

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ANTHONY and HOLLY ANTHONY,

Plaintiffs/Counter Defendants-
Appellees/Cross-Appellants,

v

DELAGRANGE REMODELING, INC.,

Defendant/Counter Plaintiff-
Appellant/Cross-Appellee,

and

GREGORY DALMAN, DENNIS YODER, and
DELAGRANGE HOMES, INC.,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED

March 15, 2005

No. 252644

Branch Circuit Court

LC No. 00-008579-CK

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendants appeal as of right a judgment awarding plaintiffs \$461,860.29 following a bench trial in this contract dispute involving construction of plaintiffs' summer home. Plaintiffs cross-appeal the trial court's denial of prejudgment interest with respect to the award of attorney fees. We affirm in part, vacate in part, and remand.

I

In the summer of 1999, plaintiffs, residents of Illinois, purchased two lakefront lots on Lake George in Branch County and thereafter entered into an oral agreement with defendant Delagrang Remodeling through its principals, defendants Gregory Dalman and Dennis Yoder, for construction of a summer home.¹ The parties agreed that the home would be constructed on a

¹ Although Yoder was the majority shareholder and president of Delagrang Remodeling, Dalman managed the day-to-day operations. Dalman negotiated the contract with plaintiffs and oversaw the construction of the home with minimal involvement from Yoder.

cost-plus basis, whereby Delagrange Remodeling would invoice plaintiffs each month for the cost of work performed by subcontractors plus a twenty percent (later, eighteen percent) markup. Plaintiffs paid a deposit of \$60,000 in August 1999, and construction began in the fall.

Following several months of construction, in May 2000, the parties reached an impasse when plaintiffs refused to continue paying invoiced monthly charges and Delagrange Remodeling ceased construction. At that point, plaintiffs claimed that they had paid the full cost of construction as agreed upon, approximately \$668,000. However, Dalman claimed there was no agreed upon price and informed plaintiffs that final invoices would bring the cost to approximately \$970,000.

Plaintiffs secured new contractors to complete the home and filed the instant action to recover damages. Defendants filed a countercomplaint for damages based on breach of contract, quantum meruit/quantum valebant, and foreclosure of a construction lien filed by Delagrange Remodeling. The trial court granted plaintiffs' motion to dismiss the countercomplaint on the ground that Delagrange Remodeling was not a licensed residential builder in Michigan and therefore was barred from filing a claim for compensation for home construction services, pursuant to MCL 339.2412.²

Following a bench trial in October 2003, the trial court found in favor of plaintiffs, awarding them \$327,412.33: \$104,534.04 for reimbursement of the management fee paid to defendants; \$60,000 for the deposit that defendants retained; \$19,135.39 for billing statement errors; \$563.66 for improper charges for invoiced lumber; \$9,179.24 for defendants' failure to credit plaintiffs' account for an audio/video services subcontractor invoice credit; and \$134,000 of the \$234,000 cost of completing the home. The court also awarded attorney fees and costs of \$134,447.96. Accordingly, on November 19, 2003, the court entered a judgment against all defendants, jointly and severally, in the amount of \$461,860.29.

II—Breach of Contract

On appeal, defendants first challenge the trial court's award of damages for breach of contract on several grounds. We find no basis for reversal.

A. Standard of Review

This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 425; 670 NW2d 729 (2003) vacated in part on other grounds, ___ Mich ___; 689 NW2d 227 (2004). We review questions of law de novo. *Id.* at 432. With respect to findings in a bench trial, this Court must give due regard to the trial court's superior ability to judge the credibility of witnesses who appeared

² The court dismissed the countercomplaint without prejudice. Defendants subsequently filed a separate action against plaintiffs. The trial court in the second action thereafter granted plaintiffs' motion for summary disposition. Defendants appeal the dismissal of the second action in a companion case, *Delagrange Remodeling, Inc v Anthony*, Michigan Court of Appeals (Docket No. 250022).

before it. MCR 2.613(C); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999); *Hawkins v Smithson*, 181 Mich App 649, 651-652; 449 NW2d 676 (1989).

