STATE OF MICHIGAN

IN THE SUPREME COURT

DANNY EPPS and JOYCE EPPS,

Plaintiffs-Appellees
and Cross-Appellants,

v

4 QUARTERS RESTORATION, LLC, TROY WILLIS, EMERGENCY INSURANCE SERVICES, and DENAGLEN CORP, d/b/a MBM CHECK CASHING, jointly and severally,

Defendants-Appellants
and Cross-Appellees.

Supreme Court No. 147727

COA Docket No. 305731

Wayne County Circuit Court
No. 09-018323-NO

PLAINTIFFS' SUPPLEMENTAL "MOAA" BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

POSNER, POSNER AND POSNER
By: Gerald F. Posner – P 24269
Attorneys for Plaintiffs-Appellees/
and Cross-Appellants
1400 Penobscot Building
Detroit, MI 48226
(313) 965-7784

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STATEMENT OF SUPPLEMENTAL QUESTIONS INVOLVED

I.

BECAUSE DEFENDANT CONTRACTORS WERE UNLICENSED, AND MISREPRESENTED TO PLAINTIFFS THAT THEY WERE LICENSED, THE ENTIRE CONTRACT, INCLUDING THE LIMITED POWER OF ATTORNEY, WAS VOID, NOT JUST VOIDABLE, UNDER ESTABLISHED MICHIGAN LAW, LEAVING THE DEFENDANTS NO LEGAL AUTHORITY TO HAVE TAKEN THE $128,047.23 IN CHECKS MADE PAYABLE TO THE PLAINTIFFS, SIGNED THE PLAINTIFFS' NAMES, AND USE THOSE FORGED/ LEGALLY UNAUTHORIZED ENDORSEMENTS TO CASH THE CHECKS AND POCKET THE MONEY.

II.

PLAINTIFFS WERE ENTITILED TO JUDGMENT BASED ON THE $128,047.23 FACE AMOUNT OF THE CHECKS AND WERE NOT REQUIRED TO ESTABLISH ANY OTHER "ACTUAL DAMAGES" OVER AND ABOVE THE FACE AMOUNT OF THE CHECKS PAYABLE TO THEM WHICH THE DEFENDANTS TOOK, CASHED, AND RETAINED.

PREFACE

Defendants-Appellants filed an application for leave to appeal in this case, and plaintiffs filed an application for leave to appeal as cross-appellants, asking for relief only in case the defendants were granted leave to appeal. On 6-13-14, this Court issued an Order for a "MOAA" and supplemental briefing:

> On order of the Court, the application for leave to appeal the June 6, 2013 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants are considered. We direct the Clerk to schedule oral argument on whether to grant the application for leave to appeal or take other action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the contracts and limited power of attorney at issue are void or merely voidable, and whether the plaintiffs are required to establish actual damages to recover on their breach of contract and fraud/misrepresentation claims. The parties should not submit mere restatements of their application papers.
>
> Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.
>
> The application for leave to appeal as cross-appellants remains pending.

Plaintiffs are, accordingly, filing this brief as a *supplemental* brief, shall not repeat in detail the Statement of Facts set forth in their answer to defendants' application or in their cross-application, and shall only restate the law contained in their application papers as is necessary to address the above questions, and then supplement that law with additional law and argument.

In addition, plaintiffs are taking to heart what a number of members of this Court emphasized at the last Appellate Bench-Bar Conference, that by the time this Court has decided to take a look at the issues raised in a case, the Court is less concerned with the particular client's case than it is with the big picture, the overall legal issues, the effect on the jurisprudence of this State, and the practical effect which a decision on an issue can have. Thus, after setting forth the

law and initial argument on each issue, plaintiffs will be setting forth a separate section entitled "The Big Picture" in an attempt to address those very concerns.

Plaintiffs note that the discussions on the big picture on each issue are necessarily interrelated. Should, for example, this Court consider changing the clearly established law that a contract entered into by an unlicensed contractor is void, and instead hold that it is voidable, meaning that the contract is effectively valid until the crook, operating in violation of both the licensing statutes and the criminal law, is discovered and caught, this would give a crystal clear blueprint to how an unlicensed contractor can operate illegally with impunity, and laugh all the way to the bank. Likewise, should this Court now place significant impediments and burdens upon the victims and their insurers to obtain relief, by requiring a victim or the victim's insurer to prove "actual" damages over and above, as here, the face amount of the checks made payable to the plaintiffs which defendants forged and then took the money, and by defining "actual" damages in a manner so that the victim and his insurer remain victimized and the criminal retains his spoils, the blueprint for the unlicensed contractor to follow will be enhanced and refined, with the result that the public policy in this state designed to protect its citizens will be effectively gutted. And a decision in favor of defendants on either issue will have severe adverse impact upon the thousands of law abiding, licensed contractors, who have to operate within the law, who have to answer to licensing authorities should they receive a complaint for shoddy workmanship, and who are undercut and lose business to the unlicensed contractors who do not have to operate under the same rules.

Furthermore, a decision in favor of defendants on either issue will have broad implications regarding many other services for which a license is required, for example, payments made for services illegally performed by a person posing as a doctor, or one whose

license has been revoked, who then say that those monies cannot be recovered because the money was paid before they were found out, or because the patient actually benefited from the illegally rendered service.

SUPPLEMENTAL STATEMENT OF FACTS

As previously stated, plaintiffs rely upon their Statement of Facts in their answer to defendants' application for leave to appeal and in plaintiffs' application for leave to appeal as cross-appellants, and are supplementing those Statements as set forth below.

Certain facts will be highlighted below, as plaintiffs believe that they are relevant to the discussion of the issues upon which this Court has requested supplemental briefing. In addition, plaintiffs believe that these facts only serve to emphasize that this case is not an appropriate vehicle for this Court to employ in order to author any tome or seek to change or alter what has been the established law in this State. Bad cases may make bad law, and there is no reason for this Court to intervene in this case where the facts against the defendants are overwhelming so that no relief whatsoever is warranted.

Plaintiffs believe that it is first important to recognize who the parties are, since not only are the plaintiffs innocent parties, but the unlicensed contractor defendants are in a different posture and legal position than the defendant check cashing company, which, by virtue of its default, has admitted that it acted in combination and conspiracy with the contractor defendants, assisted and aided Willis in converting and embezzling the funds belonging to the plaintiffs, acted in bad faith, and with lack of reasonable commercial standards.

And because this Court is considering whether to consider the contract voidable rather than void, which would give the defendant contractors the benefit of their illegal transaction until they were found out and caught, it is important to remember just what lengths they went to in order not to be discovered; their fraud goes far beyond merely misrepresenting their licensing status, but permeates the entire action.

The plaintiffs. The plaintiffs are completely innocent parties in this action. There is no suggestion whatsoever that they knew that the defendant contractors were unlicensed, or that they intended to rely upon the unlicensed contractor statute to have work done and not pay, or that they were *in pari delicto* or *in pari criminis* with the unlicensed contractors.

They did not know what checks had been issued by the insurance company and their mortgage company. Only when they started to make inquiries when the work was not complete[1] and not done right did they discover, to their shock and dismay, how much had been paid and that Willis had forged their names to the checks.

The extent of Willis's misdeeds only became known after suit was filed and discovery was conducted, including the phony second claim Willis made in plaintiffs' name, and then took the money for. Willis admitted that there was never any contract for that claim, no power of attorney, and the plaintiffs never saw any estimate or signed off on it. Willis also admitted that for the vast, vast majority of the "extra" work he claims he did, there was no contract at all, no power of attorney, and, again, the plaintiffs never saw any estimate or signed off on it.

The plaintiffs are not wealthy individuals. They do not have the funds to pay a contractor to rip out what the unlicensed contractors did and redo it. They do not have the funds to pay an attorney on an hourly basis to attempt to recover anything if the interpleader funds are not recovered; in fact, such an attempt would be useless anyway, since the unlicensed contractors have spent the money long ago, are out of business, and have nothing.

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[1] For example, Joyce Epps stated in her affidavit that "Willis and his companies did some work, but never completed the work. Much of the work he did do was poorly done, we still have damage, and there are leaks. For example, the bathroom was not done, the shower was not completed, the hot water tank was left in the middle of the room and not connected, and the new furnace was not properly installed and does not work properly; Willis fired the furnace company and decided to do it himself. No permits were pulled, and no city inspections were done."

And those unlicensed contractors caused them even more damage. Under the watchful eye of Charles Willis, brother of defendant Troy Willis, co-owner of some of the businesses, and foreman of the job on plaintiffs' home, defendants had defendant Maximum Restoration pick up a great amount of plaintiffs' personal in order to "restore" it property (there was a 37 page inventory, the pink carbon copies of which were found in defendant contractor's files). But because Maximum Restoration's bills sent to Charles Willis were never paid, they never returned the property and then went out of business. An uncollectible default judgment against Maximum in the amount of $33,958 was entered on 7-29-11.

Plaintiffs' insurer. The insurer used an outside adjuster (who was undoubtedly in cahoots with the defendant contractors, as discovery as to other claims involving the defendant contractors and the same adjuster revealed). The insurer did not know the defendants were unlicensed. The insurer did not know it was paying for work not done, or that the last claim was not valid, or that Willis was forging the plaintiffs' names onto certificates of completion and satisfaction of work performed.

Insofar as the insurer would be entitled to any of the funds being held by virtue of the order of interpleader, to any of the check proceeds or to the return of monies paid for work not performed or to be repaid for a fraudulent claim, all of those rights were assigned in writing to the plaintiffs and the plaintiffs have succeeded to those rights.

The unlicensed contractors.

This is not, and never has been, a simple case where an unlicensed contractor told the homeowners he was licensed, did all the work, the homeowners voluntarily paid the defendants out of their pocket and then, when they found out the contractor was unlicensed, sued to get their money back. It is a case in which the plaintiffs claim that the defendants, who misrepresented

their licensed status to the plaintiffs, then, without plaintiffs' knowledge, and without legal authority, signed the plaintiffs' names to the checks, which were made payable only to the plaintiffs, and took the money, thus wrongfully obtaining the funds.

Because this Court is apparently considering whether to overrule prior precedent so as to consider the contract voidable rather than void, which would give the defendant contractors the benefit of their illegal transaction until they were found out and caught, it is important to remember just what lengths the defendants went to in order not to be discovered; their fraud goes far beyond merely misrepresenting their licensing status, but permeates the entire action. The level and nature of fraud committed by the defendants was pervasive and their acts were designed to prevent the plaintiffs from learning what was going on and to eliminate their ability to take any action or seek any remedy until the defendants, together with plaintiffs' money, were long gone. Thus plaintiffs want to "bullet point" a few matters so this Court can see the nature and extent of the scheme.

