

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/Cross-
Appellants,

v

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

Defendants-Appellants/Cross-
Appellees,

Supreme Court No. 147727

Court of Appeals No. 305731

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

147727'
**DEFENDANTS' ANSWER TO PLAINTIFFS'
APPLICATION FOR LEAVE TO APPEAL AS CROSS-APPELLANTS**

Submitted by:

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. May The Assignment And Power Of Attorney Provisions In The Builders' Contract Documents Be Disregarded On The Ground That The Willis Defendants Lacked A Residential Builder's License And The Indorsement Of Insurance Checks Then Treated As Conversion Of Negotiable Instruments By Defendants?

Defendants-Appellants/Cross-Appellees answer this question "No."

- II. Does There Exist In Michigan Law A Right To An Automatic Refund Of All Moneys Paid To An Unlicensed Residential Contractor?

Defendants-Appellants/Cross-Appellees answer this question "No."

- III. Did The Trial Court Err in Granting Judgment Against Defendants On A Theory Of Conversion Of The Insurance Checks When Plaintiffs Had Failed To Plead Or To Make An Evidentiary Showing That The Checks Had Been Delivered To Plaintiffs, Thereby Omitting A Required Element Of A Conversion Claim Under MCL 440.3420(1)?

Defendants-Appellants/Cross-Appellees answer this question "Yes."

- IV. Did Plaintiffs Have A Viable Claim Against Defendants For Conversion Of The Insurance Checks Since The Insurance Power Of Attorney Authorized Defendant Troy Willis To Indorse The Checks To Pay For The Cleanup And Restoration Work Done By The Willis Defendants And Since Plaintiffs Were Not The Owners Of The Insurance Proceeds After They Executed Documents Assigning The Insurance Proceeds To The Willis Defendants?

Defendants-Appellants/Cross-Appellees answer this question "No."

- V. Did The Trial Court Err In Setting The Conversion Liability Against Defendants At The Amount Of All Monies Received On The Insurance Checks When Factual Issues Existed As The Amount Of Plaintiffs' Interest In The Checks And As To The Amount Of Damages Suffered By Plaintiffs?

Defendants-Appellants/Cross-Appellees answer this question "Yes."

VI. Would Reducing Plaintiffs' Damages To Reflect The Benefit That Plaintiffs Received Have Constituted The Impermissible Pursuit Of Setoff By Defendants?

Defendants-Appellants/Cross-Appellees answer this question "No."

VII. Did The Trial Court Err In Rendering A Money Judgment Against Defendant Denaglen Pursuant To Plaintiffs' Motions For Summary Disposition When Denaglen Was Entitled To A Jury Trial On The Issue Of Damages Without Any Exclusion Of Evidence Of Benefits Received By Plaintiffs?

Defendants-Appellants/Cross-Appellees answer this question "Yes."

COUNTER-STATEMENT OF FACTS

Defendants-Appellants/Cross-Appellees, DENAGLEN CORP. d/b/a MBM CHECK CASHING; TROY WILLIS; 4 QUARTERS RESTORATION, LLC; and EMERGENCY INSURANCE SERVICES (collectively "Defendants") submit this Answer to Plaintiffs' Application for Leave to Appeal as Cross-Appellees. Because they find inaccurate and incomplete the Statement of Facts submitted on behalf of Plaintiffs-Appellees/Cross-Appellants DANNY EPPS and JOYCE EPPS ("Plaintiffs"), Defendants submit this Counter-Statement of Facts.

Facts and Proceedings

This case involves extensive flood cleanup and home repair work that Defendants Troy Willis and his companies 4 Quarters Restoration, LLC and Emergency Insurance Services (the "Willis Defendants") performed for Plaintiffs from July through October of 2006 on their home in Detroit. Defendant Willis's residential builder's license had been revoked by the State of Michigan on January 31, 2006 and neither he nor his companies were licensed at the time that the work was performed. However, the cleanup and repairs were performed satisfactorily 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. See Paragraphs 12-15 of the Affidavit of Troy Willis submitted in support of motion of Defendant Denaglen to set aside default of Denaglen (Exhibit 1 hereto).

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's companies to assure that they would receive payment of the insurance moneys directly. The repair agreement, misdenominated Fire Repair Agreement (Exhibit 2 hereto), covered the repairs to the real estate. The Work Authorization

document (Exhibit 3 hereto) covered the removal of water and debris from the basement and the restoration of the personal property located in Plaintiffs' basement. In addition, Plaintiffs executed an Insurance Power of Attorney (Exhibit 4 hereto) in favor of Defendant 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. All of the checks related to work for cleaning and repairs from the flooding incident of July 26, 2006, except for one check in the amount of \$20,682.28 received October 23, 2006. The October check for \$20,682.28 paid for some additional insurance work that the Willis Defendants say that they carried out with respect to damage to the roof of Plaintiffs' home occurring in September of 2006.

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 Manino, 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.) See Affidavit of Denaglen's employee, Rose Manino, submitted in support of motion of Defendant Denaglen to set aside default of Denaglen (Exhibit 5 hereto).

Plaintiffs knew that the Willis Defendants would receive, and were receiving, the insurance moneys directly from the insurance company and mortgage company and Plaintiffs raised no objection at the time to the Willis Defendants' receiving the funds. Plaintiff Danny Epps testified in his deposition that he knew that Defendant Troy Willis was going to be paid from the insurance proceeds. The testimony of Plaintiff Danny Epps was as follows:

Q. [Attorney Yezbick] Okay. When you signed this authorization for lets take the emergency work first, **did you understand that Troy Willis was going to be paid out of the insurance proceeds** for that emergency work?

A. [Danny Epps] **That was my understanding.** [Emphasis added.]

(Danny Epps deposition, page 23, lines 7-11 quoted in Defendants' motion for partial summary disposition.)

In their affidavits in support of their motion for summary disposition, Plaintiffs said that the checks should have been brought to them for their indorsements in order for Defendant Willis to receive the funds. They pointed to the following language of the Work Authorization document: "**Endorsement** of the insurance draft(s) **to 4 Quarters Restoration, LLC**, will be **payment in full** for all cleaning and or restoration." [Emphasis added.] See ¶ 8 of the Affidavit of Joyce Epps submitted as Exhibit G to Plaintiffs' motion for summary disposition of May 13, 2011. The language about endorsement **to 4 Quarters Restoration** made it clear that the funds from the checks were all supposed to be realized by the Willis Defendants. Plaintiffs never asserted that there were supposed to receive any of the actual funds from the checks, only that the Willis Defendants should have obtained Plaintiffs' indorsements in the process of the Willis Defendants' realizing the funds from the checks.

In their affidavits supporting their motion for summary disposition, Plaintiffs admitted that the Willis Defendants "did some work" but say that the Willis Defendants never completed the work. See ¶ 9 of respective affidavits of Plaintiffs Joyce Epps and Danny Epps appearing

as Exhibit G to Plaintiffs' motion for summary disposition filed below. In interrogatory answers, Plaintiffs indicated that 60-75% of the work was completed. However, Plaintiffs had no evidence supporting their suggestion that any of the work was incomplete. During Mr. Epps' deposition, Mr. Epps testified:

Q. [Attorney Yezbick] Did you ever take any pictures of these alleged problems?

A. [Danny Epps] Yes, I did.

...
I got plenty of them.

(Page 98, lines 7-11 of Danny Epps deposition quoted in motion for partial summary disposition of Willis Defendants.)

Subsequently, in response to defense counsel's request for the production of those pictures, Plaintiffs' counsel responded by email that "unfortunately" the photos no longer existed. See Exhibit 6 hereto. In the email (submitted with Defendants' motion for partial summary disposition), Plaintiffs' counsel said that the photos had been erased from the camera's memory card and that a computer crash had destroyed the only stored copies of the Plaintiffs' photos. The mortgagee Countrywide Home Loans obtained an independent inspection report, completed by an objective third party inspection company, which further corroborated Defendant Willis's testimony that the work was completed. The first inspection report was conducted on September 20, 2006 and reflected 75% completion and the final inspection report was conducted on October 12, 2006 and reflected 100% completion. (The two inspection reports were attached as Exhibit F to Defendants' motion for partial summary disposition.) This work that passed inspection accounted for \$53,000.00 of the monies that the Willis Defendants received for their work.

A significant part of the work for cleaning and restoring personal property was paid for a check in the amount of \$46,443.34 issued by Auto-Owners Insurance. In his deposition, Plaintiff

Danny Epps admitted that this check received by the Willis Defendants had been earned by removing, cleaning and returning personal property, mainly clothing. This check amount matches exactly with the personal contents inventory submitted to and approved by Auto-Owners Insurance. Plaintiff Danny Epps admitted that the subject check amount was issued in the amount of the personal contents inventory and was indeed for contents. While testifying about the personal contents, Epps agreed that the check was issued for personal contents:

Q. [Attorney Yezbick] Okay. And on the third page, this is a three-page document, on the third page, do you see a grand total for all the inventory?

A. [Danny Epps] Yes, I do.

Q. What is that?

A. \$46,443.34.

Q. Okay. Does that match the amount on Exhibit 12, the check for contents?

A. Okay, I see it now. Yes.

Q. Ok, so this entire check was for personal contents inventory; is that correct?

A. That's what it says.

(Deposition of Danny Epps. Page 90, lines 18-25; page 91, lines 1-3)

As a result of the foregoing, there is simply no issue regarding what the \$46,443.34 check was for or as to the existence of the document submitted to support the issuance of same. There is also no question that the personal contents were returned to the Plaintiffs. With regard to the clothing listed in the personal property inventory of items to be restored, Mr. Epps stated as follows in his deposition: "All I know they came and got the clothes and they brought them back, that's all I can tell you." (Page 112, lines 15-16 of Danny Epps deposition.)

