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SUPREME COURT

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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.)

ROBERT and PATRICIA STOKES,

Plaintiffs/Appellants,

vs.

MILLEN ROOFING COMPANY,

Defendant/Appellee.

_____/

Supreme Court Docket No. 119074

Court of Appeals No. 216334

Circuit Court Case No. 94-3123-NZ
Hon. Donald A. Johnston III

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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TABLE OF CONTENTS

STATEMENT OF THE BASIS OF JURISDICTION vii

STATEMENT OF THE QUESTION INVOLVED viii

STATEMENT OF FACTS 1

1. Introduction 1

2. The Project 1

3. Litigation in the Trial Court 4

4. The Court of Appeals Decision 9

SUMMARY OF ARGUMENT 12

ARGUMENT 14

THE TRIAL COURT'S AWARD OF EQUITABLE RELIEF TO MILLEN ROOFING, ON MILLEN ROOFING'S AMENDED COUNTER-COMPLAINT, CONTRAVENED MCL 339.2412 AND THE ESTABLISHED PRINCIPLES OF EQUITY 14

A. Standard of Review 14

B. Section 2412 of the Occupational Code 14

C. Controlling Equitable Principles 17

1. Equity should not provide relief to a party whose right to legal relief was denied for an appropriate reason 18

2. Equity will not allow indirectly that which, because of public policy, cannot be done directly 19

3. One who seeks the aid of equity must come in with "clean hands." 21

D. *Kirkendall v Heckinger* 23

E. *Republic Bank v Modular One PLC* 24

F. The Further Erosion of § 2412 Below 26

CONCLUSION AND RELIEF REQUESTED 27

INDEX OF AUTHORITIES

Cases:

Alexander v Neal
364 Mich 485; 110 NW2d 797 (1961) 16, 17

Bein v Heath
6 How 47 US 228, 247 [12 L Ed 416 (1848)] 22

Bennos v Waderlow
291 Mich 595; 289 NW2d 267 (1940) 20

Bernard F Hoste, Inc v Kortz
117 Mich App 448; 324 NW2d 46 (1982) 17

Charles E. Austin v Secretary of State
321 Mich 426; 32 NW2d 694 (1948) 21

Charles Featherly Const Co v Property Development Group, Inc
400 Mich 198; 253 NW2d 643 (1977) 17

Chartiers Valley School Dist v Virginia Mansions Apartments, Inc
340 Pa Super 285; 489 A2d 1381 (1985) 18

Corkins v Ritter
326 Mich 563; 40 NW2d 726 (1950) 18

Daley v City of Melvindale
271 Mich 431; 260 NW2d 898 (1935) 20, 26

Ecco Ltd v Balimoy Manufacturing Co
179 Mich App 748; 446 NW2d 546 (1989) 18

Excelsior Wrapper Co v Yund
176 Mich 372; 142 NW 353 (1913) 18

Forest City Enterprises, Inc v Nationwide Ins Co
228 Mich A.P. 57; 577 NW2d 150 (1998) 14

Frank Adam Electric Co v Westinghouse Electric & Mfg Co
146 F2d 165 (CA 8, 1945) 22

Gaudiosi v Mellon
269 F2d 873 (CA 3, 1959) 22

Hall v Wright
240 F2d 787 (CA 9, 1957) 22

Immigration & Naturalization Service v Pangilinan
486 US 875; 108 S Ct 2210; 100 L Ed 882 (1988) 21

Kirkendall v Heckinger
403 Mich 371; 269 NW2d 184 (1978) 10, 11, 12, 14, 23, 24, 25

League General Ins Co v Budget Rent-A-Car of Detroit
172 Mich App 802; 432 NW2d 751 (1988) 20

Majurin v Dep't of Social Services
164 Mich App 701; 417 NW2d 578 (1987) 19

Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co
324 US 806; 65 S Ct 993; 89 L Ed 1831 (1944) 22

Rees v City of Water Town
86 US 107; 22 L Ed 72 (1873) 21

Reno v Bossier Parrish School Bd
520 US 471; 117 S Ct 1491; 137 L Ed 2d 730 (1997) 20

Republic Bank v Modular One PLC
232 Mich App 444; 591 NW2d 335 (1998) 10, 11, 12, 24, 25, 26

Robert H. Pastor Building Co v Cole
127 Mich App 168; 339 NW2d 11 (1983) 17

Senters v Ottawa Savings Bank, FSB
443 Mich 45; 503 NW2d 639 (1993) 19

Sovereign v Sovereign
354 Mich 65; 92 NW2d 585 (1957) 18

Stachnik v Winkel
394 Mich 375; 230 NW2d 529 (1975) 11, 21, 23, 25

Stokes v Millen Roofing Co
465 Mich 909 (2001) . . . . . vii, 12

Tracer v Bushre
381 Mich 282; 160 NW2d 898 (1968) 16, 17

Walker v Farmer's Ins Exchange
226 Mich A.P. 75; 572 NW2d 17 (1997) 14

Court Rules

MCR 2.116(C)(8) 4

MCR 2.116(C)(10) 4

MCR 7.215(D) 10

MCR 7.215(H)(1) 10

MCR 7.215(I)(1) 10

MCR 7.301(A)(2) vii

Statutes

MCL 338.881 16

MCL 338.901 16

MCL 339.101 4

MCL 339.602(e) 22

MCL 339.604 22

MCL 339.2412 . . . . . viii, 14

MCL 570.1101 . . . . . 11, 22

MCL 570.1114 . . . . . 4, 23, 25

MCL 600.2920 . . . . . 5, 6

Other Authorities

27A Am Jur 2d, Equity § 39 . . . . . 18, 19

27A Am Jur 2d, Equity, §109 18

STATEMENT OF THE BASIS OF JURISDICTION

This Court granted Plaintiffs' application for leave to appeal in an order dated November 20, 2001. *Stokes v Millen Roofing Co*, 465 Mich 909 (2001). Therefore, this Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF THE QUESTION INVOLVED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S AWARD OF EQUITABLE RELIEF TO DEFENDANT, ON DEFENDANT'S AMENDED COUNTER-COMPLAINT, WHERE THE AWARD WAS MADE IN CONTRAVENTION OF MCL 339.2412 AND THE ESTABLISHED PRINCIPLES OF EQUITY?