- Willis and his companies were unlicensed contractors; in fact, Willis's license had been revoked on 1-31-06, after multiple disciplinary actions.

- The contractor defendant misrepresented himself as a licensed contractor in order to convince plaintiffs to hire him. Willis showed the plaintiffs' a book of his work which had a copy of his license in it. The contract consisted of three papers, one of which was an "Insurance Power of Attorney" on EIS letterhead which affirmatively stated "Licensed Residential Builders #2101157151", when the license had in fact been revoked.

- That document contains a false notary from Willis's wife who was not present when the document was signed.

- The plaintiffs testified and stated in their affidavits that they never would have hired the contractors if they knew they were unlicensed.

- Willis used the contract with the falsified notary to immediately instruct the insurance company to send all checks directly to him in order to hide all payments from the plaintiffs. It worked; the plaintiffs never knew what checks had been issued and what money Willis had taken until Willis was long gone.

- On 9-8-06, Willis met with the Epps at their home. They signed a contract for $4,245 in additional work (the only contract for any additional work they ever discussed and signed) and he gave some money to them, together with a document which falsely stated that there would be $15,000 for contents replacement, but that there was just $7,500 now, and so Willis subtracted half of the extra construction amount, and gave the Epps $5,377.32 in cash; Willis testified that the $7,500 was actually "a gift to them".

- But Willis had already received – and cashed after signing plaintiffs' names – a $46,443.34 check that very same day, but "chose not" to tell plaintiffs about it because "it didn't involve them".

- The pattern was to continue. All of the checks went to Willis, Willis forged the plaintiffs' names to the checks without their knowledge and consent, and Willis took the money.

- Willis cashed all of the checks upon which he signed plaintiffs' names, a total of $128,047.23, at defendant MBM Check Cashing for which they charged him around 3%, rather than going to a bank, like a legitimate contractor.

  That is not surprising, since no bank would cash those checks. Plaintiffs' counsel also banks at Comerica, and can assure this Court that if he walked into the bank with a check made payable to his clients, signed the check and tried to cash it, Comerica would never cash it – not for $10, much less over $128,000.

- Out of the $46,443.34, Troy Willis said that he allocated (and took) $36,047.07 for additional contracting work on the plaintiffs' home, but there was no contract for that work, no power of attorney, no written document authorizing any additional work at all, and the Epps never saw any estimate Willis prepared, nor agreed to it or signed off on it.

  Of course, that is an admission that there had been no contract for any such additional work or if no such work was ever done by Willis, then the $36,047.07 belonged to the plaintiffs.

- Willis claimed that the $46,443.34 was to clean and restore contents, but Willis also supplied the bill he allegedly paid to Elegant Dry Cleaners for the same work – in the amount of $13,277.70. Another fraud -- the address of Elegant Dry Cleaners is the same address as 4 Quarters (and is not a cleaners). Note that many of the items were unusable, the amounts to clean were often more than the purchase price, items were listed twice, and the items had tags from the $1.89 cleaners instead of the huge amounts charged.

- Willis never pulled any permits. Permits are, of course, required for the protection of the public from poor workmanship and work not up to code.

  That Willis never pulled any permits is not surprising, *since this would have revealed to the Epps that the contractor was unlicensed.*

  See, e.g, Bernard F. Hoste, Inc v Kortz, 117 Mich App 448, 449-450; 324 NW2d 46, 47 (1982):

  > On May 17, 1976, plaintiff applied for a building permit to the City of St. Clair Shores. The city refused to issue the permit because plaintiff did not have a valid residential builder's license.

- On two inspections by Countrywide, defendant Willis posed as Danny Epps. The phone number for Danny Epps and Joyce Epps on the forms is *Willis's* number, and Willis admits that he signed Danny Epps' name as mortgagor, indicating *his* satisfaction with *his own work.*

- In order to get money released by Countywide, it was necessary for the homeowner to sign a Certificate of Completion of Repairs. Willis forged Joyce Epps' signature to it, then got the checks sent to him. He forged the plaintiffs' signatures, and cashed all checks at MBM.

- In order to get money released by the insurer, it was necessary for the homeowner to sign an Affidavit of Completion by Owner. Willis forged the signatures of the plaintiffs on it, even adding on "Great job! Thanks", admitted to putting a false notary on it (he signed it, not his wife), and used it to get checks sent to him upon which he forged the plaintiffs' signatures and cashed at MBM.

- Not content with the amount of money he had already taken from the Epps, Willis posed as Danny Epps and made a subsequent claim with a date of 9-6-06 for "roof damage", a claim that plaintiffs testified they had no knowledge of. In the insurance agent's email, the phone number listed for Danny Epps is once again *Willis's* number, clearly explaining who in fact was the caller and made the claim. That email also says that Mr. Epps said that the roof was two years old, but both plaintiffs testified that the roof had just been put on that spring and identified who put it on.

  For that "claim" Willis admitted that there was no work authorization, no power of attorney, or any other agreement to perform work for a claim with the date of loss 9-6-06, and plaintiffs never saw any estimate or signed off on it.

  Willis claimed that he did work on the house, and was paid $20,682.80. Again the check payable to the Epps was sent to Willis. Once again he signed the plaintiffs' names to the check without their knowledge and consent, cashed the check at MBM Check Cashing, and took the money.

- There was massive fraud committed by Willis in these claims, all part of the same pattern and practice designed to obtain checks payable to the Epps without their knowledge and consent, keep the Epps in the dark, forge their names to the checks, cash the checks at the check cashing company, and take the money.

  While there is not space to detail the extent of the fraud committed by the contractor defendants, plaintiffs' counsel wishes to give this Court a example so that this Court will see even more why the case of the unlicensed contractors and their co-conspirator check cashing company is not worthy of this Court's intervention nor an appropriate vehicle for development of the law.

  The defendant contractors falsified large estimates from an electrical contracting company; they also did similar stunts with other contractors. The electrical contractor had performed a small amount of legitimate work. It supplied an estimate and bill on its letterhead with a logo, a certain type of print, was signed by the contractor, and had the contractor's license number on it. The bogus estimate for $12,360 to replace the entire electrical service had no logo, was in the same typestyle and print that came off of Willis's printer for many "estimates" and was different print than the legitimate one, did not contain the contractor's license number, and misspelled contractor as "contactor". It was "legitimized" by virtue of a second estimate provided *by Charles Willis*, who is not a licensed contractor either.

  Then the very same bogus estimate for $12,360 for the exact same electric work – verbatim but redated – which was submitted *before* the date of the second alleged claim, was submitted again for the second claim; same no logo, not signed, no license number, and "contactor", and approved by virtue of a second estimate provided by Charles Willis.

  It was paid for twice, but the work was never even done once. The plaintiffs' still have their original electrical service.

  To make matters worse, these same unlicensed contractors pulled the same stunt, with the help of the same insurance adjuster, on the claims of other people, as found in the insurer's files during discovery. Same no logo, not signed, no license number, and typo "contactor", and approved by virtue of a second estimate provided by Charles Willis, acting on behalf of yet another company.

And, as to the interpleader funds, plaintiffs' counsel reminds this Court that the unlicensed contractor can have no claim to them since they were already paid the entire amounts of the checks (minus MBM's cut) and retained the monies.

The check cashing company. The defendant check cashing company is not an innocent party, as a holder in due course or otherwise. It is critical to understand what it has admitted by virtue of its default. It has admitted that it acted in combination, concert and conspiracy with the contractor defendants (Complaint, ¶18). It admitted that it guaranteed the checks and guaranteed that the indorsements of plaintiffs were genuine and proper (¶56). It has admitted that it wrongfully paid the checks and distributed the funds on the forged indorsements, in contravention of Michigan law, including, but not limited to, the applicable provisions of the UCC (¶57). It has admitted that it converted the instrument and funds and/or assisted and aided Troy Willis in converting and embezzling the funds belonging to the plaintiffs (¶57). It has admitted that it was negligent in paying the check and funds and wrongfully paid the check and funds (¶57). And it has admitted that it acted in bad faith, and with lack of reasonable commercial standards (¶58).

That is the posture of this case as it pertains to the check cashing defendant.

Interpleader. And it is also important to recognize the position of not only the unlicensed contractor defendants, who have already been paid the amount of the checks, but also the check cashing defendant with respect to the monies being held in interpleader which, as a practical matter, are really the only funds available in this case. Those interpleader funds belonged to Comerica, not Denaglen/MBM, the check cashing company. Comerica interpled those funds and paid them into court. That they may have been taken by Comerica from MBM's account pursuant to the terms of a contract between Comerica and MBM is of no moment or concern *in this case*. That was and is a matter between Comerica and MBM. If Comerica did not properly take the funds, then MBM should have filed a claim against Comerica. Not only is there is no such claim between them in the instant case, but the Order for interpleader, to which

MBM agreed, specifically discharges Comerica from any liability to MBM with respect to the holding, freezing, setting off and/or debiting MBM's account at Comerica. In addition, MBM signed a release in which it released Comerica from any such liability (Mutual release between Comerica and Denaglen, pages 3-4, ¶6 of the omnibus Settlement Agreement and Release in conjunction with the interpleader).

In addition, the interpleader Order also provides, ¶F, that "The rights of all remaining parties to some or all of the Interpleader Fund shall be determined pursuant to a procedure established by the Court." The trial court did not find it necessary for the parties to file claims and cross-claims against each other to establish their rights to the funds, but was able to determine that plaintiffs were the only parties legally entitled to the funds.

Also note that with respect to the interpleader funds, the plaintiffs were acting both in their own right and as assignees of their insurer. The order of 7-13-11 dismissing the insurers also provided that:

> IT IS HEREBY ORDERED THAT Danny Epps and Joyce Epps, as Assignees of Auto-Owners Insurance Company and Home-Owners Insurance Company be, and they hereby are substituted as party defendants in the place and stead of defendants Auto-Owners Insurance Company and Home-Owners Insurance Company in both the principal action and the interpleader action.
>
> . . . .
>
> IT IS FURTHER ORDERED THAT this Order shall have no effect whatsoever on and shall not extinguish any claim or right which Auto-Owners Insurance Company and/or Home-Owners Insurance Company or their assigns may have to any portion of the $128,047.23 Interpleader Fund being held in escrow as a result of the Interpleader Complaint and First Amended Interpleader Complaint filed by Comerica Bank in this case, and the Order & Judgment Granting Comerica Interpleader Relief and Discharging Comerica Bank With Prejudice entered by this Court on May 28, 2010 which rights Auto-Owners Insurance Company and/or Home-Owners Insurance Company have assigned to plaintiffs Danny Epps and Joyce Epps in consideration for this Dismissal.