It can be said that the Willis Defendants essentially completed the work that they were engaged to perform by Plaintiffs and obtained payment in the manner that was contemplated by

the parties, i.e., having the insurance checks cashed by the Willis Defendants. In their cross-application, Plaintiffs paint a totally false picture when they say that the work of the Willis Defendants was "bad, very bad." There can be no doubt that a great deal of valuable cleaning and restoration work was performed by the Willis Defendants for Plaintiffs and that the amount of payment was appropriate.

Plaintiffs are incorrect when they assert that Defendant Willis impersonated Danny Epps at the two inspections of the house carried out by an inspector for Plaintiffs' mortgage lender, Countrywide Home Loans. On deposition, Troy Willis testified that Danny Epps was at home when both inspections of the work in the Epps basement took place but that Danny Epps declined to come to the basement to participate in the inspections. When asked about the presence of Mr. Epps for the inspections, Defendant Willis testified as follows: "Mr. Epps was present. He was upstairs in his house. He didn't want to come down. He said he didn't want to get involved." (Willis Deposition, Exhibit H to Plaintiffs' summary disposition motion of May 13, 2011, page 87, lines 21-23.) When Danny Epps did not participate, Defendant Willis used his authority under the Insurance Power of Attorney to sign the acceptance documents on behalf of the homeowners.

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 day 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 taken delivery 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 jury 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. (A jury trial was required since Plaintiffs' had demanded a jury trial when they filed their complaint.) 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 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 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 made the following arguments:

(1) the trial court 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 denying 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. 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 alleged fraud of the Willis Defendants in representing to Plaintiffs that they were licensed builders, Plaintiffs were entitled to restitution from all of the Defendants 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 indorse 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 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 constituted

conversion of instruments under MCL 440.3420(1), a conversion provision of the Michigan Uniform Commercial Code.

In regard to the opinion issued by the Court of Appeals, Defendants 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 filed an application for leave to appeal with this Court on September 17, 2013 contending 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 600.2919a.

Besides filing an answer to Defendants' application for leave to appeal, Plaintiffs filed a cross-application for leave to appeal on October 15, 2013. In that cross-application, Plaintiffs requested that, in the event this Court grants Defendants' application for leave to appeal, the Court also review the reversal by the Court of Appeals of the trial court's determination that Defendants were liable to Plaintiffs, pursuant to MCL 339.2412(1), in the amount of all insurance checks cashed by the Willis Defendants with Defendant Denaglen. In this answer to the cross-application, Defendants contend that the reversal of the determination of liability under MCL 339.2412(1) was undoubtedly correct and that there is no good reason why the issue of that reversal should be reviewed by this Court if the Court grants Defendants' application for leave to appeal.

Plaintiffs' Mistaken Statements as to Failure to Preserve Issues for Appeal

It should also be pointed out that Plaintiffs are mistaken in asserting that Defendants have not preserved the appellate issues raised in their application. For example, Defendants have not relied solely upon the insurance power of attorney as authority for Defendant Willis to indorse the insurance checks. They raised below the fact that Plaintiffs in the work authorization document (including the Fire Repair Agreement) assigned to the Willis Defendants all rights in the insurance proceeds in full payment for the cleaning and restoration work. See ¶ 5 of affirmative defenses of the Willis Defendants filed Jan. 4, 2010. At page 5 of their brief in support of motion for partial summary disposition (filed May 13, 2011), the Willis Defendants pointed out that the work authorization executed "assigns the proceeds" of Plaintiffs' insurance claim to Defendant 4 Quarters as "full payment" for the work authorized by the insurance company. That the assignments deprived Plaintiffs of any further interest in the insurance proceeds was raised in Plaintiffs' appeal brief below at p. 5.

Likewise, Plaintiffs have previously cited MCL 440.3420(2) and argued that recovery for conversion of an instrument "may not exceed the amount of the plaintiff's interest in the instrument." In its summary disposition brief filed below (p. 7), Defendant Denaglen cited MCL 440.3420(2) and argued that Plaintiffs had no more interest in the insurance check proceeds and no right to damages since the funds were applied toward payment of the amounts due to the Willis Defendants for the repair work. In their appellate brief below, Defendants continued to assert that Plaintiffs did not have any cognizable damages for conversion because Plaintiffs had no more interest in the insurance checks after the funds were applied to the obligations owing to the Willis Defendants for the restoration work.

Plaintiffs also incorrectly assert that Defendants never previously raised the issue that the contract documents of the Willis Defendants were not void and ineffective because of their lack

of a license. Defendants have consistently argued that the power of attorney and the assignment of the check proceeds were effective to allow Willis to indorse the insurance checks and to apply the funds to the amounts owed to the Willis Defendants for the restoration work. See pages 1 and 2 of Defendants' appeal brief in the Court of Appeals pointing out that the Willis Defendants were entitled to receive the insurance proceeds by virtue of the insurance power of attorney and the assignment of insurance proceeds in the work authorization documents. Defendants have never conceded that the insurance power of attorney and the assignment documents were invalid simply because Plaintiffs' counsel contended that the contract documents were "void" because of the unlicensed status of the Willis Defendants. Defendants have always taken the position that cases stating that the contract of the unlicensed builder is "void" merely mean that the unlicensed builder is barred from bringing a lawsuit to collect compensation and nothing more. With respect to Plaintiffs' answer to the application for leave and their cross-application, this Court should disregard the careless and incorrect statements by Plaintiffs as to Defendants' failure to preserve issues for appeal.

ARGUMENT

I. There Exists No Legal Support For Plaintiffs' Theory That The Assignment And Power Of Attorney Provisions In The Builders' Contract Documents May Be Disregarded Simply Because The Willis Defendants Lacked A Builder's License And The Indorsement Of Insurance Checks Then Treated As Conversion Of Negotiable Instruments By Defendants.

The trial court erred in ruling that, pursuant to MCL 339.2412(1), the unlicensed status of the Willis Defendants made their contract documents with Plaintiffs invalid and thereby rendered Defendants liable for conversion with respect to all insurance checks indorsed and cashed by Defendant Troy Willis. The trial court's determination of liability under MCL 339.2412(1) was legally flawed because that statutory provision merely provides a defense to a homeowner against a lawsuit by an unlicensed residential builder and does not provide grounds for a cause of

action by the homeowner. The determination of conversion liability against Defendant under MCL 339.2412(1) does not hold up to legal scrutiny and is contrary to established precedents of this Court. Accordingly, the reversal by the Court of Appeals of the finding of liability under MCL 339.2412(1) was clearly correct and review by this Court of that reversal is not warranted.

MCL 339.2412(1)—Section 2412(1) of the Michigan Occupational Code—simply disqualifies a residential builder who did not have a builder’s license throughout the period of his contract work from bringing or maintaining an action against his customer to collect compensation. That statutory provision reads as follows:

(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 without alleging and proving that the person was licensed under this article during the performance of the act or contract. [Emphasis added.]

This provision does not create any cause of action in favor of the homeowner/customer against the unlicensed residential builder. On that basis, a summary judgment requiring a return to the homeowner of monies previously paid to an unlicensed builder was reversed in *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471; 335 NW2d 7 (1983), (applying the very similar wording of the predecessor statute to MCL 339.2412(1)). The opinion stated as follows:

[T]he 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.** [Boldface emphasis added.]

In this case, it should have been clear to the trial court that Plaintiffs had no case for conversion of checks for insurance payments because the contract documents executed by Plaintiffs (1) assigned all proceeds of the insurance claims to the Willis Defendants and (2) granted a power of attorney to Defendant Troy Willis to sign Plaintiffs’ names to all

documents pertaining to settling the insurance claim and restoring damage to their property. Coupled with the fact that MCL 339.2412(1) does not create a cause of action, it would seem clear that Plaintiffs have no legal basis for recovery of the insurance proceeds amounts received by the Willis Defendants.

However, Plaintiffs came up with an unprecedented liability theory that was accepted by the trial court. Plaintiffs' central theory is (1) that the contract documents executed between Plaintiffs and the Willis Defendants must be treated as a nullity from their inception because of the unlicensed status of the Willis Defendants and (2) that any acts carried out by the Willis Defendants in reliance on the contract documents can be treated retroactively as unauthorized acts for which Plaintiffs can recover damages. In Plaintiff's view, all check indorsements by Defendant Willis were unauthorized and improper because of the null nature of the contract documents and conversion liability arose from making indorsements of the checks cashed with Defendant Denaglen.

According to Plaintiffs, that result follows from the fact that some Michigan cases state that the contract of an unlicensed residential contractor is "void" or that it is "not only voidable but void." This theory of retroactive voidness is fatally flawed because it is a fanciful notion created by misapplication of labels and is not based on actual case holdings awarding the kind of relief sought by Plaintiffs. There is **absolutely no Michigan case** which endorses Plaintiffs' theory that the contract of the unlicensed builder should be viewed from its inception as creating no legal rights and that acts carried out by the builder pursuant to the contract should be viewed retroactively as being unauthorized and improper.