B. Contract

Defendants first argue that the court erred in finding that the parties entered into a \$600,000 fixed price contract because there was no mutuality of agreement or mutuality of obligation, both of which are essential elements of contract.³ We disagree.

“In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Mutuality of agreement, commonly described as “a meeting of the minds,” means that there must be a meeting of the minds on all the material facts in order to form a valid agreement. *Sanchez v Eagle Alloy, Inc.*, 254 Mich App 651, 665; 658 NW2d 510 (2003); *Kamalath v Mercy Memorial Hosp Corp.*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). The element of mutuality of obligation requires that both parties must be bound by an agreement or neither is bound. *Reed v Citizens Ins Co*, 198 Mich App 443, 449; 499 NW2d 22 (1993).

It is undisputed that the parties entered into a cost-plus agreement for construction of the home, by which defendants would be paid the cost of construction plus an eighteen percent management fee. However, according to plaintiffs, the cost-plus contract was not to exceed \$668,000 for construction of the home. According to defendants, the parties simply agreed to a cost-plus arrangement and there was no limitation on the total cost. After hearing the testimony at trial and reviewing the evidence, the trial court found plaintiffs’ view more credible.

1. Mutuality of Agreement

Defendants argue that the trial court’s determination that plaintiffs intended “a reasonable cap” on the construction cost and that “the cap was a moving target” requires a conclusion that there was no mutuality of agreement on the total cost of the project. Defendants assert that these findings indicate that the project cost was the subject of ongoing negotiation and therefore lacked the certainty required for mutual agreement. We reject this reasoning.

The trial court’s notation that the cap was a moving target prefaced its findings on the total cost dispute and was made in the context of the project’s history. The court noted that the initial design plans were modified from one set of plans to the next, and the next, until “the ones that finally were essentially agreed upon....” Contrary to defendants’ argument, the court did not find that a cap was never agreed upon to the extent that the project cost lacked certainty. Rather,

³ Plaintiffs assert that defendants failed to preserve this issue for appeal by raising it below. At trial, it was undisputed that the parties entered into a contract. Dalman admitted in his trial testimony that he entered into a building contract with plaintiffs, which was consummated at the time of plaintiffs’ \$60,000 down payment in August 1999. Dalman also stated in a sworn affidavit that, on behalf of Delagrang Remodeling, he entered into a building contract with plaintiffs in October 1999. Nonetheless, in their closing argument, defendants raised the issue of a lack of mutuality concerning a fixed-price contract.

the court found that there was an anticipated cap of \$600,000, which “perhaps migrat[ed] upward to \$668,000 as the firm cost for the completed dwelling.”

In prefacing its findings, the court stated that the parties’ dispute centered on whether the plan modifications were made to reduce costs, from the initial projection of approximately \$900,000, as plaintiffs testified, or whether the modifications were simply for aesthetic changes, as Dalman indicated. The court concluded that the parties differing views were not simply a matter of a misunderstanding, and that plaintiffs’ view was more credible for several reasons. We find no basis for disturbing the court’s conclusion that the project cost was as plaintiffs asserted, \$668,000.

Whether there is mutuality of agreement or “a meeting of the minds” is judged by an objective standard, looking to the expressed words of the parties and their visible acts, not their subjective states of mind. *Sanchez, supra* at 665; *Kamalnath, supra* at 548. As the court noted, plaintiffs’ down payment of \$60,000 coincides with their contention that the initial plan was to construct a home for \$600,000, even though plaintiffs admitted that the figure was raised almost immediately to \$650,000 with the addition of the \$35,000 pilings and the completion of the family or recreation room over the garage. Likewise, the building permit application completed by Dalman stated that the estimated cost of the home was \$650,000. Finally, the cap alleged by plaintiffs was supported by the \$668,000 estimate for the project on the final drawings upon which the home was actually built.