ARGUMENT

I. BECAUSE DEFENDANT CONTRACTORS WERE UNLICENSED, AND MISREPRESENTED TO PLAINTIFFS THAT THEY WERE LICENSED, THE ENTIRE CONTRACT, INCLUDING THE LIMITED POWER OF ATTORNEY, WAS VOID, NOT JUST VOIDABLE, UNDER ESTABLISHED MICHIGAN LAW, LEAVING THE DEFENDANTS NO LEGAL AUTHORITY TO HAVE TAKEN THE $128,047.23 IN CHECKS MADE PAYABLE TO THE PLAINTIFFS, SIGNED THE PLAINTIFFS' NAMES, AND USE THOSE FORGED/LEGALLY UNAUTHORIZED ENDORSEMENTS TO CASH THE CHECKS AND POCKET THE MONEY.

This Court has requested supplemental briefing on the issue addressing whether the contracts and limited power of attorney at issue are void or merely voidable. This is not uncharted territory, but an issue upon which there is controlling Supreme Court precedent, precedent which is consistent with Michigan Supreme Court decisions for over a century.

The controlling precedent is this Court's decision in *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002). The *Stokes* decision made it crystal clear that a contractor who is unlicensed at the time the contract is entered into and the work is performed is barred from collecting any compensation from the homeowner, either for materials or labor, no matter what theory is pled, whether the theory is legal or equitable, and even if the homeowner is unjustly enriched. The entire contract is indivisible, and cannot be bifurcated, and, quoting its prior decision in *Bilt-More Homes, Inc v French,* 373 Mich 693, 699; 130 NW2d 907 (1964), this Court held, *supra* at 672, 130 NW2d at 377 (emphasis added):

> **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.

Plaintiffs' counsel is at a loss to see how the law could be any clearer.

Thus **the entire contract** between the plaintiffs and Willis and his companies, those three pages constituting the entire contract consisting of both the work authorizations **and the related "Insurance Power of Attorney"** by virtue of which Willis claims he had the right to sign the plaintiffs' names to the checks, "**are not only voidable but void**"; further, under *Stokes*, Willis was and is not entitled to one penny of the proceeds of the checks.

Because **the entire contract is void,** not just voidable, **this means that the Insurance Power of Attorney**, which was part of the contract, and which is the only document upon which the defendants claim that Willis had the authority to sign the plaintiffs' names to the checks made payable to them, **is also void**, as is the "Work Authorization" upon which defendants now claim that the insurance proceeds were assigned to them, and therefore these void documents gave him no authority whatsoever to the funds or to endorse the plaintiffs' names to the checks and collect the money. The endorsements, without legal authority, are therefore forged, and defendants are liable to plaintiffs on the forged endorsements.

The Court of Appeals was 100% correct in holding (emphasis added):

> **"Where a license or certification is required by statute as a requisite to one practicing a particular profession," and a party enters a contract without possessing the required license, <u>the contract is void</u>.** *Wedgewood v Jorgens*, 190 Mich 620, 622; 157 NW 360 (1916) (quotation marks and citation omitted). **"[C]ontracts by a residential builder not duly licensed are not only voidable but void."** *Bilt–More Homes, Inc v French*, 373 Mich 693, 699; 130 NW2d 907 (1964).

As will be seen, the controlling principle of law is over a century old. Defendants' argument, necessary for defendants to escape binding precedent, is that void does not really

mean void, that the Supreme Court erred in case after case in which it used the term void since it really meant to use the word voidable. But this Court meant what it said; its language in *Stokes* and *Bilt-More* certainly could not have been clearer. Void means void. Arguing that void does not really mean void but only means voidable in some respects is like being a little bit pregnant. It reminds us of that infamous presidential deposition testimony "It depends on what the meaning of the word 'is' is." (And we all know how well that argument was received.)

Nor does defendants' argument that void only means unenforceable, and unenforceable really means voidable, not void, withstand analysis any better. Of course a void contract is unenforceable. That comes with the territory and definition of a void contract. Stating in an opinion that a contract is void and unenforceable is a truism. It is not void *or* unenforceable, and adding unenforceable to the term void does not mean that the contract is really voidable rather than void. Definitions in Black's Law Dictionary (9th ed. 2009), state:

> ***void contract.*** (17c) A contract that is of no legal effect, so that there is really no contract in existence at all. • A contract may be void because it is technically defective, contrary to public policy, or illegal.
>
> ***void ab initio*** (ab i-nish-ee-oh). (17c) Null from the beginning, as from the first moment when a contract is entered into. • A contract is void ab initio if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract.
>
> ***null***, adj. (16c) Having no legal effect; without binding force; void <the contract was declared null and void>. • The phrase null and void is a common redundancy.

Under established Michigan law, a contract entered into without the required license required by statute is in fact void, and void *ab initio*. It squarely fits into that definition, because it is illegal, offends law, and is contrary to public policy, as many cases have stated.

On the other hand, the Black's definition of voidable states:

> ***voidable***, adj. (15c) Valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. • This term describes a valid act that may be voided rather than an invalid act that may be ratified.

Entering into a contract without the statutorily required license is not a valid act but an invalid and illegal act in contravention of statute, and does not fit within the definition of voidable. A contract made by an unlicensed contractor is not "a valid act that may be voided" but is unquestionably "an invalid act that may be ratified", and thus, by definition, is not voidable, but void.

Let us go back to the 1917 case of *Detloff v Hammond*, 195 Mich 117, 136 (1917), in which this Court clearly stated (emphasis added; citations omitted):

> **A contract is void if it contemplates acts that are illegal or contrary to public policy. A contract which in its execution contravenes the policy and spirit of a statute is equally void** as if made against its positive provisions.
>
> **We are impressed with the claim that the agreement in question was void *ab initio*, because opposed to public policy and express statute.**

The principle that any contract in violation of a regulatory statute requiring licensing is void, not just merely voidable, has a long and storied history in Michigan jurisprudence. Even preceding the *Wedgewood* case cited by the Court of Appeals in the instant case, going back to 1910, to *In re Reidy's Estate,* 164 Mich 167; 129 NW 196 (1910), a case involving acts performed without the statutorily required pharmacist's license, the principle was firmly established:

> It is a well settled principle of law that **all contracts which are founded on an act prohibited by a statute under a penalty are void**, although not expressly declared to be so. *O'Donnell v Sweeney*, 5 Ala 467; 39 Am Dec 336. The same principle has been recognized by this court. *Niagara Falls Brew Co v Wall*, 98 Mich 158; 57 NW 99, and cases cited.

In the **1893** *Niagara Falls Brew Co* case, this Court stated, *supra* at 159 (emphasis added):

> It has been held by this court that a saloon keeper cannot recover for sales made by him before he has paid his tax and filed his bond. *Loranger v Jardine*, 56 Mich 518; 23 NW 203. It was there held that the liquor law was not enacted for the purpose of revenue only, but for the safety and protection of public morals as well; **and that a contract or sale made in violation of it was void**. The same was held in *Deering v Chapman*, 22 Me 488 [1843].

Loringer was an **1885** case. This Court stated, *supra* at 519-520 (emphasis added):

> Under the first section of the statute above referred to, the sale, without vendor files the statutory bond, is declared unlawful, but not, in language, void. I do not think, however, that this section was enacted for the purpose of revenue only, but for the safety and protection of public morals as well, and **therefore the contract of sale made in violation of its provisions would be void**. . . . a sale made contrary to the provisions of either of the sections referred **to is made a misdemeanor**, and punished by fine and imprisonment, **and therefore void**.

Likewise, our statutes provide that a person operating as a contractor without the required license is guilty of a misdemeanor. Under consistent precedent going back almost 150 years, the contract made without the requisite license **is void**, and void means void.

Let us quickly make short shrift of any argument that if plaintiffs are correct that the contract is void, then plaintiffs are without a remedy. Where, as here, plaintiffs are not *in pari delicto* or *in pari criminis* with the unlicensed contractors, declaring the contract void does not leave plaintiffs without a remedy as, again, long-standing precedent so holds. In *Groves v Jones*, 252 Mich 446, 449-451; 233 NW 375 (1930), a case which also cited *In re Reidy's Estate, supra*, this Court stated (in noncontiguous sections, emphasis added):

> 'It is a well settled principle of law that **all contracts which are founded on an act prohibited by a statute under a penalty are void**, although not expressly declared to be so.' *In re Reidy's Estate*, 164 Mich 167; 129 NW 196, 199; *Edward v Ioor*, 205 Mich 617; 172 NW 620, 15 ALR 256.

> It is also well established that money paid on a void contract, made in violation of a statutory provision where the parties are *in pari delicto* and *particeps criminis*, cannot be recovered; that the law will not lend its aid to either party, but will leave them where they have placed themselves. . . . .
>
> The court was right as to the law, but we think it was wrong in holding that the parties were *in pari delicto* and *particeps criminis*. The defendant sold these cattle to the plaintiff with full knowledge . . . The defendant did not tell him the truth. . . . The plaintiff was the innocent victim of defendant's fraud. . . . Clearly they were not *in pari delicto* or *particeps criminis*.
>
> Having determined that the parties are not *in pari delicto* in making a contract prohibited by the statute, **it follows that the plaintiff is entitled to recover on the common counts the money he paid** for the cattle. The rule is well stated in 6 R. C. L. p. 833, as follows:
>
> 'A distinction has been taken between those illegal contracts both parties to which are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly on one. Unless, therefore, the parties are *in pari delicto* as well as *particeps criminis*, the courts although the contract is illegal, will afford relief, where equity requires it, to the more innocent party, even after the contract has been executed.'

The principle that a contract made without the license required by the residential builders law is void was also recently upheld in *Lofts on the Nine, LLC v Akey*, COA#294825, 2011 WL 475458 (2011). There the trial court held a purchase agreement for a condominium was void due to the lack of a residential builders license, and the Court of Appeals affirmed, relying upon the case of *Brummel v Whelpley*, 46 Mich App 93; 207 NW2d 399 (1973), in which the court held such a contract "**Void** and unenforceable". That court had found it helpful to look at the interpretation of a similar Arizona statute in a case citing Michigan law, and had "**held that the contract was void**". The Arizona court in *Miller v Pima County Superior Court*, 8 Ariz App 420, 422; 446 P2d 699, 701 (1968) specifically looked to a Michigan Supreme Court case for guidance, *supra,* 207 NW2d at 401, in holding that the contract was **void** (emphasis added; italics in original):

> This statute has been construed by the Michigan Supreme Court. Justice Talbot Smith in *Alexander v Neal*, 364 Mich 485, 487; 110 NW2d 797, 798 (1961), quoted from *F. S. Bowen Electric Co, Inc v Foley*, 194 Va 92, 100; 72 SE2d 388, 393 (1952), as follows:
>
> **'(A) contract made in violation of a police statute enacted for public protection is *void*** and there can be no recovery thereon.' (Emphasis supplied.)
>
> **The contract in the present case is *void*** and unenforceable. The parties are in their same respective positions as before they entered into the void contract.