It is true that precedents exist in Michigan where the contract of the unlicensed builder is referred to as being "void." However, in **every one** of those cases, the only legal significance of the lack of the required license was (1) that the builder could not pursue a complaint or

counterclaim in court to recover moneys alleged to be owing to the builder and (2) that no lien placed on premises could be enforced. Michigan's present-day case law dealing with unlicensed builders can be traced back to *Alexander v Neal*, 364 Mich 485, 487; 110 NW2d 797 (1961), involving a prior statute similar to MCL 339.2412(1). The opinion indicated that there was no doubt that the contractor's lack of a license required the denial of recovery to the contractor in his lawsuit, pointing out that the statute provided that no action for collection of compensation could be brought or maintained without the contractor's pleading and proving that he was duly licensed during the performance of the contract. The Court remarked that, even in the absence of such an express prohibition on recovery by the unlicensed contractor, "the courts frequently deny recovery on the ground that a contract made in violation of a police statute enacted for public protection is void and there can be no recovery thereon." The statement about the void nature of an unlicensed person's contract was merely *obiter dictum* and did not form any part of the Court's holding in the case. The actual holding was simply that no collection lawsuit could be maintained by the unlicensed contractor in view of the express prohibition in the statute on such a lawsuit.

Subsequently, *Bilt-More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964), quoting from the lower court's opinion, inaccurately stated that *Alexander v Neal* stood for the following proposition: "[C]ontracts by a residential builder not duly licensed are not only voidable but void[.]" That inaccurate view of *Alexander v Neal* did not, however, figure into the holding in *Bilt-More Homes*. The ultimate decision in *Bilt-More Homes* was simply that the unlicensed builder was barred by the express terms of the applicable statute from maintaining its action for lien foreclosure or for debt collection because the builder had not been duly licensed at all times during the performance of the work.

In *Bilt-More Homes*, the builder was simply unable to pursue collection of the moneys claimed to be due at the time of filing suit. There was no ruling that the homeowners could recover any moneys previously paid to the unlicensed builder. Labeling the builder's contract as "void" did not cause any different outcome in the lawsuit beyond what the statute specifically required. There was no indication that the "voidness" of the contract meant that any activities previously conducted by the builder, such as receiving payments or entering the homeowner's property, could be viewed retroactively as unauthorized or as creating liability in damages against the builder.

Thirty-eight years later, *Stokes v Millen Roofing Co*, 466 Mich 660, 672; 649 NW2d 371 (2002), used the following quotation from *Bilt-More Homes* that included the "not only voidable but void" language:

Contracts by a residential builder not duly licensed are not only voidable but void- and it is not for a trial court to begin the process of attrition whereby, in appealing cases, the statutory bite is made more gentle, until eventually the statute is made practically innocuous and the teeth of the strong legislative policy effectively pulled. If cases of such strong equities eventually arise that the statute does more harm than good the legislature may amend it"

However, the quoted passage was used solely for its exhortation to avoid creating judge-made exceptions to the statutory mandate of barring compensation suits. *Stokes* had no discussion of the effect of a contract's being void and did not provide for any remedy to the homeowner beyond barring the unlicensed contractor's money judgment and construction lien claims, as expressly called for in the applicable statute. The only propositions for which the case stands are the following: (1) equitable remedies may not be used to provide an affirmative recovery to the unlicensed contractor and (2) where a contract charges an all-inclusive price for services requiring a license and those not requiring a license, the agreement cannot be bifurcated into

separate contracts to allow the contractor to recover moneys claimed to be due for the work not requiring a license.

Although Plaintiffs rely heavily on *Stokes* in their cross-application, the opinion actually contains no support whatever for their theory (1) that the unlicensed builder's contract can be treated retroactively as though it never existed and (2) that liability of the builder can be created retroactively by withdrawing any authorizations granted in the contract. Although the case opinions mention that the builder had received a partial payment of \$51,934 for the roofing job in question, there was no refund to the homeowner of those moneys paid under the contract. Essentially, the case involves, once again, simply barring the unlicensed builder's attempt to recover compensation in a lawsuit for the unlicensed work.

Treatise writers warn that the result in a case should not be controlled by labels, such as "illegal" or "void," placed on contracts involving some statutory violation. See Restatement of Restitution and Unjust Enrichment, 3rd (2011), § 32 Illegality, Comment *a*, which states:

The fact that a particular contract is described by statute or regulation as "illegal," "unenforceable," or "void" is **merely the beginning, not the conclusion, of the inquiry** under this section [i.e., § 32, Illegality].
[Emphasis added.]

Plaintiffs take an erroneous approach when they presume to assign their meaning to the word "void" and ignore the fact that the word has varying meanings. The word "void" is used with great inexactness in American law. See Abraham J. Levin, *The Varying Meaning and Legal Effect of the Word "Void,"* 32 Mich L Rev 1088, 1089 (1933). In the article, the commentator indicated that inexactness in the use of the word "void" has been a problem in law for a long time, quoting *Land, Log Lumber Co v McIntyre*, 100 Wis 245, 252; 75 NW 964 (1898):

So it is manifest, as has been remarked often by text writers and oftener by courts, that few, if any, words are more inaccurately used in the books than the word "void."

The problem continues to the present day, as indicated in the recent law review article, Jesse A. Schaefer, *Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*, 33 Campbell L Rev 193, 194 (2010), which states: "The law is littered with confusion when it comes to the concept of voidness."

When a court is applying a past precedent in which a contract was said to be "void," it is important to examine carefully the sense in which the prior court used the term and to consider the degree to which the contract was held to be void. As stated in *Way v Root*, 174 Mich 418, 424; 140 NW 577 (1913), the word "void" in legal opinions is rarely used to imply a complete nullity. The word is usually used to imply some *degree* of weakness or unenforceability, less than being a complete nullity. Levin, *supra*, at 1094. In *Way v Root*, a husband was sued on a contract he alone had made to sell real estate held in tenancy by the entirety with his wife. In seeking to have the breach of contract claim against him dismissed, the husband relied on precedents stating that a land sale contract executed by only one of two tenants by the entirety was "void." The court held that the precedents used the term "void" in the sense of meaning that the contract would not support a claim for specific performance to force the conveyance of the entireties property. However, the contract was not a nullity and would support the purchaser's claim against the husband for damages for breach of contract.

In Michigan cases where an unlicensed builder's contract is said to be "void" for lack of a license, the **only** effect of being "void" is that the builder may not recover any compensation in the court proceeding. The contract is only "void" **to that limited degree**. Thus, there is no legal basis for Plaintiffs' view that the contracts of the Willis Defendants must be treated in this case as being nullities from their very inception. Plaintiffs have used an approach of (1) noting that some cases, such as *Bilt-More Homes*, refer to the unlicensed builder's contract as void and (2) then assigning an extreme meaning to the word "void" that does not come from cases

involving unlicensed builders or other unlicensed artisans. Plaintiffs jump to the conclusion that the “void” contract of a builder is a contract which was a nullity from its very inception and which must be treated as though it never existed. However, case law tells us that the only effect of the contract of an unlicensed builder or other unlicensed artisan being “void” is that the artisan cannot bring a lawsuit to recover compensation for work done under the contract. See, for example, *Wedgewood v Jorgens*, 190 Mich 620, 621; 157 NW 360 (1916), where the only effect of an unlicensed architect’s contract being “void” was that the architect’s suit for compensation was barred.

Michigan case authorities demonstrate that a contract made with an unlicensed builder has a legal existence and is not a nullity. Clearly, the builder’s contract has continued existence because the homeowner is permitted to bring a breach of contract claim based on failure of the builder to provide all work required by the contract. In *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 437; 670 NW2d 729 (2003), the homeowner pursued a breach of contract claim against the builder, in addition to using the builder’s unlicensed status to bar any recovery of compensation by the builder. The opinion pointed out that the unlicensed builder was entitled to defend the breach of contract claim on the merits and that MCL 339.2412(1) did not affect the builder’s defense.

Parker v McQuade Plumbing & Heating, Inc, supra, also held a statute barring collection actions by an unlicensed contractor did not prevent the contractor from defending a breach of contract suit on its merits and did not give rise to a cause of action against the builder. A breach of contract claim can be brought by the homeowner because the contract continues to exist, even though the builder cannot recover in court on the contract. Furthermore, one of the cases relied upon by Plaintiffs, *Roberson Builders, Inc v Larson*, unpublished per curiam opinion of the Michigan Court of Appeals, issued September 19, 2006 (Docket No. 260039)(a copy of which is

attached hereto as Exhibit 7), treated the unlicensed builder's contract as continuing to exist, with the homeowner successfully pursuing a damages claim for breach of contract against the builder. Those cases demonstrate the erroneousness of Plaintiffs' theory that the unlicensed builder's contract is a nullity from its inception.

Michigan follows the traditional rule that a contractor acting in violation of a statute cannot recover in court on his contract. See 5 Williston on Contracts § 12:4 (4th ed. 2004), which states as follows:

It is commonly said that illegal bargains are void. This statement, however, is not entirely correct. Rather, the traditional rule, embodied in the First Restatement [of Contracts § 598], is that "A party to an illegal bargain can neither recover damages for breach thereof, nor, by rescinding the bargain, recover the performance ... thereunder or its value[.]" [Emphasis added. Footnotes omitted.]

The reference to a builder's contract as "void," as found in some cases, has no legal significance. That label has not caused any Michigan court to diverge from the traditional result of simply denying any recovery in litigation to the unlicensed builder. Plaintiffs' theory that the contract is a nullity is based on taking the label "void" out of the context and using that label to argue for a result that is totally without support in Michigan law.

The foregoing analysis discredits the theory on which the trial court's determination of liability under MCL 339.2412(1) was based. The unlicensed status of the Willis Defendants did not cause the contract documents relied upon by the Defendants to become a nullity. No case applying MCL 339.2412(1), or its predecessor statute, has ever held that the builder's contract is a nullity from its inception or has ever extended the effect of the statute beyond simply barring any action by the unlicensed builder to collect compensation. Even though some cases describe the unlicensed builder's contract as void, the effect of such "void" designation is merely that the builder cannot bring a lawsuit to collect monies claimed as owing from the homeowner. The

contract is regarded as remaining in effect and will support a claim for damages for breach of contract brought by the homeowner.

