

STATE OF MICHIGAN  
IN THE SUPREME COURT

On appeal from the Court of Appeals, Gleicher, P.J., and Sawyer and Fort Hood, JJ.

DANNY EPPS and JOYCE EPPS,  
Plaintiffs-Appellees,

Supreme Court No.

*Op 6-6-13  
Rec 8-6-13*

Court of Appeals No. 305731

v

4 QUARTERS RESTORATION, L.L.C.,  
DENAGLEN CORP., d/b/a MBM CHECK  
CASHING, EMERGENCY INSURANCE  
SERVICES, and TROY WILLIS,

Wayne County Circuit Court  
LC No. 09-018323-NO

*M. Sapala*

Defendants-Appellants,

and

AM ADJUSTING & APPRAISALS, L.L.C.,  
MICHAEL N. ANDERSON, JR., HOME-  
OWNERS INSURANCE COMPANY, PAULA  
MATHEWS, MAXIMUM RESTORATION,  
L.L.C., AUTO-OWNERS INSURANCE  
COMPANY, CHARLES WILLIS, and  
COMERICA BANK,

Defendants.

*ok*

*147727*

*APIL*

*12/15*

*842209*

**DEFENDANTS-APPELLANTS'  
APPLICATION FOR LEAVE TO APPEAL**

Submitted by:

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4 Quarters Restoration, L.L.C.,  
Denaglen Corp., d/b/a MBM Check Cashing, Emergency  
Insurance Services, and Troy Willis  
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**FILED**

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## STATEMENT OF QUESTIONS PRESENTED

- I. To The Extent That There Was A Misrepresentation By Defendant Willis As To The Licensure Status Of Himself And His Companies, Did Such Misrepresentation Merely Constitute Fraud In The Inducement To Contract, Making The Contracts Merely Voidable Rather Than Void *Ab Initio*, Leaving the Contracts In Effect When They Were Relied Upon By Defendants-Appellants In 2006 As Authorizing Receipt and Indorsement of the Insurance Checks?

Defendants-Appellants answer this question "Yes."

- II. Did The Court of Appeals Err in Ruling that the Appropriate Damages Remedy Against All Defendants-Appellants Was In The Amount of All Insurance Checks Cashed by the Contractor Defendants at Denaglen?

Defendants-Appellants answer this question "Yes."

- III. Did The Trial Court and Court of Appeals Err in Failing to Set Aside the Default Entered Against Defendant Denaglen Since Denaglen Demonstrated In Its Post-Default Motion for Summary Disposition That Plaintiffs Had Failed to State a Claim upon which Relief Could Be Granted Because Plaintiffs Did Not Allege The Required Element for Conversion under MCL 3.420(1) That The Checks Had Been Delivered to Plaintiffs?

Defendants-Appellants answer this question "Yes."

- IV. Did Plaintiffs Have Any Cause of Action against Any Defendants-Appellants For Conversion of the Insurance Checks Regardless of Whether the Insurance Power of Attorney Is Viewed as Providing Authorization for the Indorsement of Checks?

Defendants-Appellants answer this question "No."

- V. Did The Courts Below Err In Granting Relief to Plaintiffs on a Rescission-Restitution Theory of Relief Without Requiring That Property Or Credits Be Granted in Favor of Defendants-Appellants to Restore Them to the Status Quo Ante or to Otherwise.

Defendants-Appellants answer this question "Yes."

**VI. Did The Trial Court Err in Failing to Grant Defendant Denaglen's Original Motion to Set Aside Its Default Since It Is Clear That Plaintiffs' Counsel Engaged In Extreme Gamesmanship In Purporting to Revoke The Extension Granted to Counsel for Defendant-Appellant Denaglen and In Taking the Default The Very Next Morning?**

**Defendants-Appellants answer this question "Yes."**

## STATEMENT OF THE MATERIAL PROCEEDINGS AND FACTS

### Orders Appealed

Defendants-Appellants' Application for Leave is appealing from the Wayne County Circuit Court's Order of July 11, 2011 granting summary disposition in favor of Plaintiffs and denying Defendants' motion for partial summary disposition (Exhibit A hereto); the Wayne County Circuit Court's Judgment and Order for Distribution of July 29, 2011 (Exhibit B hereto); the opinion of the Michigan Court of Appeals in this matter dated June 6, 2013 (Exhibit C hereto); and the order of the Michigan Court of Appeals dated August 6, 2013 denying Defendants-Appellants' timely motion for reconsideration (Exhibit D hereto). This Application is being timely filed within 42 days of the date of the Order of the Court of Appeals denying that motion for reconsideration.

