

STATE OF MICHIGAN
IN THE SUPREME COURT

DANNY EPPS and JOYCE EPPS,

Plaintiffs-Appellees,

v

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

Defendants-Appellants.

Supreme Court No. 147727

COA Docket No. 305731

Wayne County Circuit Court
No. 09-018323-NO

147727

PLAINTIFFS' ANSWER TO
APPLICATION FOR LEAVE TO APPEAL

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**STATEMENT OF FAILURE TO ESTABLISH GROUNDS
FOR APPEAL UNDER MCR 7.302(B),
AND OF APPELLANTS' WAIVER OF, AND FAILURE
TO PRESERVE ISSUES AND ARGUMENTS**

Defendants-Appellants have failed to establish any grounds for appeal to this Court as required by MCR 7.302(B). The case does not involve any issue as to the validity of a legislative act, (B)(1), is not an action with significant public interest against the state, an agency or officer, (B)(2), nor do defendants even argue that the issues presented involve legal principles of major significance to the state's jurisprudence, (B)(3). Turning to (B)(5), not only is the decision of the Court of Appeals not clearly erroneous so as to cause material injustice and not in conflict with decisions of the Supreme Court or Court of Appeals, all this case really presents is application of clear and consistent Supreme Court precedent. That defendants do not like that precedent is not grounds for appeal to this Court.

The Application is yet another example of what this counsel has seen all too often in his 39 years of appeals and calls a "straw man" appeal in that defendants have not only failed to supply a fair presentation of the lower court record, as the court rules require, but have ignored and hidden portions of the lower court record which caused the trial court to make its decisions, and have thus fabricated a case in order to set up a straw man and then knock it down. For example, when arguing that the trial court should have set aside the default against MBM/Denaglen, the check cashing company, *just how did defendant just conveniently forget to mention the most salient fact that it inexplicably waited a full seven weeks after the entry and service of the default to file its motion to set aside the default?* These kinds of attempts to play fast and loose with the facts and misrepresent the record should not and cannot be tolerated.

Furthermore, the majority of the arguments raised by the new appellate counsel for defendants were never made to the trial court, and thus waived and not preserved. In addition, the arguments were not even made to the Court of Appeals, another reason they are not preserved and waived; defendants can hardly argue that the Court of Appeals decision is clearly erroneous because the Court did not agree with an argument or issue which the defendant failed to present. “The Court of Appeals did not consider it, and we therefore do not consider the issue on this appeal.”¹ Getting a new lawyer does not allow a party to start again from scratch. As this Court stated in *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431, 437 (2008):

Michigan generally follows the “raise or waive” rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a “failure to timely raise an issue waives review of that issue on appeal.”

The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute.

On top of this, defendants, through their new lawyer, are now urging positions directly contrary to that which they took in the lower court, but our jurisprudence does not allow this: As stated in *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 455, n 1; 733 NW2d 766, 771 (2006):

¹ *Weems v Chrysler Corp*, 448 Mich 679, 686, n 5; 533 NW2d 287 (1995), *overruled in part on other grounds*, 466 Mich 95; 643 NW2d 553 (2002). *Also see, In re Woods Estate*, 299 Mich 635; 1 NW2d 19, 22 (1941) [“Again we repeat that questions raised for the first time on appeal to the Supreme Court will not be considered.”]

“A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994).

Some simple examples will now be given of why this case only involves application of established precedent, giving no rise to grounds for appeal to this Court, and how defendants never raised some of the issues or arguments raised in this Application; others will be set forth in the body of this brief.

For example, in Issue I as formulated by appellants, they argue that the misrepresentation that defendant contractors were licensed only made the contract voidable, not void. Not only was this argument not made to the trial court or to the Court of Appeals, causing plaintiff to state on Page 20 of their appellate brief (emphasis in original) that

Nowhere in defendants' brief to this Court or their pleadings in the trial court do defendants respond to or contest that as a clear matter of law, the entire contract is void (both the initial contract and any alleged additional contracts to perform further construction work on the plaintiffs' home).

And noticeably absent from defendants' brief to this Court or their pleadings in the trial court is any argument that defendants had any legally valid authority to sign plaintiffs' names to the checks which were made payable to the plaintiffs. That, itself, speaks wonders, as it appears that defendants now clearly realize that they cannot rely upon the legally void Insurance Power of Attorney as giving Willis authority to sign the plaintiffs' names to the checks and take the money, which was the *sole* basis upon which Willis has ever claimed he signed plaintiffs' names to the checks.

but the Court of Appeals correctly relied on Supreme Court precedent 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, **the contract is void**. *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).

Bilt-More in turn was quoted with approval by this Court in the seminal case of *Stokes v Millen Roofing Co*, 466 Mich 660, 672; 649 NW2d 371, 377 (2002) (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.

Reliance upon and application of long-standing Supreme Court precedent gives no basis for an appeal to this Court. And, as will be seen in the Argument section of this brief, once it is determined that the contract is void, *this case is over*.

Defendants' argument in its Issue II is not only without merit, but is based upon a section of the UCC never cited to or argued by defendants in either the trial court or the Court of Appeals.

Issues III and VI concerning the default fail to inform this Court that defendant inexplicably waited a full seven weeks to file a motion to set aside its default; that the motion to set aside the default did not raise or argue the statute now cited; that the motion for summary disposition referred to was improperly filed and rejected because the default had not been set aside; and that the argument that the checks had not been delivered to the plaintiffs is in direct contradiction to the position taken throughout the case by defendants, and set forth in the affidavits of their prior attorney and defendant Willis, that Willis was the "acknowledged agent" of the plaintiffs and therefore authorized to accept delivery of the checks on their behalf and negotiate the checks. Furthermore, the Application is completely devoid of any law and argument regarding the requirements for setting aside a default, nor does it recognize just what defendant Denaglen admitted by virtue of the default.

Issues IV and V fare no better and are subject to the same waiver and non-preservation arguments as well as being contrary to clear precedent. The assignment referred to in Issue IV is part of the contract which is void under established precedent, *see above*, and established precedent, including *Stokes, supra*, does not allow defendants to go through the back door of equity to obtain or retain monies it had no right to in the first place for incomplete and shoddy work which was illegally performed and which the contractor defendants fraudulently induced the plaintiffs to have them do. Furthermore, defendants admitted in their reply brief in the Court of Appeals, p 2, that they are not permitted to set off a verdict for damages – in this case it would be a judgment based on the forged endorsements – by claiming entitlement to monies for services rendered, which is what this argument essentially is.

Defendants have failed to establish any valid grounds for appeal to this Court and there is no reason for this Court to disturb the decision of the Court of Appeals.

**COUNTER-STATEMENT OF JURISDICTION
AND STANDARD OF REVIEW**

Defendants-Appellants have set forth the orders involved in this appeal, but have completely failed to set forth any standard of review, contrary to court rule.

Plaintiffs-Appellees have restated the questions involved so as to more precisely and accurately reflect the actual issues involved in this case. The standard of review for those issues is as follows.

"Appellate review of a motion for summary disposition is de novo." *Spiek v Michigan Dept of Transportation*, 456 Mich 331; 572 NW2d 201, 204 (1998).

The same de novo standard of review applies to Counter-Issues II and IV which involve basing the judgment against the defendant unlicensed contractors and the default judgment against Denaglen, the check cashing company, on the face amount of the checks, and not allowing defendants a setoff for the claimed value of their work.

A trial court's decision on a motion to set aside default is reviewed for a clear abuse of discretion. *Alken-Ziegler, Inc v Waterberry Headers Co*, 461 Mich 219, 227; 600 NW2d 638, 642 (1999).

Furthermore, as set forth in the prior section of this Brief, *supra*, most of the issues and arguments raised by defendants have not been preserved and are waived, and should not be reviewed by this Court.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN GRANTING PLAINTIFFS SUMMARY DISPOSITION AGAINST THE UNLICENSED CONTRACTOR DEFENDANTS IN THIS CASE, A CASE BASED PRIMARILY ON THE DEFENDANTS' FORGED/LEGALLY UNAUTHORIZED ENDORSEMENTS UPON \$128,047.23 IN CHECKS MADE PAYABLE TO THE PLAINTIFFS, WHERE THE ONLY DOCUMENT UNDER WHICH DEFENDANTS CLAIMED ANY AUTHORITY TO SIGN THE PLAINTIFFS' NAMES TO THE CHECKS, AN "INSURANCE POWER OF ATTORNEY", WAS PART OF THE CONTRACT BETWEEN THE PARTIES AND, BECAUSE DEFENDANTS WERE UNLICENSED, AND MISREPRESENTED TO PLAINTIFFS THAT THEY WERE LICENSED, THE ENTIRE CONTRACT WAS VOID, NOT JUST VOIDABLE, UNDER ESTABLISHED MICHIGAN LAW, LEAVING THE DEFENDANTS NO LEGAL AUTHORITY TO HAVE TAKEN THE CHECKS, SIGNED THE PLAINTIFFS' NAMES, AND CASHED THE CHECKS AND TAKEN THE MONEY?

Plaintiffs-Appellees say "No."

Defendants-Appellants say "Yes".

The trial court said "No".

The Court of Appeals said "No".

II.