The Court of Appeals panel would answer "No," but only because it believed that its judgment was bound by the Court of Appeals conflict resolution procedures.

Plaintiffs/Appellants would answer "Yes."

Defendant/Appellee would answer "No."

STATEMENT OF FACTS

1. Introduction

The basis facts underlying this matter are not in dispute. Plaintiffs'/Appellants' Robert and Patricia Stokes ("the Stokes") entered into a contract with Defendant/Appellee Millen Roofing Co. ("Millen Roofing") for the construction of a slate roof on an addition to their home in East Grand Rapids, Michigan. Millen Roofing was not a licensed residential builder. (Appellants' Appendix, p 79A). Although the roof was eventually finished, a number of disputes arose between the parties resulting in this litigation. The primary point of contention on appeal involves the legal effect of Millen Roofing's failure to obtain a license from the State of Michigan.

2. The Project

In the early 1990's, the Stokes planned to expand and remodel their house. The project was unique in that it entailed moving the house, which had been built in 1924, to remedy problems from a chronically leaking basement, and adding a substantial addition. The intent was to modernize the inside of the house, while maintaining the charm of the old architectural style on the outside. (Appellants' Appendix, p 29A). The Stokes contracted for a slate roof to be installed that matched the existing slate already in place. The slate roof was originally to be installed by Detroit Cornice and Slate. Shortly after the installation was to begin, however, the Stokes learned that Detroit Cornice and Slate was unable to perform the work. Because it was crucial at this juncture to install the roof to prevent damage to the property, the Stokes approached Millen Roofing, which had previously made an unsuccessful bid for the roofing job.

Millen Roofing was an established roofing concern in Wisconsin that specialized in the type

of roof that the Stokes desired. Millen Roofing's principal, Mr. Matt Millen, also held a law degree. It is undisputed that at all times relevant here, Millen Roofing was never licensed as a residential builder in the State of Michigan. On December 20, 1993, the Stokes and Millen Roofing executed a written contract for the slate roof installation. For a price of $162,519, Millen Roofing agreed to install a slate roof together with downspouts, flashing and other appurtenances. (Appellants' Appendix, pp 69A-71A).

In January, 1994, Millen Roofing began its work on the roof. The contract required it to install the colored slate roof in a fashion to "match existing roof." (Appellants' Appendix, p 69A). In violation of this contractual obligation, however, Millen Roofing's work crew initially did not apply the slate in the proper fashion. Instead of mixing the various colors in a random pattern to match the existing roof, the crew laid the various colors in a "line by line" fashion. This resulted in a "striping effect" on the roof. After the Stokes notified Mr. Millen of the problem, Millen Roofing agreed to re-lay the slate in the random fashion called for in the parties contract. Despite its initial failure to comply with the terms of the contract, Millen Roofing claimed that it should be paid additional compensation for the work performed in re-laying the slate. The Stokes, on the other hand, did not believe that they should be required to compensate Millen Roofing for its failure to comply with the initial agreement.

Due in part to this dispute, Millen Roofing ceased work on the project in February, 1994. The parties disagree on the precise factors that led to the work suspension. They also disagree on the question whether Millen Roofing was removed from the project or left voluntarily. In any event, the parties eventually resolved their differences and work resumed one month later. (Appellants'

Appendix, pp 31A-32A).

During the course of the project, only one change order was approved by the parties in writing. That change order, sent to Defendant on May 24, 1994, included certain items to be deleted and other to be added, the net effect of which was to increase the contract price by an amount of $2,684. When Mr. Millen executed and returned the change order, he attempted to add the following paragraph:

> Contractor does not give up claim for other change orders which it contends were ordered by owner or owner's agent, see attached regarding licenses.

The attached document "regarding licenses" was a self-serving statement that Millen Roofing was not required to be licensed in Michigan. (Appellants' Appendix, pp 72A-73A). Plaintiffs never approved the change order as "modified" by Defendant.

In July, 1994, Millen Roofing ceased work on the roofing project, leaving behind a "punchlist" of items yet to be completed. Despite this, the Stokes were willing to pay Millen Roofing its outstanding contract balance in exchange for an unconditional waiver of lien. Although Millen Roofing's entitlement to full payment was disputable, the Stokes simply wanted to terminate the relationship. On July 11, 1994, the Stokes, through their attorney, tendered a written offer to Millen Roofing pursuant to which they promised to pay the balance left on the original contract, $110,619, plus the approved change order of $2,684, in exchange for Millen Roofing's unconditional waiver of lien. (Appellants' Appendix, p 77A). Millen Roofing, through counsel, rejected the offer on July 21, 1994, indicating a belief that the Stokes owed an additional $52,000 over the contract balance and approved change order. (Appellants' Appendix, p 78A).

On or about July 18, 1994, Millen Roofing filed an improper claim of lien against the Stokes' property.[1] The lien amount included the $52,000 in "extras" purportedly due. (Appellants' Appendix, pp 74A-76A).

3. Litigation in the Trial Court

On August 16, 1994, in response to Millen Roofing's improper filing of the lien against their property, the Stokes filed this action in the Kent County Circuit Court to remove the lien and recover damages from Millen Roofing for breach of contract. (Appellants' Appendix, pp 80A-89A). On November 8, 1994, Millen Roofing filed a counter-complaint against the Stokes seeking to foreclose on its lien and to recover damages for breach of contract and quantum meruit. Millen Roofing alleged that the Stokes were liable to it for $52,824 in additional work. (Appellants' Appendix, pp 90A-96A).