### Facts and Proceedings

This case involves extensive flood cleanup and home repair work that Defendants-Appellants, TROY WILLIS and his companies 4 QUARTERS RESTORATION, LLC and EMERGENCY INSURANCE SERVICES (the "Willis Defendants") performed for Plaintiffs-Appellees DANNY EPPS and JOYCE EPPS in 2006. Defendant Willis was no longer licensed as a residential builder when the work was performed and his companies were not licensed. However, the cleanup and repairs were performed skillfully by the Willis Defendants, fully passed an inspection by Plaintiffs' mortgage lender, and the work was fully paid for through checks from insurance claims adjusted by Plaintiffs' insurance company, Auto-Owners Insurance.

Under the written agreements that the Willis Defendants had with Plaintiffs, Willis' companies agreed to do the work for the amount of the adjusted insurance claim and the

proceeds of the insurance were assigned to Willis' companies to assure that they would receive payment of the insurance moneys directly. In addition, Plaintiffs executed an Insurance Power of Attorney in favor of Troy Willis giving Willis the power to sign all documents pertaining to settling the insurance claims and restoring the damage to Plaintiffs' property.

By the end of October of 2006, the work had been completed to the apparent satisfaction of Plaintiffs and the Willis Defendants had collected the sum of \$128,047.23 through the insurance claim checks. The checks had come directly to Defendant Willis bearing the names of Plaintiffs or the names of Plaintiffs and Troy Willis as payees.

Troy Willis obtained the funds on the insurance claim checks by indorsing the names of Mr. and Mrs. Epps pursuant to the Insurance Power of Attorney and cashing the checks at a check-cashing company, Defendant-Appellant DENAGLEN CORP. d/b/a MBM CHECK CASHING COMPANY (which charged a fee of 3% of the amount of the checks and paid out to Troy Willis the remainder of the funds). Defendant Denaglen reviewed the Insurance Power of Attorney documentation to verify Troy Willis' authority to cash the assigned checks and, according to Denaglen's employee Rose Manion, Denaglen was told by Mrs. Epps in the phone call that it was OK for Troy Willis to cash the checks (although the Plaintiffs dispute that the phone call took place.)

Although Plaintiffs had indicated satisfaction with the cleanup and repair work by the Willis Defendants in 2006, Plaintiffs brought his lawsuit in 2009 with the thought of using the unlicensed status of the Willis Defendants as a ground for claiming all of the \$128,047.23 in insurance money that the Willis Defendants had received for their work. Plaintiffs also dragged Defendant Denaglen d/b/a MBM Check Cashing into the matter by contending that Denaglen and its bank, Comerica, were liable to them in conversion for paying insurance checks that

supposedly had unauthorized and forged indorsements of Plaintiffs' names. Plaintiffs asserted that the unlicensed status of the Willis Defendants, and the fact that Plaintiffs were not aware of the unlicensed status, meant that the documents assigning the insurance proceeds to Willis' companies, and the Insurance Power of Attorney, were all invalid and deprived Willis of any authority to cash the insurance claim checks relating to cleaning and restoration work.

Plaintiffs' suing Comerica Bank in this case caused Comerica to remove all of the amount in issue, i.e., \$128,047.23, from Denaglen's bank account and to pay Denaglen's money into the trial court in return for an order which dismissed Comerica from the case with prejudice upon its making that payment. Accordingly, since an early date in the case, Denaglen has been without its \$128,047.23 that now sits in a so-called interpleader fund deposited with the Court. Under the interpleader order, Denaglen's funds have served as security for any liability determined against Denaglen in the case although there can be no doubt that the moneys would belong to Denaglen if Denaglen were ultimately determined to have no liability to Plaintiffs in this case.

Although Denaglen would appear to be an innocent party in this matter with no responsibility for checking on what representations the Willis Defendants made to Plaintiffs, Defendant Denaglen has turned out to be the biggest loser in the case so far. A default was entered against Defendant Denaglen around 9:40 a.m. on the 22nd after it was served in the case after Plaintiff's counsel, Gerald Posner, informed Denaglen's counsel, Anthony Yezbick, at 4:40 p.m. on the prior day that he was revoking the extension of time to answer that he had granted to attorney Yezbick. Thereafter, Denaglen's motion to have the default set aside was denied by trial judge Michael Sapala despite (1) the irregularity of purporting to revoke an extension of time upon which Denaglen's was relying and then immediately entering a default

and (2) the fact that Denaglen demonstrated meritorious defenses (including the defense that Plaintiffs' complaint failed to state any cause of action for conversion of checks because it failed to allege that Plaintiffs had ever obtained possession of the checks in question.)