In this case, three contract documents signed by Plaintiffs gave the Willis Defendants the right to receive the insurance moneys and to indorse the checks relating to payment of the insurance claims. The documents were as follows:

1. The repair agreement on a form entitled Fire Repair Agreement (which was actually intended to authorize repair of flood damage to Plaintiffs' real estate) (Exhibit 2 to the Epps deposition of 10-6-2010) covering repairs to Plaintiffs' damaged home (attached as Exhibit 2 hereto). This agreement, executed by Mr. and Mrs. Epps, makes mention of insurance and provides that "[t]he undersigned to insure payment, **assigns the proceeds of the adjusted claim** to Emergency Insurance Services, **as full payment** for the ... repairs." [Emphasis added.]

2. The Work Authorization document (Exhibit 7 to the Epps deposition of 10-6-2010) covering the initial dryout of the flooded basement and the restoration of the personal property located in the basement (a copy of which is attached as Exhibit 3 hereto). This agreement, executed by Mr. and Mrs. Epps, also makes mention of insurance and provides that "[t]he undersigned to insure payment, **assigns the proceeds of the adjusted claim** to 4 Quarters Restoration LLC, **as full payment for cleaning and restoration.**" [Emphasis added.]

3. The Insurance Power of Attorney (Exhibit 5 to the Epps deposition of 10-6-2010) authorizing Troy Willis to sign the names of Plaintiffs to documents relating to the insurance claims (a copy is attached as Exhibit 4 hereto). This signed document provides as follow: "I Danny Epps & Joyce Epps, hereby give my (Contractor), Troy Willis Power of Attorney, to sign my name to **all documents pertaining to settling the**

insurance claim and restoring the damage to my property located at 5503 Pennsylvania, Detroit, Michigan. [Boldface emphasis added.]

By virtue of these documents, the Willis Defendants (1) became the persons entitled to the insurance claim proceeds and (2) had the right to sign Plaintiffs' names on the back of the checks representing insurance claim proceeds. Since these documents existed and were in force when the Willis Defendants cashed the insurance proceeds checks with Defendant Denaglen in 2006, the cashing of the checks was authorized and did not render Defendants liable to Plaintiffs for conversion.

As indicated above, the Court of Appeals acted correctly in reversing the trial court's ruling finding that, pursuant to MCL 339.2412(1), Defendants were liable to Plaintiffs in the amount of all checks cashed by the Willis Defendants with Defendant Denaglen. Accordingly, the granting of leave to appeal with respect to that reversal of the trial court's ruling is unwarranted.

II. There Exists in Michigan Law No Right to an Automatic Refund of All Moneys Paid to an Unlicensed Residential Contractor.

In their cross-application, Plaintiffs also assert that the award of damages by the trial court, pursuant to MCL 339.2412(1), was proper because current-day law recognizes a right of a homeowner to recover all monies paid to an unlicensed builder even if the builder has completed the construction project. As Defendants will demonstrate, Plaintiffs' theory of automatic entitlement to a full refund of monies is not a viable cause of action and does not provide a basis for reinstatement of the trial court's determination of liability under MCL 339.2412(1).

The case of *Parker v McQuade Plumbing & Heating, Inc, supra*, would seem to defeat Plaintiffs' contention about an automatic refund of all moneys because that case held that the statute does not provide a cause of action to the homeowner. However, Plaintiffs contend that

Parker is an outmoded precedent because it was decided 30 years ago and that it is no longer current law that MCL 339.2412(1) does not provide a cause of action to the homeowner. That purported analysis by Plaintiffs is baseless. Recent cases still cite the “sword not a shield” rule of the *Parker* opinion. See *Benson v Vanderbeke*, unpublished per curiam opinion of Michigan Court of Appeals, issued November 3, 2009 (Docket No. 285318), a copy of which opinion is attached as Exhibit 8. *Benson* applied *Parker* in holding that a similar statute pertaining to property managers did not provide an affirmative cause of action against an unlicensed property manager for recovery of property management fees already paid.

Plaintiffs also seek to undermine *Parker* on the ground that the opinion cited *Kirkendall v Heckinger*, 403 Mich 371; 269 NW2d 184 (1978), a case which was later limited in *Stokes, supra*. That criticism of *Parker* is unwarranted because the opinion did not base its holding on *Kirkendall* and merely observed that *Kirkendall* may apply in cases involving an equitable counterclaim by a builder, an issue not involved in *Parker*.

In asserting that the rule of *Parker* has been swept away, Plaintiffs also cite the concurring statement of Justice Marilyn Kelly (joined by Justice Young) filed in regard to the issuance of an order vacating a grant of leave appeal and denying the application for leave to appeal, in *Roberson Builders, Inc v Larson*, 482 Mich 1138, 1139-1141; 758NW2d 284 (2008). In relying on the statement of Justice Kelly, Plaintiffs ignore the fact that neither an order denying leave to appeal nor an accompanying statement has any precedential significance. In *Forton v Laszar*, 463 Mich 969, 971; 622 NW2d 61 (2001), Justice Marilyn Kelly herself had emphasized the lack of precedential value of a statement accompanying an order denying leave to appeal, stating as follows:

I write separately, without commenting on the merits of Chief Justice Corrigan's concurring statement. I wish to reiterate the well-settled fact that **nothing of precedential significance should be deduced from an order of this Court**

denying leave. See *Tebo v Havlik*, 418 Mich 350, 363, n 2, 343 NW2d 181 (1984)(opinion of Brickley, J.); *Maryland v Baltimore Radio Show, Inc*, 338 US 912, 919, 70 SCt 252, 94 LEd 562 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari); see also MCR 7.321. Accordingly, **I caution the bench and bar against treating such an order or, for that matter, an accompanying explanation as having legal precedential significance.** See *People v Gronewald*, 607 NW2d 85 (2000) (Cavanagh, J., dissenting). [Emphasis added.]

In addition, MCR 7.321 provides that the reasons for denying leave to appeal “are not to be regarded as precedent.” Since Plaintiffs’ counsel mentions in his answer to the application for leave to appeal and in his cross-application (1) that he has 38 years of experience in appellate practice and (2) that he is a long-time member of the Council of the State Bar of Michigan Appellate Practice Section, it is surprising that he cites Justice Kelly’s concurring statement in *Roberson Builders* as though it were a true precedent of the Michigan Supreme Court.

Furthermore, there is nothing in the Justice Kelly statement, or in the unpublished opinion of the Court of Appeals in the *Roberson Builders* case, which changes the *Parker* rule against basing a cause of action on MCL 339.2412(1). Those purported precedents relied upon by Plaintiffs provide no support whatever for Plaintiffs’ theory that a homeowner is entitled to recover from an unlicensed builder all payments received by the builder on the construction project involved in the case. The unpublished Court of Appeals opinion in *Roberson Builders* merely held that the statutory bar against recovery of compensation by an unlicensed builder in an “action” applied to bar a setoff asserted by the builder for purposes of reducing the net damages recoverable by a homeowner suing for breach of the construction contract. The builder was not permitted to reduce the breach of contract damages with its setoff for work covered by oral orders for extras not falling within the written contract.

With respect to *Roberson Builders*, it is very significant that the homeowner’s recovery was for damages for breach of the construction contract, **not** under a theory that the homeowner

was entitled to recover all monies paid to an unlicensed builder. Thus, *Roberson Builders* followed the *Parker* rule that the homeowner does not have a cause of action for return of the funds paid with respect to a completed job, although a damage remedy for breach of contract is available for any deficiencies in the construction work.

Moreover, substantial arguments exist for the contrary view that a setoff or recoupment pled by an unlicensed builder constitutes a defense to the homeowner's claim for breach of contract, not an action barred by MCL 339.2412(1). See dissenting statement of Justice Markman, joined by Justice Cavanagh, filed in regard the Michigan Supreme Court's order denying leave to appeal in *Roberson Builders, supra*. In his dissenting statement, Justice Markman made a persuasive analysis that the builder's recoupment theory for reduction of the damage award to the homeowner constituted a defense to the homeowner's claim, not an "action" barred by MCL 339.2412(1).

Plaintiffs also contend that looking to the law of our sister states will show that the modern trend is to allow the homeowner to recover all consideration provided to a builder who lacks a license required by an applicable statute. That contention of Plaintiffs as to the current state of the law nationally is demonstrably false. In reality, the overwhelming majority of scholarly commentaries and case decisions across the country support the view that, under a statute like MCL 339.2412(1), a homeowner does not have a cause of action for recovery of the moneys paid to an unlicensed builder with respect to a completed building project.

See Anno: *Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract*, 74 ALR3d 637 (published in 1976 and updated semiannually), which states the majority rule as follows:

In the absence of a statute providing for recovery, the cases very generally hold that one who has paid money to an unlicensed person in consideration of the performance of a contract by such person is **not entitled to recover back the**

money so paid on the ground that the contract was illegal because the person performing the contract did not have an occupational or business license or permit which he was by law required to have. [Emphasis added.]

The annotation catalogues the five principal reasons set forth in the cases following the majority rule as follows:

The bases of such holdings are [(1)] that the law requiring the license does not specifically provide for such a right to recover back money paid, [(2)] that the sanctions of such law are penal in nature and must be strictly construed, [(3)] that the specification by such laws of particular penalties, such as making violation a misdemeanor and prohibiting suits for compensation for the unlicensed services, preclude the construction of the statute as embracing a loss of the right to retain compensation which has been paid, under the rule of *inclusio unius est exclusio alterius*, [(4)] that the allowance of recovery back is not necessary to effectuate the policy of the licensing statutes, and [(5)] the conclusion that equity and the principles of restitution do not require that the money be paid back.