On November 11, 1994, the Stokes filed a motion seeking (1) to discharge Millen Roofing's construction lien and (2) summary disposition, pursuant to MCR 2.116(C)(8) & (10), of Millen Roofing's counterclaim. (Appellants' Appendix, pp 97A-98A). Relying primarily on § 2412 of the Occupational Code, MCL 339.101 *et. seq.* (hereafter, "§ 2412"), the Stokes argued that Millen Roofing was precluded from filing a construction lien against their property and from suing for the alleged breach of contract because it was not a licensed residential builder. (Appellants' Appendix, pp 99A-111A). In response, Millen Roofing admitted that it did not have a residential builders license, but argued that no license was required. (Appellants' Appendix, pp 112A-124A). On December 2, 1994, the trial court entered an order dismissing Millen Roofing's Counter-Complaint

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[1] Pursuant to MCL 570.1114, an unlicensed contractor may not file a claim of lien against residential property.

with prejudice and vacating and discharging Millen Roofing's claim of lien dated July 18, 1994. (Appellants' Appendix, pp 125A-126A). Notably, the trial court vacated the construction lien without imposing any special conditions upon the Stokes. At this point in the litigation, the only remaining claim was the Stokes' breach of contract action against Millen Roofing.

After the trial court dismissed its original counter-complaint with prejudice, Millen Roofing sought and received leave to file an amended counter-complaint. On January 10, 1995, Millen Roofing filed an amended counter-complaint against the Stokes containing eleven counts. The amended counter-complaint contained three claims against the Stokes that were identical to claims in the original counter-complaint that had already been dismissed with prejudice (breach of contract, lien foreclosure, and quantum meruit), along with six entirely new claims against the Stokes (fraud, misrepresentation, Michigan Consumer Protection Act violations, unjust enrichment, an action to recover possession of the roofing materials under MCL 600.2920, and a general request for equitable relief).[2] (Appellants' Appendix, pp 127A-137A).

On July 17, 1995, the Stokes filed a motion for summary disposition in which they argued, once again, that Millen Roofing had failed to state a claim upon which relief could be granted because it did not allege that it was properly licensed by the State of Michigan to engage in residential building. (Appellants' Appendix, pp 138A-147A). In an order dated September 29, 1995, the trial court granted the Stokes' motion for summary disposition as to all but two of Millen Roofing's claims. The only claims to survive were Count X, in which Millen Roofing sought to

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[2] In both its original counter-complaint and amended counter-complaint, Millen Roofing also alleged third-party claims against Douglas Sumner, Comerica Bank, Thomas Dowling, and George Schuler. The trial court dismissed Millen Roofing's claims against the third-party defendants on September 29, 1995, and the propriety of that ruling is not now before this Court.

recover possession of the roofing materials under MCL 600.2920, and Count XI, in which Millen Roofing sought general equitable relief. (Appellants' Appendix, pp 163A-165A). In a ruling from the bench on August 31, 1995, the trial court explained that it arguably would be within the court's equitable jurisdiction to allow "Mr. Millen to go back to the Stokes home and take the roof off of it." (Appellants' Appendix, p 157A). Accordingly, the trial court allowed Millen Roofing to proceed with what it considered to be an "equitable" claim "for the recovery of goods." (Appellants' Appendix, pp 148A-162A).

On February 2, 1996, shortly before the trial was to begin, the trial court heard additional arguments regarding the proper scope of Millen Roofing's claim. Consistent with its prior ruling, the trial court explained that it would allow Millen Roofing to proceed on its equitable claim, despite § 2412. (Appellants' Appendix, pp 166A-175A).

Without inundating this Court with further details of the protracted and contentious motion practice, suffice it to say that several other motions were filed by the parties, including additional dispositive motions and a motion to further amend Millen Roofing's Counter-Complaint. Throughout this process, Millen Roofing concocted several "theories" as convenient routes around the provisions of the Residential Builders Act, including: (1) a claim that Patricia Stokes assumed the role of general contractor; (2) a claim that Patricia Stokes agreed to procure a license for Millen Roofing, and (3) a claim that the Stokes' offer to pay the contract balance in exchange for an unconditional waiver somehow constituted a separate agreement under which Millen Roofing could seek monetary compensation, despite the fact that it rejected the offer. Although some of these allegations found their way into the trial in some manner, all were eventually rejected by the trial

court.

Before trial, the Stokes voluntarily dismissed their lone remaining breach of contract claim against Millen Roofing. They took this action after determining that their claim was not supported by the facts.[3] After the Stokes voluntary dismissal of this claim, the only claim for trial was Millen Roofing's argument that it was entitled to equitable relief. As a result, the case was tried only on Millen Roofing's Counter-Complaint, as if Millen Roofing were a plaintiff and the Stokes were defendants.

The case was tried before the court without a jury. In making its findings of fact, the trial court described the numerous disputes associated with the roof project, but concluded that the contract between the parties included only the original agreement for $162,519, plus a single approved and conforming change order in the amount of $2,684, resulting in a total price of $165,503. The trial court also found that the Stokes had paid $51,934 of this amount to Millen Roofing. The trial court rejected defendant's argument that the contract included an additional $52,000 for change orders (in particular, "the taking up and relaying of the slates") because Millen Roofing had failed to prove that this cost was a part of the contract. In sum, the trial court concluded that there remained $113,269 owing on the total contract price. (Appellants' Appendix, pp 33A-34A, 41A).

After determining the amount of the contract, the trial court concluded that Millen Roofing was not empowered to recover under the contract, because it was not a licensed residential builder.

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[3]The Stokes' breach of contract claim was premised upon a lack of inverted "V's" on the roof. (An inverted "V" is a device installed to prevent a particular type of water damage to the roof.) Upon discovering that most of the roof did in fact contain inverted "V's," the Stokes elected to dismiss this claim.

Despite this legal conclusion, the trial court proceeded to make an equitable award to Millen Roofing under what it deemed to be "a limited equitable exception which allows for equitable claims to be pursued on behalf of an unlicensed individual in what I would characterize as extraordinary circumstances." (Appellants' Appendix, p 36A). The trial court then found (1) that Patricia Stokes was aware since September, 1993, that an unlicensed contractor could not maintain a cause of action for the collection of compensation, (2) that since April 4, 1994, Patricia Stokes knew that Millen Roofing was not licensed, and (3) that after the temporary suspension of the work, the Stokes continued to seek to have Millen Roofing finish the roof job.[4] (Appellants' Appendix, pp 38A-40A). Although the trial court considered these circumstances to be "extraordinary," (Appellants' Appendix, p 41A), it did *not* conclude that the Stokes intended to take advantage of Millen Roofing's lack of a license. To the contrary, the trial court found that on July 11, 1994, the Stokes tendered the balance of the contract to Millen Roofing, but that their "good faith offer" to pay was "stunningly" rejected by Millen Roofing prior to the litigation, because Millen Roofing sought to additionally recover the disputed $52,000 for extras.[5] (Appellants' Appendix, pp 41A-42A). Summing up the situation, the trial court surmised:

> I think I have observed previously that Mr. Millen in effect was sitting at a high stakes poker game holding a pair of duces and making a very high bet when his bluff was called, and the ultimate effect of it has been disastrous for him and also for the Stokes. [Appellants' Appendix, p 42A].