Defendant does not challenge the court’s factual findings, and the court’s reasoning is supported by the record. Further, with respect to Dalman’s credibility, the court found that the facts contradicted Dalman’s assertion that the garage and the porch were included as living space in the square footage of the home. Viewing the circumstances objectively and giving due regard to the trial court’s assessment of credibility, we cannot conclude that mutuality of agreement was lacking.

2. Unilateral Mistake

Defendants argue that the court’s finding that plaintiffs intended a “reasonable cap” on the contract and that the cap was a “moving target” establishes only a unilateral mistake, which is not a basis for reforming a contract. For the reasons discussed above, with respect to mutuality of agreement, we find this argument without merit. Further, we reject defendants’ assertions that because the “footprint of the house” and the selection of materials had not yet been finalized, no cap on the cost could have existed. Evidence indicated that the construction-cost cap prompted modifications in the building plans to contain costs, and it can reasonably be inferred that the cap would dictate the selection of materials as construction progressed. The court’s finding of mutual assent to the \$668,000 cap was supported by the evidence and did not constitute reformation of the contract on the improper basis of a unilateral mistake.

3. Mutuality of Obligation

Defendants argue that plaintiffs’ belief that they could cease the construction without being in breach of contract establishes that the element of mutuality of obligation was lacking because mutuality is not present if one party is bound to perform, but the other is not, *Reed, supra* at 449. In support of this argument, defendants cite Holly’s testimony that the parties had a cost-plus contract with a limit, that it was Dalman’s job to keep the cost under \$600,000, and

that David indicated in a meeting with Dalman that if the contract could not be kept under \$600,000, the construction would cease. Defendants also cite David's testimony that it was Dalman's job to keep the contract price under \$600,000, but there was no finalized plan.

We find defendants' argument unconvincing. As plaintiffs point out, it is undisputed that they paid defendants \$728,000. Plaintiffs do not contend that they had no obligation to perform under the parties' agreement, i.e., to pay for the agreed-upon construction of the home. Contrary to defendants' contention, the element of mutuality of obligation was not lacking.

III—Evidence

A. Attorney Letter

Defendants argue that the trial court erred in admitting into evidence a letter received by Dalman from an attorney for Delagrang Remodeling. Defendants assert that the letter was subject to the attorney-client privilege, that it was inadvertently included in a box of discovery documents reviewed by plaintiffs' attorneys, and that such inadvertent disclosure does not waive the attorney-client privilege with respect to the letter.

The issue whether the attorney-client privilege applies to a communication is a question of law that this Court reviews de novo. *Leibel v Gen Motors Corp*, 250 Mich App 229, 236; 646 NW2d 179 (2002). The question of what constitutes a waiver of the attorney-client privilege is also a question of law that we review de novo. *Id.* at 240.

The trial court admitted the letter at issue solely for purposes of impeachment during cross-examination of Dalman, who was called as an adverse witness by plaintiffs. Counsel asked Dalman when he first became aware that a residential contractor in the State of Michigan must be properly licensed. Dalman responded “[a]t my arrest,” “a year and a half ago,” after the Anthony project. After reviewing the letter produced by plaintiffs' counsel, Dalman testified that he recalled receiving the letter and indicated that, according to the letter, he was aware in July 1999, that the issuance of a license would be extremely important to Delagrang Remodeling in the event of a dispute with an owner on a Michigan project. The record indicates that Dalman received the letter, dated July 29, 1999, from an attorney for Delagrang Remodeling, and that the attorney indicated that it was important to be licensed as a residential builder in Michigan in the event of a dispute with an owner on a Michigan project.⁴

Contrary to plaintiffs' argument, we disagree that the attorney-client privilege is inapplicable here because the privilege applies to only “a communication from a client to his advisor.” See *Leibel, supra* at 238-239; see also *Franzel v Kerr Mfg Co*, 234 Mich App 600, 613-614; 600 NW2d 66 (1999) (letter written by defendant's former counsel, to defendant's vice president of human resources, subject to the attorney-client privilege). Further, inadvertent

⁴ The parties disputed the content and import of the letter, to which the court responded that the letter speaks for itself. The letter apparently was not included in the record on appeal. Our review is therefore limited to the discussion of the letter during trial and the representations of counsel.

disclosure of a document does not necessarily waive the attorney-client privilege. *Id.* at 615-616; *Leibel, supra* at 240-241.