All of the five reasons apply in Michigan and support the conclusion that Plaintiffs were not entitled to recover the monies received by the Willis Defendants with regard to the project completed by them. Since Michigan legislators could have easily provided for a refund of all monies paid to an unlicensed builder if that was their intent, it logically follows that Michigan's statutes do not provide for a refund action in favor of the homeowner.

Fausnight v Perkins, 994 So2d 912 (Ala 2008), is a thoroughly reasoned case which ruled that a homeowner was not entitled, solely on grounds of lack of licensure, to recover the moneys paid to an unlicensed builder under a completed contract for construction of a house. A major reason for denying restitution of the moneys received by the builder was that the legislature had passed statutory enactments which expressly set forth the sanctions imposed on an unlicensed builder. As in Michigan, the statutory enactments barred the unlicensed builder from suing to recover monies claimed to be due to the builder and provided for penal sanctions such as fines payable to the state. Since the legislature had prescribed express sanctions to be imposed upon the unlicensed builder and had not provided for a refund cause of action, the court reasoned that

the legislature did not intend that the homeowner would have a refund or restitution cause of action against the unlicensed builder with respect to a completed building project. The opinion also pointed that it would not be in accord with general principles of equity and restitution to permit the homeowner to have a windfall by recovering all of the money paid to a builder on a completed building project.

Another out-of-state case on point is *Bentivegna v Powers Steel & Wire Products, Inc*, 206 Ariz 581, 587-588; 81 P3d 1040 (2003). Like the Michigan statute, the Arizona statute (ARS § 32-1153) barred claims by a contractor who could not plead and prove that it was licensed at the time that construction work was performed. The Arizona Supreme Court rejected the argument that the statute should be interpreted to provide for “automatic restitution” to homeowners of all monies paid to an unlicensed contractor. The opinion stated as follows:

Contrary to the Bentivegnas’ assertions, allowing unlicensed contractors to keep sums they have been paid, while prohibiting them from suing to collect sums they have not been paid, will not undermine the protective function of the statute. [T]he Bentivegnas have an adequate remedy for Powers’ allegedly substandard performance without torturing the plain language of § 32-1153 to create a new remedy. They can, and did, file a suit for breach of contract, breach of warranty, and negligence. **We decline to interpret § 32-1153 to provide an additional “automatic restitution” remedy.** [Emphasis added.]

Hawkins v Holland, 97 NC App 291; 388 SE2d 221 (1990), also holds that, while an unlicensed contractor may not sue to recover monies due on a project, the homeowner is not entitled to recover back monies paid to the contractor on a completed contract. Likewise, *Lenz v Walsh*, 362 SC 603, 608; 608 SE2d 471 (SC App 2005), holds that a homeowner may not recover payments already made to an unlicensed contractor merely because the contractor did not have a license when the contract was performed.

Plaintiffs contend that the general principles of restitution call for the refund of all monies to an unlicensed contractor without the need of a statute expressly providing for that relief.

However, a review of cases and treatises on the subject of restitution shows that a homeowner does not have a right to restitution of monies paid to an unlicensed builder after the builder's performance has been rendered.

Restatement of Restitution and Unjust Enrichment, 3rd (2011) (hereinafter Restatement of Restitution 3rd) supports the proposition that the customer **cannot**, on grounds of lack of licensure, recover moneys paid to an unlicensed contractor with respect to a completed project.

See Comment *a* to § 32 Illegality, which states as follows:

A performing party who succeeds in obtaining the counterperformance of the contract (notwithstanding the prohibited status of the transaction) has no claim in restitution and no need of one.

Restatement of Restitution 3rd, further states (in § 32 Illegality, Reporter's Note to Comment *f*):

[I]llegality will rarely serve as the basis of a claim to recover a payment previously made pursuant to the parties' agreement, because the allowance of the claim would create an unjust enrichment rather than reverse one:

"The law may at times refuse to aid a wrongdoer in getting that which good conscience permits him to receive; it will not for that reason aid another in taking away from him that which good conscience entitles him to retain."

Schank v. Schuchman, 212 N.Y. 352, 359, 106 N.E. 127, 129 (1914) (Cardozo, J.)

.... See also 2 Palmer, Law of Restitution § 8.3(b) (1978 & Supp.); Annot., 74 A.L.R.3d 637 (1976); *Fausnight v. Perkins*, 994 So.2d 912, 921 (Ala. 2008) (denying recovery of payments made to unlicensed builder, explaining that "we do not believe that creating an inequitable situation where one does not already exist is a proper use of the courts"); *Remsen Partners, Ltd. v. Stephen A. Goldberg Co.*, 755 A.2d 412, 416 (D.C. 2000) (denying recovery of payments made to unlicensed real estate broker, and noting that "[t]here is no equitable reason for ordering disgorgement where plaintiffs have received the benefits they expected"); *Arcidi v. National Ass'n of Government Employees, Inc.*, 447 Mass. 616, 856 N.E.2d 167 (2006) (denying recovery of "consulting fee" paid to agent, following his successful performance of illegal contract to influence official action); *Sutton v Ohrbach*, 198 App. Div. 2d 144, 603 N.Y.S.2d 857 (1993) (claimant may not use licensing statutes "as a sword to recoup monies already paid in exchange for the purportedly unlicensed services" of architect).

The treatise points out that there are very few jurisdictions where the customer could bring a claim for recovery of moneys paid to unlicensed contractor when the work had already been performed. Plaintiffs' short quotation from the District of Columbia case of *Saul v Rowan Heating and Air Conditioning*, 623 A2d 619 (DC Ct of Appeals, 1993) does not change the fact that the overwhelming balance of authority supports Defendants' view. Furthermore, the later District of Columbia case of *Remsen Partners, Ltd v Stephen A Goldberg Co*, 755 A2d 412, 416 (DC Ct of Appeals, 2000), characterized as dictum the statement in *Saul* about the existence of a right to recover monies paid to an unlicensed person and declined to apply that dictum to a case where a plaintiff sought to recover fees paid to an unlicensed real estate broker with respect to a completed transaction.

In 2 George E. Palmer, *The Law of Restitution* § 8.3(b) (1978), it was explained that courts have almost universally rejected restitution claims by customers for return of payments made to unlicensed persons providing services, as follows:

When services contracted for have been performed by an unlicensed person, **courts nearly always have denied restitution of payments made for such services.** In the usual case there is no unjust enrichment of the unlicensed person, since he merely receives the agreed compensation for services performed. This is the reason, either expressed or implicit, in most of the cases denying restitution, although other reasons sometimes are given. The fact that an unlicensed person will not be permitted to recover compensation for his work, either on the contract or on principles of restitution, does not make his retention of a payment for such services an unjust enrichment. This is exemplified in the decisions rejecting his action to recover for uncompensated work, while at the same time denying the defendant's counterclaim seeking restitution of payments made for the work." [Emphasis added; footnotes omitted.]

See also *Van Zanen v Qwest Wireless, LLC*, 522 F3d 1127, 1131 (CA 10, 2008), where it was held that customers did not have a right to restitution of insurance sales commissions which a cell phone company earned on their insurance payments in violation of a Colorado statute requiring an insurance license for a person to receive insurance sales commissions. Since the

customers actually received the counterperformance for which they contracted (i.e., insurance coverage on their mobile phones), they had no grounds for a restitution claim against the cell phone company, regardless of the contention that it received benefits in violation of the insurance licensing statute.

In a vain attempt to show that Michigan recognizes a claim for restitution like the one asserted in this case, Plaintiffs cite the cases of *DeCroupet v Frank*, 212 Mich 465; 180 NW 363 (1920), and *Kuchenmeister v Disza*, 218 Mich 497; 188 NW 337 (1922). Those cases merely stand for the proposition that a person has a claim for recovery of monies paid under an executory oral contract that is unenforceable under the statute of frauds. The two cases dealt with situations where the agreements were executory and where restitution was appropriate to remedy a situation where monies were paid under an oral contract as to which the opposing party disclaimed any obligation to perform. There is nothing in those cases which counteracts the mountain of authority holding that a homeowner does not have a restitution claim to recover all monies paid to an unlicensed builder with respect to a completed contract.

In summary, no cause of action exists pursuant to MCL 339.2412(1), or under general principles of restitution, in favor of Plaintiffs for recovery of the monies which the Willis Defendants received with respect to the completed cleanup and restoration work. Accordingly, granting Plaintiffs' cross-application for leave to appeal is unwarranted in this matter because no meritorious grounds exist for reinstating the trial court's original ruling finding a cause of action under MCL 339.2412(1) for recovery of the monies paid to the Willis Defendants.

III. The Trial Court Erred in Granting Judgment Against Defendants On A Theory Of Conversion Of The Insurance Checks Because Plaintiffs Failed To Plead Or To Make An Evidentiary Showing That The Checks Had Been Delivered To Plaintiffs, Thereby Omitting A Required Element Of A Conversion Claim Under MCL 440.3420(1).

In this case, the trial court accepted Plaintiffs' theory that the contract documents of the Willis Defendants were invalid under MCL 339.2412(1) and that, accordingly, Defendants had committed conversion of negotiable instruments under the applicable provision of the Michigan Uniform Commercial Code. That decision of the trial court was erroneous because Plaintiffs failed to plead and to demonstrate the existence that all necessary elements of a conversion cause of action against Defendants under the Michigan Uniform Commercial Code.