The trial court then characterized Millen Roofing's claim against the Stokes as follows:

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[4] Although not germane to this appeal, the Stokes' strongly disagree with the trial court's findings regarding their "knowledge" of Millen Roofing's legal status.

[5] Certainly, the Stokes' would not have tendered the balance of the contract if they had somehow planned to take advantage of Millen Roofing's non-licensed status.

> What we have, as far as I'm concerned, is an equitable claim, pure and simple, and while the claim is in the nature of a claim and delivery, it is not strictly speaking a claim and delivery count. What it amounts to is a claim by Mr. Millen to be allowed to reclaim, repose if you will, his roof and restore the situation to the status quo ante, inasmuch as he has been paid only a fraction of the value and the agreed upon contract price for the roof. That is the basis upon which the matter has been advanced. [Appellants' Appendix, p 45A].

Employing its equitable powers to "fashion a creative remedy," (Appellants' Appendix, p 46A), the trial court ordered that the Stokes could chose to either (A) pay Millen Roofing the remainder of the contract balance, or (B) allow Millen Roofing to *physically remove* the slates and other materials from the Stokes roof in exchange for a return of the money the Stokes had already paid on the contract.[6] This unusual remedy was formally set forth in a written judgment dated May 26, 1998. (Appellants' Appendix, pp 21A-25A). Regarding the law prohibiting Millen Roofing from bringing an action to recover compensation on the contract, the trial court explained that "a court of chancery or equity may provide for non-legal, equitable remedies *in order to avoid unduly harsh application of strict legal doctrines, including those statutorily provided, as circumstances warrant.*"[7] (Appellants' Appendix, p 36A).

4. <u>The Court of Appeals Decision</u>

The Stokes filed a claim of appeal with the Court of Appeals. In a decision published at 245 Mich App 44, a Court of Appeals reluctantly affirmed the judgment of the trial court. While the

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[6] The Stokes have not yet been required to make this choice because the trial court's order has been stayed pending this appeal.

[7] As set forth in more detail in the argument section, *infra*, the Stokes contend (1) that it was not the trial court's place to determine whether the statutory doctrine at issue was "unduly harsh," and (2) that the circumstances of this case did not warrant an equitable award in this case–given the statutory framework within which the trial court was required to operate.

panel concluded that the equitable remedy ordered by the trial court contravened the policy established by § 2412 of the Occupational Code, which prohibits unlicensed residential builders from suing to recover compensation, it believed that it was bound by former MCR 7.215(H)(1)[8] to follow the holding of *Republic Bank v Modular One PLC*, 232 Mich App 444; 591 NW2d 335 (1998).

The *Republic Bank* decision was released after the trial court's judgment, but before the Court of Appeals decision in the instant case. In *Republic Bank*, a property owner brought an equitable action against an unlicensed residential builder seeking to remove a construction lien filed by the builder. The panel held that, although the builder was statutorily precluded from bringing an action to enforce its lien, the trial court should have ordered the plaintiff property owner to do equity (*i.e.*, "compensate defendant for its work on the premises"), *id.* at 450, as "a *precondition* to resolving plaintiff's [equitable] action to quiet title," *id.* at 455 (emphasis added). The *Republic Bank* decision was expressly based on the equitable maxim that "one seeking equity must first do equity." *Id.* at 453. The *Republic Bank* panel also relied, in part, on this Court's opinion in *Kirkendall v Heckinger*, 403 Mich 371, 372-375; 269 NW2d 184 (1978), which held that equitable principles obliged a plaintiff seeking specific performance of a real estate conveyance to reimburse the defendant for "reasonable expenditures for improvements on the property" made while defendant was an equitable mortgagee, despite the fact that defendant also made the improvements as an unlicensed residential builder. Considering all of the circumstances, the *Republic Bank* panel believed that equity required the property owner to compensate the unlicensed residential builder as a condition to having its lien removed. See *Republic Bank, supra* at 453-454.

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[8] With the addition of *new* MCR 7.215(D), former MCR 7.215(H)(1) has been re-numbered as MCR 7.215(I)(1).

Concluding that the *Republic Bank* involved a factually similar situation, the instant Court of Appeals panel determined that it must apply the rule of *Republic Bank.* The Court of Appeals panel further concluded that the *Republic Bank* rule authorized the trial court to award equitable relief on Millen Roofing's counterclaim for equitable relief. 245 Mich App at 53. The Court of Appeals distinguished *Kirkendall, supra,* by explaining that the circumstances were considerably different in *Kirkendall.* There, the defendant had a right to equitable relief as an equitable mortgagee independent from, and unaffected by, his status as an unlicensed residential builder. See 245 Mich App at 51-53.

The Court of Appeals panel in this case had three objections regarding the merits of the *Republic Bank* decision. First, the panel noted that *Republic Bank* improperly failed to consider the "clean hands" doctrine, which "closes the doors of a court of equity to a party tainted by inequitable conduct or bad faith relative to the matter for which equity is sought, however improper the behavior of the other party." 245 Mich App at 54, citing *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975). In both *Republic Bank* and the instant case, the builders violated the law by engaging in residential construction without the necessary State license. Moreover, both builders recorded construction liens that were invalid *ab initio* under § 114 of the Construction Lien Act, MCL 570.1101 *et seq.* Given these facts, the Court of Appeals would have held that these defendants came to court with "unclean hands" and therefore were not entitled to equitable relief. 245 Mich App at 55.