DID THE TRIAL COURT ABUSE ITS DISCRETION AND COMMIT REVERSIBLE ERROR IN DENYING DEFENDANT DENAGLEN/MBM CHECK CASHING'S MOTION TO SET ASIDE DEFAULT, PARTICULARLY IN LIGHT OF THE FACT THAT IT INEXPLICABLY WAITED A FULL SEVEN WEEKS AFTER BEING NOTIFIED THAT THE DEFAULT HAD BEEN ENTERED TO FILE ITS MOTION TO SET ASIDE DEFAULT?

Plaintiffs-Appellees say "No."

COUNTER-STATEMENT OF QUESTIONS INVOLVED

(Continued)

Defendants-Appellants say "Yes".

The trial court said "No".

The Court of Appeals said "No".

III.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN GRANTING PLAINTIFFS JUDGMENT AGAINST THE UNLICENSED CONTRACTOR DEFENDANTS BASED ON THE \$128,047.23 FACE AMOUNT OF THE CHECKS, AND NOT ALLOWING DEFENDANTS TO REDUCE THE AMOUNT OWED BY SETTING OFF AMOUNTS CLAIMED FOR THE VALUE OF THEIR WORK?

Plaintiffs-Appellees say "No."

Defendants-Appellants say "Yes".

The trial court said "No".

The Court of Appeals said "No".

IV.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN GRANTING PLAINTIFFS JUDGMENT AGAINST THE DEFENDANT DENAGLEN/MBM CHECK CASHING WHERE THERE WAS NO GENUINE ISSUE AS TO THE AMOUNT OF DAMAGES AND THE JUDGMENT WAS BASED ON THE \$128,047.23 FACE AMOUNT OF THE CHECKS?

Plaintiffs-Appellees say "No."

Defendants-Appellants say "Yes".

The trial court said "No".

The Court of Appeals said "No".

COUNTER-STATEMENT OF FACTS

Preface. In determining what facts are relevant to this case, it is important to realize just what this case is about. Frankly, defendants still don't get it. The plaintiffs' case is primarily an action *based on forged endorsements*, and their other causes of action, including conversion, fraud and misrepresentation, and so forth, merely flow from the forged endorsements on the checks.

This is not a case where plaintiffs voluntarily paid the defendants out of their pockets and then sued later to get their money back, but 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.

Defendants have continually missed the central point that in this case involving a claimed forged endorsement, the defendants' unlicensed status means that the entire contract, including the Insurance Power of Attorney which is *the sole basis* upon which defendant Willis claims he was authorized to sign and endorse the plaintiffs' names on the checks and take the money, was **void**, meaning that Willis had no legal authority whatsoever to endorse the checks and get the money. Accordingly, plaintiffs, who were the payees on the checks, are entitled to recover against Willis on the forged endorsements for the full amount of the checks.

And the extent of any dispute as to what work defendants may or may not have performed is irrelevant to the issues properly before this Court, since, as a matter of clear law, an unlicensed contractor cannot defend an action based on forged endorsements of checks by arguing that he should be entitled to credit, or setoff, for any work performed.

Plaintiffs note that defendants set forth matters in their statement of facts, as well as in other portions of their brief, which are not facts at all, but merely the positions taken and arguments made by defendants when defendants know quite well that there is record evidence and testimony to the contrary. Many of these matters, including how skillfully the contractors performed their shoddy-in-fact work, are just plain false. Plaintiffs do not have the space to spend page after page in this Court responding to supposed allegations of fact which really have nothing to do with this appeal, but will attempt to respond only to matters which are really relevant.

Plaintiffs shall now proceed with an overview of this case, followed by a more detailed recitation of the relevant facts and proceedings.

Overview. Plaintiffs' basement flooded on 7-26-06, damaging and/or destroying building structure and personal property. Defendants Auto-Owners/Home-Owners insured the risk, and sent the claim to their adjustment company, defendant AM Adjusting (defendants Anderson and Mathews), where Mathews handled the claim and steered the repair work to defendant Troy Willis, and his related companies, defendants 4 Quarters and EIS, by singing Willis's praises to the plaintiffs.

The contractors were unlicensed - worse, actually, as the license had been revoked after several disciplinary actions. These unlicensed contractors did some work, but never completed the work and never restored or replaced the majority of plaintiffs' personal property. Willis forged plaintiffs' names to documents, including a certificate of Completion of Repairs and an Affidavit of Completion By Owner, and arranged, sometimes with assistance from defendant Anderson, who appears was deep in this crooked scheme with Willis (indeed,

discovery turned up another \$20,000+ forged check on a phony claim Willis and Anderson concocted on plaintiffs' home) to have checks from the insurer and from the mortgage company sent to Willis.

Willis then forged plaintiffs' endorsements on \$128,047.23 in checks which he cashed through defendant Denaglen/MBM Check Cashing (rather than depositing the checks in a bank like a legitimate contractor) which in turn deposited the checks in Comerica Bank which paid out on the checks. Willis claimed the right to sign the checks pursuant to an "Insurance Power of Attorney", which was not actually a power of attorney with banking powers to endorse and negotiate checks at all; however, the factual dispute of the parties as to its scope is irrelevant because this power of attorney is part of the contract between the parties which is **void**, and not just voidable, as a matter of law, and therefore could give Willis no legal right to sign the plaintiffs' names to the checks.

Default was entered against defendant Denaglen, and the trial court denied the motion to set aside the default, and the motion for rehearing of that decision. Additional facts regarding this decision will be set forth in the Argument section regarding Issue II, but this Court should be made immediately aware of the fact that Denaglen inexplicably waited 49 days – a full 7 weeks – after the default was entered and both Denaglen and its attorney were notified of the default, to file its motion to set aside the default.

Attorney Yezbick represented both the check cashing company, Denaglen, and the unlicensed contractors/check forgers, throughout these proceedings, and now a new attorney is representing all of the defendants in this Court.

Comerica took back the \$128,047.23 from Denaglen's account, and filed a cross-complaint for interpleader. An Order and Judgment Granting Comerica Inter-pleader Relief and

Discharging Comerica Bank With Prejudice was entered on 5-28-10, and the money is now still being held in court pending this appeal.

Defendants Auto-Owners Insurance Company and Home-Owners Insurance Company assigned all of their claims or rights to the checks, the proceeds of the checks, and the interpleader funds to the plaintiffs, together with any causes of action (*see*, Appendix K). an order was entered on 7-23-11, substituting the plaintiffs as party defendants in the place and stead of the insurers in both the principal action and the interpleader action, and dismissing the claims against the insurers in the principal action with prejudice and in the interpleader action without prejudice.

The plaintiffs' case against five other defendants was resolved.²

That leaves the plaintiffs' claims against the contractor defendants (Troy Willis, 4 Quarters, and EIS) and the check cashing company, Denaglen/MBM. Plaintiffs brought suit against these defendants on a number of theories regarding the forged checks, including but not limited to conversion, provisions of the UCC, embezzlement, negligence, and so forth, and further requested a full accounting, declaratory relief, rescission and equitable relief.

Plaintiffs filed a motion for summary disposition against the contractor defendants. To summarize the arguments, plaintiffs asserted that because defendants were unlicensed

² The case against defendants AM Adjusting, Anderson, and Mathews was settled and an order dismissing these defendants was entered on 6-28-11.

Defendant Maximum Restoration had, at the behest of the contractors and/or adjusters, picked up a great amount of plaintiffs' personal property (there was a 37 page inventory) in order to "restore" it, never returned the property (its bills sent to Charles Willis were never paid), and then went out of business. A default judgment against this defendant was entered on 7-29-11.

Defendant Charles Willis, brother of defendant Troy Willis, co-owner of some of the businesses, and foreman of the job on plaintiffs' home, was also in default. An order dismissing this defendant without prejudice was entered on 7-29-11.

contractors, as a matter of law the entire contract in this case was and is void, including the Insurance Power of Attorney which is the sole basis upon which defendant Willis ever claimed he was authorized to sign and endorse the plaintiffs' names on the checks and take the money. Accordingly, plaintiffs, who were the payees on the checks, were entitled to recover against Willis on the forged endorsements for the full amount of the checks. In addition, defendants, who displayed their license to plaintiffs and put the license number on the Insurance Power of Attorney despite the fact that the license had been revoked, were guilty of fraud and misrepresentation, allowing the plaintiffs relief. Further, plaintiffs were entitled to rescission and recovery of monies which defendants received under a void contract, and were entitled to damages for conversion as well.

Defendants filed an answer to the motion and their own motion for partial summary disposition. They argued that plaintiffs suffered no damages, because defendants did all the work it was illegal for them to do. Plaintiffs responded that not only had plaintiffs testified that the work was not in fact completed, but the fact that the defendants did work is not a defense to a cause of action based on forged endorsements (or any other cause of action for that matter), and unlicensed contractor defendants are not able to get the benefit of their bargain through the back door of equity or an equitable defense such as setoff. If the endorsements were without legal authority, and therefore forged, then plaintiffs, who were the payees on the checks, were entitled to the proceeds in this action, and the issue of what monies the defendants may be entitled to for the work they performed would be left for another day and another lawsuit (one which defendants would then lose, because they were unlicensed).

Plaintiffs also brought a motion for summary disposition as to the interpleader funds.

Oral argument on the motion was held on 6-24-11, and the trial court, in an order dated 7-11-11, granted both of plaintiffs' motions and denied defendants' motion. Defendant Denaglen filed a motion for reconsideration which was denied in an order dated 7-29-11.