Nonetheless, we are persuaded on the record before us that the bare statement at issue was factual in nature, rather than confidential legal advice that would be subject to the attorney-client privilege. Legal opinions, conclusions, and recommendations based on facts are protected by the attorney-client privilege when the facts are confidentially disclosed to an attorney for the purpose of legal advice. *Id.* at 239. “[H]owever, the protection of the privilege extends only to communications, and not to facts.” *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 451; 528 NW2d 778 (1995). Whether Dalman was aware of the licensing requirement, and if so, when he became aware of the requirement, cannot be shielded from disclosure merely because the fact was established by a letter from an attorney. *Id.* at 452. Dalman had already admitted in testimony that in the summer or fall of 1999 he may have had discussions with Yoder in which he was advised that Delagrange Remodeling needed to become licensed to perform residential construction work in Michigan. He further testified that he obtained study materials before the Anthony construction project began in preparation for taking the Michigan licensing test. The letter addressed Dalman’s awareness of the licensing requirements in the context of these facts, not in the context of confidential legal advice. We find no error in the trial court’s admission of the letter for the purpose of impeachment.

B. Receipt of Inadmissible Evidence

Defendants argue that the trial court erred in taking custody of a videotape and deposition transcript that the court ruled were inadmissible. They note that at the time plaintiffs sought admission of the deposition transcript, plaintiffs’ counsel stated that some statements may tend to impeach testimony of Dalman and Yoder. Because defendants present only cursory argument and fail to argue the merits of this issue, it is not properly presented for review. It is therefore deemed abandoned. *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). An appellant may not merely assert an error and then leave it up to the Court to discover and rationalize the basis for his claims or search for authority to either sustain or reject his position. *Id.* Nor may a party give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

Moreover, defendants’ suggestion that they may have been prejudiced by the court’s receipt of this evidence is mere speculation. After ruling in defendants’ favor by finding the transcript and videotape of the deposition inadmissible, the court stated that it “would receive those as a separate record so that the record is preserved as an offer of proof.” Defendants’ challenge on this basis is without merit.

IV—Conversion

Defendants argue that the court erred in finding that Delagrange Remodeling committed conversion by applying plaintiffs’ \$60,000 down payment to costs incurred under the construction contract. They contend that the court’s finding that the deposit was not in a third-party account should lead to a legal conclusion that the deposit was not an escrow, and therefore defendants did not wrongfully exert dominion over plaintiffs’ property. We disagree.

The trial court's conclusion that the \$60,000 down payment had been converted was made with regard to piercing the corporate veil, and thereby holding defendants Dalman, Yoder, and Delagrane Homes liable for damages awarded against defendant Delagrane Remodeling. The court stated that one of the grounds for piercing the corporate veil was the misappropriation of the \$60,000 down payment:

“[A]s to the issue of the corporate veil, the Court is satisfied that the wrongdoing, either directly by Mr. Dalman or by acquiescence by Mr. Yoder in obtaining the permits by fraud and misrepresentation, compelled the Court to pierce the corporate veil, *as well as the misappropriating without the Plaintiffs' consent in the conversion of the \$60,000 deposit, which the Court finds was, in fact, intended to be held affectively [sic], though not in a third-party account, as escrow to be distributed with the Plaintiffs' consent at the end of the project.* [Emphasis added.]

In assessing damages, the court awarded the \$60,000 down payment, which it found was misappropriated.