The section of the Michigan UCC governing claims for conversion of negotiable instruments is MCL 440.3420. The last sentence of subsection (1) of MCL 440.3420 contains the following 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 a negotiable instrument must include the allegation that the plaintiff-payee had received delivery of the instrument. See *Attorney's Title Ins Fund, Inc v Regions Bank*, 491 F Supp 2d 1087, 1095 (SD Fla 2007). In that case, the plaintiff's case for conversion of a check was dismissed because the plaintiff did not allege the necessary element of delivery of the check to the payee. At the conclusion of the opinion, the court ruled as follows:

[B]ecause the complaint fails to allege or establish delivery of the Check either to the [payees] or to an agent of the [payees], the complaint must be dismissed for failure to state a claim upon which relief may be granted

As Defendant Denaglen pointed out in its motion for summary disposition filed in 2011 in this case, Plaintiffs' complaint failed to state a viable claim for conversion of checks because

it contained no allegation that Plaintiffs had received delivery of the checks on which they were suing Denaglen and the Willis Defendants for conversion. Furthermore, with respect to their motion for summary disposition, Plaintiffs never submitted any evidentiary materials showing that they had received delivery of the checks on which they based their conversion claim.

Generally, it has been held that UCC 3-420 (MCL 440.3420) displaces the common law cause of action for conversion of negotiable instruments. See *Carson Fischer, PLC v Std Fed Bank*, unpublished opinion per curiam of the Michigan Court of Appeals, issued February 8, 2005 (Docket No. 248125) rev'd in part on other grounds sub nom *Carson Fischer, PLC v Mich Nat Bank*, 475 Mich 851; 713 NW2d 265 (2006), a copy of which is attached hereto as Exhibit 9. In that case, the Court of Appeals ruled that the common law cause of action for conversion is displaced by the UCC in those circumstances where MCL 440.3420 applies. Other cases holding that UCC 3-420 displaces common law claims for conversion of negotiable instruments are *Bucci v Wachovia Bank, NA*, 591 F Supp 2d 773, 780 (ED Pa, 2008), and *Halifax Corp v Wachovia Bank*, 268 Va 641, 657-658; 604 SE2d 403 (2004).

Since MCL 440.3420 governs claims alleging conversion of checks through forged or unauthorized indorsements, there can be no doubt that the requirements of MCL 440.3420 had to be met in this case for Plaintiffs to have a viable conversion claim. Since Plaintiffs never pled the necessary element of delivery in their complaint and did not support their motions for summary disposition with evidentiary materials demonstrating that they had received delivery of the checks, the trial court erred in granting Plaintiffs' motions for summary disposition as to liability and as to Plaintiffs' right to the monies in the so-called interpleader fund. Furthermore, no other viable cause of action was pled or proven by Plaintiffs in this action.

Plaintiffs have attempted to get around the deficiencies of their complaint and their motion for summary disposition by arguing that Troy Willis was the agent of Plaintiffs under the

insurance power of attorney and that the delivery of the checks to Troy Willis as such agent of Plaintiffs satisfied the delivery requirement of a conversion cause of action. However, that theory of delivery is inconsistent with the theory upon which Plaintiffs persuaded the trial court to render summary disposition for them, i.e., that the insurance power of attorney and other documents signed by Plaintiffs were a nullity and did not create any agency under which the Willis Defendants were acting for Plaintiffs. At the time that the trial court considered the motions for summary disposition, Plaintiffs were not entitled to prevail on the motion because they had not alleged the necessary delivery element in their complaint and had not provided evidentiary materials in support of their motion for summary disposition showing that Plaintiffs had received delivery of the allegedly converted checks.

Because of Plaintiffs' pleading deficiencies in this case, the trial court should have (1) granted Defendants' motion for summary disposition for dismissal of the case for failure to state a claim upon which relief may be granted, possibly with an opportunity for Plaintiffs to file an amended complaint, and (2) set aside the default of Denaglen on the ground that a complaint that does not state a claim will not support a default or a judgment and allowed Denaglen to answer any amended complaint. Although Denaglen had been defaulted, it was entitled to pursue its motion for summary disposition because a complaint which fails to state a cause of action will not support a judgment. *Hunley v Phillips*, 164 Mich App 517, 523; 417 NW2d 485 (1987). *State, ex rel Saginaw Prosecuting Attorney v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 N.W.2d 512 (1981).

In this case, the Court of Appeals reversal of the trial court's determination of liability against Defendants under MCL 339.2412(1) has achieved a correct result of dismissing claims upon which Plaintiff have no viable cause of action. Accordingly, there exists no appropriate

basis for granting Plaintiffs' cross-application for leave to appeal seeking to reinstate that erroneous determination of liability.

IV. Plaintiffs Did Not Have A Viable Claim Against Defendants For Conversion Of The Checks For The Insurance Monies Since The Insurance Power Of Attorney Authorized Defendant Troy Willis To Indorse The Checks To Pay For The Cleanup And Restoration Work Done By The Willis Defendants And Since Plaintiffs Were Not The Owners Of The Insurance Proceeds After They Executed Documents Assigning The Insurance Proceeds To The Willis Defendants.

In this case, the trial court erred by determining that there was conversion liability for indorsing Plaintiffs' names on insurance settlement checks. The indorsement of the checks was proper because Plaintiffs had authorized Defendant Troy Willis to sign their names to "all documents pertaining to settling the insurance claim and restoring the damage to [their] property." [Emphasis added.] The checks for the insurance proceeds were significant documents pertaining to settling the insurance claim and restoring the damage to the property. Getting the insurance monies to the Willis Defendant was necessary for restoring the damage to the property. In addition, their deposition testimony shows that Plaintiffs realized at the time of the restoration work that the Willis Defendants were receiving the insurance monies directly from the insurance company and the mortgage company and that Plaintiffs made no objection to that arrangement at the time. Plaintiffs acquiesced in, and ratified, the arrangement in which Troy Willis signed their names to checks for insurance proceeds. Accordingly, there was no conversion because the indorsement of the insurance checks was authorized by Plaintiffs. Certainly, the Willis Defendants were at least entitled to have a jury trial to resolve the issue of the meaning of the insurance power of attorney and whether Plaintiffs authorized the indorsement of the checks.

In addition, it was very clear that Plaintiffs had no conversion claim against Defendants because Plaintiffs had executed documents assigning the insurance proceeds to the Willis

Defendants. As a result of the assignments, Plaintiffs no longer owned the rights to the insurance proceeds and had no right to sue for conversion of property that they did not own.

In re Bartoni-Corsi Produce, Inc, 130 F3d 857, 860 (CA 9, 1997), established that a party who has assigned its rights to anticipated payments does not have a claim for conversion of checks when the assignee later cashes the checks without obtaining the assignor's indorsement. The Ninth Circuit Court of Appeals held that the assignor of property cannot maintain a conversion action relating to 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.

In that case, Bartoni-Corsi Produce, Inc. had assigned all of its accounts receivable from customers to another corporation. Subsequently, the customers sent checks to pay the assigned receivables made out to the assignor as payee and the assignee of the receivables 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 under UCC 3-420 on the theory that the bank had converted checks of the assignor by allowing the checks to be deposited into the bank account of the assignee. The court 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.

In the present case, 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 for conversion of that property. Plaintiffs suffered no damage by reason of Troy Willis' indorsing the checks for insurance proceeds that had been assigned to the Willis companies.

Knowing that the assignments destroy any cause of action of Plaintiffs to recover the amount of the checks, Plaintiffs have said many times in their cross-application that the insurance power of attorney is the sole document upon which Defendants have relied as providing the authority for Defendant Troy Willis to indorse the insurance checks. Those statements by Plaintiffs' counsel are incorrect because Defendants have clearly raised below the issue that the assignments transferred all rights in the checks to the Willis Defendants and gave the Willis Defendants all rights to receive the monies on those checks. Certainly, Plaintiffs know that Defendants have relied on the assignment of the insurance proceeds since Plaintiffs have made extensive efforts to get around the assignments in their briefs below.

In their cross-application, Plaintiffs also raise the issue that the assignments only covered insurance claims relating to the damage to Plaintiffs' house and personal property from a flooding incident of July 26, 2006 and would not cover the insurance check for \$20,682.28 of October 23, 2006 from Auto-Owners Insurance that the Willis Defendants cashed as payment for subsequent roof repair work that the Willis Defendants say they did for Plaintiffs. Although Defendants have written statements from Auto-Owners insurance personnel contradicting Plaintiffs' contentions, Plaintiffs assert that they knew nothing about any roof repair work or any insurance claim for roof repair work in 2006. Plaintiffs contend that the Willis Defendants must have duped the insurance company into issuing an additional check for \$20,682.28 for nonexistent roof repair work.

Plaintiffs' assertions that they made no roof damage insurance claim in 2006 are fatal to their position that the amount of that check for roof repair was properly included in the conversion judgment against Defendants. If Plaintiffs did not have any right to receive any moneys for a roof repair claim in 2006, they had no rights to the \$20,682.28 check relating to that claim and had no conversion cause of action against any Defendant with respect to that

check. In addition, since they never received delivery of any such check in 2006, they did not have a conversion claim with respect to the check under MCL 440.3420.

In their appellate documents, Plaintiffs attempt to get around the fatal flaw in their damage claim for the \$20,682.28 check and for other checks by asserting that they obtained in 2011 an assignment of all claims that the insurance company defendant had with respect to that check and other checks. Plaintiffs are basically asserting that the insurance company had a right to recover that \$20,682.28 check and that Plaintiffs are now entitled to those moneys as assignees. That theory of liability is not properly raised by Plaintiffs in this appeal because there was never any claim asserted below by Plaintiffs in the capacity of assignees of the insurance company.