Second, the Court of Appeals panel lamented the fact that the holding of *Republic Bank* "drew a roadmap" for residential builders wishing to avoid licensing requirements:

> If the homeowner does not pay the unlicensed contractor, the contractor need only file a lien on residential property. Even though the lien is invalid and unenforceable, the homeowner, or as in the case of *Republic Bank*, the subsequent purchaser of the property is forced to file a suit to remove the cloud that the lien has placed on the title. Because an action to quiet title invokes the equitable powers of the court, the homeowner or subsequent purchaser must now "do equity" by paying the contractor, thereby defeating the statutory licensing scheme and its resultant penalties. [245 Mich App at 57.]

Finally, and in a related vein, the Court of Appeals panel opined that it was not the judiciary's job "to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree." 245 Mich App at 58. The panel reasoned that extending *Kirkendall* to cover situations in which a property owner merely seeks to remove an invalid construction lien would "subvert the clear intent of the Legislature," which was to penalize unlicensed residential builders. 245 Mich App at 57-58.

On April 2, 2001 the Court of Appeals entered an order indicating that a majority of the judges polled had determined that a special panel should not be convened to resolve the conflict with *Republic Bank*. 245 Mich App 801. This Court then granted the Stokes' Application for Leave to Appeal. *Stokes v Millen Roofing Co*, 465 Mich 909 (2001).

SUMMARY OF ARGUMENT

A court may not use its equitable powers to undermine a public policy established by the Legislature. Under the plain language of § 2412 of the Occupation Code, a builder that performs residential work without a license bears the risk of a total loss. This penalty was intended to encourage contractors to become licensed before performing residential work. The wisdom of the policy set forth in § 2412 is a matter of legislative, not judicial, concern.

In the case at bar, the trial court improperly used its equitable powers to circumvent the

requirements of § 2412 when it ordered the Stokes to either pay the balance of the contract price or allow the physical removal of the slates from their roof. There are three major problems with the trial court's award of equitable relief to Millen Roofing.

First, equity should not be available to a party's whose right to legal relief is prohibited for an appropriate reason. The trial court's judgment allowed Millen Roofing to make an "end run" around § 2412. Were it not for § 2412, Millen Roofing would be limited to a claim for money damages—the proper *legal* remedy for an alleged breach of contract. By enacting § 2412 to prohibit a claim for money damages, the Legislature certainly did not intend to *open* the door of equitable relief to unlicensed residential builders. By allowing Millen Roofing to take this equitable route, the trial court's action defeated the policy of § 2412.

Second, the courts of this state have long recognized that equity should not permit a party to obtain indirectly that which the law prohibits the party from obtaining directly. Unfortunately, that is precisely what occurred here. By allowing Millen Roofing to either recover the contract price of the physical return of the materials provided, the trial court allowed it to avoid the risk and penalty imposed by § 2412.

Finally, and perhaps most importantly, a court may not award equitable relief to a party that comes to the court with "unclean hands." Here, Millen Roofing violated the law by performing residential construction work without a license and by recording an invalid construction lien against the Stokes' property. But for the invalid lien, this litigation likely would not have occurred. Millen Roofing should not be *rewarded* for recording an invalid construction lien.

ARGUMENT

THE TRIAL COURT'S AWARD OF EQUITABLE RELIEF TO MILLEN ROOFING, ON MILLEN ROOFING'S AMENDED COUNTER-COMPLAINT, CONTRAVENED MCL 339.2412 AND THE ESTABLISHED PRINCIPLES OF EQUITY.

A. Standard of Review

A trial court's decision whether to grant equitable relief is reviewed de novo. *Walker v Farmer's Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997). A trial court's findings of fact in support of an award of equitable relief are reviewed for clear error. *Forest City Enterprises, Inc v Nationwide Ins Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998).

B. Section 2412 of the Occupational Code

The focal point of the Stokes' argument on appeal is MCL 339.2412(1), which prohibits unlicensed builders from suing to recover compensation for residential contracts:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract.

This prohibition applies equally to counterclaims made by defendants. See *Kirkendall, supra* at 374.

In this case, it is undisputed that Millen Roofing did not allege, and could not prove, that it was a properly licensed residential builder. Moreover, it is clear that a license was required to perform construction work on the Stokes' residence. Subsection 601(1) of the Occupation Code states:

> A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the

person possesses a license or registration issued by the department for the occupation

Article 24 regulates residential builders. Subsection 2401(a) defines "Residential Builder" as a person engaged in the construction of a residential structure for compensation.[9] Further, § 2403 sets forth nine exceptions to the residential builders license requirement, none of which are applicable to this case.[10] Therefore, under the plain language of § 2412, Millen Roofing was precluded from

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[9] Subsection 2401(a) provides as follows:

> "Residential builder" means a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property.

[10] Section 2403 provides as follows:

> Notwithstanding article 6, a person may engage in the business of or act in the capacity of a residential builder or a residential maintenance and alteration contractor or salesperson in this state without having a license, if the person is 1 of the following:
>
> (a) An authorized representative of the United States government, this state, or a county, township, city, village, or other political subdivision of this state.
>
> (b) An owner of property, with reference to a structure on the property for the owner's own use and occupancy.
>
> (c) An owner of rental property, with reference to the maintenance and alteration of that rental property.

bringing a counterclaim to recover compensation for the roofing work it performed for the Stokes.

Article 24 of the Occupational Code is a re-codification of the former "Residential Builders Act." Substantively, Article 24 is substantially the same as the former Residential Builders Act. This Court has explained that the Residential Builders Act was "essentially a consumer protection measure." *Tracer v Bushre*, 381 Mich 282, 290; 160 NW2d 898 (1968). Its purpose was to "protect the public from incompetent, inexperienced, and fly-by-night contractors." *Alexander v Neal*, 364 Mich 485, 487; 110 NW2d 797 (1961). Thus, the provision prohibiting unlicensed residential

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(d) An officer of a court acting within the terms of the officer's office.

(e) A person other than the salesperson who engages solely in the business of performing work and services under contract with a residential builder or a residential maintenance and alteration contractor licensed under this article.