On appeal, defendants challenge the court's finding of a conversion solely on the basis that the down payment check was not deposited with a third party and there was no escrow agreement. Defendant argues that the court erred in finding that Delagrane Remodeling “wrongfully exerted dominion” over the check by using it to pay for goods and services ordered by plaintiffs in conjunction with the parties' construction contract. Accordingly, we limit our review of the conversion finding to defendants' argument.⁵

Conversion is defined as “*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). To support an action for conversion of money, the defendant “must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship” and “must have had an obligation to return the specific money entrusted to his care.” *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111-112; 593 NW2d 595 (1999) (citation omitted). [*Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (emphasis added).]

Statutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. *Head, supra*; [MCL] 600.2919a. This Court has ruled that simply retaining money does not amount to “buying, receiving or aiding in the concealment of stolen, embezzled or

⁵ To the extent that defendants argue that the court erred in awarding plaintiffs \$9,000 credited by Audio Visual Lifestyles, we decline to consider this argument because it was not raised in defendants' statement of the issues presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

converted property.” *Hovanesian v Nam*, 213 Mich App 231, 237; 539 NW2d 557 (1995). [*Lawsuit Financial, supra* at 592-593.]⁶

The trial court found that the \$60,000 deposit was to be held effectively, although not in a third-party account, as escrow to be distributed with the plaintiffs’ consent at the end of the project. The court found that defendants misappropriated the deposit money by using the money without plaintiffs’ consent.

We find no clear error in the court’s findings. There was ample evidence to support the court’s finding that the money was to be held until the end of the project to be distributed with plaintiffs’ consent. This finding is in accordance with plaintiffs’ testimony, which the court found credible. Further, defendants’ monthly statements to plaintiffs carried the deposit forward and did not apply it to costs incurred in construction, for which plaintiffs wrote separate additional monthly checks. The court properly concluded that defendants wrongfully exerted domain over the deposit and used the money inconsistent with plaintiffs’ rights to it. *Lawsuit Financial, supra* at 591. Defendants’ allegation of error is without merit.

V—Fraud

Defendants argue that the court’s finding of fraud was without support and therefore the award of all damages other than the \$19,000 discrepancy in accounting must be reversed. We disagree.

As plaintiffs note, and as stated above, the court’s reference to fraud was made in the context of piercing the corporate veil. The court stated that part of the justification for piercing the corporate veil was that “wrongdoing, either directly by Mr. Dalman or by acquiescence by Mr. Yoder in obtaining the permits by fraud and misrepresentation” Contrary to defendants’ assertion, the damages awarded by the court were not “premised upon a recovery in fraud,” and therefore defendants’ allegation of error is without merit. Evidence supported the court’s finding that Dalman or by acquiescence, Yoder, committed wrongdoing in obtaining the building permit by listing plaintiffs as the general contractor without plaintiffs’ knowledge or consent. It was undisputed that Dalman was arrested on the basis of criminal wrongdoing with regard to obtaining the building permit and that both Dalman and Yoder were held liable for violations of Michigan law on the basis of the misrepresentation on the building permit and undertaking construction of a home in Michigan while Delagrange Remodeling was not licensed in Michigan.

VI—Piercing the Corporate Veil

Defendants argue that the trial court erred in finding that there was sufficient wrongdoing to hold Delagrange Homes liable and to pierce the corporate veil. We disagree.

⁶ In their conversion claim, plaintiffs sought treble damages, plus costs and reasonable attorney fees pursuant to MCL 600.2919a; however, the court did not award treble damages.

A

We review de novo a trial court's decision regarding piercing the corporate veil because of the equitable nature of the remedy. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). We review factual findings for clear error. MCR 2.613(C); *HA Smith Lumber, supra* at 425.