In *Alexander, supra*, this Court first quoted from the statute which was the predecessor to our current MCLA 339.2412(1), and noted that under statute, a violator could be subject to a criminal penalty; not only was it illegal for the Willis defendants to do the work as unlicensed contractors under MCLA 339.601(1), but under MCLA 339.601(3), the unlicensed contractor Willis was guilty of a misdemeanor, and the 2007 amendments increased the criminal penalties and fines.[2] It stated, 110 NW2d at 798 (emphasis added):

> Statutes and municipal ordinances similar in purport to the above are a commonplace in this country. ***The police power is thus employed to protect the public from incompetent, inexperienced, and fly-by-night contractors.*** In the case before us there is no challenge to the constitutionality of the statute, nor to the penalty for its violation here involved, namely, prohibition against action for collection of compensation, a not uncommon provision in such statutes. Even where the statute contains no such express prohibition, the courts frequently deny recovery on the ground that **'a contract made in violation of a police statute enacted for public protection is void . . . .'**

Also see, Maciak v Olejniczak, 79 F Supp 817 (ED Mich, 1948):

> The statute of Michigan, in order to safeguard and protect home owners, make it unlawful under penalty of criminal sanctions, . . . for any person, firm, partnership, association or corporation, in any capacity to undertake, offer to undertake, purport to have the capacity to undertake, submit a bid, or make a

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[2] *And see*, MCLA 339.601(8): "Any violation of this act shall include a requirement that restitution be made, based upon proofs submitted to and findings made by the trier of fact as provided by law."

> contract, to erect, construct, replace, repair, alter, add to, subtract from, or improve, any residential or combination of residential and commercial structure, or to engage in the residential building and alteration contracting business without first obtaining a residential builder's license or a residential maintenance and alteration contractor's license . . . . **Consequently, the contract in question was void,** and defendant was legally unable to perform it. MSA 18.85(1) et seq; *In re Reidy's Estate*, 1910, 164 Mich 167; 129 NW 196.

The court also held that where the unlicensed builder represented that he was licensed (see the license number on the EIS contract documents and Willis's testimony that his license was displayed in the book of work he showed the Epps to get the job), then the contractor "has been guilty of fraud and plaintiff is entitled to recover her loss and damage resulting therefrom".

While defendants argue that void does not mean void, other courts, including *Miller, supra,* have had no problem concluding that this Court meant what it said. For example, *see, Toltest, Inc. v Nelson-Delk*, 2008 WL 1843991 (USDC, ND Ohio, 2008):

> A contract by an unlicensed entity to perform services which require a residential builder's license **is not merely voidable** by the consumer; **the Supreme Court of Michigan has held that such contracts are void *ab initio*.** *Stokes v Millen Roofing Co,* 466 Mich 660; 649 NW2d 371, 378 (Mich 2002) (citing *Bilt-More Homes, Inc, v French,* 373 Mich 693; 130 NW2d 907 (Mich.1964)); *see also Brummel v Whelpley,* 46 Mich App 93, 96; 207 NW2d 399 (Mich Ct App 1973).

Also see, Mickel v Lovelady, 1984 WL 7954 (Ohio Ct App, 1984)(emphasis added):

> Counsel for appellant has argued that the language of this statute does not render any contract made in violation thereof void *ab initio*, but only precludes its enforcement in the courts of Michigan. However, whether the precise language of section 2412 does or does not void the contract is largely a moot question. **It is sufficient for our purposes that Michigan courts have interpreted the meaning of their own statutes, and they have held, quite clearly, that this statute renders the contracts of unlicensed parties void** and unenforceable.

Stokes is still good law, and this counsel is unaware of any case in which an unlicensed contractor has been successful in obtaining even one penny in any kind of compensation, even as a setoff to the homeowner's claim against the contractor. *Please see,* plaintiffs' answer to application for leave to appeal, p 20, ft 8, and all of the cases cited therein, including unpublished cases attached as appendices to the answer to application.

Thus it is crystal clear as a matter of law that **the entire contract in this case was and is void, *including the Insurance Power of Attorney which is the sole basis upon which defendant claims he was authorized to sign and endorse the plaintiffs' names on the checks and take the money.***

Courts in other states have held such contracts void as well. *See, e.g., Dabbs v Four Tees, Inc*, 36 So 2d 542, 551 (Alabama 2008)(emphasis added):

> "If any person performs work within [the definition of 'general contractor' as set out in § 34-8-1(a), Ala.Code 1975,] and fails to obtain a general contractor's license, **the contract must be declared null, void, and unenforceable.**" *Herbert v Birmingham-Jefferson Civic Ctr Auth*, 694 F2d 240, 241 (11th Cir 1982).

In *Elephant Lumber Co v Johnson*, 120 Ohio App 266, 268; 202 NE2d 189, 191 (1964), the court stated (emphasis added)

> The general rule is that **a contract entered into by a person engaged in a business without taking out a license as required by law is void** and unenforceable and that **where a license or certificate is required by statute** as a requisite to one practicing a particular profession, **an agreement of a professional character without such license or certificate is illegal and void.** 53 CJS Licenses § 59, p 711; 33 American Jurisprudence, 384; 34 Ohio Jurisprudence 2d 388. It is also a well established rule that **a contract which cannot be performed without a violation of a statute is void.**

The court in *Matter of C & S Grain Co, Inc,* 47 F.3d 233, 237 (CA 7, 1995), stated:

> **In Illinois, once a statute imposes licensure as a precondition for operation and provides a penalty for its violation, a contract for the unlicensed performance of that act is void.**

The D.C. court stated in *Cevern, Inc v Ferbish*, 666 A2d 17, 19-20 (D.C. 1995) (emphasis added):

> In *Capital Constr Co v Plaza West Coop Ass'n*, 604 A2d 428 (D.C. 1992) (per curiam), this court stated:
>
> In the District of Columbia it is a principle of long standing that **an illegal contract, made in violation of a statutory prohibition designed for police or regulatory purposes, is void** and confers no right upon the wrongdoer. Therefore, we have oft held that receipt of payment by an unlicensed contractor before completion of the work under the contract violates the home improvement regulations **and renders the contract void** and unenforceable, even on a quasi-contractual basis. . . .
>
> Our decisions rejecting any deviation from this rule span more than a quarter-century.

Also see, Trade-Winds Envtl Restoration, Inc v Stewart Dev Ltd Liab Co, 409 F App'x 805, 807 (CA 5, 2011)(emphasis added):

> **Louisiana courts have long recognized that a contracting agreement entered into without the benefit of a contractor's license is null and void.** *See, e.g., Hagberg v John Bailey Contractor*, 435 So 2d 580, 584–85 (La App 3 Cir. 1983); *Alonzo v Chifici*, 526 So 2d 237, 243 (La App 5 Cir. 1988); ....

In the Virginia *Bowen* case, quoted by this Court in *Alexander, supra,* the Supreme Court of Virginia held that a contract made in violation of a licensing statute was **void.**

In New York, the court stated in *Rasmus Const Corp v Nagel*, 168 Misc 2d 520, 522; 646 926, 927 (App. Term 1996) that (emphasis added):

> Based upon the "public safety" concerns underlying the Code licensing requirements, **home improvement contracts entered into by such unlicensed entities are considered "void"** (citation omitted).

In Florida, the court in *R.A.M. of S Fl, Inc v WCI Cmtys., Inc*, 869 So 2d 1210, 1219 fn 3 (Fla. 2d DCA 2004), a case involving the lack of a contractor's license, stated (emphasis added):

> In the instant case, it is undisputed that there was no lawful contract. **The contract was not merely unenforceable; it was also illegal**. See § 489.12(1)(f); *see also Local No. 234 of United Ass'n of Journeymen v. Henley & Beckwith, Inc*, 66 So 2d 818, 823 (Fla 1953) ("The cases are legion that a contract against public policy may not be made the basis of any action either in law or equity.... **Agreements in violation of public policy are void** because they have no legal sanction and establish no legitimate bond between the parties."); . . . .

Accord, Fabricant v Sears Roebuck, 202 FRD 310, 320 (SD Fla 2001) (emphasis added):

> Florida law is well-settled that **where the law requires licenses to conduct business, the contracts by the unlicensed to perform licensed services are illegal and void.**

Also see, Carrico v Village of Sugar Mountain, 114 F Supp 2d 422, 426 (WD NC 2000) *aff'd* 13 F App'x 79 (CA 4, 2001) (applying North Carolina law) (emphasis added)

> The contracts entered into by the Plaintiffs **were void *ab initio*** because none of them was licensed.

And see, the unlicensed contractor case of *Northen v Elledge* 72 Ariz 166; 232 P2d 111 (1951), in which the court, *quoting Hunt v Douglas Lumber Co*, 41 Ariz 276; 17 P2d 815, 819 (1933) (emphasis added), stated that:

> **a construction contract between a building owner and an unlicensed contractor is void** and unenforceable. Quoting from that *[Hunt]* decision the court stated: 'It is the general rule of law that where a statute expressly forbids a person from entering into a certain kind of contract until he performs some precedent act, and imposes a penalty upon such person for attempting to enter into the forbidden contract, **the contract itself is absolutely void *ab initio*** and the party penalized has no rights thereunder.'

Thus it is clear that established Michigan precedent for over a century holds that where a license is required by statute as a requisite to one practicing a particular profession and a party enters a contract without possessing the required license, **the contract is void**. Michigan precedent is not only consistent within this State, but is in accord with decisions in other states

throughout the country. And there is certainly no reason to call into question this Court's clear and unequivocal decisions in *Stokes* and *Bilt-More* that **"Contracts by a residential builder not duly licensed are not only voidable but void."**

Under this clearly established precedent **the entire contract in this case was and is void**, including the Insurance Power of Attorney which is the sole basis upon which defendant claims he was authorized to sign and endorse the plaintiffs' names on the checks and take the money. Willis had no legal right whatsoever to endorse plaintiffs' names on the checks (or any other documents for that matter) and take the money.

