirmative defense has been defined as a defense which by reason of an affirmative matter seeks to avoid the legal effect or defeat the claim of an opposing party, in whole or in part. Examples include contributory negligence, the existence of an agreement to arbitrate, assumption of risk payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, statute of limitations, immunity granted by law, want or failure of consideration, or that an instrument or transaction is void or voidable or cannot be recovered on by reason of statute or non-delivery. *Harris v Vernier*, 242 Mich App 306; 617 NW2d 764 (2000); MCR 2.111(F)(3).

Applying the above definition, the setoff permitted by the trial court in the instant matter appears to constitute an affirmative defense. Here, Roberson submitted evidence that he had performed extra work under the contract for which he had not been paid in an attempt to avoid the legal effect of the damages claimed by Larson. As discussed by the Court of Appeals in *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 46; 698 NW2d 900 (2005), an affirmative defense does not deny the allegations of the plaintiff's complaint, but instead denies that the plaintiff is entitled to recover for the claim for some reason not disclosed in the plaintiff's pleadings. In this matter, full recovery was disallowed based on the extra uncompensated work performed by Roberson that was not disclosed in Larson's pleadings.

Likewise, the setoff permitted by the trial court in this action might also be coined a recoupment. In a contract case between a contractor and subcontractor involving cross-claims similar to those presented herein, failure of performance and performance of additional uncompensated work, the Court of Appeals in *Minority Earth Movers, Inc. v Walter Toebe Construction Co.*, 251 Mich App 87; 649 NW2d 397 (2002), identified the ability of one party to receive a deduction of the other party's damages arising out of the same contract as a recoupment. Specifically, the court stated at 96-97:

The defense of recoupment refers to a defendant's right, in the same action, "to cut down the plaintiff's demand, either because the plaintiff has not complied with some cross obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract." 20 Am. Jur. 2d, Counterclaim, Recoupment, etc., § 5, p. 231. Recoupment is 'a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity and good conscience should be reduced.'

As explained in *Warner v. Sullivan*, 249 Mich. 469, 471, 229 N.W. 484 (1930):

‘Recoupment is a creature of the common law. It presents to the court an equitable reason why the amount payable to the plaintiff should be reduced, and the plaintiff will not be permitted to insist upon the statute of limitations as a bar to such a defense when he is seeking to enforce payment of that which is due him under the contract out of which the defendant's claim for recoupment arises.’ [*Mudge v. Macomb Co.*, 458 Mich. 87, 106-107, 580 N.W.2d 845 (1998) (citation omitted; emphasis deleted).]

Similarly, the defensive nature of setoff, counterclaims and recoupments has been recognized in the discussion of the applicability of such claims to claims barred by statutes of limitations.

The question here is whether, in what cases, and under what statutes, a claim which is barred by a general statute of limitations may nevertheless be used in setoff, counterclaim, or recoupment, or be made the subject of a cross action or cross suit. The fact that general statutes of limitation are usually regarded as extinguishing the remedy rather than the right lends some degree of plausibility to the suggestion that a claim, though barred, may be used in setoff, and especially if intimately related to plaintiff's cause of action.

The present subject plainly does not include any inquiry as to the availability of matters which in their nature are defenses only. Yet, especially in view of the freedom with which setoffs, counterclaims, and recoupments are spoken of as defenses when offered to prevent or reduce recovery, it should be noted that the scope of the treatment here is governed by substance rather than name. A setoff may be used to prevent recovery, and in that sense defensively, although it is not otherwise a defense. 1 A.L.R. 2d 630, §1 Scope of Annotation.

Thus, Roberson suggests that the question is not so much whether a setoff, which may result from the assertion of a counterclaim, affirmative defense or recoupment, should itself be coined a counterclaim or affirmative defense, but should instead be whether the nature of the setoff is used defensively. To that question as it pertains to the instant matter, Roberson contends the answer is yes.

ARGUMENT

II.