Plaintiff brought a motion for entry of judgment which was heard by the trial court on 7-29-11. Once again defendants argued that the plaintiff had suffered no damages. Plaintiffs responded that the damages were based on the face amount of the checks, and the court agreed. As to the contractor defendants, the judgment was for the face amount of the checks, with treble damages under the conversion statute. As to the check cashing company, the judgment was based on the face amount of the checks, and plaintiffs did not pursue their claim for treble damages for conversion. With regard to defendant's argument that it was entitled to a trial as to damages, plaintiffs responded that the judgment was for a fixed amount, the face amount of the checks, and the trial court agreed, stating, Transcript, 7-29-11, p 10:

And secondly, I am loath to take the issue of damages away from a jury if there is any genuine issue with regard to amount. But there is not in this case, so [the] motion is granted.

On that same date, Judge Sapala entered the Judgment and Order for Distribution of Funds Held in Escrow from which defendants have filed a claim of appeal.

Defendants appealed to the Court of Appeals which affirmed in a decision issued on 6-6-13. Rather than basing its decision primarily on the unlicensed contractor statute, as the trial court had done, the Court of Appeals affirmed on the alternate ground that the misrepresentation by defendants that they were licensed rendered the contract void under clearly established precedent. Defendants' motion for reconsideration was denied on 8-6-13.

Facts. Facts relevant to the actual issues to be decided in this appeal are set forth below, with proper references to the record. "MSD" refers to plaintiffs' motion for summary disposition and the exhibits attached thereto.

Willis was an unlicensed contractor. His license was revoked on 1-31-06, and he had other disciplinary actions as well (*see*, MSD, Exhibit A, records from State website, and deposition of Willis, MSD, Exhibit H, pp 18, 22). The three documents together, the EIS "Fire Repair Agreement", the "Work Authorization" to 4 Quarters, and the EIS "Insurance Power of Attorney" constituted the contract between the plaintiffs and the contractor defendants to do work for the insurance claim on the property, both personal property and contracting work (Dep, 49-50):³

Q Am I correct that these three documents taken together, this Fire Repair document, which is Number 2; the Work Authorization, Number 7; the Insurance Power of Attorney, Number 5; this would constitute at that time the contract between you to do the work for the insurance claim on the property, both personal property and contracting work?

A Correct.

Q At the time these documents were signed by the Epps, were you or your company, either you or your companies, a licensed contractor?

A No.

All three documents were signed at the Epps home (Dep 37-38, 39-41). Willis went alone to the plaintiffs' home; the notary on the power of attorney is his wife, who was not actually present when the document was signed (Dep 41).

At the times when the contract documents were signed, when the work on the

³ Those three documents were set forth in MSD, Exhibit B, and were attached to defendants' Court of Appeals brief as Exhibits A, B, and D.

property was done, and when any funds were received, Willis and his companies were not licensed contractors (Dep 50-52).

When he talked to the Epps about doing the rest of the work on the property after the initial emergency work, he brought out a book to show the Epps his work and the book had a copy of his license in it (Dep 56).

On 9-8-06, Willis met with the Epps at their home, they signed a contract for \$4,245 in additional work, and he gave some money to them (*see* MSD, Exhibit C and Dep, pp 55, *et seq*). He gave the Epps a \$2,576.30 contents replacement check from the insurance company (Dep 55). The document states that there will be \$15,000 for contents replacement, but that there was just \$7,500 now, he subtracted half of the extra construction amount, and gave the Epps \$5,377.32 in cash (*see* MSD Exhibit C and Dep 58). The \$7,500 was actually “a gift to them” (Dep 107).

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 (see check contained in MSD Exhibit D, and Dep 60) because “it didn’t involve them” (Dep 67-68).

He cashed all of the checks upon which he signed plaintiffs’ names at MBM Check Cashing for which they charged him around 3%, rather than going to a bank (Dep 69-71). Willis admitted that he was the person who signed/endorsed the plaintiffs’ names on all of the checks (Dep 72, 78, 80, 91, 92, 96). All in all, the checks to which defendants forged plaintiffs’ names totaled \$128,047.23.⁴

⁴ The checks, as identified in the interpleader action, are as follows:

- | | |
|--------------------------------------------|--------------------------------------------|
| 1. <u>September 7, 2006</u> : \$46,443.34 | 4. <u>September 24, 2006</u> : \$7,248.00 |
| 2. <u>September 19, 2006</u> : \$13,340.20 | 5. <u>September 25, 2006</u> : \$16,705.25 |
| 3. <u>September 23, 2006</u> : \$10,015.16 | 6. <u>October 23, 2006</u> : \$20,682.28 |

Out of the \$46,443.34, Troy Willis allocated (and took) \$36,047.07 for additional work on the plaintiffs' home (Dep 81); the 4 Quarters estimate was attached as MSD, Exhibit E. But aside from the 9-8-06 document for the additional \$4,000+ in work which the Epps signed, there is no other written document authorizing any additional work at all, even though as a former contractor, he knew the importance of having a person sign a contract for additional work (Dep 81-82). When he received and took the \$36,000+ from the check to do the additional work on the home, he was unlicensed (Dep 83-84). And the Epps may have never been shown the \$36,047.07 estimate and never signed off on it (Dep 82).

He never pulled any permits (Dep 87). Defendants state to this Court that the work passed inspection by plaintiffs' mortgage lender, but conveniently forget to tell this Court the rest of the story. 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* (Dep 88-90).

As to a subsequent claim with a date of 9-6-06 (the Epps dispute that they were the ones who made any claim) for "roof damage", he did work on the house and was paid \$20,682.80; again he signed the plaintiffs' names to the check (Dep 90-92, 93). However, he has no work authorization, no power of attorney, or any other agreement to perform work for a claim with the date of loss 9-6-06.⁵

⁵ In the Court of Appeals, defendants referenced the affidavit of the insurance agent stating that Danny Epps called and made a claim for roof damage on a 9/6 date, but have admitted that Danny Epps adamantly denies making such a claim or that there was any damage to their roof as does Joyce Epps not only in their affidavits but in their deposition testimony as well. (footnote continued next page)

Willis signed the plaintiffs' names to a Certificate of Completion and Affidavit of Completion by Owner, even adding on "Great job! Thanks" (see MSD, Exhibit F and Dep 96-97) and falsified the notary; he signed it, not his wife (Dep 98).

It is impossible, within the page limit of the court rules, to set forth the plaintiffs' testimony in detail and still have sufficient room for argument; their deposition transcripts are 481 pages long. Their general testimony, however, is along the lines of their affidavits which had been previously submitted to the trial court, and which were resubmitted as MSD, Exhibit G.

It appears that in this Court defendants have finally abandoned their false argument that the plaintiffs provided drivers licenses and other documents "to further facilitate negotiation of checks", well knowing that plaintiffs testified to the contrary. The plaintiffs clearly testified, as well as stated in their affidavits, that the Insurance Power of Attorney was never intended to allow Willis to endorse checks.⁶ Portions of plaintiffs' depositions were attached to their answer to defendants' motion for partial summary disposition. Joyce testified that Troy Willis stated that it was just to help him move faster with the with the insurance company (Dep 23, 24) and not to sign checks (Dep 24), and she thought that the checks would come to her and she would endorse them over (Dep 25, 92-93). Danny Epps testified that the document was to quicken the process and the freedom to do the work faster (Dep 45), to get rid of the red tape and do things

(footnote 5, continued):

What is again telling here is the contemporaneous email attached to the affidavit of the insurance agent. 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.

⁶ Again, any dispute as to the scope of the Insurance Power of Attorney is actually irrelevant to the issues in this appeal. Since it was part of the contract between plaintiffs and the unlicensed contractors, it is absolutely void, and cannot provide a legal basis for Troy Willis to have endorsed the plaintiffs' names to the checks.

faster (Dep 47), to sign documents and forms to the insurance company (Dep 48), and it did not give Willis authorization to sign checks and cash checks on his behalf (Dep 46).

Plaintiffs testified to the shoddy and incomplete work done by the defendants. When the defendants refused to complete the work, the plaintiffs began inquiries and only then found out about a number of checks that had been issued and cashed by Willis without their knowledge or consent, including for work never performed by the contractors (including getting paid twice for work not performed). They hired one lawyer who unsuccessfully attempted to obtain information from Willis, and subsequently hired current counsel who filed the instant action.

Again, because of space constraints, it is impossible to detail the extent of the fraud committed by the contractor defendants. It is bad, very bad.

Other factual matters may be discussed in the Argument sections of this Brief, both affirmatively and to correct inaccurate assertions by defendants.