Finally, plaintiffs wish to remind this Court that while this Court requested supplemental briefing on whether "the contracts" were void or voidable, there were no contracts at all for the vast majority of the additional construction and the second claim. There was only one contract for $4,245.37 in additional work which plaintiffs signed on 9-8-06, when plaintiffs paid defendants half of that sum, and defendants had received a check for over $46,000 that very day, signed plaintiffs' names, taken the money, and hid that fact from the plaintiffs. That contract, too, was clearly void.

There was no contract at all between plaintiffs and the defendant unlicensed contractors for the $36,047.07 in additional renovation work on plaintiffs' home for which defendants retained plaintiffs' monies. The Epps were never shown the estimate, never signed off on it, and never signed any contract or even work authorization for it. There was also no power of attorney for that work, so that there cannot be any colorable claim that the defendants had any right to sign plaintiffs' names on the checks, cash the checks and take the money.

There was also no contract at all between plaintiffs and the defendant unlicensed contractors for $20,682.28 in additional renovation work on plaintiffs' home for which

defendants retained plaintiffs' monies arising out of a second insurance claim of which plaintiffs had no knowledge for damage on 9-6-06. The Epps were never shown any estimate, never signed off on it, and never signed any contract or even work authorization for it. Again, there was no power of attorney for that work or insurance claim, so that there cannot be any colorable claim that the defendants had any right to sign plaintiffs' names on the checks, cash the checks and take the money.

The big picture – a blueprint for disaster. Should this Court decide to change the law and hold that the contract by the unlicensed contractor is not void but merely voidable, meaning that the contract is effective until such time as the homeowners (or their insurer) discover that there is no license and take affirmative action to disavow the contract, **then this Court will in fact have given every unlicensed, fly-by-night contractor a blueprint – step by step instructions – how to operate illegally, without a license, get paid, and get away with it.**

Simple as pie. Here are the simple instructions we can give the unlicensed contractor:

- Meet with the homeowners. Tell them you are a licensed contractor in order to convince them to hire you. Show them a copy of your license; make up a fake one or, if your license has been revoked, show them a copy of that one. Have them sign documents, including one with the invalid license number on it to make it look official.

- Use those documents to get the insurance company to mail the homeowners' checks to your address. That way the homeowners will never know what has actually been paid.

- If any inspections are necessary in order to get paid, pose as the homeowner, say how satisfied you are with your own work, and sign any necessary documents in the name of the homeowner.

- If any affidavits or certificates of completion are necessary in order to get paid, falsify the homeowner's signature, and falsify any notary needed.

- Make sure you don't pull any permits. The authorities will want your license number and you might be discovered.

- When the checks come in to your address, don't tell the homeowners. Just take the checks to a check cashing company, rather than a bank, because a bank won't cash the checks but check cashing companies are not picky. Sign and endorse the homeowners' names on the checks, and keep the cash.

- Never tell the homeowners anything about how you are getting paid. If the homeowners get inquisitive, lie and dangle a few bucks in front of them (never more than a tiny percentage of what you have actually received). They'll be so happy to get some cash, they will leave you alone and you will be able to continue to get checks, sign their names without their knowledge, and take the cash.

- The enhanced version: If things are going smoothly, tell the insurance company that there are supplements, or another claim, don't tell the homeowners, and have all the paperwork come to you. That way you get even more money.

- If you don't actually finish the work, so what? It's not like the State could take your license or anything, or the courts could make you disgorge the money.

- If you are finally found out, so what? You already have the money, and the money has been spent. And you can always argue that yes, I endorsed the checks without legal authority, and cashed the checks with my forged endorsements and took the money, but you, homeowners, who didn't figure it out fast enough, got the benefit of my work which it was illegal for me to perform and have to reduce the amount I owe you by the value of my work.[3] Too bad.

Simplicity itself. **Is that really what this Court wants to do?** Homeowners and their insurance companies unwittingly pay millions of dollars a year to unlicensed contractors. A holding that contracts with unlicensed contractors are not void but merely voidable, effective unless and until the unlicensed contractor is found out and action taken to disavow the contract, will leave homeowners and their insurance companies without any effective remedy, will allow persons to act as unlicensed contractors with impunity, and will reward those unlicensed contractors who are the most effective at deception and not getting caught.

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[3] This is, of course, interrelated to the discussion in Argument II as to damages.

The business climate in Michigan will be severely harmed as well. It will have severe adverse impact upon the thousands of law abiding, licensed contractors who have to operate within the law. Those licensed contractors have to do their work properly, up to code, spending the extra time and dollars to do the job right. They have to answer to licensing authorities should they receive a complaint for shoddy workmanship, because their licenses, and their ability to make an honest living, is on the line. Those licensed contractors are undercut and lose business to the unlicensed contractors who do not have to operate under the same rules.

Why bother with a license when you can get away with not having one and make more money, with no accountability, without one? And the protection for the citizens of this State from improper and shoddy workmanship will have been eviscerated. The more operating without a license is encouraged by a lack of teeth in the law, the more construction will be done without a license and the more actual danger to the public from improperly constructed and dangerous buildings.

Furthermore, making contracts entered into without the statutorily required license merely voidable until the crook, operating in violation of both the licensing statutes and the criminal law, is discovered and caught, will have dire consequences regarding many other services for which a license is required. Michigan has long had statutes requiring licenses not only for contractors, but for real estate brokers, doctors, lawyers, architects, accountants, engineers, morticians, and many, many others. Does this Court really want to encourage unlicensed people to work in those professions? Any decision making those contracts merely voidable so that the crook will be able to keep what is paid until he is caught, will turn the Legislature's decision to regulate professions into a modern day equivalent of the Wild West, totally destroying the regulatory schemes this State has had in place for well over a century.

What about, for example, payments made for services illegally performed by a person posing as a doctor, or one whose license has been revoked? If the contract for services is merely voidable, effective until the crook is caught, then the patient, or his no-fault or medical insurer, will be without a remedy because the money was paid on a contract which was not yet void, that is, before the crook was found out. And, regarding the interrelated issue of damages, do we leave the parties the statute was designed to protect without a remedy by allowing a defense that the patient actually benefited from the illegally rendered service or that the patient cannot sustain the burden of proving that the result would not have been better with a real, licensed doctor?

What about a person posing as a lawyer, or a disbarred lawyer? If the contract for services is merely voidable, effective until the crook is caught, then there is no remedy and the monies illegally obtained may be retained, because the contract was still effective and not yet voided when the monies were paid. And, again, regarding the interrelated issue of damages, do we leave the parties the statute was designed to protect without a remedy by allowing a defense that the client actually benefited from the illegally rendered service or that the client cannot sustain the burden of proving that a real, licensed lawyer, would have achieved a better result?

What of the effect on other areas of the law? Certainly if a contract is not void *ab initio* when a party does not have the required statutory license, then a contract should not be declared void *ab initio* when no such statutory license is required. For example, a material misrepresentation in an application for insurance allows an insurance company to void and rescind a policy *ab initio*. *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1959); *United Sec Ins Co v Comm'r of Ins*, 133 Mich App 38; 348 NW2d 34 (1984). Shall an insurer be without a remedy to recover monies wrongfully paid because now the contract will be held to be merely voidable

rather than void *ab initio* and the fraud and misrepresentation was not discovered until after the money was paid? In all of these circumstances, do we reward those who are dishonest, or provide a proper remedy to the innocent who have followed the law?

This Court has consistently and properly held that a contract by a residential builder not duly licensed are not only voidable but void. This Court should continue to adhere to that law. Any change in the law to make contracts by persons not duly licensed as required by statute voidable rather than void would have disastrous consequences and would reward those who are dishonest and operate outside the law to the detriment of those the statutes were designed to protect, their insurers, and persons duly licensed who operate honestly within the law.

II. PLAINTIFFS WERE ENTITILED TO JUDGMENT BASED ON THE $128,047.23 FACE AMOUNT OF THE CHECKS AND WERE NOT REQUIRED TO ESTABLISH ANY OTHER "ACTUAL DAMAGES" OVER AND ABOVE THE FACE AMOUNT OF THE CHECKS PAYABLE TO THEM WHICH THE DEFENDANTS TOOK, CASHED, AND RETAINED.

This Court also requested supplemental briefing on "whether the plaintiffs are required to establish actual damages to recover on their breach of contract and fraud/ misrepresentation claims". Plaintiffs assert that once the first question is answered, and the contract is held to be void, they are not required to establish any other "actual damages" over and above the face amount of the checks payable to them which the defendants took, cashed, and retained. The fraud/misrepresentation and breach of contract claims are merely the other side of the coin which caused the contract to be declared void in the first place.

Once it is determined that the contract, including the limited "Insurance Power of Attorney" which is *the sole basis* upon which defendant has ever claimed he was authorized to

sign and endorse the plaintiffs' names on the checks and take the money, is void, and that therefore Willis had no legal right whatsoever to endorse plaintiffs' names on the checks and take the money, **this case is over**. Plaintiffs, the named payees on the checks, are entitled to recover on the forged endorsements.

Defendants have no defense to this. They have not claimed any other legal basis to sign the plaintiffs' names to the checks and take the money other than the void contract and the void limited Insurance Power of Attorney which was part of the void contract (and, anyway, not a power of attorney giving defendants banking powers and the right to endorse and cash checks). Defendants are not entitled to set off claimed amounts for the work they performed against their liability to the plaintiffs; while defendants merely assert that they are not claiming setoff, knowing that the law prohibits them from doing so, this is, in point of fact, the heart of their defense, that they are entitled to a dollar for dollar setoff for the work they illegally performed against what they rightly and legally owe plaintiffs based on the face amount of the checks.

Once it has been determined that the contract is void, this case is a simple case to recover on the forged endorsements and converted checks. Nothing more need be shown, and any separate damages for contract or fraud/mispresentation as a separate cause of action would merely be duplicative; plaintiffs cannot be awarded the same damages twice. When a check is paid on a forged endorsement, an action lies for conversion. As the court stated in *Continental Casualty Co v Huron Valley National Bank*, 85 Mich App 319, 322-323; 271 NW2d 218, 219-220 (1978):

> It is clear under the Uniform Commercial Code that when a check is paid on a forged indorsement, an action lies for conversion. In relevant part MCL §440.3419(1)(c); MSA §19.3419(1)(c) reads:
>
> (1) An instrument is converted when
> (c) it is paid on a forged indorsement.

For further elaboration we look to Official UCC Comment 3 to MCL §440.3419; MSA §19.3419:

> 3. Subsection (1)(c) is new. It adopts the prevailing view of decisions holding that payment on a forged indorsement is not an acceptance, but that even though made in good faith it is an exercise of dominion and control over the instrument inconsistent with the rights of the owner, and results in liability for conversion.