Subsequently, in an order of July 11, 2011, the trial judge granted summary disposition against the Willis Defendants as to their liability for all of the insurance checks that were cashed with Defendant Denaglen as though that result was required by virtue of the statutory prohibition of MCL 339.2412(1) on the filing or maintenance of any court actions by unlicensed residential builders for compensation. In the same summary disposition order, the trial judge (1) denied the motion of the Willis Defendants for partial summary disposition which had contended that MCL 339.2412(1) created no cause of action against unlicensed residential builders and (2) granted Plaintiffs' motion for summary disposition which had contended that Plaintiffs were entitled to all of funds which had been paid into court in the case. All Defendants-Appellants, including Denaglen, contended that there had to be a trial on damages before any money judgment could be entered against any of Defendants-Appellants since Plaintiffs obviously had not sustained damages of \$128,047.23 as result of their dealing with the Willis Defendants since Plaintiffs had the substantial benefit of having valuable cleaning and repairs and restoration to their property. Thereafter, in a Judgment and Order for Distribution of Funds Held in Escrow dated July 29, 2011 the trial judge (1) granted judgment against all Defendants-Appellants in the amount of \$128,047.23, plus statutory interest and \$565.00 in costs; (2) ordered that the funds held in the escrow by the Court in the amount of \$128,047.23, plus interest earned on the funds, be distributed to Plaintiffs and their counsel, subject to being stayed by timely motion for stay upon appeal; and (3) granted any additional judgment for Plaintiffs against the Willis Defendants for additional damages of \$256,094.46 pursuant to the treble damages for statutory conversion

provision of MCL 600.2919a, plus actual costs and reasonable attorney fees to be determined upon the motion of Plaintiffs.

On August 18, 2011, Defendants-Appellants filed a timely claim of appeal with the Michigan Court of Appeals with respect to the final order in the case, i.e., the Judgment and Order for Distribution of Funds Held in Escrow entered on July 29, 2011, which also allowed Defendants-Appellants to seek reversal on the appeal of the earlier orders entered by the trial judge denying Defendant Denaglen's motion to set aside default; denying the summary disposition motions filed by the Willis Defendants and by Defendant Denaglen, respectively; and granting summary disposition as to liability against the Willis Defendants. In their brief on appeal filed February 1, 2012, Defendants-Appellants the following arguments:

(1) the trial court's erred in holding that the statutory provision of MCL 339.2412(1) (prohibiting an action by an unlicensed builder for compensation) created a cause of action in favor of Plaintiffs and right to restitution in favor of Plaintiffs for all funds paid to unlicensed residential builders, such as the Willis Defendants, with respect to work done by said unlicensed builders;

(2) the trial court erred in holding that an unlicensed residential builder did not have a right to defend a breach of contract claim by a homeowner on the merits by showing that the amounts paid to the unlicensed builder were appropriate under the terms of the parties' contract;

(3) the trial court erred in ruling that MCL 339.2412(1) applied to deny compensation to the Willis Defendants for work of the type that does not require a residential builders license where separate prices were established for that work;

(4) the trial court erred in Defendant Denaglen's motion to set aside default; and

(5) the trial court erred in denying to Defendant Denaglen a jury trial on the matter of

damages in violation of its procedural due process rights and Michigan law.

The Court of Appeals issued an opinion of June 6, 2013 on the appeal of Defendants-Appellants. The appellate panel ruled that the trial judge had erred in holding that MCL 339.2412(1) created a cause of action in favor of Plaintiffs and a right to restitution of the insurance moneys received the Willis Defendants in the case. However, the Court of Appeals then ruled that the judgments rendered by the trial judge should be affirmed upon an alternate ground. The Court of Appeals held that, on basis of the fraud of the Willis Defendants in representing to Plaintiffs that they were licensed builders, Plaintiffs were entitled to restitution from all of the Defendants-Appellants for the total amount of the insurance checks that the Willis Defendants cashed with Denaglen, i.e., \$128,047.23. The Court of Appeals ruled that the fraud of Defendant Troy Willis in making the misrepresentation to Plaintiffs that he was a licensed residential builder had the effect of rendering void *ab initio* the various contracts that Plaintiffs had with the contractor defendants and meant that the insurance power of attorney was never valid. The opinion went on to say Willis therefore lacked authority to endorse the insurance checks on behalf of Mr. and Mrs. Epps and that all of the insurance proceeds had to be returned to Mr. and Mrs. Epps. The opinion indicated that the Defendants-Appellants were liable to Plaintiffs for conversion of the checks and that the contractor defendants were liable for treble damages for statutory conversion under MCL 600.2919a.