ARGUMENT

- I. **THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING PLAINTIFFS SUMMARY DISPOSITION AGAINST THE UNLICENSED CONTRACTOR DEFENDANTS IN THIS CASE, A CASE BASED PRIMARILY ON THE DEFENDANTS' FORGED/LEGALLY UNAUTHORIZED ENDORSEMENTS UPON \$128,047.23 IN CHECKS MADE PAYABLE TO THE PLAINTIFFS, WHERE THE ONLY DOCUMENT UNDER WHICH DEFENDANTS CLAIMED ANY AUTHORITY TO SIGN THE PLAINTIFFS' NAMES TO THE CHECKS, AN "INSURANCE POWER OF ATTORNEY", WAS PART OF THE CONTRACT BETWEEN THE PARTIES AND, BECAUSE DEFENDANTS WERE UNLICENSED, AND MISREPRESENTED TO PLAINTIFFS THAT THEY WERE LICENSED, THE ENTIRE CONTRACT WAS VOID, NOT JUST VOIDABLE, UNDER ESTABLISHED MICHIGAN LAW, LEAVING THE DEFENDANTS NO LEGAL AUTHORITY TO HAVE TAKEN THE CHECKS, SIGNED THE PLAINTIFFS' NAMES, AND CASHED THE CHECKS.**

Summary of arguments. The trial court's decision was absolutely correct, as was the decision of the Court of Appeals, affirming the trial court on alternate grounds. These matters were and are established as a matter of fact and as a matter of law:

- Willis and his companies were unlicensed contractors; in fact, Willis's license had been revoked on 1-31-06. Accordingly, the contractors were unlicensed at the time the contracts were entered into, at the time any work was performed, at all times any monies were received, and at all times Willis signed plaintiffs' names to any documents including endorsing plaintiffs' names on all checks.
- Since the contractor was unlicensed, the entire contract between the contractor and the plaintiffs was void, and not just voidable, as a matter of law.
- The contractor defendant misrepresented himself as a licensed contractor in order to convince plaintiffs to hire him.
- By fraudulently inducing the Epps to enter into the contracts by misrepresenting his possession of a statutorily-required license, Willis rendered the contracts void, and not just voidable, as a matter of law.
- The contract consisted of three papers, confirmed by the testimony of Willis: an EIS "Fire Repair Agreement" (it was water damage, not fire), a "Work Authorization" to 4 Quarters (upon which a "Construction" box was checked), and the "Insurance Power of Attorney" on EIS letterhead; that document also stated "Licensed Residential Builders #2101157151", when the license had been revoked, and contains a false notary from Willis's wife who was not present when the document was signed.
- The "Insurance Power of Attorney" upon which Willis claims authority to sign plaintiffs' names to the checks, being part of the contract, was void, not just voidable, as a matter of law. Thus Willis had no legal right to endorse plaintiffs' names on the checks (or any other documents) and take the money.
- The "Work Authorization" upon which defendants now claim that the insurance proceeds were assigned to them, being part of the contract, was void, not just voidable, as a matter of law. Thus Willis had no legal right to the insurance proceeds, and those proceeds belonged to the plaintiffs.
- As unlicensed contractors, defendants had no right to any payment at all, either for materials or labor, and no right to receive any proceeds whatsoever from the checks as a matter of law.
- Plaintiffs are entitled to recover against Willis on the forged endorsements.

- Plaintiffs are entitled to rescission *ab initio*.
- Any amendments to the initial contract, and any claimed subsequent contracts, are void, and not just voidable, as a matter of law.
- There was no valid contract, and in fact 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.
- There was no valid contract, and in fact no contract at all, between plaintiffs and the defendant unlicensed contractors, for the \$20,682.28 in additional renovation work on plaintiffs' home for which defendants retained plaintiffs' monies arising out of a second insurance claim for damage on 9-6-06.
- Plaintiffs are entitled to the monies being held in escrow pursuant to the order of interpleader, and in fact are the only parties entitled to these monies.
- Plaintiffs are also entitled to judgment against defendants for conversion.

In addition, as will be discussed in the Argument section on Issue III:⁷

- As a clear matter of law, the unlicensed contractor defendants are not entitled to maintain any defense in equity, including setoff, to reduce the amount of plaintiff's judgment. In other words, defendants are not allowed to argue "Yes, I endorsed the checks without legal authority, and cashed the checks with my forged endorsements and took the money, but you, plaintiffs, got the benefit of my work and have to reduce the amount I owe you by the value of my work." Clear Michigan law prohibits this.

⁷ And this will be discussed in even more detail in plaintiffs' application for leave to appeal as cross-appellant, which is being filed because it is unclear whether plaintiffs' argument that the trial court's original grounds for decision, based squarely on the unlicensed contractor statute, which the Court of Appeals rejected (but then affirmed on alternate grounds), can be asserted herein as an alternate basis for affirming the Court of Appeals decision or whether it needs to be challenged on cross-appeal (which, of course, need not be reached if this Court agrees with the Court of Appeals).

Counsel for plaintiffs is a long-time member of the Council of the State Bar of Michigan Appellate Practice Section. The uncertainty in the court rules and inconsistency in application of the court rules has been discussed, and the Council is leaning toward proposing a new rule to clarify when a cross-appeal is necessary. Thus, just to be safe, an application for leave as cross-appellant is being filed.

Argument. Defendants' arguments, and their framing of issues, demonstrate a clear lack of understanding of what this case is about. The plaintiffs' case is primarily an action *based on forged endorsements*, and their other causes of action, including misrepresentation, fraud, conversion, and so forth, merely flow from the forged endorsements on the checks.

This is not a case where plaintiffs voluntarily paid the defendants out of their pockets and then sued later to get their money back, but 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.

Defendants have continually missed the central point that in this case involving a claimed forged endorsement, the defendants' unlicensed status, and misrepresentation as to their licensed status, means that the entire contract, including the Insurance Power of Attorney which is *the sole basis* upon which defendant Willis claims he was authorized to sign and endorse the plaintiffs' names on the checks and take the money, was **void**, not just voidable, meaning that Willis had no legal authority whatsoever to endorse the checks and get the money. Accordingly, plaintiffs, who were the payees on the checks, are entitled to recover against Willis on the forged endorsements for the full amount of the checks.

And the extent of any dispute as to what work defendants may or may not have performed is irrelevant to the issues properly before this Court, since, as a matter of clear law, an unlicensed contractor cannot defend an action based on forged endorsements of checks by arguing that he should be entitled to credit, or setoff, for any work performed.

Nowhere in defendants' brief to the Court of Appeals or their pleadings in the trial court did defendants respond to or contest that as a clear matter of law, the entire

contract is void (both the initial contract and any alleged additional contracts to perform further construction work on the plaintiffs' home). Their non-preserved argument made for the very first time to this Court that the contract was not void but merely voidable is contrary to clear Supreme Court precedent.

And noticeably absent from defendants' brief to the Court of Appeals and their pleadings in the trial court was any argument that defendants had any legally valid authority to sign plaintiffs' names to the checks which were made payable to the plaintiffs. That, itself, speaks volumes, as it appears that defendants clearly realized that they could not rely upon the legally void Insurance Power of Attorney as giving Willis authority to sign the plaintiffs' names to the checks and take the money, which was the *sole* basis upon which Willis has ever claimed he signed plaintiffs' names to the checks. Thus, with a new attorney, they have resorted to an attempt to rely in this Court upon a desperate, non-preserved argument that the contract was not void but merely voidable, which is contrary to clear Supreme Court precedent.

Once it is realized and determined that Willis had no legal right to sign the plaintiffs' names to the checks, **the case is over**. Plaintiffs, the named payees on the checks, are entitled to recover on the forged endorsements.

Defendants have no defense to this and 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.

Plaintiffs shall now address the arguments, summarized above, to demonstrate that the decision of the trial court and Court of Appeals was correct and should be affirmed.

Defendants were unlicensed at all relevant times. There is no issue about this.

This is clearly established.

Unlicensed contractors. The law concerning unlicensed contractors is crystal clear. The controlling precedent is this Court's decision in *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002), attached hereto for easier reference as Appendix A.

The *Stokes* decision makes 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 *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.

Thus **the entire contract** between the plaintiffs and Willis and his companies, 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"**, and, further, under *Stokes*, Willis was and is not entitled to one penny of the proceeds of the checks.

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.⁸

Plaintiffs understand that the defendants' contention is that *Stokes* and other authorities only relate to a case in which the contractor is attempting to sue for compensation or foreclose a lien, but defendants miss the point entirely. Not only is the absolute rule also applicable to any **"suit in equity and any other proceedings in which rights are determined"**,⁹ *Roberson, supra*, but the controlling principle applicable to this case is that **the entire contract is void.**

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

⁸ See, e.g., *Roberson Builders, Inc v Larson*, 482 Mich 1138; 758 NW2d 284 (2008), concurring opinion of Justice Kelly, joined in by Justice Young, upholding the Court of Appeals opinion, COA #260039, 2006 WL 2683319 (2006), and explaining that the prohibition of an unlicensed contractor being held to be entitled to any monies in an "action" in a court of this state also **includes "a suit in equity and any other proceedings in which rights are determined"**. The Supreme Court order, followed by the unpublished Court of Appeals opinion, is attached as Appendix B.

Also see, numerous unpublished Court of Appeals opinions which were cited to the trial court, attached hereto as Appendices C-F pursuant to MCR 7.215 (C)(1), such as *84 Lumber Company v Pagel & Frey, LLC*, COA #271310, 2007 WL 1228629 (2007); *Delagrange Remodeling, Inc v Anthony*, COA #250022, 2005 WL 678160 (2005) [including affirming the dismissal of a count for promissory estoppel]; *Gabara v Gentry*, COA #262603, 2006 WL 3733255 (2006); and *Cabinets by Graber, Inc v Hebel*, COA #257506, 2006 WL 743888 (2006).

⁹ And, of course, this applies to the interpleader action and the determination of who is entitled to the interpleader funds, since **interpleader is an action in equity**. See, e.g., *Oakland County v Bice*, 386 Mich 143, 152, n 1; 191 NW2d 338 (1971), citing *Maxim v Shotwell*, 209 Mich 79; 176 NW 414 (1920).

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.