This definition is consistent with Michigan cases which define the tort of conversion as an "act of dominion wrongfully exerted over another's personal property". [citations omitted]

It is also clear that as the payee of the converted checks, Electric Apparatus is the rightful "owner" of the checks.

Also see, Trail Clinic, PC v Bloch, 114 Mich App 700; 319 NW2d 638, 640 (1982):

> Checks are considered to be the property of the designated payee and may be the subject of a suit for conversion.

There can be no dispute but that the Willis defendants converted the plaintiffs' property to Willis's own use. The checks were made payable to the plaintiffs. Willis, without plaintiffs' knowledge, and without any legal right to do so, signed and endorsed plaintiffs' names to the checks, cashed the checks, and took and retained the money to his own personal use. Thus plaintiffs are entitled to judgment for conversion against these defendants for treble the amount of the checks, plus costs and attorney fees, and the Court of Appeals was correct in so holding:

> In their reply brief on appeal, the contractor defendants contend that this award was improper. As this issue was not properly presented to this Court as an issue on appeal, we need not address it. *Mich Ed Ass'n v Secretary of State,* 280 Mich App 477, 488; 761 NW2d 234 (2008). We note, however, that as Willis lacked the authority to endorse the insurance checks, he did convert the proceeds by accepting delivery and cashing those instruments. See MCL 440.3420(1) ("An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment."). MCL 600.2919a(1) specifically provides for treble damages in the face of such a conversion.

Even endorsing and cashing a check and taking the money pursuant to a valid power of attorney, rather than a void one as is the case herein, can constitute conversion. For example, *see, Pike v Reed*, 47 So 2d 253 (Alabama 2009). In that case, the power of attorney given by one sister to another did not specifically grant her the right to endorse and deposit a check to her own account. The court stated, *supra* at 258-261, in noncontiguous paragraphs (emphasis added):

> In the case now before us, although **the power of attorney granted Pike "full Power of Attorney to represent [Reed] in all matters relating to [Reed's] property** located [on] Highway 69 [in] Oakman, Alabama 35579," **it did not expressly grant her the authority to deposit the Alfa check into the Pikes' account. The absence from the power of attorney of a provision expressly granting Pike such authority appears to support Reed's argument that a conversion occurred when Pike deposited the Alfa check into the Pikes' account.**
>
> Accordingly, we conclude that Pike's depositing the Alfa check into the Pikes' account **was not authorized by the power of attorney because the power of attorney did not expressly authorize it**. . . . [C]hecks can constitute specific money capable of identification and, therefore, **will support a conversion claim**, ...
>
> . . . The tort of conversion occurred when Pike wrongfully deposited the Alfa check into the Pikes' account without Reed's authorization.

In the instant case, the plaintiffs, as payees of the checks, were the rightful owners of the checks, *Continental Casualty, supra*, and thus the initial measure of damages is simple and fixed: the face amount of the checks. The Court of Appeals also correctly noted that "damages were simply measured by the face amount of the checks", that the Willis defendants converted the instrument, and that "MCL 600.2919a(1) specifically provides for treble damages in the face of such a conversion." The plaintiffs' "interest in the instrument" was and is the face amount of the checks – there was and is no one else legally entitled to the monies – and the conversion statute, MCL 600.2919a(2), states that the treble damage provisions of the statute " is in addition

to any other right or remedy the person may have at law or otherwise."

It is circular logic to claim, as defendants do, that while they could not have legally collected money for their work, they still ought to be given a dollar for dollar credit against the amount they took on the forged checks for the work they illegally performed in violation of both a licensing statute and the criminal law, work that never would have been performed if the plaintiffs had been told that they were unlicensed. The defendants can neither keep their spoils in law or equity. In *Stokes, supra,* 649 NW2d at 376-377, this Court, in holding that a prior Court of Appeals decision was wrongly decided, stated (emphasis added):

> By contrast, both Millen and the defendants in *Republic Bank* acquired liens by committing a misdemeanor, performing an unlicensed activity. MCL 339.601(3). . . . .
>
> In its bench ruling granting equitable relief to Millen, the trial court stated that a court in equity may provide for nonlegal, equitable remedies to avoid unduly harsh legal doctrines. **Its analysis is invalid because, in this case, equity is invoked to avoid application of a statute. Courts must be careful not to usurp the Legislative role under the guise of equity because a statutory penalty is excessively punitive.**
>
> As the Court of Appeals stated:
>
>> **Regardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree.**

This is a *supplemental brief.* Plaintiffs shall not repeat page after page of detailed analysis of the case law establishing that the void contract is indivisible and cannot be bifurcated, that defendants are not entitled to a setoff for the work they illegally performed, and that the absolute rule prohibiting the receipt of monies by an unlicensed contractor is also applicable to any suit in equity (which interpleader is) and any other proceedings in which rights are

determined (which applies to the determination of the rights of the parties in the interpleader funds). Instead, plaintiffs refer this Court to those extended discussions of the law contained in both their answer to defendants' application for leave to appeal and their own cross-application.

The Court of Appeals correctly held that due to defendants' fraudulent misrepresentations as to being licensed, the contract was void *ab initio*. Thus plaintiffs were and are entitled to rescission of the contract *ab initio*, and return of the monies paid; note that this was one of the remedies sought in the Complaint. The contract was void, not just voidable, because defendants were unlicensed, and thus rescission is warranted.

And it is well established law in Michigan that a plaintiff may recover money paid to a defendant under a void contract. In this case, the amount is the face amount of the checks. This law was even very firmly established in 1920, as this unanimous Court stated in *DeCroupet v Frank*, 212 Mich 465, 467-468; 180 NW 363 (1920), *citing cases back to 1873* (emphasis added):

> It is undisputed that **the money contributed by the plaintiff was paid to defendant under an agreement void under the statute**. . . . We have many times held that the common counts in assumpsit are equitable in their nature and **will support a recovery where money has been paid by plaintiff to defendant under a void contract**. *Davis v Strobridge*, 44 Mich 157; 6 NW 205; *De Moss v Robinson*, 46 Mich 62; 8 NW 712; 41 Am St Rep 144; *Murphy v McGraw*, 74 Mich 318; 41 NW 917; *Harty v Teagan*, 150 Mich 75; 113 NW 594; *Taylor v Belton*, 188 Mich 302; 154 NW 149. *See, also, Scott v Bush*, 26 Mich 418; 12 Am Rep 311; *Nims v Sherman*, 43 Mich 45; 4 NW 434; *Duquette v Richar*, 102 Mich 483; 60 NW 974.

And see, Kuchenmeister v Disza, 218 Mich 497; 188 NW 337 (1922), which quoted *DeCroupet* with approval and stated (emphasis added):

> In the case at bar the defendant received money, which ex aequo et bono, he ought to refund, and judgment should have been entered for plaintiff. **The only excuse defendant advanced for not paying the money back to plaintiff**

was that it was paid to him under a void agreement. That is the very reason why he had no right to the money . . . .

Thus it is clear that the plaintiffs had the right to rescind the indisputably void contract, and the right to the return of all monies paid to the defendants thereunder. And under *Kuchenmeister* and *DeCroupet,* defendants' unpreserved argument that they should somehow be given credit for the work they illegally performed and not have to pay back all of the monies paid under a void agreement fails on the merits as well.

When a contract is void for violation of a licensing statute, the courts generally attempt to place the parties "in their same respective positions as before they entered into the void contract", *Brummel, supra* at 96. But in an unlicensed contractor case, this is not literally possible. The homeowner cannot remove and return flooring, or a wall, or a ceiling. There seems, therefore, to be a clear choice. Either the wrongdoer gets the benefit of his illegally performed acts, or the innocent homeowner, or its insurer, gets the return of the funds paid for the illegal work. This Court has never sanctioned the retention of monies paid for illegal acts. So how can we resolve this dilemma? In this case, there is an easy solution.

Putting the homeowners and contractor in the same position means that the checks in the homeowners names have not yet been endorsed and cashed. Plaintiffs' *actual damages*, whether on the forged endorsements, fraud/misrepresentation, or breach of contract, are measured by the face amount of those checks. So how can someone be put in the same position when they were a joint payee on check which was, via fraud, issued without their knowledge and their name forged? There is a solution in this case. **The instant case involves interpleader, and the check monies are being held in court.**

Thus we have the functional equivalent of holding the unendorsed checks made payable to the Epps in our hands. We have a lawsuit to determine the rights to the monies represented by those checks. The plaintiffs, as payees on the checks, are the rightful owners of the checks, *Continental Casualty, supra.*

The unlicensed contractors are not entitled to those monies, both because they are unlicensed and the contract is void, and because they have already been paid the full amount of the checks; awarding them the money would amount to a double recovery when they were not even entitled to a single recovery.

The check cashing company is not entitled to the money. First, those interpleader funds belonged to Comerica, not MBM. That they may have been taken by Comerica from MBM's account pursuant to the terms of a contract between Comerica and MBM is of no moment or concern *in this case*. The Order for interpleader, to which MBM agreed, specifically discharges Comerica from any liability to MBM with respect to taking those funds and MBM signed a release in which it released Comerica from any such liability. Second, MBM has admitted, by virtue of its default, that it conspired with the contractor defendants, that it guaranteed the indorsements of plaintiffs were genuine and proper, that it wrongfully paid the checks and distributed the funds on the forged indorsements, in contravention of Michigan law including, but not limited to, the applicable provisions of the UCC, that it converted the instrument and funds and/or assisted and aided Troy Willis in converting and embezzling the funds belonging to the plaintiffs, that it was negligent in paying the check and funds and wrongfully paid the check and funds, and that it acted in bad faith and with lack of reasonable commercial standards. Under these circumstances, the check cashing company is certainly not entitled to the interpleader funds being held in court.

Accordingly, the plaintiffs, on their own behalfs and as assigness of the insurer as well, are the only parties entitled to the interpleader funds. **Awarding the interpleader funds to the plaintiffs is the functional equivalent of placing the parties in the same position they would have been in had the checks been issued but not yet endorsed and cashed by the unlicensed contractor defendants.**

While the defendants have argued that there is no Michigan case specifically ordering repayment or disgorgement of funds received by an unlicensed professional contrary to the licensing statutes and the criminal law, neither is there any authority allowing the wrongdoer to retain those funds; the *Kuchenmeister* and *DeCroupet* cases do, however, speak of the recovery and repayment of the monies paid under a void contract.