Plaintiffs' counsel merely mentioned in passing the existence of the assignment of claims at the end of the summary disposition hearing of June 24, 2011. See page 20 of the transcript of the hearing of June 24, 2011. The assignment document of June 15, 2011 (which was filed with Plaintiffs' Court of Appeals brief) was never filed in the trial court proceedings. None of the claims as to which Plaintiffs assert assignee status was ever pursued by the insurance company or Plaintiffs as assignees in any complaint or cross-claim in this case. More than seven years has now elapsed from the time that the last check in this matter was cashed by the Willis Defendants. Clearly, all applicable statute of limitation periods have elapsed on any claims covered by the assignment to Plaintiffs. This Court should disregard completely Plaintiffs' contention that it had rights to recovery by virtue of an assignment from the insurance company.

The assignment documents in favor of the Willis Defendants covered all insurance proceeds (with the possible exception of the \$20,682.28 of October 23, 2006) and their insurance power of attorney covered all insurance checks by its terms. Accordingly, the trial court clearly erred in ruling that, under MCL 339.2412(1) and under the UCC, Plaintiffs were entitled to

damages of \$128,047.23 for conversion of negotiable instruments. There is no good reason for this Court to review the reversal by the Court of Appeals of that erroneous ruling.

V. The Trial Court Erred In Setting The Conversion Liability Against Defendants At Amount Of All Monies Received On The Insurance Checks When Factual Issues Existed As To The Amount Of Plaintiffs' Interest In The Checks And As To The Amount Of Damages Suffered By Plaintiffs.

In this case, the trial court erred in ruling as a matter of law that Plaintiffs were entitled to recover from Defendants the face amount of all insurance checks cashed by the Willis Defendants with Defendant Denaglen. The trial court made the unwarranted assumption that the amount of damages on a claim for conversion of checks is automatically the face amount of all of the checks. The trial court ignored the fact that, under MCL 440.3420(2), the damages recoverable by the payee of a converted check may not exceed the amount of the payee's interest in the check. In this case, Defendants argued that Plaintiffs had little or no interest in the checks because the check proceeds were supposed to go the Willis Defendants to fund the cleanup and restoration work on the house. Clearly, a factual issue existed as the amount of Plaintiffs' interest in the checks and a jury trial was necessary to resolve that issue.

MCL 440.3420(2) (added to the Michigan UCC effective September 30, 1993) governs the matter of damages available for conversion of a negotiable instrument. That subsection reads as follows:

(2) In an action under subsection (1) [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.]

This provision has greatly changed the prior rule (under the superseded UCC 3-419) of automatically awarding conversion damages in the face amount of the converted instrument. Now, if the monies from a check end up going for the purpose that was intended, no damages may be awarded simply because an indorsement to a check was unauthorized or missing.

A leading treatise on the UCC explains that UCC 3-420(b) [MCL 440.3420(2)] has the laudable effect of avoiding a windfall for a payee of a check when the proceeds of the check end up in the hands of the person for whom they were intended (even though the check was paid over an inadequate or unauthorized indorsement.) White, Summers & Hillman state as follows regarding UCC 3-420(b):

We [e]ndorse judicial adoption of the proposition that there should normally be no recovery when the check proceeds come into the hands of the person for whom they are intended. A number of cases stand for the proposition that neither the drawer nor an intended payee of check paid over a forged or inadequate indorsement may maintain a conversion action **when the funds ultimately reach or benefit the intended payee.** [2 J. White, R. Summers & R. Hillman, *Uniform Commercial Code: Practitioner Treatise Series* (6th ed. 2013), § 19:9, p. 356. Emphasis added.]

The authors indicate that the implication of UCC 3-420(b) is that a plaintiff-payee should not receive as damages more than his actual injury.

A case demonstrating the proper application of UCC 3-420(b) is *Edwards v Allied Home Mortgage Capital Corp*, 962 So 2d 194, 205-06 (Ala 2007). In *Edwards*, the defendant received checks payable to her employer on which the employer was supposed to (1) receive the funds from each check, (2) retain a percentage of the funds as a fee, and (3) send the balance of funds back to the defendant as compensation for her operating a branch office of the employer's mortgage business. The defendant admitted that she had converted several checks by depositing them into her own bank account rather than forwarding them to the employer. The plaintiff employer asserted that its damages for conversion of the checks were in the face amount of all of the checks. The defendant contended that, since the employer was only entitled to retain a percentage of each check, the amount of the employer's interest in the checks was only the amount of those percentage fees. The *Edwards* court held that the plaintiff-employer's interest in the checks was only the portion of the funds which it was entitled to retain and that, under

UCC 3-420(b), the defendant's liability for conversion was limited to that portion of the funds. Accordingly, a conversion judgment for the face amount of the checks was reversed and the case remanded for a jury trial on the damages issue.

Edwards was cited with approval in *Saxon Mortgage Services v Harrison*, 186 Md App 228, 274-276; 973 A2d 841 (2009), which also held that evidence may be introduced to show that a payee's damages are less than the face amount of the check(s). Also limiting a plaintiff's conversion damages under UCC 3-420(b) to the portion of the checks the plaintiff was entitled to retain is *Aces A/C Supply N v Security Bank*, 2010 Okl Civ App 35; 231 P3d 761, 764 (2010).

The New York case of *Mouradian v Astoria Federal Sav and Loan*, 236 AD2d 451; 653 NYS2d 654 (1997), also demonstrates that, under UCC 3-420(b) [MCL 440.3420(2)], it is inappropriate to award damages in the face amount of a converted check where proceeds of the check were applied to the purpose for which the check was issued and the payee received benefit from that application of the proceeds. *Mouradian* involved three checks paid to the co-payee's estranged husband from an insurance settlement for home damage and used for the purpose of making repairs on the home jointly owned by the payee and her husband. The majority opinion rejected the dissent's view that the husband's liability should be eliminated or reduced because the funds went to the purpose for which the checks were originally issued and went into a joint asset of the parties—because New York has not adopted the revised conversion provision in UCC 3-420 and still has its predecessor, 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 of UCC 3-420(b) (as Michigan has) stating that the recovery for conversion of an instrument may not exceed the plaintiff's interest in the instrument.

Even if the checks are viewed as having been converted, Plaintiffs sustained little or no damages since the monies all went for the purposes and to the persons that the parties intended when Plaintiffs hired the Willis Defendants to perform the cleanup and restoration work for a price equal to the amount of the insurance proceeds. No damages were sustained by Plaintiffs because they received the services that they requested for the amount of the adjusted insurance claims without Plaintiffs paying any moneys out-of-pocket, as the Willis Defendants agreed.

All proceeds of the insurance checks were intended to go the Willis Defendants to fund their cleanup and construction work relating to Plaintiffs' home and the damaged contents. Since Plaintiffs were never supposed to retain any of the insurance proceeds for themselves, the amount of Plaintiffs' interest in the checks was zero. Moreover, Plaintiffs benefited from having the monies go to the Willis Defendants to fund the work on the house. Because (1) the insurance proceeds were supposed to go to the Willis Defendants to fund the cleaning and restoration work and (2) Plaintiffs obtained substantial benefit from the services paid for with the funds, the damages recoverable for the alleged conversion of insurance proceeds checks would not be in the face amount of the checks that Defendant Willis cashed at Defendant Denaglen.

Factual issues existed as to the amount of the benefit that Plaintiffs received from the monies that went to the Willis Defendants and how much money the Willis Defendants were entitled to receive under their agreements with Plaintiffs. In view of the factual issue as to the amount of damages recoverable by Plaintiffs, it was improper for the trial court to award judgment to Plaintiffs without a trial on the issue of damages. See *American State Bank v Union Planters Bank, NA*, 332 F3d 533, 538 (CA 8, 2003), applying UCC 3-420(b) and holding that summary judgment was inappropriate in a check conversion case where a factual issue existed as to the amount of actual harm suffered by the payee as a result of the conversion of checks.

The trial court clearly erred in holding that Plaintiffs were entitled to recover judgment

against Denaglen and the Willis Defendants for the face amount of the checks and that no trial was necessary on the issue of damages. There is no good reason for reviewing the reversal by the Court of Appeals of the trial court's determination that the Defendants were liable under MCL 339.2412(1) for the amount of all insurance checks cashed.

VI. Reducing Plaintiffs' Damages To Reflect the Benefit That Plaintiffs Received Would Not Have Constituted the Impermissible Pursuit of Setoff by Defendants.

In this case, Plaintiffs have attempted to achieve a windfall for themselves by retaining the benefit of the cleanup and restoration work that the Willis Defendants provided to them and by arguing that the damage award for conversion should be in the face amount of the checks, without any reduction in the damage figure to reflect the benefits that Plaintiffs received from the work. Plaintiffs are incorrect when they contend that, in assessing Plaintiffs' damages, taking into account the value of the work provided by the Willis Defendants amounts to an impermissible pursuit of a setoff by Defendants, contrary to the terms of MCL 339.2412(1).

There is no precedential Michigan authority holding that the value provided by the unlicensed builder cannot be taken into account in determining the amount of the homeowner's damages where the homeowner alleges that the builder has been overpaid on the job. *Roberson Builders, Inc v Larson*, 482 Mich 1138; 758NW2d 284 (2008), relied upon by Plaintiffs, merely involves a concurring statement relating to the denial of an application for leave to appeal and does not constitute precedent. Furthermore, the concurring statement merely indicated that an unlicensed builder could not use a claim for extras not included in the parties' written contract as a setoff to reduce the damages otherwise due to the homeowner for breach of contract. In this case, Defendants are not asserting a claim for monies for the purpose of setting off the claim against Plaintiffs' damages. Instead, Defendants are

showing that Plaintiffs have not been damaged at all because Plaintiffs received what they bargained for at the price agreed to between Plaintiffs and the Willis Defendants.