Thus Willis had no legal right to the insurance proceeds, and those proceeds belonged to the plaintiffs. And, under *Roberson*, the statutory prohibition against an unlicensed contractor not only instituting but "maintaining" an action prohibits any attempt by that contractor, in any proceeding in which rights are determined, including by setoff or recoupment, "to secure a dollar-for-dollar reduction in the amount owed".

Defendants have no authority for any proposition that a contract which is void is still valid and enforceable for some other purpose. Either the contract is void or it is not void. It's a bit like arguing someone is just a little bit pregnant.

The contract was void *ab initio*. The Court of Appeals was clearly correct in this case in holding the contract void *ab initio*, stating that (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, **the contract is void.** *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).

And, as shown, *Bilt-More* was quoted with approval by this Court in *Stokes, supra*.

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 *Wedgewood*, 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.

The principle was recently upheld in *Lofts on the Nine, LLC v Akey*, COA#294825, 2011 WL 475458 (2011), in which 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), a case which had found it helpful to look at the interpretation of a similar Arizona statute, and had **“held that the contract was void”**. The *Brummel* court also 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.¹⁰ 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 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".

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**

¹⁰ *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."

*defendant claims he was authorized to sign and endorse the plaintiffs' names on the checks and take the money.*¹¹

Thus Willis had no legal right whatsoever to endorse plaintiffs' names on the checks (or any other documents for that matter) and take the money. Accordingly, plaintiffs, who were the payees on the checks, are entitled to recover against Willis on the forged endorsements for the full amount of the checks.

¹¹ In any event, this clearly was NOT a power of attorney with banking powers to endorse and negotiate checks, but was merely to allow Willis, identified as "my (Contractor)", "to sign my name to all documents pertaining to settling the insurance claim and restoring the damage to my property", so that he could negotiate the claim with the insurance company and get the claim for damages paid. No one, including the plaintiffs, would ever consider this to be a power of attorney with banking powers to endorse and negotiate checks. (Think "attorney" who can negotiate and settle claims but never endorse a client's check and take the money.) This counsel has been doing such powers of attorney for 38 years. A typical banking provision reads as follows:

Banking Powers. To conduct my business with banks, including to endorse all checks and drafts made payable to my order and to collect the proceeds; to sign in my name checks on all accounts; to make withdrawals from or deposits to any checking or savings account, or time deposit account, or certificate of deposit, or other account, whether said account is in my name alone or jointly with another, for whatever purpose my agent may think necessary, advisable or proper; to open or close accounts in my name or in her name as my agent.

The power of attorney in this case does not come close to one authorizing banking powers to endorse checks. What makes this all the more clear is the both the fire repair agreement and the work authorization specifically contemplated that the plaintiffs would be required to endorse any checks, providing that:

"Endorsement of the fire draft(s) to Emergency Insurance Services, will be payment in full for the fire repairs."; and

"Endorsement of the insurance draft(s) to 4 Quarter Restoration, LLC, will be payment in full for all cleaning and of restoration."

In any event, the disputed scope of the power of attorney is irrelevant to the disposition of this appeal because the entire contract, including the power of attorney, is void.

And note that it was only plaintiffs who had the right and interest in the funds represented by the checks; as unlicensed contractors, defendants had no right to any payment at all, either for materials or labor, and no right to receive any proceeds whatsoever from the checks as a matter of law.

Other alleged contracts. Any amendments to the initial contract, and any claimed subsequent contracts, are void, and not just voidable, as a matter of law.

First, this includes the 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.

Second, there was no valid contract, and in fact 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. Any contract with the unlicensed contractor was void as a matter of law. Further, the Epps were never shown the estimate, never signed off on it, and never signed any contract for it.

Third, there was no valid contract, and in fact no contract at all, between plaintiffs and the defendant unlicensed contractors, for the \$20,682.28 in additional renovation work on plaintiffs' home for which defendants retained plaintiffs' monies arising out of a second insurance claim for damage on 9-6-06. Any contract with the unlicensed contractor was void as a matter of law. Further, the Epps were never shown any estimate, never signed any contract for it, and Willis admitted that the Epps never signed any work authorization or power of attorney or other document regarding this claim.

In addition, the fact that the Epps never signed any power of attorney as to this latter claim completely negates any argument that Willis had any right to endorse the \$20,682.28 check regarding this claim.

Rescission. While the trial court never found any need to specifically reach this issue, 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. Affirming the trial court's decision on this basis was proper as well.

The argument is simple. The contract was void, not just voidable, because defendants were unlicensed, and thus rescission is warranted.

It should first be noted that ancient authority even holds that it is not even technically necessary to first rescind a void contract before an action may be had to recover money paid under it, for "A void contract needs no rescission." *Wright v Dickinson*, 67 Mich 580, 589; 35 NW 164 (1887).

But modern trend certainly allows rescission, and the remedy, with or without formal rescission, is the return of the money as well. Just as the *Brummel* court had looked for guidance under the similar statute of another state, we can look to our sister states as well on this issue. 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).

And it is well established law in Michigan that a plaintiff may recover money paid to a defendant under a void contract. This law was even very firmly established in 1920, as a unanimous Supreme 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.

Funds held in escrow under order of interpleader. The trial court and Court of Appeals correctly ruled that plaintiffs are entitled to the monies being held in escrow pursuant to

the order of interpleader. In fact, they are the only parties entitled to these monies. The plaintiffs, as payees on the checks, are the parties entitled to the money, and the damages are measured by the face amount of the checks. The Willis defendants, who converted the checks (see next section), have no right to the funds because, under *Roberson, supra*, 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.

Conversion. The trial court and the Court of Appeals also correctly ruled that plaintiffs were also entitled to judgment against the contractor defendants for conversion, which, under the conversion statute, MCLA 600.2919a, provides for treble damages and attorney fees:

Sec. 2919a. (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person's stealing or embezzling property or converting property to the other person's own use.

(b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

(2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

Subsection (a) was added in 2005, took immediate effect June 16, 2005, and extended the statute's reach to the actual person who took and converted the money, rather than just someone who received converted funds or was just an aider and abetter, correcting a judicial interpretation to the contrary.

A good summary of just what constitutes conversion is contained in *Shelton & Associates, PC v Mayer*, unpublished COA #217456, 2001 WL 732397 (2001), *lv denied*, 465 Mich 935; 638 NW2d 757 (2001), attached hereto as Appendix G, pursuant to MCR 7.215(C)(1). In that case, the Court held that where an attorney failed to return an unearned fee at the close of representation, the client was entitled to summary disposition on his claim of conversion and was entitled to judgment for treble damages and attorney fees under Michigan's conversion statute. The Court of Appeals stated, Opinion, pp 4-5 (emphasis added):

Conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Conversion is an intentional tort which constitutes an injury to property. *Id.* See also *Blue Cross and Blue Shield of Michigan v Folkema*, 174 Mich App 476; 436 NW2d 670 (1988) (characterizing conversion as an injury to property). Further, the intent necessary to constitute conversion is the intent merely to do the general act. Consequently, one can commit the tort "[u]nintentionally if unaware of the plaintiff's outstanding property interest." *Id.* . . . **An action for conversion exists where an individual cashes a check and retains the full amount while only entitled to a portion.** *Citizens Ins Co of America v Delcamp Truck Center, Inc.*, 178 Mich App 570, 576; 444 NW2d 210 (1989).

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.

For all of the reasons set forth above, the trial court correctly held that the plaintiffs were entitled to summary disposition against the unlicensed contractor defendants, Troy Willis, 4 Quarters, and EIS, and the Court of Appeals was correct in affirming the trial court.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT COMMIT REVERSIBLE ERROR IN DENYING DEFENDANT DENAGLEN/MBM CHECK CASHING'S MOTION TO SET ASIDE DEFAULT, PARTICULARLY IN LIGHT OF THE FACT THAT IT INEXPLICABLY WAITED A FULL SEVEN WEEKS AFTER BEING NOTIFIED THAT THE DEFAULT HAD BEEN ENTERED TO FILE ITS MOTION TO SET ASIDE DEFAULT.

It is absolutely telling that defendants, in their Application, do not even address the standards for setting aside a default, or cite a single case on setting aside a default. The issue, not being properly briefed, should be deemed abandoned. However, since it is nominally raised, plaintiffs will address it.¹²

The trial court acted well within its discretion in refusing to set aside the default of defendant MBM/Denaglen. Defendant has deliberately hidden the salient facts from this Court. Defendant failed to establish good cause, including good cause for inexplicably waiting a full 7 weeks - 49 days - after being served with the default, to file its motion, nor did defendant, by proper affidavit of facts, set forth a meritorious defense.

This lawsuit was filed on 7-24-09, and defendant's resident agent was served on 8-6-09, making its answer due on 8-27-09. The default was regularly and properly taken on 8-28-09, and served on both defendant and attorney Yezbick, with whom plaintiff's counsel had had

¹² Plaintiffs' counsel notes that this "issue" was so lacking in merit that when he asked the Court of Appeals panel on oral argument whether he should address it, he was told not to bother.

conversations, on 8-28-09; indeed, plaintiff's counsel spoke with Yezbick on 8-28-09 and informed him that the default had been taken. The motion to set aside default was not filed until a full 7 weeks later.

On 8-12-09, defendant received the extension which attorney Yezbick requested. The extension *was only six minutes long*. This was confirmed by the affidavit of plaintiff's counsel attached to the answer to motion to set aside default, the emails attached to the pleadings, and was further confirmed at oral argument on the motion (Transcript, 11-20-09, p 7).