With respect to Denaglen's contention that it was entitled to a jury trial on the matter of damages, the Court of Appeals ruled that no hearing was required in the case since the damages were a sum certain. With respect to Denaglen's argument that the trial judge should have granted its motion to set aside the default against it rendered early in the case, the Court of Appeals made no ruling, apparently believing that Denaglen could not mount a meritorious

defense in view of the appellate court's ruling that the contracts and the insurance power of attorney were void *ab initio*. Addressing an issue raised in Defendants-Appellants' reply brief on appeal, the Court of Appeals ruled that the trial judge's awarding of treble damages under MCL 600.2919a was proper because the actions of the contractor defendants did amount to conversion of instruments under MCL 440.3420(1), a conversion provision of the Michigan Uniform Commercial Code.

In regard to opinion issued by the Court of Appeals, Defendants-Appellants agree with the first ruling that MCL 339.2412(1) does not create a cause of action for restitution against an unlicensed contractor. However, Defendants-Appellants believe that the ruling of the Court of Appeals that the contract documents were void *ab initio* is clearly erroneous and will cause material injustice to Defendants and that said ruling conflicts with existing precedents of the Supreme Court on the matter of when instruments are regarded as void *ab initio*, rather than merely voidable. Likewise, Defendants-Appellants contend that the following rulings of the Court of Appeals are also clearly erroneous and will cause material injustice: (1) that Plaintiffs' damages are in a sum certain and no trial on the issue of damages is necessary; (2) that the trial court did not abuse its discretion in denying Denaglen's motion to set aside its default; and (3) that the contractor defendants were properly held to be liable for statutory conversion under MCL 600.6919a.

### ARGUMENT

- I. **To The Extent That There Was A Misrepresentation By Defendant Willis As To The Licensure Status Of Himself And His Companies, Such Misrepresentation Would Merely Constitute Fraud In The Inducement To Contract, Making The Contracts Merely Voidable Rather Than Void *Ab Initio*, And The Contracts Were Effective When They Were Relied Upon By Defendants-Appellants In 2006 As Authorizing Receipt and Indorsement of the Insurance Checks.**

In the second paragraph of Section IV its opinion in this case, the Court of Appeals correctly sets forth the rule applicable in Michigan and the rest of the country that a misrepresentation of fact in the discussions leading to the execution of a contract constitutes “fraud in the inducement” and merely makes the contract voidable rather than void *ab initio*. The most important feature of a voidable contract is that it remains effective and in force until such time as the party who has been defrauded takes affirmative steps to inform the other contracting party that he will no longer abide by the contract because of the fraud. In this matter, the Court of Appeals clearly failed to follow established Michigan law in making its ruling that the alleged misrepresentation of Defendant Willis made the contracts with Plaintiff void, rather than voidable.

The concept of whether a contract is voidable, rather than void *ab initio*, is particularly important where the rights of third parties, such as Denaglen, are involved. A voidable instrument is effective to transfer rights or convey title to a third party was not involved in the fraudulent representation that led to the execution of the instrument. See, for example, Calamari & Perillo, *Law of Contracts*, § 9.22 (4th Ed. 1998), which states as follows:

#### § 9.22 Fraud in the Factum (or Execution) Versus Fraud in the Inducement

In the great majority of cases, actionable misrepresentation renders a transaction voidable rather than void. ... The distinction becomes of crucial importance if property has been transferred ... If the property has been subsequently transferred to a bona fide purchaser for value, the defrauded party may recover the property only if the initial transaction is void.

*Resolution Trust Corp v Kennelly*, 57 F3d 819, 822 (9th Cir 1995), explains that a misrepresentation of fact leading a party to enter into a transaction is considered fraud in the inducement and results in the contract as being merely voidable, not void. If, on the other hand, a person was duped into signing a piece of paper that he did not even know was a contract or

legal instrument, the situation involves fraud in the factum (sometimes called fraud in the execution) and the instrument is considered void.