THE ASSERTION OF A CLAIM FOR SETOFF OR RECOUPMENT IN RESPONSE TO ANOTHER PARTY'S CLAIM DOES NOT CONSTITUTE THE "BRINGING OR MAINTAINING" OF AN ACTION FOR "COLLECTION OF COMPENSATION" UNDER MCL 339.2412 (1).

A. Standard of Review

Statutory interpretation is a question of law and is reviewed *de novo* on appeal. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). A fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. In construing a statute, courts must give the words used by the Legislature their common, ordinary meaning. *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999).

B. Preservation of Issue

This issue was addressed and decided by both the trial court¹⁵ and the Court of Appeals.¹⁶ Moreover, this Court in its Order granting leave to appeal specifically requested that the parties' address this issue. It is therefore preserved for appeal.

C. Analysis

The statute at issue provides in relevant part:

(1) A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not *bring or maintain an action* in a court of this state for the *collection of compensation* for the performance of an act or contract for which a license is required by this article

¹⁵ See September 8, 2004, Trial Transcript pp 120-123; Appendix, pp. 18a-35a.

¹⁶ See Court of Appeals opinion; Appendix, pp. 55a-58a.

without alleging and providing that the person was licensed under this article during the performance of the act or contract.

Residential Builders Act, MCL 339.2412 (Emphasis Added).

The language of the statute is plain, clear and ordinary. It is therefore not subject to judicial interpretation. *People v McIntire, supra*. The statute precludes an unlicensed builder from *bringing or maintaining* an action for the *collection of compensation*. Thus, the trial court properly dismissed Roberson's complaint against Larson alleging breach of contract, quantum meruit, and unjust enrichment because the complaint constituted the bringing or maintaining of an action for the collection of compensation.¹⁷ However, the trial court did not err in permitting Roberson to assert its performance under the contract as a defense to Larson's action. Evidence of Roberson's performance did not constitute an *action for the collection of compensation* but instead was a proper defense to the amount of damages claimed in the breach of contract claims made against it. In *Parker v McQuade Plumbing & Heating, Inc.*, 124 Mich App 469; 335 NW2d 7 (1983), a panel of the Court of Appeals, applying the same statutory language "bring or maintain any action" and "for the collection of compensation" contained in an earlier version of the act, concluded:

By its terms the statute prevents an unlicensed contractor from suing to collect on the contract. An unlicensed contractor also cannot collect on a counterclaim, although equitable principles may demand an offset for the value of services rendered by the contractor. But the statute nowhere prohibits an unlicensed contractor from defending a breach of contract suit on its merits. The statute removes an unlicensed contractor's power to *sue*, not the power to defend. It was intended to protect the public as a shield, not a sword. (Citations Omitted). *Id.* at 471.

The trial court did not err in permitting Roberson to defend against Larson's breach of contract claim, including assertion of a defense against the amount of damages

¹⁷ See footnote 8.

sustained. As discussed in the previous issue, the decision whether to permit a setoff is equitable in nature. The *Parker* court, *supra*, correctly concluded that under circumstances such as those presented herein, equitable principles may demand an offset for services performed by the contractor. The Court of Appeals erred in ruling otherwise in this matter.

ARGUMENT

III.

ACCORDING TO THIS COURT'S OPINION IN *LISS V LEWISTON-RICHARDS*, 478 MICH 203; 732 NW2D 514 (2007), THE MCPA IS NOT APPLICABLE TO TRANSACTIONS INVOLVING THE BUILDING OF A RESIDENTIAL HOME AND THUS IS NOT APPLICABLE TO APPELLANT.

A. Standard of Review

Statutory interpretation is a question of law and is reviewed *de novo* on appeal. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). The primary task in construing a statute is to discern and give effect to the intent of the Legislature. The words of the statute are the most reliable evidence of intent. *46th Circuit Trial Court v Crawford County*, 476 Mich 131; 719 N.W.2d 553 (2006) amended 476 Mich 1201 (2006).