The dissenting statement of Justice Markman (joined by Justice Cavanagh) in the *Roberson Builders, supra*, case in the Michigan Supreme Court provides a very cogent and convincing explanation why an unlicensed builder can use defensively a claim for benefits conferred on a plaintiff to reduce or defeat the plaintiff's claim for damages arising in the same transaction. First, that statement correctly pointed out that a claim raised defensively and arising out of the same transaction on which plaintiff is suing is properly labeled as a "recoupment." Justice Markman observed that MCL 339.2412(1) only bars "actions" by unlicensed builders seeking affirmative monetary recovery and does not limit the builder's right to raise a recoupment defense to eliminate or reduce a damage claim asserted by a plaintiff against the builder. Certainly, a strictly defensive matter such as a recoupment would not fall within the concept of an "action" as that term is used in MCL 339.2412(1). Justice Markman appropriately used the following quote from *Parker v McQuade, supra*: "The statute removes an unlicensed contractor's power to *sue*, not the power to defend. [MCL 339.2412] was intended to protect the public as a shield, not a sword."

Morris v Achen Const Co, Inc, 155 Ariz 507; 747 P2d 1206 (Ariz App 1986), rev'd in part on other grounds, 155 Ariz 512; 747 P2d 1211 (1987), supports the proposition that an unlicensed builder can use a recoupment claim to reduce or eliminate a customer's damage claim where the recoupment arose out the same transaction. In that case, the builder's unlicensed status barred its affirmative claim seeking to recover moneys from the customer. However, with respect to the customer's breach of contract claim, the builder was able to raise a recoupment defense based on unpaid amounts owing to the builder under the same contract. While the customer proved breach of contract damages of \$16,500.00 for work not properly performed by

the builder, those damages were reduced by the sum of \$18,437.19 that remained unpaid to the builder under the parties' contract—leaving the customer with recoverable damages of zero in the case.

Even if the *Roberson Builders* opinion in the Court of Appeals is viewed as stating the law in Michigan, the rule of that case does not apply here. In *Roberson Builders*, the setoff raised by the builder involved a claim outside of the four corners of the contract between the builder and the homeowner. The builder's setoff claim arose out of a separate oral contract for extras provided to the homeowner. While the builder could not use its claim under that separate oral contract to reduce the homeowner's damage claim, there was no dispute that the builder could demonstrate what valuable services had been performed under the main contract in an effort to rebut the homeowner's proofs on damages. In the present case, the Willis Defendants should have been allowed to present evidence at trial of the value of the work performed under the parties' contract in order to demonstrate (1) that there was no breach of contract by the Willis Defendants and (2) that little or no damages had been suffered by the Plaintiffs with respect the contracts made with the Willis Defendants. Defendants were not attempting to use a claim from a separate transaction to reduce or eliminate Plaintiffs' damage claim. Accordingly, the rule applied by the Court of Appeals in *Roberson Builders* has no applicability to the present case.

Defendants have contended that Plaintiffs have suffered no damages because proper cleanup and restoration services have been performed by the Willis Defendants under their contracts. Plaintiffs mischaracterize Defendants' contention as being an attempt to pursue a setoff against Plaintiffs' claim seeking recovery of the face amount of the checks. Under Michigan law, Plaintiffs have no automatic right to recover the face amount of the checks, as established earlier in this answer to the cross-application. Plaintiffs were not entitled to recover monies in this case without proving to a jury (1) the existence of breaches of contract by the

Willis Defendants and (2) the extent of their damages from the alleged breaches. Obviously, Defendants would be permitted to rebut Plaintiffs' testimony and proofs as to damages by showing the extent, quality and value of the work performed for Plaintiffs. For Defendants to present their evidence of Plaintiffs' lack of damages does not constitute the assertion of a setoff claim and would not be affected by the holding in *Roberson Builders*. Clearly, the trial court erred in holding that a trial was not necessary to determine Plaintiffs' damages in this case.

The trial court denied essential due process to Defendants in not allowing them to present to a jury evidence of the appropriateness and value of the services performed for Plaintiffs. If Plaintiffs' interpretation of *Roberson Builders* is to be followed in Michigan, then a rule of law has been created which "deprives unlicensed builders of even the most basic opportunity to defend themselves in a court of law *and* opens the door to extraordinarily unfair exercises in gamesmanship by those who might sue an unlicensed builder." Dissenting statement of Justice Markman in *Roberson Builders* at 482 Mich 1143. Fortunately, Plaintiffs' view of *Roberson Builders* is not the law and it is clear that the trial court erred in failing to hold a jury trial in which Defendants could present evidence bearing on Plaintiffs' lack of damages. Accordingly, the trial court's determination of liability under MCL 339.2412(1) was correctly reversed by the Court of Appeals.

VII. The Trial Court Erred In Rendering A Money Judgment Against Defendant Denaglen Pursuant to Plaintiffs' Motions for Summary Disposition Because Denaglen Was Entitled to A Jury Trial on The Issue of Damages Without Any Exclusion of Evidence of Benefits Received by Plaintiffs.

Even though Defendant Denaglen's default was entered in this case, Denaglen was entitled to have a jury trial on the issue of damages and to present evidence on the issue of damages. While a default is treated as establishing the fact of liability under a well-pleaded complaint, it does not waive the defendant's right to a jury trial on damages where factual issues

exist as to the amount of damages and where the plaintiff or defendant has demanded a jury trial. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554; 620 NW2d 646 (2001). *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 583; 321 NW2d 653 (1982). Where factual issues exist as to the amount of damages, MCR 2.603(B)(3)(b) requires that the defendant's constitutional right to a jury trial be observed. In this case, Plaintiffs had demanded a jury trial when it filed its complaint. Under MCR 2.508(D)(3), that jury demand could not be withdrawn without the consent of all parties expressed in writing or on the record.

As previously demonstrated, factual issues exist in this case as to the appropriate amount of damages with respect to Plaintiffs' conversion claim against Denaglen. MCL 440.3420(2) [UCC 3-420(b)] limits Plaintiffs' conversion damages to the amount of Plaintiffs' interest in the checks. Where the plaintiff-payee has benefited from the use made of the check proceeds, the value of that benefit must be taken into account. The amount of the benefit can be used to reduce or eliminate any damage assessment in favor of the plaintiff-payee, as commentators and case authorities have indicated. The implication of UCC 3-420(b) is that a plaintiff-payee suing for conversion should not receive damages greater than the amount of his actual injury. See Argument Section V above of this answer.

In this case, Defendant Denaglen was prepared to show that Plaintiffs had little or no damages because (1) Plaintiffs had no interest in the checks due to the assignment of the check proceeds to the Willis Defendants and (2) the agreed price and value of the services received by Plaintiffs came close to, or exceeded, the face amount of the insurance settlement checks used to fund that work. Obviously, Plaintiffs derived benefit from the restoration work that was paid for with the funds from the insurance checks cashed by Defendant Denaglen. Only if Plaintiffs derived no benefit or value whatever from the cleaning and restoration work could it be said that Plaintiffs had damages equal to the face amount of the checks.

Plaintiffs argue that MCL 339.2412(1) bars the consideration of the value of the work done by the unlicensed builder. However, that argument had no application to Defendant Denaglen. Denaglen had committed no licensing violation and was not aware of the revocation of Defendant Willis's license as a builder when it cashed the insurance settlement checks. However harshly Plaintiffs contend that the Willis Defendants should be treated, there is no logical reason why Denaglen should have been barred from showing at a trial that Plaintiffs had little or no actual damages from the cashing of the checks when the benefits received by Plaintiffs from the cleanup and restoration services were taken into account. It is illogical to impose a loss of \$128,047.23 upon Denaglen so that Plaintiffs can have a windfall by retaining the benefit of the cleaning and restoration services and also recover all of the insurance settlement amounts paid out to obtain those services.

From a legal standpoint and a common-sense standpoint, Plaintiffs did not have any significant damages from the transaction in which insurance checks were cashed to fund the restoration services at Plaintiff's home. Even if the statute somehow imposes a forfeiture upon the Willis Defendants because of their unlicensed status, there was no reason legally why the burden of that forfeiture should be placed on Defendant Denaglen to any extent. Any damages assessment against Denaglen should have been limited to any actual injury proved by Plaintiffs, after weighing the benefits received by Plaintiffs. As a party that is not covered by MCL 339.2412(1), Denaglen was not burdened with any restrictions as to evidence it could present to the jury as to the benefits received by Plaintiffs.

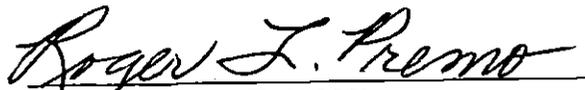
It is clear that the trial court erred by holding that Denaglen was liable to Plaintiffs, based on MCL 339.2412(1), in the face amount of the insurance checks without conducting a jury trial on the issue of damages. Accordingly, the portion of the opinion of the Court of Appeals reversing the determination of liability under MCL 339.2412(1) was correct and Plaintiff's cross-

application of leave to appeal with respect to the determination of liability under MCL 339.2412(1) should be denied.

RELIEF REQUESTED

Defendants-Appellants Denaglen Corp., Troy Willis, 4 Quarters Restoration, LLC, and Emergency Insurance Services request that this Court deny Plaintiffs' cross-application for leave to appeal and grant Plaintiffs' application for leave to appeal.

Respectfully submitted,



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