In this case, there was no contention that Plaintiffs did not know that they were signing a contract pertaining to payment for the work on their house and an insurance power of attorney when they engaged the contractor defendants. Accordingly, the contracts with the contractor defendants were effective until expressly rescinded by Plaintiffs and were enforceable legal instruments at the time that the contractor defendants used the documents to receive the insurance checks and to cash the checks at MBM Check Cashing between August and October of 2006. Accordingly, Defendant Denaglen received valid indorsements to the checks and valid rights in the checks by the indorsements of Troy Willis in 2006. Denaglen was a bona fide transferee of the checks for value by reason of the Willis indorsements and had every right to receive and enforce the checks and collect the moneys thereon in 2006.

The case cited in the Court of Appeals opinion, *Wedgewood v Jorgens*, 190 Mich 620, 621; 157 NW 360 (1916), does not stand for the proposition that a contract made with an unlicensed person is void ab initio. It merely involved the frequently-encountered proposition a person lacking an architectural license could not sue to recover fees for architectural services performed. In saying that the plaintiff's contract was void and unenforceable for lack of a license, the appellate court was merely indicating that the plaintiff could not sue and was adding nothing to the jurisprudence of the State of Michigan about when a contract is considered void ab initio for fraud in the factum.

Likewise, the other case cited in the Court of Appeals opinion, *Bilt-More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964), is an ordinary case holding that the lack of a residential builder's license bars an unlicensed contractor from being able to sue for

compensation. It did not involve any question of looking back in time and declaring a contract void ab initio or claiming restitution of funds paid under the unenforceable contract. In the opinion, the Court of Appeals has miscited those two cases to stretch to reach the incorrect conclusion that Plaintiffs' contract and power of attorney were void ab initio.

The interests of justice do not require the Court of Appeals to strain to support the Plaintiffs' position. Mr. and Mrs. Epps are not victims. They received cleanup and building restoration services quoted at \$128,000 for a price of \$128,000. There is no reason to bend the law relating to voidable contracts in order to allow Plaintiffs to receive the money taken from the bank account of Defendant Denaglen so that Plaintiffs cannot have a valuable and satisfactory cleanup and restoration job for free at the expense of an innocent third party who was not involved in the alleged misrepresentations made by Troy Willis to Plaintiffs. Certainly, there is no hint in this case that the owner of Denaglen or its employees knew that Troy Willis' builder's license had been revoked earlier in the year of 2006.

Accordingly, it is proper in this case that this Court grant leave to appeal, or grant immediate reversal, in regard to the ruling of the Court of Appeals that Plaintiffs are entitled to recover all of the insurance moneys paid out for the work on their home under the theory that the contracts and insurance power of attorney were void ab initio and were not effective to assign rights in the insurance proceeds and checks to Defendant Willis' companies.

**II. The Court of Appeals Erred in Ruling that the Appropriate Damages Remedy against All Defendants-Appellants Was in The Amount of All Insurance Checks Cashed by the Contractor Defendants at Denaglen.**

The claim on which Plaintiffs have recovered against all Defendants-Appellants is one for conversion of negotiable instruments in accordance with the rules of MCL 440.3420 of the Michigan Uniform Commercial Code. In deciding what damages should properly be awarded for

conversion of instrument under MCL 440.3420, the trial court and the Court of Appeals have incorrectly assumed that the damages would automatically be for the face amounts of all the checks cashed by the contractor defendants at Denaglen. That assumption is incorrect under the provisions of MCL 440.3420(2).

When the former provision on conversion of instruments under MCL 440.3419 of the Michigan Uniform Commercial Code was replaced with the current provision, MCL 440.3420, a new provision was introduced in subsection (2) indicating that the amount of the recovery would not exceed the plaintiff's interest in the instrument. That subsection (2) reads as follows:

(2) In an action under subsection (1) [i.e., for conversion of an instrument], the measure of liability is presumed to be the amount payable on the instrument, but **recovery may not exceed the amount of the plaintiff's interest in the instrument.** [Emphasis added.]

That new provision allows the consideration of mitigating factors relating to damages, including questions of whether the moneys in question ended up being applied to the use for which they were intended even if the checks were negotiated without obtaining the indorsement of one or more payees on the check. See the New York case of *Mouradian v Astoria Federal Sav and Loan*, 236 AD2d 451; 653 NYS2d 654 (1997), involving three checks paid to the co-payee's estranged husband from an insurance settlement and used for the purpose of making repairs on the home jointly owned by the payee and her husband. In that case, the majority opinion rejected the dissent's view that the husband's liability should be eliminated or reduced because the funds went the purpose for which the checks were originally issued and went into a joint assets of the parties because New York has not adopted the revised conversion provision in UCC 3-420 and still has UCC 3-419. However, both the majority and the dissent agreed that the damages in that case would not have been in the face amount of the checks if New York had

adopted the revised conversion provision (like Michigan) stating that the recovery for conversion of an instrument may not exceed the plaintiff's interest in the instrument.