After a phone conversation, in which attorney Yezbick told plaintiffs' counsel that his client claimed to have made a phone call with plaintiff in which plaintiff confirmed Willis's authority to endorse the checks, an extension was given "until we speak again regarding the phone call my client had with your client prior to cashing the checks" (Yezbick's email at 3:54 p.m.). At 4:00 p.m., plaintiffs' counsel emailed back that the plaintiff denied that there was any such call, and thus the only extension granted was over. Defense counsel confirmed receipt of that email (Transcript, *id*). There was no further extension granted.

On 8-27-09, instead of answering the Complaint, attorney Yezbick faxed plaintiffs' counsel a "drop dead" letter demanding immediate dismissal or defendant would file a motion to dismiss in the next two business days and seek sanctions and attorney fees. Faced with this heavy-handed response, plaintiffs' counsel faxed back a letter to Yezbick complaining of his tactics, and reminding him that he was no longer operating under an extension of time.

On 8-28-09, therefore, the default of defendant was taken, and a copy served on defendant and on Yezbick as well. Later in the day, Yezbick called plaintiffs' counsel apologized profusely for sending the letter, and said that he was just "posturing" for his client, whose funds had been frozen by Comerica. Plaintiffs' counsel informed him that a default had

been taken and was already in the mail, which he would now have to explain to his client. Defendant then inexplicably waited a full 7 weeks - 49 days - to file a motion to set aside default.

Defendant failed to establish either the good cause or the meritorious defense necessary as a matter of law to set aside the default in this case. MCR 2.603(D) reads, in pertinent part (emphasis added):

Setting Aside Default or Default Judgment.

(1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted **only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.**

In *Alken-Ziegler, supra* at 228-230, this Court stated (emphasis added):

Moreover, although the law favors the determination of claims on the merits (citation omitted), **it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered.** [citations omitted]

Since that decision it is much harder than it once was to have a default set aside. Most cases, frankly, have been unpublished, since they involve only application of the law and not a new principle of law.¹³

¹³ See, e.g. *Huizingh v Allstate*, unpublished, COA #233698, 2003 WL 1985254 (2003), attached as Exhibit H, in which the court reversed the trial court which had set aside a default against Allstate which filed its answer a mere nine days late, and just six days after default was entered, finding no good cause had been established for the delay. Of course, in the instant case, no action was taken by defendant until 7 weeks after default was entered.

Also see, *Toma v Constable*, unpublished, COA #252970, 2005 WL 1923172 (2005), attached as Appendix I, in which the court upheld the determination refusing to set aside a default based on lack of good cause when the answer was filed just two business days after it was due.

And see, *Semaan v Smith Building and Development Corp*, unpublished, COA #284284, 2009 WL 2448165 (2009), attached as Appendix J, affirming the denial of a motion to set aside a default where defense counsel claimed he thought he had a verbal agreement for an extension and to refrain from filing a default.

In *Alken-Ziegler, supra*, this Court made clear that there could not properly be any "blurring" or the good cause and meritorious defense requirements; each had to be independently established. As stated in *Barclay v Crown Building and Development, Inc*, 241 Mich App 639, 653-654; 617 NW2d 373, 381 (2000) (emphasis added):

Michigan law generally disfavors setting aside default judgments that have been properly entered. *Alken-Ziegler, supra* at 229; 600 NW2d 638. In *Alken-Ziegler, supra* the Supreme Court explained that the **"good cause and meritorious defense" requirements of MCR 2.603(D)(1) are analytically different concepts and that a party must show both in order to prevail on a motion to set aside a default judgment.** *Id* at 231-234, 600 NW2d 638. Good cause is established by (1) a procedural irregularity or defect, or (2) a reasonable excuse for not complying with the requirements that created the default. *Id* at 233, 600 NW2d 638. Manifest injustice is not a third form of good cause that excuses a failure to comply with the court rules where there is a meritorious defense.

In the instant case, neither good cause nor a meritorious defense was established. Defendant clearly failed to establish good cause. Its attorney sought and was granted an extension of time which was exactly six minutes long. He did not request nor was given an additional extension of time. Instead of answering the complaint or requesting a further extension of time, he chose to fax plaintiffs' counsel a drop dead, threatening letter, and the default of his client was then regularly entered and served on both defendant and its attorney. Defendant then inexplicably waited a full seven weeks to file a motion to set the default aside. The trial court acted well within its discretion in refusing to set aside the default on this basis alone.

Although unnecessary to reach this issue, defendant also failed to establish a meritorious defense by filing an affidavit of facts showing a meritorious defense. *The only affidavit actually submitted in support of this motion* was an affidavit of counsel stating that "my client acted in good faith with reasonable commercial standards and that Defendant properly conducted business with an acknowledged agent of Plaintiff". This is a mere opinion and

argument of counsel, and not an affidavit of facts based upon counsel's personal knowledge of the facts to which counsel could competently testify.¹⁴

And there was no meritorious defense. The liability of defendant for cashing over \$128,000 in checks with forged endorsements was and is absolute. Defendant attempts to rely upon matters already resolved in the action against Willis. Willis had no legal right to endorse the checks and cash them, and the proceeds of the checks belong solely to the plaintiffs. Defendant Denaglen's attorney, since he was the attorney for the unlicensed contractors as well, conducted *extensive* discovery, and even if the default had been set aside, summary disposition would have been granted against Denaglen anyway on the forged endorsements (*see*, Argument IV), so there is no prejudice anyway; part of doing business as a check cashing company is that if you take checks where you allow someone other than the payees to endorse them,¹⁵ you are going to get nailed when the endorsements are found to be legally unauthorized or forged.

In its Issue III, defendant contends that the default should have been set aside because there was no delivery under MCL 440.3420. This ground, however, was never set forth

¹⁴ Also, defense counsel, in his affidavit, merely said that his client's meritorious defense is "as outlined in its Motion for Summary Disposition filed herewith", but, not only was that motion improperly filed in that the default had not been set aside and defendant was not allowed to proceed, MCR but under MCR 2.113(G), "Statements in a pleading may be adopted by reference only in another part of the same pleading", and therefore the motion to set aside default was absolutely devoid of any affidavit of facts setting forth a meritorious defense to this action.

¹⁵For the Court's edification, Denaglen's summary disposition affidavit, claiming that they spoke with Joyce Epps, who faxed them a copy of the Epps' drivers licenses, was found to be patently false and contradicted by the documentary evidence submitted which conclusively established that plaintiffs faxed their drivers licenses to Willis on 8-6-09, so that Willis already had copies well before he cashed the first check with Denaglen.

in the motion to set aside default, and has therefore been waived.¹⁶ Further, the argument that the checks had not been delivered to the plaintiffs is in direct contradiction to the position taken throughout the case by defendants, and set forth in the affidavits of their prior attorney and defendant Willis, that Willis was the “acknowledged agent” of the plaintiffs and therefore authorized to accept delivery of the checks on their behalf and negotiate the checks, and is therefore not properly raised on appeal. And note that there is a huge difference in being authorized merely to be sent a check on the one hand, and being authorized to sign the plaintiffs' names and endorse the check, and negotiate the check and take the money on the other hand. Think “attorney”. An attorney may have the authority to receive a check on behalf of a client, but this does not mean that the attorney can sign the client’s name to the check and take the money.

The Comment to this Section of the UCC states that

The typical case was one in which a check was stolen from the drawer or in which the check was mailed to an address different from that of the payee and was stolen after it arrived at that address. The thief forged the indorsement of the payee and obtained payment by depositing the check to an account in a depository bank.

Again, in the instant case, the checks were mailed to and/or otherwise received by Willis, who may have had authority to receive them, but not to forge the plaintiffs’ names and cash them. And, further, even if there was no delivery, the UCC Comment further states, that in that case: “The loss will fall on the person who gave value to the thief for the check.”

In other words, even in that case, the loss will fall on MBM Check Cashing, “the person who gave value to the thief for the check.”

¹⁶ Also note that citing one statute is insufficient to allow the issue that another statute provided a defense to be raised on appeal. *See, ACIA v Kondziolka*, unpublished, COA #308255, 2013 WL 951296 (2013), Opinion, pp 3-4, attached as Appendix L.

III. THE TRIAL WAS CORRECT IN GRANTING PLAINTIFFS JUDGMENT AGAINST THE UNLICENSED CONTRACTOR DEFENDANTS BASED ON THE \$128,047.23 FACE AMOUNT OF THE CHECKS, AND NOT ALLOWING DEFENDANTS TO REDUCE THE AMOUNT OWED BY SETTING OFF AMOUNTS CLAIMED FOR THE VALUE OF THEIR WORK.

The trial court was completely correct in its ruling, basing the judgment against the unlicensed contractors on the face amount of the checks, and the Court of Appeals was correct in affirming the trial court on alternate grounds as well.

First, in this action involving forged endorsements on multiple checks, the plaintiffs, as payees of the checks, were the rightful owners of the checks, *Continental Casualty, supra*, and thus it is patently obvious that 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.” Defendants’ attempt in its Issue II to cite to a section of the UCC never before raised is non-preserved and waived, but lacks merit in any event. 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.”