B. Preservation of Issue

The question whether the MCPA applied to Roberson, a residential builder, was addressed and decided by the trial court¹⁸ the Court of Appeals¹⁹ and in Roberson's application for leave to appeal to this Court. The issue is therefore preserved.

¹⁸ See footnotes 8 and 9.

¹⁹ See Court of Appeals opinion; Appendix, pp. 55a-58a.

C. Analysis

The MCPA “does not apply to a transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.” MCL 445.904(1)(a). Larson acknowledges that Roberson is required by the Michigan Occupational Code, MCL 339.2401, et seq., to be licensed as a residential builder. Moreover, Larson cannot contest that Roberson's complaint against him was dismissed based on the fact Roberson was subject to the regulations contained in the MOC and the RBA. Because Roberson is required to be licensed, and is subject to the statutes, regardless of its actual licensure, it cannot be sued under the MCPA.

This Court in *Smith v Globe Life Insurance Company*, 460 Mich 446, 597 NW2d 28 (1999), stated that “when the Legislature said that transactions or conduct 'specifically authorized' by law are exempt from the MCPA, ***it intended to include conduct the legality of which is in dispute.***” *Id* at 465 (emphasis added). This Court held that:

. . . we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is “specifically authorized.” Rather, it is whether ***the general transaction is specifically authorized by the law, regardless of whether the specific misconduct alleged is prohibited.***

Smith, supra at 465, (emphasis added).

This rationale was recently reaffirmed by this Court in *Liss, supra*. at 214 wherein this Court stated:

Therefore, with limited exceptions, contracting to build a residential home is a transaction ‘specifically authorized’ under the MOC, subject to the administration of the Residential Builders’ and Maintenance and Alteration Contractor’s Board.

Therefore, pursuant to this Court's holdings in *Smith and Liss*, the issue is whether the activity subject to this action comes within the scope of the residential building licensing scheme. Roberson and Larson entered into a contract whereby Roberson was to make improvements to residential real estate. Because such a transaction is subject to regulation under the Occupational Code, specifically the RBA, the transaction is exempt from the MCPA.

ARGUMENT

IV

THE QUESTION WHETHER A PARTY'S CONDUCT UNDER A CONTRACT CONSTITUTES A FAILURE TO PROVIDE A PROMISED BENEFIT IS A QUESTION OF FACT PROPERLY SUBMITTED TO THE JURY.

A. Standard of Review

Determination of the appropriate standard of review depends upon the context of the case and presents a question of law which is subject to de novo review. *People v Prelesnik*, 219 Mich App 173; 555 NW2d 505 (1996), overruled in part on other grounds in *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999); *People v Walters*, 266 Mich App 341; 700 NW2d 424 (2005). The issue raised herein, whether a particular question at trial involves a question of fact or a question of law, necessarily involves both questions of fact and law. A trial court's findings of facts will not be disturbed on appeal unless they were clearly erroneous, but questions of law are reviewed de novo. *Fraser Township v Linwood-Bay Sportsman's Club*, 270 Mich App 289; 715 NW2d 89 (2006).

B. Preservation of Issue

The question whether the trial court properly submitted to the jury the issue whether Roberson's conduct constituted a "failure to provide the promised benefit" under

the MCPA was addressed and decided by both the trial court and the Court of Appeals and raised in Roberson's application for leave to appeal to this Court.²⁰ The issue is therefore preserved.

C. Analysis

The MCPA, provides in relevant part:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits. MCL 445.903(1)(y).

The Court of Appeals, in its opinion in this matter, discussed the facts of *Mikos v Chrysler Corp*, 158 Mich App 781; 404 Nw2d 783 (2006), and concluded the case stood for the proposition that any breach of an implied warranty constitutes a "failure to provide the promised benefits" under the MCPA and thus, a violation of the MCPA. Therefore, the Court held that because the jury concluded Roberson's actions constituted a breach of the contract's implied warranty of good workmanship, as a matter of law, the conduct violated the MCPA. Appellant suggests that the Court's reading of *Mikos* is too broad and that it erred by assuming that the jury found a breach of the implied warranty of good workmanship.