But the modern trend in our sister states allows rescission and the remedy, with or without formal rescission, of the return of the money as well when a contract is void for failure to comply with a licensing statute. For example, in *Saul v Rowan Heating and Air Conditioning*, 623 A2d 619, fn 4 (D.C. Court of Appeals, 1993), the Court stated (emphasis added):

> Ordinarily, **when a party sues successfully to rescind a contract determined to be void and unenforceable because of the contractor's violation of licensing statutes or regulations, the appropriate remedy is a return of the money paid**. *Erwin v Craft*, 452 A2d 971, 972 (D.C. 1982).

While the instant case can be decided solely on the basis of the forged endorsements on the checks, without need to reach any other issue, **there is a forceful argument to be made that this Court should specifically follow the modern trend of cases in holding that the statute also requires an unlicensed contractor to disgorge and repay the monies received.** Plaintiffs' counsel can say it no better than the New Mexico Supreme Court did in *Mascarenas v Jaramillo*, 111 NM 410, 411; 806 P2d 59, 60 (1991) (emphasis added; citations omitted):

This court has decided many cases involving the issue of whether an unlicensed contractor may recover for his work. **However, we have never considered whether the recipient of work can recover payments made on a contract to an unlicensed contractor.** Because **we believe that similar policy considerations and goals apply to both issues,** we reverse.

We long have held that Section 60–13–30(A) bars an unlicensed contractor from bringing or maintaining a suit on the contract, or in quantum meruit. The statute bars suits by unlicensed contractors even when they seek compensation for construction work fully and satisfactorily performed.

Our holding in these cases is in accordance with the policy and purpose of the Construction Industries Licensing Act (the Act), NMSA 1978, Sections 60–13–1 to 60–13–58 (Repl.Pamp.1984). Section 60–13–4 sets forth the legislative purpose of the Act:

> The purpose of the Construction Industries Licensing Act is to promote the general welfare of the people of New Mexico by providing for the protection of their lives, property and economic well-being against substandard or hazardous construction, alteration, installation, connection, demolition or repair work, and by providing protection against the fiscal irresponsibility of persons engaged in construction occupations or trades.

In determining legislative intent, we look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied. **The object sought to be accomplished by the Act is a healthy, ordered market in which consumers may contract with competent, reliable construction contractors who have passed the scrutiny of a licensing division. The wrong to be remedied is the exploitation of the public by incompetent and unscrupulous contractors who are unable or unwilling to obtain a license. In effect, the wrongs to be remedied are circumstances which permit unlicensed contractors to flourish and profit at the expense of the public. . .** "The purpose of the Act is to protect the public from incompetent and irresponsible builders. **This purpose should not be lost sight of.**"

In *Domach v Spencer*, 101 Cal App 3d 308; 161 Cal Rptr 459 (1980), the court held that a consumer could recover damages on a construction contract from an unlicensed contractor. As in the case before us, ***Domach* involved an unlicensed contractor who received most or all of the contract price**, and who failed to perform according to contract specifications and workmanlike standards of quality. The California statute which prohibits unlicensed contractors from using the courts to collect for their work is virtually identical to Section 60–13–30(A). The court stated:

> The bar of [the statute] applies by its terms only to the person acting in the capacity of a contractor and not to a member of the public. **To apply that statute to members of the public would defeat its purpose by providing a shield from litigation for an unlicensed builder due to the fortuity that he had been paid.**

Id, 101 Cal App 3d at 312; 161 Cal Rptr at 461–62.

> We agree with the rationale set forth in *Domach*. **We believe that allowing recovery of payments made on a contract to an unlicensed construction contractor serves and advances the purpose of the Act. The practical effect of our decision will be to further inhibit unlicensed contractors from engaging in construction work without a license.** Section 60–13–30(A) prohibits an unlicensed contractor from using the courts of this state to collect compensation for his work, no matter how expertly performed. **He could, however, evade the harsh consequences of Section 60–13–30(A) by collecting most or all of the contract price before significant commencement of performance. Our ruling today effectively ends this sort of practice. As a matter of public policy, an unlicensed contractor may not retain payments made pursuant to a contract which requires him to perform in violation of the Construction Industries Licensing Act.** This is true even if, as here, the consumer has knowledge that the contractor is unlicensed. **The public policy behind the licensing requirement of the Act is so strong that the element of consumer knowledge is of no consequence in our decision.** The award of partial refund is reversed, and the cause is remanded with instructions to award Mascarenas a full refund of $4,898.00.

In *Ransburg v Haase*, 224 Ill App 3d 681; 586 NE2d 1295 (1992), the court ordered repayment of the monies received by person performing architectural services who was not licensed in Illinois. The court stated, *supra* at 686-688 (emphasis added; citations omitted):

> The question in the case before us is a different one: **Do Illinois courts recognize a cause of action to recover money previously paid to defendant for architectural services which have been rendered but for which defendant was not licensed?** Although it is a general rule that parties to a void contract will be left where they have placed themselves with no recovery of money paid for illegal services, exceptions to that rule have been recognized under two different rationales: (1) that the person who paid for the services is not *in pari delicto* with the unlicensed person, and (2) that the law in question was passed for the protection of the person who paid and it appears that the purposes of the law would be better effectuated by granting relief than by denying it. . . . .

. . . . After observing that the statute governing foreign corporations was enacted for the benefit of the general public and its purpose cannot be bargained away by individuals, **the court decided to allow recovery of money paid pursuant to the void contract**, holding:

"The general rule is that where a contract is illegal, 'a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief, by canceling the executory contract, by setting aside an executed contract, conveyance or transfer, ***by recovering back money paid or property delivered***, as the circumstances of the case shall require * * *.' " (Emphasis supplied [by the Court].) 232 Ill App at 551.

Courts of other jurisdictions also have allowed recovery of money paid for professional services where the person rendering the service was not licensed. In *Rubin v Douglas* (D.C. App 1948), 59 A 2d 690, plaintiff sought to recover money paid to defendant for a treatment for arthritis after discovering that defendant was not licensed to practice "the healing arts" as required by statute. After noting that a court ordinarily will not interfere to give relief to either party to an illegal contract, the court went on to recognize an exception to that rule where the law in question was passed for the protection of the plaintiff and where it appears that the purposes of the law would be better effectuated by granting relief than by denying it. The court stated that the licensing law in that case was passed for the protection of the public, including the plaintiff, and then held:

"[T]he purposes of the Act will not be effectuated by permitting defendant to retain that which he ought not to have received. The public interests, in our opinion, are best served by requiring defendant to pay back the fruits of his illegal agreement." 59 A2d at 691. *Accord, Bathroom Design Institute v Parker* (D.C. App 1974), 317 A2d 526 (unlicensed contractor); *Wineman v Blueprint 100, Inc* (1973), 75 Misc 2d 665, 348 NYS2d 721 (unlicensed architect). . . . .

Defendant relies upon those decisions in other jurisdictions denying recovery of money paid for service performed by one not licensed. . . . .

We believe the public policy of Illinois to be better served by recognizing a cause of action here. **To allow the unlicensed architect to retain the fees paid is to allow him to practice architecture in the state of Illinois without a license and to reap the rewards thereof. The purpose of the Illinois licensing act can best be effectuated by recognizing plaintiff's right to recovery.**

The Supreme Court of New Hampshire held that real estate commissions paid to an unlicensed broker had to be repaid. In *Kowalski v Cedars of Portsmouth Condo Ass'n*, 146 NH 130, 132-33; 769 A2d 344, 347-48 (2001), the court first held (emphasis added) that

> An agreement to pay a real estate brokerage commission to a person who is not a licensed real estate broker is not an enforceable obligation **and is void at its inception**.

The court then held (emphasis added):

> The **defendant**, while conceding this provision acts as a shield to prevent an unlicensed broker from suing for a commission, **argues that it is nonetheless consistent with the statutory scheme to prevent the plaintiff from suing to recover paid commissions. We cannot accept that interpretation of the statute. To do so would encourage unlicensed persons to seek advance payments, thereby undermining the purpose** of RSA chapter 331–A.
>
> The defendant contends that the plaintiff failed to demonstrate and the district court did not find that the defendant received a benefit that would be unconscionable for it to retain because the plaintiff received that for which he bargained: the rental or sale of his units. We disagree. **The defendant admitted that it did not hold a real estate license; the district court found that its actions were illegal. It wrongfully obtained commissions by selling real estate without a license. Further, allowing the defendant to retain the commissions under such circumstances would be unconscionable for it would "affront [our] affirmative duty to see that the party violating public policy not benefit in any way as a result of [its] wrongdoing."**

In *Vista Designs, Inc v Silverman*, 774 So 2d 884 (Fla Dist Ct App 2001), the court ordered an attorney unlicensed in Florida to disgorge fees he had been paid, stating, *supra* at 886-888 (emphasis added):

> In this case, any monies owed in legal fees flowed directly from the void contract. **[W]e hold that under the facts in this case, public policy favors the disgorgement of funds received by Silverman.**
>
> In *Cooper v Paris*, 413 So 2d 772 (Fla 1st DCA 1982), the court held that an unlicensed real estate broker sought to enforce an agreement to pay a real estate commission, and the property owner counterclaimed against the Georgia-licensed broker seeking to have his conduct declared that of an unlicensed real

estate broker and for a recovery of the sums previously paid to the broker. . . On appeal, the First District held that the brokerage commission agreement was void and illegal *ab initio*.

> The broad basis for the doctrine that contracts of certain unlicensed persons are unenforceable is that the courts should not lend their aid to the enforcement of contracts where performance would tend to deprive the public of the benefits of regulatory measures.
>
> . . . **The court held that an unlicensed real estate broker was obligated to disgorge monies paid to him as commission based on the regulatory measure**, Chapter 475, Florida Statutes. Said statutes' manifest purpose was to prevent unscrupulous real estate practices and to promote the protection of the consumer/purchaser. *See id* at 773–74. The Act subjects unlicensed real estate brokers not only to forfeit their right to compensation but also to criminal liability. *See id.* **"To refuse to return the monies paid would affront the court's affirmative duty to see that the party violating public policy not benefit in any way as a result of his wrongdoing."** *See id* at 774.
>
> . . .
>
> Silverman claims that because there is no regulatory measure requiring the forfeiture of fees where a contract has been declared void, disgorgement is improper. . . . **Clearly, public policy dictates that a party should be unable to benefit in any way as a result of one's wrongdoing**.
>
> . . .
>
> **We reject Silverman's claim that he be entitled to keep the monies paid to him under a fee agreement which was declared void *ab initio*,** . . . While Silverman conferred a benefit upon Vista Designs by providing expert legal services which may have assisted in the settlement of its legal dispute with Trend Marketing, **public policy, however, dictates that a party should not benefit from its wrongdoing**. Accordingly, this matter is reversed as to Vista Designs' counterclaim and remanded for further proceedings to determine the amount **Vista Designs is to be reimbursed for monies paid to Silverman for legal fees under the void contract**.