(f) A person working on 1 undertaking or project by 1 or more contracts, the aggregate contract price for which labor, material, and any other items is less than $600.00. This exemption does not apply if the work of a construction is only a part of a larger or major operation, whether undertaken by the same or a different residential builder or residential maintenance and alteration contractor, or in which a division of the operation is made in contracts of amounts less than $600.00, to evade this act.

(g) An electrical contractor who is licensed under Act No. 217 of the Public Acts of 1956, as amended, being sections 338.881 to 338.892 of the Michigan Compiled Laws. This exemption applies only to the electrical installation, electrical maintenance, or electrical repair work performed by the electrical contractor.

(h) A plumbing contractor licensed under Act No. 266 of the Public Acts of 1929, as amended, being sections 338.901 to 338.917 of the Michigan Compiled Laws. This exemption applies only to plumbing installation, plumbing maintenance, or plumbing repair work performed by the plumbing contractor.

(i) A mechanical contractor who is licensed under the mechanical contractors act. This exemption applies only to mechanical installation, mechanical maintenance, or mechanical repair work performed by the mechanical contractor.

builders from suing to collect compensation—now codified as § 2412 of the Occupational Code—was "the act's most important section." *Charles Featherly Const Co v Property Development Group, Inc*, 400 Mich 198, 202; 253 NW2d 643 (1977). Although this provision may seem overly harsh to some, and may permit certain property owners to reap windfalls, courts have consistently applied the provision to prohibit unlicensed residential builders from suing to recover compensation for their work. See *Charles Featherly, supra*; *Tracer, supra*; *Alexander, supra*; *Utica Equipment Co v Ray W. Mallow Co*, 204 Mich App 476, 478-479; 516 NW2d 99 (1994); *Robert H. Pastor Building Co v Cole*, 127 Mich App 168, 172; 339 NW2d 11 (1983); *Bernard F Hoste, Inc v Kortz*, 117 Mich App 448, 451; 324 NW2d 46 (1982). As this Court has observed, the "wisdom" of the prohibition against legal action "is a matter for legislative rather than judicial consideration." *Charles Featherly, supra* at 207.

By prohibiting unlicensed residential builders from suing to recover compensation for their acts or contracts, § 2412 imposes the risk of total loss as a penalty. In the instant case, the trial court minimized the risk/penalty imposed by § 2412 when it granted relief on Millen Roofing's equitable claim, and ordered the Stokes to either pay the balance of the contract price or allow the physical removal of the slates. As such, the trial court's judgment frustrated the intent of § 2412. The courts of this State should not be permitted to use their equitable powers to undermine public policies put into place by the Legislature.

C. <u>Controlling Equitable Principles</u>

"A court of equity has no more right than a court of law to act on its own notion of what is right in a particular case; it must be guided by the established rules and precedents. Where rights

are defined and established by existing legal principles, they may not be changed or unsettled in equity." 27A Am Jur 2d, Equity, § 109. As set forth below, the trial court's award of equitable relief to Millen Roofing, on Millen Roofing's Amended Counter-Complaint, contravened a number of important equitable principles. Therefore, simply as a matter of equity, it should not be permitted to stand.

1. *Equity should not provide relief to a party whose right to legal relief was denied for an appropriate reason.*

It is well-settled that equity jurisdiction is excluded where the party seeking such relief has an adequate remedy at law. E.g. *Sovereign v Sovereign*, 354 Mich 65, 96; 92 NW2d 585 (1957); *Corkins v Ritter*, 326 Mich 563, 569; 40 NW2d 726 (1950), *Excelsior Wrapper Co v Yund*, 176 Mich 372, 376; 142 NW 353 (1913); *Ecco Ltd v Balimoy Manufacturing Co*, 179 Mich App 748, 751; 446 NW2d 546 (1989). For purposes of this maxim, however, the "adequacy" of a particular legal remedy should not be measured by the likelihood of success or failure of the claim. See 27A Am Jur 2d, Equity, § 39; *Chartiers Valley School Dist v Virginia Mansions Apartments, Inc*, 340 Pa Super 285, 294-295; 489 A2d 1381 (1985). "Equity will not provide relief where an adequate remedy at law existed and the claimant was denied relief for appropriate reasons." 27A Am Jur 2d, Equity, § 39.

Here, Millen Roofing claimed that it was injured by the Stokes' failure to pay full compensation for the labor and materials provided pursuant to the roofing contract. Generally, a party claiming this type of injury has an adequate remedy at law in the form of a breach of contract action. In this case, were it not for the prohibition set forth in § 2412, defendant would have had a viable contract action for money damages and, consequently, would not have been able to seek the

physical return of the property through equity. Accordingly, the trial court's judgment turned the *prohibition* of § 2412 on its ear. Under the trial court's reasoning, instead of *preventing* Millen Roofing from obtaining compensation, the existence of § 2412 had the ironic, and unintended,[11] effect of *enabling* Millen Roofing to obtain equitable relief (*i.e.*, the physical return of the roofing materials provided under the contract) that would not have been available otherwise.

Because Millen Roofing's ability to secure the generally available legal remedy for an alleged breach of contract was denied for an appropriate legal reason (*i.e.*, § 2412), equitable relief also should have been denied. 27A Am Jur 2d, Equity, § 39. When the trial court suggested that it could use its equitable powers in a manner contrary to the statute for the purpose of avoiding the "unduly harsh application" of the statute, it wrongly put itself in a position of superiority over the Legislature. See *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 56; 503 NW2d 639 (1993) ("Where, as in the present case, a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere."); *Majurin v Dep't of Social Services*, 164 Mich App 701, 707; 417 NW2d 578 (1987) ("Equitable principles cannot be applied in derogation of an unambiguous legislative requirement.").

2. *Equity will not allow indirectly that which, because of public policy, cannot be done directly.*

Even if this Court were to determine that Millen Roofing had no "adequate remedy at law"—because of the existence of § 2412—the trial court's award of equitable relief was nevertheless improper. The public policy of this State, as embodied by § 2412, is that unlicensed

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[11] By eliminating an unlicensed residential builder's right to pursue a legal action for breach of contract, the Legislature surely did not intend to *create* a new equitable remedy in its place.

residential builders may not resort to the courts to recover compensation. By using its equitable powers to order the Stokes to either pay Millen Roofing or allow for the return of their roofing materials, the trial court enabled Millen Roofing to obtain indirectly, that which it was precluded from obtaining directly.