The Court of Appeals panel in *Mikos* addressed, in a very short opinion, the application of the "promised benefit" language of the MCPA in the context of the sale of a vehicle and the implied warranty of merchantability. Although in portions of the opinion the Court used broad language, the holding was narrow:

²⁰ See footnote 8 and Appendix, pp. 55a-58a.

A plaintiff who establishes breach of an implied warranty of merchantability is therefore entitled to attorney fees under the Consumer Protection Act. *Mikos*, 158 Mich App at 785.

The trial court, after considering the underlying facts in *Mikos*, concluded it was not applicable to this case because the questions herein did not involve the merchantability of a product, but instead the propriety of a given construction project methodology.²¹ There is no question that there is a vast difference between the concepts of an implied warranty of merchantability with regard to a product, such as was involved in *Mikos*, and an implied warranty of workmanship in a multi-faceted construction project. The failure to properly perform a particular aspect of a construction project, unlike the failure of a product to function, does not render the entire construction project “unmerchantable.” In the instant matter Roberson contracted to perform approximately \$243,618 worth of construction for Larson.²² Larson was satisfied with, and paid for, approximately \$208,178 worth of the construction.²³ The dispute therefore involved a very small portion of the entire construction project. Roberson contends the trial court did not err in applying the facts to the law and determining that *Mikos* was distinguishable.

Moreover, even assuming *Mikos* and its very specific holding applied, according to Larson's argument, and the Court of Appeals holding, one would still have to find that the jury determined Roberson specifically breached an "implied warranty of good workmanship." The jury verdict was not specific enough to permit such a finding.²⁴ In addition to a claim for breach of implied warranty, Larson's complaint included claims of general breach of contract and breach of express warranty with regard to several aspects

²¹ Trial court's ruling on Larson's motion for directed verdict, September 15, 2004, Trial Transcript pp 11-13; See Appendix, pp.36a-39a.

²² See Appendix, p. 1a.

²³ See Appendix, pp. 2a-10a.

²⁴ See Appendix, pp. 49a-51a.

of the construction project. Given the differing theories presented on the several allegations of breach, the trial court did not err in concluding the jury verdict, which found Roberson liable for breach of contract but not a failure to provide the promised benefit, was not inconsistent.

As noted, Larson claimed a breach of contract with regard to several items of performance under the construction contract. The jury returned a verdict for damages considerably less than those proposed by Larson. Moreover, as previously indicated Larson paid Roberson, without objection, a large portion of the original contract price. It, therefore, would not have been unreasonable for the jury to determine that although there might have been some breaches of the contract with resultant damages, Roberson did not fail overall to provide the promised benefit.

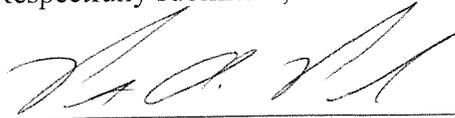
CONCLUSION

The decision of the Court of Appeals finding, not only that a residential builder providing services regulated by the MOC is subject to the MCPA, but also that any breach of a construction contract by a residential builder constitutes, as a matter of law, a violation of the MCPA, was clearly erroneous. It also erred in concluding that a statute that intended to limit a builder's right to institute an action for compensation under a contract performed without a license also precluded the builder from *defending* against a breach of contract action for which it was named as a defendant.

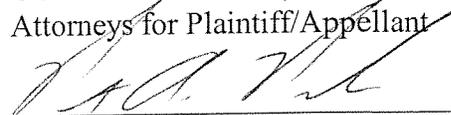
RELIEF REQUESTED

Plaintiff-appellant requests that this Court vacate the September 19, 2006, unpublished Court of Appeals per curiam opinion (Docket No. 260039) and reinstate the December 8, 2004, judgment entered by the trial court.

Respectfully submitted,



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