While the arguments in the cases above are forceful and compelling, plaintiffs reiterate that there is no need to even reach them in the instant case. This case can be decided solely on the basis of the forged endorsements on the checks, without need to reach any other issue, and the plaintiffs' damages are the face amount of the checks. Likewise, the plaintiffs'

"actual damages" for the fraud/misrepresentation and breach of contract are also represented by the face amount of the checks, and plaintiffs cannot be awarded the same damages twice. The face amount of the checks being held in interpleader places the plaintiffs in the same position they would have been in had the checks been mailed to them or held by a third party, and their endorsements not been forged and the monies taken by the unlicensed contractors.

To require the plaintiffs to prove anything more as "actual" damages would allow defendants, operating in violation of the licensing statutes and the criminal law, to retain the benefit of their own misconduct and wrongful acts, by a setoff to the amounts they wrongfully obtained measured by the purported value of the work it was illegal for them to perform; this the law will not allow. It would change the entire focus of this case, requiring the parties to retain and name (should the trial court even allow it) new experts in building, adjusting, home valuation, and others, and place the burden upon the wholly innocent homeowners rather than the wrongdoers.

And should this Court for any reason hold that the interpleader funds are not the property of the plaintiffs, then the innocent homeowners will have no avenue of recovery whatsoever. The innocent should not be punished and the wrongdoers rewarded.

This is an unusual case, not the usual case in which the homeowners have voluntarily paid the contractor and then later sued for repayment, and there is no need for this Court to reach the issue of what the law should be in a case not before this Court. The instant case is unusual because the checks were received, forged, and cashed by the unlicensed contractor without the plaintiffs' knowledge and consent, and cashed through a check cashing company which was still doing business with a bank such that the monies could be clawed back and interpled into court, thus affording the plaintiffs an avenue of relief where they would, under the more usual

circumstances where the unlicensed, fly-by-night contractor is out of business and uncollectible, have none. A simple forged endorsement case where checks were signed without any legal right to do so should not be allowed to be complicated into something it is not, particularly where the conduct of the defendant unlicensed contractors and the defaulted defendant check cashing company is so egregious and wrongful.

The decision of the trial court was and is completely correct, the Court of Appeals was correct in affirming it, and this Court should deny leave to appeal.

The big picture. In what other area of law would we even consider protecting and rewarding a party who acts in violation of the law, both civil and criminal, and punishing the very parties our statutes were designed to protect, their insurers, and legitimate businesses operating within the law?

The unlicensed contractor problem is huge, and has been getting much worse. Every time there is a dip in the economy, or a disaster suchmore and more people come out of the woodwork and decide to act as unlicensed contractors to make a quick buck. This counsel has handled many of these cases over the past ten years, and the problems with the unlicensed contractors are what one might expect, with poor and shoddy workmanship, incomplete jobs, and taking excessive money for work not performed, the very ills which our statutes were designed to protect against. Insurance monies are taken,[4] and the homeowners have no way to repair their homes. This counsel has had to recently decline many other unlicensed contractor cases, since

[4] Somewhat shockingly, insurance companies do not routinely check whether or not a contractor is licensed before authorizing and making payment. In the instant case, this counsel spoke with the insurer's adjuster in the courtroom hallway, and asked why the insurer did not take thirty seconds to go to a bookmarked State of Michigan website and check whether a contractor was licensed before making payment; if unlicensed, the insurer and homeowner would owe nothing, and the whole gamut of problems would be avoided. The only answer was that this was not their practice. And this counsel has seen an unlicensed contractor appear on an insurance company's list of "Preferred Contractors"!

experience has taught him that these cases are often litigated through trial only to find out that there is no way to collect upon any judgment and to obtain relief for the homeowner.

When a case finally arises such as this one in which there is an avenue of relief for an innocent homeowner, particularly one, in contrast to *Stokes*, in which the homeowner is not *in pari delicto* or *in pari criminis* with the unlicensed contractor, has no idea that the contractor was unlicensed and does not go into the transaction with the intention of avoiding paying the contractor, it is essential that the avenue of relief not be closed.

Should this Court require an innocent homeowner to prove "actual" damages over and above the face amount of the payments made to the unlicensed contractor (all the more when the contractor, without the homeowner's knowledge and consent and without legal right, has received, endorsed and cashed checks), then this Court will have added the finishing touch to the blueprint allowing anyone to act as an unlicensed contractor with impunity, as set forth to this Court in "the big picture" section of Argument I.

If the unlicensed contractor is allowed to set off the claimed value of the work he illegally performed against the amount he was wrongfully paid in violation of law then the purpose of the law will have been destroyed, and its effectiveness eviscerated. Why shouldn't a person operate as an unlicensed contractor?[5]

This would also unfairly place the burden upon the very parties the law was designed to protect. With no practical avenue of relief, the homeowner will not only not be able to hire a lawyer, but will have to expend sums on expert witnesses, builders, appraisers, accountants, and others. Why should the burden be placed upon the innocent party rather than the wrongdoer?

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[5] This counsel has never, ever seen a criminal prosecution against an unlicensed contractor. And in this case, although the Epps made a complaint, the police and prosecutor declined to proceed.

Requiring proof of more specific "actual" damages, and thus giving credit for the value of work illegally performed, will have dire consequences regarding many other services for which a license is required. Let us once again take the example of the person posing as a doctor, or one whose license has been revoked, who has received payments made for services illegally performed. Do we place the burden upon the defrauded patient to prove that the result would have been better had he received treatment with a real, licensed doctor? Do we leave the patient, and his no-fault or medical insurer without a remedy because we have allowed the defense that the patient actually benefited from the illegally rendered service?

The D.C. court in *Rubin v Douglas, supra,* held that monies paid to an unlicensed person acting as a doctor had to be repaid, and its reasoning was and is sound.

Let us once again take the example of the person posing as a licensed lawyer, or a disbarred lawyer, who has received payments made for services illegally performed. Do we place the burden upon the defrauded client to prove that the result would have been better had he hired a real, licensed lawyer, and allow a defense that the client actually benefited from the illegally rendered service? If the nonlawyer writes an appellate brief, do we place the burden upon the defrauded client to somehow show that had he hired a licensed appellate lawyer he would have obtained a better decision, or allow a defense that the client got the benefit of the services rendered? If the nonlawyer negotiates a personal injury settlement presuit, do we place burden upon the defrauded client to somehow show that had he hired a licensed lawyer he would have obtained more money, or allow a defense that the client got the benefit of the services rendered and that must be set off from the amount to be repaid?

The Florida court in *Vista Designs, supra,* held that fees paid to an unlicensed lawyer had to be disgorged, as did the Illinois court in *Ransburg, supra,* as to fees paid to an unlicensed

architect. The reasoning of those courts is sound, and public policy in Michigan demands the same result. Any other decision which requires the plaintiffs to prove any "actual" damages over and above the face amount of the checks paid to the unlicensed contractor will have widespread effect encouraging the unauthorized practice of all of the professions regulated in the State of Michigan.

The big picture concerns and policy considerations set forth by the New Mexico Supreme Court in *Mascarenas, supra,* and the California *Domach* case cited therein, as well as the other cases involving other professions, are dead on. Any decision which requires plaintiffs to prove anything other than the face amount of the checks taken by the unlicensed contractors will "permit unlicensed contractors to flourish and profit at the expense of the public". It will allow the unlicensed contractor to avoid the consequences of the law by the simple expedient of being paid. The purpose of the unlicensed contractor law, stated by Justice Talbot Smith in *Alexander, supra,* "to protect the public from incompetent, inexperienced, and fly-by-night contractors", will have been frustrated, and the *Mascarenas* court said it well:

> The object sought to be accomplished by the Act is a healthy, ordered market in which consumers may contract with competent, reliable construction contractors who have passed the scrutiny of a licensing division. The wrong to be remedied is the exploitation of the public by incompetent and unscrupulous contractors who are unable or unwilling to obtain a license. In effect, the wrongs to be remedied are circumstances which permit unlicensed contractors to flourish and profit at the expense of the public. . . "The purpose of the Act is to protect the public from incompetent and irresponsible builders. This purpose should not be lost sight of."

A decision in favor of defendants will encourage unlicensed people to work in all of the professions for which the State of Michigan requires licenses because it will be easy for them to retain the monies they have received by violating the law. Why would this Court possibly want to benefit those who act in violation of law to the detriment of those who the law was

designed to protect, their insurers, and other legitimate businesses operating within the law, with the added burdens and expenses the law demands for the protection of the public, and trying to make an honest living?

And, as the *Mascarenas* court, and other cases regarded other professions noted, when you require the monies to be repaid and take the profit out, you go a long way to stopping people from operating without a license: "The practical effect of our decision will be to further inhibit unlicensed contractors from engaging in construction work without a license."

This Court has never protected and rewarded illegal and criminal behavior. It should not start now.

RELIEF

WHEREFORE, Plaintiffs-Appellees and Cross-Appellants pray that this Court **deny** Defendants leave to appeal.

Respectfully submitted,

POSNER, POSNER AND POSNER

By: Gerald F. Posner – P 24269
Plaintiffs-Appellees/Cross-Appellants
1400 Penobscot Building
Detroit, MI 48226
(313) 965-7784

DATED: August 14, 2014

POSNER, POSNER AND POSNER
ATTORNEYS AND COUNSELORS AT LAW
1400 PENOBSCOT BUILDING
DETROIT, MICHIGAN 48226

(313) 965-7784

GERALD F. POSNER
ERIC D. FREY
ZACHARY M. POSNER

SAMUEL POSNER
(1916-2006)
ELIZABETH F. POSNER
(1916-1995)

Via FedEx

August 14, 2014

Clerk of the Court
Supreme Court of Michigan
925 West Ottawa St., Fourth Floor
Lansing, Michigan 48915

Re: Epps v 4 Quarters Restoration
Supreme Court No. 147727

Dear Sir:

Enclosed herewith please find eight copies of Plaintiffs' Supplemental "MOAA" Brief and Proof of Service in the above-entitled matter.

Pursuant to your prior instructions, I have not bound the original brief, and have not placed a plastic sheet in front of the first page of any of the copies.

Very truly yours,

POSNER, POSNER AND POSNER

Gerald F. Posner

GFP:j
Encl.

cc: Roger L. Premo, Esq.

RECEIVED
AUG 15 2014
LARRY S. ROYSTER
CLERK SUPREME COURT