B

The trial court found that Delagrange Remodeling, a recently incorporated subsidiary of⁷ Delagrange Homes, relied almost entirely on the good name and reputation of the latter, was undercapitalized, and failed to maintain a sufficient separation from Delagrange Homes. The court also found sufficient wrongdoing by Dalman directly and Yoder, by acquiescence, to hold them personally responsible on the basis of fraud and misrepresentation in obtaining the building permit for plaintiffs' home and in misappropriating plaintiffs' \$60,000 deposit.

In general, the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all the stock. *Foodland Distributors, supra* at 456. "This fiction is a convenience, introduced to serve the ends of justice." *Id.* When this fiction is invoked to subvert justice, it may be ignored by the courts. *Id.* There is no single rule concerning when the corporate entity may be disregarded. *Id.* Each case must be decided on the basis of the underlying facts in determining whether equitable principles justify disregarding the corporate entity. *Klager v Robert Meyer Co*, 415 Mich 401, 411; 329 NW2d 721 (1982). The entire spectrum of relevant facts is examined to determine if piercing the corporate veil is warranted; the facts are assessed against the corporation's economic justification to determine if the corporate form was abused. *Id.* at 411-412; *Foodland Distributors, supra* at 456-457.

Defendants argue that there was no clear and convincing evidence of fraud to pierce the corporate veil. Fraud may be proved by facts that are inconsistent with an honest purpose. *Id.* at 459. Further, our courts have recognized that the corporate veil may be pierced even in the absence of fraud. *Id.* at 460.

The trial court's findings are supported by the evidence. Yoder and Dalman were associated with both Delagrange Homes and Delagrange Remodeling, Yoder as an owner of Delagrange Homes and Dalman as an employee, before they formed Delagrange Remodeling. The companies shared employees and at one time shared office space, and shared logos and business and financial affairs, such as general liability insurance coverage.

A draft contract presented to plaintiffs during negotiations for the construction of their home identified Delagrange Remodeling as a division of Delagrange Homes. Yoder testified that Delagrange Remodeling was formed to undertake remodeling projects by capitalizing on the longstanding good name and reputation of Delagrange Homes. He stated that as a remodeling project company, Delagrange Remodeling was intended to balance the cyclical nature of the new

⁷ Counsel for plaintiffs conceded at oral argument that Delagrange Remodeling was not a subsidiary of Delagrange Homes.

home construction undertaken by Delagrange Homes. When new home construction was down, remodeling business would be up.

In fact, according to the record, Delagrange Remodeling did not limit its activities to remodeling projects, but undertook large-scale new home construction such as plaintiffs' home. Nonetheless, Delagrange Remodeling was capitalized with \$1,000. Yoder testified that he had not made any additional capital contributions to the corporation, but, because of the problems with plaintiffs, he had made loans to Delagrange Remodeling of approximately \$207,000 and that he and Dalman had made a joint loan of \$160,000 in 2001 to cover costs and overhead.

Further, some documents identified Delagrange Homes as the account for projects undertaken by Delagrange Remodeling. And Holly testified that Dalman took her to the Delagrange Homes showroom to choose construction materials and products for the home. There was ample evidence to support the court's finding that the companies were not separate in identity.

There was also sufficient evidence to support the court's conclusion that Dalman and Yoder were personally liable. *Id.* at 459-460. It is undisputed that Delagrange Remodeling was not licensed for residential construction in Michigan. There was evidence that both Yoder and Dalman knew of the licensing requirement and that Dalman had at one time taken initial steps to secure a license. Nevertheless, Dalman obtained the building permit for plaintiffs' home by misrepresenting that the homeowner, plaintiffs, rather than Delagrange Remodeling, was the general contractor. There was evidence to support the court's finding that Dalman and Yoder misappropriated plaintiffs' \$60,000 deposit. In light of the evidence and the entire spectrum of relevant facts, we find no error in the court's decision to pierce the corporate veil and hold defendants jointly and severally liable. *Id.* at 455-456.

VII—Damages and Attorney Fees

Defendants argue the court erred in awarding as damages the amount of the management fee plaintiffs paid, \$104,534.04, and awarding damages of \$134,000 for costs incurred in completing the home. Defendants also argue that the court erred in awarding attorney fees.