See also the discussion of that second subsection of UCC 3-420 in White, Summers and Hillman, Uniform Commercial Code (Practitioner Treatise Series, 6th Ed. 2013). These leading commentators on the UCC indicate that the modified damage provision in UCC 3-420 is a welcome change and should permit a court to reduce or eliminate a damage award for conversion of an instrument when the money in question goes for the use originally intended even though an unauthorized indorsement may have made in order to realize on the funds.

In this case, the intended use of the proceeds of the insurance checks was to clean up and restore Plaintiffs' personal property, basement and damaged roof. The funds actually did go to pay the Willis Defendants to accomplish that work. Accordingly, any assessment of damages for conversion of checks would have to take into account the fact that Plaintiffs had little or no damages from the fact that the Willis Defendants received the insurance moneys because the use that the insurance company and the mortgage company intended for the checks sent to Troy Willis was to pay the contractor defendants to carry out the work on the house.

In light of the wording of subsection (2) of MCL 440.3420, it is not true that the appropriate damages would be for a sum certain, i.e., the face amount of the checks. Accordingly, a jury trial should have been held (with the participation of Denaglen) to determine what damages Plaintiffs had sustained by having the checks cashed by Defendant Willis. Since the checks actually went for the purpose for which they were originally intended, the damage assessment of the jury could come back in a very small amount and not the "sum certain" that the trial judge and Court of Appeals said was appropriate.

In this matter, the decision of the Court of Appeals on the amount of the damages was clearly erroneous and should be examined by this Court in depth by granting leave to appeal in this case or granting peremptory relief in favor of Defendants-Appellants.

**III. In This Matter, The Trial Court Should Have Set Aside the Default Entered Against Defendant Denaglen Because Denaglen Demonstrated In Its Post-Default Motion for Summary Disposition That Plaintiffs Had Failed to State a Claim upon which Relief Could Be Granted Because Plaintiffs Did Not Allege The Required Element for Conversion under MCL 3.420(1) That The Checks Had Been Delivered to Plaintiffs.**

The last sentence of MCL 440.3420 contains the following limiting language:

**An action for conversion of an instrument may not be brought by ... a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee. [Emphasis added.]**

Case authorities hold that a well-pleaded cause of action for conversion of an instrument must include the allegation that the plaintiff-payee had received delivery of the instrument. *Attorney's Title Ins Fund, Inc v Regions Bank*, 491 F Supp 2d 1087 (SD Fla 2007). As Defendant Denaglen pointed out in this motion for summary disposition filed in 2011, the complaint of Plaintiffs for conversion of the checks contained no allegation that Plaintiffs had received delivery of the checks as to which they were suing Denaglen and the other Defendants-Appellants for conversion. Accordingly, the trial judge erred in failing to set aside the default of Defendant Denaglen since a complaint that fails to state a cause of action will not support a default of a defendant and cannot proceed further unless there is an amendment to the pleadings to add the missing allegations needed in order to state a viable claim.

In this matter, the trial court and the Court of Appeals clearly erred in failing to set aside the default of Defendant Denaglen on the basis of Denaglen's post-default motion for summary disposition pointing out that the Plaintiffs' complaint failed to state a cause of action for

conversion of instruments under the Michigan UCC. Accordingly, it would be appropriate for this Court to grant leave to appeal on that issue or grant peremptory relief in favor Defendant Denaglen on that issue in order to avoid an injustice that has been visited upon Defendant Denaglen and the other Defendants-Appellants.

**IV. Because The Proceeds of the Adjusted Insurance Claims Were Assigned to the Willis Companies in the Repair Agreement and the Work Authorization, Plaintiffs Had No Cause of Action against Any of the Defendants-Appellants for Conversion of the Insurance Checks Regardless of Whether the Insurance Power of Attorney Is Viewed as Providing Authorization for the Indorsement of Checks.**

In this matter, Plaintiffs contend that Defendants-Appellants are liable to them for conversion of the insurance claim checks because they say that the Insurance Power of Attorney did not contain sufficient authorization to cover the matter of indorsing the names of Plaintiffs on those checks. That contention by Plaintiffs is definitely erroneous. The fact that the insurance claim proceeds were assigned to the Willis companies in the first repair agreement and in the subsequent work authorization document.