Michigan Courts have long held that equity will not allow indirectly that which, because of public policy, cannot be done directly. In *Daley v City of Melvindale*, 271 Mich 431; 260 NW2d 898 (1935), a bank sought an equitable set-off of municipal bonds against public funds deposited by the municipality. This Court held that allowing an equitable set-off would be "in effect to countenance, in an indirect manner, the seizure of the property of the village or city in a similar manner as if by attachment, garnishment or execution," which was prohibited by law. The Court then explained that "[e]quity as a rule will follow the law, and will not permit that to be done by indirection which, because of public policy, cannot be done directly." *Id.* at 436; see also *Bennos v Waderlow*, 291 Mich 595, 600; 289 NW2d 267 (1940); *League General Ins Co v Budget Rent-A-Car of Detroit*, 172 Mich App 802, 806; 432 NW2d 751 (1988).

Likewise, in *Corkins , supra*, a plaintiff sought to establish a lien on certain lands to recover money for improvements made by him. Prior to the equitable action to establish the lien, the plaintiff was a defendant in an ejectment action where it was determined, as a matter of law, that he could not recover for the improvements. In affirming the dismissal of his equitable action, this Court explained as follows: "If plaintiff could not have a new trial, it follows that he could not bring a separate action in equity, as equity will not allow indirectly what may not be done directly." *Id.* at 568.

The decisions of in the United States Supreme Court sound a similar note. Justice Scalia, writing for the Court in *Immigration & Naturalization Service v Pangilinan*, 486 US 875, 893; 108 S Ct 2210; 100 L Ed 2d 882 (1988), explained that "[a] Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of the law." In *Pangilinan*, the Supreme Court held that courts may not invoke their equitable powers to confer citizenship in violation of limitations established by Congress. *Id.* See also *Reno v Bossier Parrish School Bd*, 520 US 471, 485; 117 S Ct 1491; 137 L Ed 2d 730 (1997) (explaining that a litigant may not obtain through equity that which the law forbids); *Rees v City of WaterTown*, 86 US 107, 121; 22 L Ed 72 (1873) ("There are cases, indeed, in which a court of equity give remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rule, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows.").

The trial court violated these equitable principles when it allowed Millen Roofing to obtain, albeit in a round-a-bout fashion, a remedy prohibited by law in the form of partial compensation for its roofing work.

3. *One who seeks the aid of equity must come in with "clean hands."*

As recognized by the Court of Appeals panel below, the trial court's award of equitable relief on Millen Roofing's equitable counterclaim violates the well-established "clean hands" maxim.

This Court described the parameters of the clean hands doctrine in *Stachnik, supra* at 382-383:

> "No citation of authority is necessary to establish that one who seeks the aid of equity must come in with clean hands." *Charles E. Austin, Inc v Secretary of State,*

> 321 Mich 426, 435; 32 NW2d 694 (1948). The clean hands maxim is an integral part of any action in equity. The United States Supreme Court captured the essence of the maxim when it said:
>
> > "[The clean hands maxim] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein v Heath,* 6 How [47 US] 228, 247 [12 L Ed 416 (1848)]." *Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co,* 324 US 806, 814; 65 S Ct 993; 89 L Ed 1381 (1944).
>
> Since the clean hands maxim is designed to preserve the integrity of the judiciary, courts may apply it on their own motion even though it has not been raised by the parties or the courts below. See *Gaudiosi v Mellon,* 269 F2d 873, 881-882 (CA 3, 1959). See also *Hall v Wright,* 240 F2d 787, 795 (CA 9, 1957); *Frank Adam Electric Co v Westinghouse Electric & Mfg Co,* 146 F2d 165, 167 (CA 8, 1945).

On the basis of the "clean hands" maxim, this Court should conclude that the trial court erred in granting equitable relief to Millen Roofing.

Millen Roofing violated Michigan law by acting in the capacity of residential builder without the proper license. The penalties for violations of the Occupation Code are set forth in § 602. In addition to losing its right to sue the Stokes to recover compensation, Millen Roofing was subject to a civil fine up to $10,000.00. See MCL 339.602(e); MCL 339.604. Moreover, as an unlicensed contractor, Millen Roofing lacked the authority to record a construction lien on the Stokes' property. Section 114 of the Construction Lien Act, MCL 570.1101 *et seq.*, provides that a contractor "shall not have a right to a construction lien" for an improvement to a residential structure unless there is a written contract between the parties setting forth that the contractor is duly licensed. If Millen Roofing had not recorded the invalid construction lien on the Stokes' property, in violation of MCL

570.1114, this litigation would not have occurred. Recall that the Stokes' original complaint was aimed at removing the improperly-recorded lien. Because Millen roofing's conduct with respect to the roofing job at issue was tainted by these violations of Michigan law, the doors to equitable relief should be closed to it. *Stachnik, supra* at 382-383.

D. *Kirkendall v Heckinger*

This Court's decision in *Kirkendall v Heckinger, supra,* does not support the trial court's award of equitable relief to Millen Roofing. If anything, *Kirkendall* suggested the opposite result. There, this Court held that equitable principles obliged a plaintiff seeking a real estate conveyance to reimburse the defendant for "reasonable expenditures for improvements on the property" made while defendant was an equitable mortgagee. *Kirkendall* is notable because the Court reached this conclusion despite the fact that defendant also made the improvements while acting as an unlicensed residential builder.

Frank Kirkendall purchased a lot on which he planned to build a house for his son Dennis Kirkendall. Carl Heckinger agreed to pay off the land contract on the house, to pay the back taxes, and to build a house on the lot in exchange for a sum of money. When a dispute arose over the sum of money, the Kirkendall's filed suit seeking equitable relief in the form of a conveyance of the property for a certain sum of money or, in the alternative, money damages. Heckinger filed a counterclaim seeking reimbursement for the value of the labor and improvements made to the property. The trial court dismissed Heckinger's counterclaim on the ground that it violated § 16 of the Residential Builder's Act—a provision substantially the same as the current § 2412. The Court of Appeals affirmed.