We find no error in the award of costs incurred in completing the home in light of the court's findings. However, we find no basis for the award of the amount of the management fee of \$104,534.04, as a component of damages in addition to the costs of completion. We therefore vacate the award of \$104,534.04 for the management fee and remand for reconsideration. Further, because the basis of the award of attorney fees is unclear from the record, we vacate the award of attorney fees and remand for further proceedings.

A. Standard of Review

Where a court following a bench trial has determined the issue of damages, we review the award for clear error. We will not "set aside a nonjury award merely on the basis of a difference of opinion." Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made. [*Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002) (citations omitted).]

We review a trial court's decision to award attorney fees for an abuse of discretion. *Hovanesian, supra* at 238.

B. Damages

In awarding damages, the trial court vacated the management fee of \$104,534.04 charged by Delagrange Remodeling, and the court awarded \$134,000 of the \$234,000 cost of completion of the home, finding that \$100,000 of the cost would have been necessary regardless of who completed the home. The court stated no specific basis for the award, but only that it was using equity more than law in awarding the cost of completion of the home.

On the record before us, we can discern no appropriate basis for the award of both the management fee and the cost of completion. If, as defendants argue, the court's award of the cost of completion represents an award of expectation damages based on a breach of contract, then the award of restitution of the management fee of \$104,534.01 would appear to be improper. "If a builder abandons a construction project already begun, damages consist of the cost of completing the construction plus any additional expenses the owner incurs because of the default." Patek, McLain, Granzotto & Stockmeyer, 1 Michigan Law of Damages and Other Remedies (ICLE), § 15.4, p 15-4, citing *Sheldon v Leahy*, 111 Mich 29, 30; 69 NW 76 (1896); *Wells v Bd of Ed*, 78 Mich 260, 270; 44 NW 267 (1889). Restitution, on the other hand, is generally an alternative to damages. 2 Michigan Law of Damages and Other Remedies, § 25.1, p 25-1. "If the purpose of damages is, first and foremost, to *compensate* a victim of a breach, the purpose of restitution is *disgorgement* of a wrongdoer's ill-gotten gain." *Id.* "Courts impose restitution when it is determined as a matter of justice and equity that the wrongdoer should be required to pay for the benefit derived." *Id.* at p 25-2. "The contract breach victim may elect to seek damages or seek rescission of the contract and restitution of any benefits conferred during performance." 1 Michigan Law of Damages and Other Remedies, § 1.6, p 1-5. Given these general rules governing damages and remedies, and the trial court's failure to state the legal basis for vacating the \$104,534.04 the management fee, we find the trial court's action of vacating the \$104,534.04 management fee improper. However, we remand for reconsideration of the award of the fee if a proper basis exists, in which case the court shall state on the record the specific basis for the award.⁸

C. Attorney Fees

In Michigan, attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception specifically provides the contrary. *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). Plaintiffs sought attorney fees on the basis of their statutory conversion claim, pursuant to MCL 600.2919a, which provides:

⁸ Although plaintiffs argue that the trial court properly found that there should be no compensation for management because Dalman failed to manage the cost of the project and admitted in a letter to a former employee that he was not prepared to be a manager, plaintiff did not raise this argument below or seek an award of the management fee as breach of contract damages. Moreover, the trial court did not cite this as the basis for its decision to vacate the management fee.