*In re Bartoni-Corsi Produce, Inc.*, 130 F3d 857, 860-61 (CA9, 1997), Ninth Circuit Court of Appeals held that a party who has assigned property and no longer owns the property cannot maintain a conversion action based on conversion of the property, stating as follows:

However, the commercial code's conversion provisions do not preempt the general principle of common law conversion that a party can only maintain a conversion action for property that it owns at the time of the alleged conversion. See, e.g., *Moore v Regents of Cal*, 793 P2d 479, 488 (Cal 1990).

In that case, Bartoni-Corsi Produce has assigned all of its accounts receivable to another corporation. Account debtors sent checks on the assigned receivables that arrived in the name of the assignor and the assignee of the accounts receivable deposited the checks into its own bank account without obtaining any indorsement from the assignor. Later, the assignor entity ended

up in bankruptcy and the bankruptcy trustee sued Wells Fargo Bank on the theory that it had converted the assignor's funds by allowing the checks to be deposited into the bank account of the assignee. It was held that there was no conversion of the checks because Bartoni-Corsi Produce had no property interest in the checks by reason of having assigned all of the accounts receivable to the other entity.

Similarly, in this matter, the assignment of all of the insurance claim proceeds to the Willis companies divested Plaintiffs of their interest in that property and meant that Plaintiffs could have no cause of action against Defendants-Appellants for conversion of insurance proceeds amounts. Accordingly, the trial court and the Court of Appeals have made clearly erroneous rulings in holding that Defendants-Appellants are liable to Plaintiffs for conversion.

**V. The Courts Below Have Erred By Granting Relief to Plaintiffs on Rescission-Restitution Theory of Relief Without Requiring That Property Or Credits Be Granted in Favor of Defendants-Appellants to Restore Them to the Status Quo Ante or to Otherwise.**

In this case, it is clear that Plaintiffs are not proceeding on a simple damages theory in law for misrepresentations or other wrongs allegedly committed by Defendants-Appellants. If Plaintiffs were proceeding on legal damage theory for money damages, Plaintiffs' efforts would not be so strongly focused on trying to obtain return of the moneys that were paid out on the insurance claim checks. Instead they would be attempting to prove how their circumstances have been allegedly been harmed by the alleged misrepresentations and other actions of Defendants-Appellants. That theory for legal damages would not avail Plaintiffs of any significant amount of money because it is doubtful that Plaintiffs would have been in any better position if they would have been told by Defendant Willis that he was no longer a licensed builder and if they had obtained very similar work from a licensed builder and had been required to pay the insurance claim amounts to that licensed builder. Most likely, Plaintiffs would have

been in almost exactly the same position as they found themselves immediately before they decided to try to take advantage of the unlicensed status of the Willis Defendants for the purpose of trying to obtain a windfall in the amount of all of the insurance payments. They would have had their house repaired and in good shape and they would had no claim against anyone for recovery of the insurance amounts.

Accordingly, what the Plaintiffs have been pursuing in this case is essentially a rescission-restitution theory of recover. They are pursuing a kind of restitution theory even though the original dollars that the Willis Defendants received from the insurance claim checks was not sitting in fund held by Troy Willis or any other of the Defendants-Appellants. According to the commentators, the restitution theories of recovery have advanced over the years and restitution remedies can some times be ordered in situations where money is paid as a substitute for the property that is no longer around or which would be impossible or impractical to return to the other party to the bargain that is not the subject of a rescission-restitution remedy.

However, the modern-day version of the rescission-restitution retains its original equitable requirements that a party seeking restitution from another must restore the value of what that party received in the transaction either by the return of property or the granting money credits in favor of the other party so that a fair result will achieved. The goal is to be fair to both sides and, as much as possible, to restore the parties to the status that they had before embarking on the ill-fated transaction that they are not seeking to unwind. As the case authorities hold, the rescission of a contract is only appropriate where the party electing rescission can, and will, restore the other party to the position that the party had prior to the contract. *Grabendike v Adix*, 335 Mich 128, 140; 55 NW2d 761 (1952).