This Court affirmed the dismissal of Heckinger's counterclaim, but concluded that Heckinger was entitled to recover for the value of the improvements made while he had title to the property as a condition of the grant of equitable relief to Dennis Kirkendall. Such a result, it reasoned, would be consistent with the maxim that one seeking equity (*i.e.*, the Kirkendalls) must do equity. Accordingly, on the specific authority of Osborne, Mortgages, §§ 169-170, and 4 Pomeroy's Equity Jurisprudence (5th ed), § 1217, the *Kirkendall* Court held that Heckinger, as an equitable mortgagee, was "entitled as a condition to reconveyance to reasonable expenditures for improvements on the property" made while he had title to the property. *Kirkendall, supra* at 374.

The most notable distinction between *Kirkendall* and the instant case is that Millen Roofing did not have the status of "equitable mortgagee" with respect to the Stokes. Therefore, Millen Roofing is not entitled to recover equitable relief under the controlling theory of *Kirkendall.* An equally compelling distinction is the fact that Millen Roofing, unlike Heckinger, was not awarded equitable relief as a *condition* of the Stokes' recovery, but rather as a remedy for an entirely separate and independent "equitable" cause of action brought by Millen Roofing. For purposes of this appeal, because Millen Roofing was the party *seeking* equitable relief, Millen Roofing was the party required to "do equity."[12]

E. ***Republic Bank v Modular One PLC***

In *Republic Bank, supra,* the Court of Appeals applied *Kirkendall* to a new factual setting and, in the process, broadened the rule of *Kirkendall* in a considerable fashion. Where

[12] Although the Stokes initially brought an equitable claim to remove the invalid construction lien, that claim was dismissed more than one month *before* Millen Roofing filed its own independent claim seeking equitable relief. Because the trial court granted relief on Millen Roofing's equitable claim against the Stokes, only that claim at issue in this appeal.

Kirkendall held that a plaintiff seeking the equitable remedy of specific performance was required to reimburse an equitable mortgagee for improvements to the property as a condition to the reconveyance, *Republic Bank* held that a plaintiff seeking to remove an invalid construction lien was required to pay for the work upon which the invalid lien was based in order to have the invalid lien removed. See *Republic Bank, supra* at 455. The Stokes maintain that *Republic Bank* was incorrectly decided because it failed to consider, among other things, the unlicensed builder's "unclean hands" in recording an invalid construction lien. Nevertheless, this Court does not have to address the question of *Republic Bank* to resolve this appeal. Here, unlike *Republic Bank*, the trial court did not award equitable relief as a *condition* to the removal of an invalid construction lien, but rather as a remedy for a separate and independent counterclaim seeking general equitable relief.

If the Court wishes to resolve this appeal on a narrow basis, it may do so by determining whether an unlicensed residential builder may successfully maintain a separate and independent claim for equitable relief. For all of the reasons set forth above, in Parts B & C of the "Argument" section, such a claim should be barred because it undermines the requirements of § 2412 and contravenes the established principles of equity.

On the other hand, if the Court does wish to address the issue presented in *Republic Bank*, the same equitable principles counsel against awarding equitable relief as a condition for the removal of an invalid construction lien. When an unlicensed residential builder compels a property owner to file a quiet title action by recording an invalid construction lien,[13] it comes into the action with "unclean hands," and is not entitled to equitable relief. See *Stachnik, supra* at 382-383. Moreover,

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[13] As noted, *supra*, in Part C, 3 of the Argument section, a construction lien is invalid *ab initio* if recorded by an unlicensed residential builder. See MCL 570.1114.

as recognized by the instant Court of Appeals panel, awarding equitable relief to unlicensed residential builders as a condition of the removal of invalid construction liens undermines the policy of § 2412. Finally, awarding equitable relief to unlicensed residential builders as a condition to the removal of invalid construction liens would wrongly enable unlicensed residential builders to use equity to accomplish indirectly (*i.e.*, by way of a lawsuits initiated against them) that which they are precluded from accomplishing directly (*i.e.*, by way of their own direct lawsuits). See, e.g., *Daley, supra* at 436. For all of these reasons, the principles of equity counsels against such an award.

Moreover, as noted by the instant Court of Appeals panel, to now avoid the requirements of the Residential Builders Act, an unlicensed contractor need only record an invalid lien against the homeowner's property, which will, in turn, compel the homeowner to file an equitable action to "quiet title." In response, the unscrupulous contractor may then simply allege that the homeowner's "equitable action" requires the court to examine the "equities" of the entire case. The contractor may further argue that it is "inequitable" to deny it payment for the work performed on the property—an argument that will be available to *every* unlicensed residential builder. Under these circumstances, requiring the a property owner to "do equity" by compensating the contractor for the work performed directly undermines the operation of § 2412.

F. <u>The Further Erosion of § 2412 Below</u>

In the Court of Appeals published opinion below, the panel applied the rule of *Republic Bank* to yet another factual scenario. Instead of recognizing that the so-called "equitable exception" to § 2412 had been limited to situations in which the equitable award was a *condition* of an award of equitable relief to the party *opposing* the unlicensed residential builder, the Court of Appeals

affirmed the trial court's award of equitable relief to an unlicensed residential builder on a separate and independent claim for general equitable relief brought *by* the unlicensed residential builder. Thus, the Court of Appeals opinion further undermined the legislative policy set forth in § 2412, and should not be allowed to stand.

CONCLUSION AND RELIEF REQUESTED

By awarding equitable relief to Millen Roofing the trial court (1) created an avenue for Millen Roofing to avoid the strictures of § 2412, (2) allowed Millen Roofing to obtain indirectly what the law prohibited it from obtaining directly, and (3) allowed Millen Roofing to obtain an award of equitable relief despite its "unclean hands." For these reasons, this Court should REVERSE the Court of Appeals decision affirming the judgment of the trial court, and issue an opinion holding that the trial court misapplied its equitable powers when it awarded equitable relief to Millen Roofing.

Respectfully submitted,

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