Second, under *Stokes, supra*, the entire contract is **indivisible**, and **cannot be bifurcated**, and thus defendants’ argument that they ought to be given credit against the amount taken on the forged checks for amounts for work for which a license may not have been required

fails as both a matter of law and a matter of fact. As the Court of Appeals noted, footnote 3:

The contractor defendants contend that they should be able to retain at least that portion of the proceeds covering work for which no license was required. This misses the point that the Epps would not have entered into any contract with defendants had Willis truthfully informed them that his builder's license had been revoked. Absent a contract, the Epps would not have given Willis a power of attorney.

In *Stokes, supra*, the unlicensed contractor argued that "it should be allowed to the value of the materials it supplied. A 'supplier' does not require a license under the act." This Court held that the fact that the contractor was not required to be licensed to perform part of the job was "of no consequence", that the otherwise legal parts could not be severed from the illegal portions of the agreement, that "Even if, normally, the contract could be bifurcated, the statute prohibits it", that the statute "does not make provision for bifurcating building contracts into separate [illegal] and [legal] components, and that it was irrelevant that the unlicensed contractor could have performed part of the contract without a license. Accordingly, the defendant contractors in this case cannot defend on the basis that part of the work performed was work for which a license was not required.

Further, it must again be noted that this case was a action regarding forged endorsements on checks, and that the entire contract, including the Insurance Power of Attorney which defendants have always claimed applied to *all* of the checks (Query: Are they now taking an inconsistent position?) was and is completely void, giving defendants no right to endorse *any* check and take the money.

Any attempt by defendants to separate this job into separate contracts will not withstand analysis. Defendants secured, repaired, and restored the plaintiffs' home and property under the three pieces of paper which constituted the entire contract between the parties; the

contract was complete and the parts intertwined. It is strange that on appeal, defendants claimed that the initial work on the plaintiffs' home did not require a license when the EIS contract was a "Fire Repair Agreement" "to make all necessary repairs caused by fire" (yes, there was no fire), and the related "Insurance Power of Attorney" was on EIS letterhead which specifically set forth the license number of the "licensed residential builders" (which we know was revoked). Likewise, the 4 Quarters work authorization, which also checked the "Construction" box, was one indivisible contract, just as in *Stokes*. And for defendants to assert that they should have been able to keep the \$46,443.64 check for cleaning contents is absolutely incredible, and unmitigated gall, given the fact that defendant Willis testified that he actually applied the vast majority of these funds to additional construction work on plaintiffs' home.¹⁷ This argument just

¹⁷ That defendants were in cahoots with defendant Anderson to perhaps inflate the personal contents inventory so defendants could take the extra money and use it to illegally perform additional contracting work on the home does not inure to the benefit of the defendants or make them such victims that equity should intervene.

Supposedly 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. **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, and the items had tags from the \$1.89 cleaners instead of the huge amounts charged.

But Willis testified, as well as stated in answers to interrogatories, as is confirmed with documents in his file, that out of the \$46,443.34, he allocated (and took) \$36,047.07 to additional work on the plaintiffs' home (Dep 81). ***This is an admission that the \$36,047.07 would have belonged to the plaintiffs had Willis not done the additional work.*** Certainly defendants did not do what they claim is \$36,000 worth of extra construction work as a gift.

Again, note that there is not one single signed work change order or contract for this additional construction work. Furthermore, any contract, if one had been entered into, was void since Willis was an unlicensed contractor.

Also, please note that insofar as it might be argued that any check proceeds representing an inflated claim might belong to the insurance company, the insurers formally assigned all of those rights to the plaintiffs.

won't fly.

Lastly, we come to the alternate basis upon which the trial court based its decision; though rejected by the Court of Appeals, it in fact provides a legally sound alternative basis upon which to uphold the trial court's decision.¹⁸

Under the unlicensed contractor statute, as a clear matter of law, including *Stokes* and particularly *Roberson*, the unlicensed contractor defendants are not entitled to maintain any defense in equity, including setoff, to reduce the amount of plaintiff's judgment. In other words, defendants are not allowed to argue "Yes, I endorsed the checks without legal authority, and cashed the checks with my forged endorsements and took the money, but you, plaintiffs, got the benefit of my work and have to reduce the amount I owe you by the value of my work", and thus claim plaintiffs suffered "no damages". Such a defense is legally prohibited.

The Court of Appeals erred in holding that the statute did not prevent the contractor defendants from "defending" against the claims of stealing funds or faulty workmanship, though it upheld the trial court on different grounds. This entire argument is premised on one sentence from an inapposite 29 year old case saying that the statute is not a sword but a shield and does not remove the power to defend. The case is wholly inapplicable for a number of reasons, including the limited facts and holding of that case, and subsequent development in the law.

Parker v McQuade, 124 Mich App 469; 335 NW2d 7 (1983), was a simple breach of contract case for improper installation of a boiler. It was most certainly not a case involving a forged endorsement, nor a case in which the plaintiff was demanding rescission or all of her money back because the defendant was unlicensed, nor a case where the plaintiff sought to have the contract declared void; indeed, the plaintiff was suing on the contract itself. The trial court

¹⁸ As previously stated, just to be safe, plaintiffs are filing an application for leave to appeal as cross-appellant on this issue.

had granted the plaintiff summary disposition because the contractor was unlicensed. The holding of the Court of Appeals in its one page opinion was merely that “the statute nowhere prohibits an unlicensed contractor from defending a breach of contract suit on its merits”, nothing more, nothing less. That was only logical since the fact that the contractor was unlicensed does not logically mean that it improperly installed the boiler.

The *Parker* Court cited the case of *Kirkendall v Heckinger*, 403 Mich 371; 269 NW2d 184 (1978) for the proposition that “equitable principles may demand an offset for the value of the services rendered by the contractor”, but 19 years later, the Supreme Court in *Stokes, supra*, 649 NW2d at 376-377, specifically discussed *Kirkendall* and limited its scope. The Court held that the 1998 decision of the Court of Appeals in *Republic Bank v Modular One, LLC*, 232 Mich App 444; 591 NW2d 335 (1998), which had cited *Parker*, holding that when a plaintiff homeowner sued to remove a cloud on title, the unlicensed contractor could defend on the basis of its lien and the plaintiff would have to pay off the lien in order for equity to uncloud the title, was wrongly decided. *Kirkendall* was limited to its factual situation where an equitable mortgage was imposed because the defendant had paid off the land contract and back taxes, and “the defendant’s property right . . . was acquired in a valid and legal manner” and not “by committing a misdemeanor, performing an unlicensed activity”, which is what the Willis defendants in this case are guilty of. The Court stated:

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.⁷

⁷Contrary to Justice Markman's assertion, slip op at 3, n 3, we make no assessment of the Stokes' motives in their dealings with Millen. As our colleagues are well aware, their good faith or lack of it was not a consideration available to us in rendering this decision. If equity were available here, we might all have agreed that the trial court acted fairly and reasonably in applying equity as it did.

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.

And to appreciate just how much "equity" the plaintiffs in *Stokes* did not do, one only needs to look at the concurring opinion of Justice Weaver:

In this particular instance, where plaintiff homeowners invited defendant to enter into the illegal contract, knowing defendant contractor was unlicensed in Michigan and having already availed themselves of the statute to avoid paying a previous unlicensed contractor, the statutory provision for noncompliance with the licensing requirement undoubtedly imposes a heavy penalty on defendant, while providing an unwarranted windfall to these plaintiffs. Plaintiffs, who sought out defendant and helped draft the actual contract, do not allege that defendant was incompetent or inexperienced or that defendant's work was of inferior quality, and defendant could hardly be characterized as some fly-by-night contractor. Rather, plaintiffs are now using the statutory provision to their advantage to avoid paying for their slate roof.

Nonetheless, in entering into the contract, defendant contractor specifically violated the licensing requirements of the residential builders act, albeit at the plaintiff homeowner's invitation. . . . The language of the statutes is clear, and, under these circumstances, equity may not be used to avoid their effect.

It is clear, therefore, that a homeowner, who receives the benefit of work from an unlicensed contractor, such as defendants herein, who did in fact commit misdemeanors by acting as unlicensed contractors, is no longer required to do equity by allowing an unlicensed contractor to obtain or retain payment for its work when attempting to enforce their legal and equitable rights and remedies against the contractor.

And the *Roberson* case clearly lays to rest any argument as to the continued viability of *Parker* that an unlicensed contractor may still *defend* a claim, and particularly defend a claim on the basis that it did perform work and is entitled to a setoff or recoupment for the value of its services *when the homeowner sues the contractor*: *Roberson* clearly holds that such a defense is no longer allowed.

Roberson involved a counterclaim by the homeowner against the unlicensed contractor after the contractor's suit had been dismissed because the contractor was unlicensed. The trial court had allowed the contractor *to defend* on the basis that the homeowner "received services in addition to those provided in the contract" and the jury was allowed to assess those damages, giving the contractor full value for the services performed *by setting off those damages against the homeowner's recovery against the contractor* both for breach of contract and for violation of the Consumer Protection Act; that is precisely the argument being made by the Willis defendants in this case, that the plaintiffs can have or collect no damages because they performed the work, and the plaintiffs got the value of their services. The Court of Appeals reversed, and this Court upheld that holding. *The unlicensed contractors are not permitted to go through the back door and obtain or retain any compensation for work performed as unlicensed contractors – period.*

The concurring opinion of Justice Kelly, joined in by Justice Young, set forth the language of the statute stating that an unlicensed contractor shall not bring *or maintain* an "action" for the collection of compensation, and stated (emphasis added):

Black's Law Dictionary (8th ed.) generally defines "action" as "a civil or criminal judicial proceeding." **Black further notes that an " 'action' in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity, and any other proceedings in which rights are determined."** Here, plaintiff's claim was in fact a setoff against an amount found by the jury to be owed to defendant.³ . . .