Even in a case where a party seeking rescission asserts that he was a victim of fraud by the other party, the rescission case plaintiff must endeavor to unwind the transaction in a way that does not result in forfeiture for the other party or a windfall for the plaintiff. See *McMullen v. Joldersma*, 174 Mich. App. 207, 218-19, 435 N.W.2d 428, 432-33 (1988), where the court pointed out that rescission is an equitable remedy even when one side asserts a fraud claim and the goal in a rescission case is to return the parties to the status that they occupied before the contract. If the party seeking rescission cannot, or will not, provide anything to help restore the other party to the status he enjoyed before the transaction. Furthermore, since it would not be practical or desirable to return Plaintiffs to the status of having a flooded and damaged basement, the goal should be to protect the respective net worth of each party as much as possible. Accordingly, if Plaintiffs are going to retain the benefit of the cleaning and restoration work that the Willis Defendants provided, then the Willis Defendants would be entitled to retain the moneys they received from the insurance companies in order to carry out the cleaning and restoration work.

To the extent that Plaintiffs wish to impose a forfeiture upon Defendants-Appellants, then simply are not entitled to have the remedy of rescission and restitution. They can simply pursue a legal claim for damages for alleged misrepresentation but they will not be entitled to the remedy of taking back an amount of money equal to the insurance payments.

In this matter, the trial court and the Court of Appeals erred in adopting the position that they could declare the assignment of the insurance proceeds to the Willis Defendants void and impose a forfeiture upon the Defendants-Appellants. Those courts were definitely wrong in ruling that the appropriate remedy in favor of the Plaintiffs would be to award them an amount equal to all of the insurance moneys that passed through the hands of Defendant Denaglen or of

the Willis Defendants. A court with equitable powers should not subject one side of the transaction to such a harsh remedy, particularly when it is clear that Plaintiffs actually benefitted by having their property cleaned and restored by the Willis Defendants.

**VI. The Trial Court Erred in Failing to Grant Defendant Denaglen's Original Motion to Set Aside Its Default Since It Is Clear That Plaintiffs' Counsel Engaged In Gamesmanship In Purporting to Revoke The Extension After Court Hours on the 21st Day After Service on Denaglen; In Taking The Default Around 9:40 AM on The 22nd Day After Service; and In Lulling Denaglen's Counsel By Acting as Though It Would Be Necessary to File a Motion to Set Aside The Default.**

In this case, the trial court clearly abused its discretion in failing to grant Denaglen's motion to set aside the default given the gamesmanship practiced by Plaintiffs' counsel as detailed in the motion filed by Denaglen's counsel. Moreover, it is clear that Denaglen had meritorious defenses to the claim asserted by it. The first was that Denaglen's was reasonably relying on the documents signed by Plaintiffs in believing that the cashing of the checks was authorized by Plaintiffs. In addition, Denaglen had the additional defense that Plaintiffs' complaint failed to state a claim for conversion of checks because it failed to allege the necessary element that Plaintiffs had received delivery of the checks.

The trial judge clearly abused his discretion he indicated that he was basing his decision on the fact that he was concerned neither side would be happy with this decision on the motion and the simply decided on whim to rule in favor of Plaintiffs. That cavalier manner in which the trial judge handled the motion to set aside the default amounted to clear abuse of discretion. Since the case was in an early stage and there had not even been service on all of the Defendants in the case, there was no good reason for failing to set aside the default back in the fall of the 2006. In this matter, this Court should grant leave to appeal on this issue or peremptorily issue

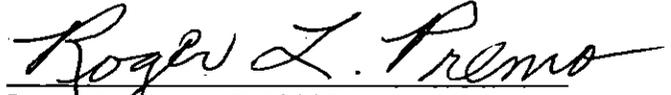
and order setting aside Denaglen's default and the judgments entered against Denaglen while it was denied the right to full participation in this case.

**RELIEF REQUESTED**

Defendants-Appellants Denaglen Corp., Troy Willis, 4 Quarters Restoration, LLC, and Emergency Insurance Services request that this Court grant leave to appeal on all of the issues

addressed by Defendants-Appellants in this Application or in the alternative grant peremptory relief in favor of Defendants-Appellants on those issues.

Respectfully submitted,



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Date: September 17, 2013

PROOF OF SERVICE

ROGER L. PREMO hereby certifies (1) that on September 17, 2013 he served a copy of Defendants-Appellants' Application for Leave to Appeal and Notice of Submission of the application to the Court on Tuesday, October 15, 2013 upon the attorney for Plaintiffs-Appellees, Gerald F. Posner, Esq. by first-class mail directed to his office at 1400 Penobscot Building, Detroit, MI 48226 and (2) that on September 17, 2013 he served by first-class mail a copy of a notice of the filing of this application for leave to appeal upon the Wayne County Circuit Court and the Michigan Court of Appeals.



Roger L. Premo

Date: September 17, 2013