³Justice Markman opines that plaintiff's claim is a "recoupment" rather than a "setoff." He relies on the definition of "setoff" in Black's Law Dictionary (6th ed.). But he overlooks Black's second definition of "setoff," which includes "a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor." I believe that, in his attempt to find the proper label for plaintiff's claim, Justice Markman misses the point. At issue is whether plaintiff's setoff, recoupment, counterclaim, counterdemand (call it what you may) constitutes an "action" within the meaning of § 2412(1).

By labeling something a "recoupment" rather than a setoff, an unlicensed builder may not avoid the proscription of § 2412(1). Such a maneuver, if permitted, would elevate form over substance. Furthermore, in *Stokes v Millen Roofing Co.*, we broadly construed the statutory term "compensation." **Even though the plaintiff in *Stokes* sought compensation in the form of a "setoff," it was nonetheless "compensation" or "something to be received as an equivalent for [the plaintiff's] services."** Accordingly, given Black's definition of "action," the precedent in *Stokes*, and the desirability of avoiding misleading labels, plaintiff's claim in this case constitutes an "action" for purposes of § 2412(1).⁶

⁶I agree with Justice Markman that, according to Black's Law Dictionary, plaintiff's claim for a setoff may arguably be characterized as a "defense." However, both *Stokes* and Black's lead to the conclusion that an "action" includes a claim for a setoff.

....

When these definitions are applied to this case, **plaintiff's claim is explicitly barred by § 2412(1). Plaintiff is seeking payment for work it performed on defendant's home.** The trial court, pursuant to § 2412(1), dismissed plaintiff's initial suit for breach of contract because plaintiff was unlicensed. **Thus, plaintiff is now essentially seeking to do indirectly what it could not accomplish directly, maintain an action against defendant for damages for breach of contract. In fact, the compensation plaintiff seeks is a dollar-for-dollar reduction in the amount owed to defendant.**

The Court of Appeals properly held that plaintiff was not entitled to seek a setoff against defendant's counterclaims.

Only a two justice minority still adheres to the holding of *Parker*. The majority of this Court has rejected *Parker's* position, and its "shield, not a sword language", and held that a

that the prohibition of an unlicensed contractor being held to be entitled to any monies in an “action” in a court of this state also **includes “a suit in equity and any other proceedings in which rights are determined”**, and that the contractor cannot defend a claim on the basis that it did perform work and is entitled to a setoff or recoupment for the value of its services *when the homeowner sues the contractor*. Accordingly, the trial court’s ruling was correct, and should be affirmed on this basis as well.

Furthermore, *see* the established law in Michigan, as set forth on pp 26-27 of this Brief, holding that a plaintiff may recover money paid to a defendant under a void contract.

IV. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING PLAINTIFFS JUDGMENT AGAINST THE DEFENDANT DENAGLEN/MBM CHECK CASHING WHERE THERE WAS NO GENUINE ISSUE AS TO THE AMOUNT OF DAMAGES AND THE JUDGMENT WAS BASED ON THE \$128,047.23 FACE AMOUNT OF THE CHECKS.

No one is arguing that a defaulted party is not entitled to a trial on damages when the amount of damages is in dispute, but the trial court and Court of Appeals correctly ruled that there was no genuine issue as to the amount of damages because the amount of damages was merely the face amount of the checks which had been cashed with the forged/legally unauthorized endorsements, and that the plaintiff payees were the owners of the checks and the funds.¹⁹

¹⁹Note that plaintiffs only presented a judgment again Denaglen for the face amount of the checks, and not for treble damages under the conversion statute as well, which they arguably could have done.

And since this judgment was entered, Denaglen has folded its tent, and sold its assets in defraud of creditors, while at the same time allowing three other business to operate under its registered name of “MBM Check Cashing”.

All that the check cashing company is doing is piggybacking and rehashing the same nonmeritorious arguments made by the contractor defendants that the plaintiffs have suffered “no damages” because they got the benefit of the work the unlicensed contractors did. This is a totally specious argument.

It is clear that the plaintiffs were entitled to judgment for the fixed amount of \$128,047.23 against all defendants on the “food chain” on the falsely endorsed checks, and the \$128,047.23 of interpleader funds was to be distributed to the plaintiffs.

The interpleader funds representing the funds from the face amount of the checks belong to *someone*; the only question is who.²⁰

The funds do not belong to the unlicensed contractor defendants - those arguments were already refuted in other Argument sections of this Brief – and Denaglen cannot somehow obtain the rights which the contractors it gave the cash to do not have. How the funds can belong to Denaglen is a mystery.²¹

²⁰ Any claim by Denaglen that it had somehow not had the opportunity to litigate who the funds belonged to or the amount of damages was thoroughly debunked in plaintiffs’ motion for entry of judgment, pp 5-6, with specific references to and quotes from the pleadings, including the pleadings filed by Denaglen.

²¹ Note that by virtue of the default, defendant Denaglen admitted all of the allegations against it, including the following:

55. On or about 9-25-06, 9-27-06, and 10-27-06, defendant Troy Willis presented the checks with the forged indorsements, which he thus guaranteed were proper and genuine, and his own indorsement to defendant Denaglen/MBM which cashed the checks and paid money on said checks, and itself endorsed the checks and presented them to defendant Comerica Bank on the above dates for payment.

56. Defendant Denagen/MBM thus guaranteed said checks and guaranteed that the indorsements of plaintiffs were genuine and proper.

(footnote continued next page)

There is only one answer to this inquiry. Under *Continental Casualty Co, supra*, as quoted on pp 29-30 of this Brief, when a check is paid on a forged indorsement, an action lies *against the defendant institution which cashed the check*, even if paid in good faith. The Court *specifically held that the payee of the checks is the rightful owner of the checks* ("It is also clear that as payee of the converted checks, Electric Apparatus is the rightful 'owner' of the checks."). *And see, Trail Clinic, PC, supra* ("Checks are considered to be the property of the designated payee").

And the interpleader funds never belonged to Denaglen in the first place so they cannot be awarded to them in any event. They belonged to Comerica, and Comerica interpled them and paid them into court. That they may have been taken by Comerica from Denaglen's

(footnote 21, continued):

57. Defendants Comerica Bank and Denagen/MBM 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; converted the instrument and funds and/or assisted and aided Troy Willis in converting and embezzling the funds belonging to the plaintiffs and are liable to plaintiffs for conversion; were negligent in paying the check and funds; and wrongfully paid the check and funds in breach of contract, express and/or implied.

58. Defendants Comerica Bank and Denagen/MBM acted in bad faith, and with lack of reasonable commercial standards.

59. That should the accounting sought herein, and/or the records and documents produced during discovery in the course of this action, show proof that defendants Comerica Bank and/or Denagen/MLM wrongfully paid other checks on which the indorsements of plaintiffs were forged and distributed the funds on the forged indorsements, then said defendants are also liable to plaintiffs for those checks.

61. In addition to the amounts paid on the forged indorsements which plaintiffs are entitled to recover under rights plaintiffs otherwise have under law, plaintiffs are entitled, under MCLA 600.2919a, to recover from the defendants Comerica Bank and Denagen/MBM, as well as any other defendants involved regarding any of the checks, treble the amount of actual damages, plus costs and reasonable attorney fees.

account pursuant to the terms of a contract between Comerica and Denaglen is of no moment or concern *in this case*. That is a matter between Comerica and Denaglen. If Comerica did not properly take the funds, then Denaglen should file a claim against Comerica, but there is no such claim between them in the instant case.

There were and are no issues left to be litigated in this case. Plaintiffs, the named payees on the checks, were entitled to have judgment against the check cashing defendant for the \$128,047.23 face amount of the checks made payable to the plaintiffs, and the \$128,047.23 in escrow gets distributed to the plaintiffs and credited against payment of the judgment. 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.²²

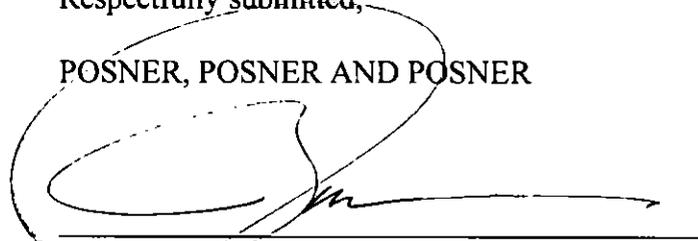
²² As a final note, in response to Denaglen's prior appellate argument that plaintiffs have no interest in the final \$20,282.28 check paid on a second claim which plaintiffs have stated they did not make, this would certainly not make the funds payable to Denaglen under any valid legal theory. At most, the funds would belong to the insurance companies. However, as stated, the insurance companies executed a formal assignment of their interest in these monies to the plaintiffs; the assignment was handed to the trial court at the hearing on the motions for summary disposition (Transcript 6-24-11, pp 20-21; attached as Appendix K).

RELIEF

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

Respectfully submitted,

POSNER, POSNER AND POSNER

A handwritten signature in black ink, appearing to be 'G. Posner', is written over a horizontal line. The signature is stylized and somewhat cursive.

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