A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, *plus costs and reasonable attorney's fees*. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

As discussed above, “[s]tatutory conversion consists of knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.” *Head, supra*. “The statute provides a remedy against the accomplice only and not against the person who actually stole, embezzled, or converted the property.” *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 438-439; 683 NW2d 171 (2004). Although plaintiff alleged a claim of conversion and cited MCL 600.2919a as a basis for an award of treble damages and attorney fees, the trial court made no findings with respect to plaintiffs’ statutory conversion claim. The trial court did not award treble damages. The trial court did not find that defendants’ conduct constituted knowingly buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property. Simply retaining money does not constitute statutory conversion, *Lawsuit Financial, supra* at 593; *Hovanesian, supra* at 237. Further, the act of conversion itself does not suffice to establish a claim of statutory conversion. The actions proscribed by the statute all occur after the property has been stolen, embezzled, or converted by the principal. *Campbell v Sullins*, 257 Mich App 179, 192; 667 NW2d 887 (2003). Thus, even if the trial court’s findings could be interpreted to support a finding of conversion, that does not necessarily support a finding of statutory conversion under MCL 600.2919a.

Accordingly, we conclude that the trial court’s findings are insufficient to support an award of attorney fees based on plaintiffs’ statutory conversion claim. Further, attorney fees may not be awarded based solely on general equitable principles. *In re Adams Estate*, 257 Mich App 230, 237; 667 NW2d 904 (2003). Without a specific statute, court rule, or common-law exception to support the award of attorney fees, the award was improper. We vacate the award of attorney fees and remand for reconsideration of the award of fees if a proper basis exists, in which case the court shall state on the record the specific basis for the award of fees. *Id.* at 237.

VIII—Counterclaim

Defendants argue that the trial court erred in dismissing their counterclaim with respect to the assigned lien claims from subcontractors. We disagree.

The Michigan residential builders act, MCL 339.2412(1), provides, in relevant part:

[A] residential builder ... 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.

The residential builders act, MCL 339.2412, bars an unlicensed builder from seeking compensation on a residential construction contract. *Stokes v Millen Roofing Co*, 466 Mich 660,

662, 664; 649 NW2d 371 (2002); *HA Smith Lumber, supra* at 436. This prohibition extends to counterclaims as well as complaints, and includes damages for labor and materials, enforcement of a construction lien, and equitable relief.⁹ *Stokes, supra* at 665-667, 673; *Parker v McQuade Plumbing & Heating, Inc*, 124 Mich App 469, 471, 335 NW2d 7 (1983). The prohibition also applies to suits between subcontractors and contractors. *Utica Equipment Co v Ray W Malow Co*, 204 Mich App 476, 477-478; 516 NW2d 99 (1994). An unlicensed subcontractor may not recover compensation if the contractor also was unlicensed. *Id.* at 478.

It was undisputed that defendant Delagrange Remodeling is an Indiana Corporation and was not licensed as a residential builder in Michigan. Defendants have presented no convincing argument or authority to support a conclusion that they were entitled to maintain a counterclaim on the basis of the assignment of two subcontractor lien claims and thereby “defeat the statutory ban on an unlicensed contractor seeking compensation for residential construction.” *Stokes, supra* at 673. We find no error in the trial court’s dismissal of defendants’ counterclaim.

Although plaintiffs conceded that a lien claim may be assigned and could be the basis of a claim if the lien claim was valid, it was unclear whether the two subcontractor liens allegedly assigned were valid or whether defendants’ counterclaim properly pleaded a claim based on the assignments. In any event, defendants have not shown that they were prejudiced, given that the trial court dismissed the counterclaim without prejudice and ordered that defendant Delagrange Remodeling was not prohibited from commencing separate proceedings alleging appropriate claims. *Yee, supra* at 404.

To the extent that defendants argue that the court acquired jurisdiction of the lien claimants upon filing of the counterclaim and that the lien claimants are still entitled to an equitable determination of their rights based on “MCL 570.117(4),”¹⁰ this issue is unpreserved. Issues first raised on appeal need not be addressed by the appellate court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

IX—Cross-Appeal

On cross-appeal, plaintiffs argue that the trial court erred in denying prejudgment interest with respect to the award of attorney fees. Because we vacate the award of attorney fees and remand for further proceedings before the trial court, we need not decide this issue. In the event that this question arises on remand, however, we briefly address the merits.

Plaintiffs correctly note that the prejudgment interest statute, MCL 600.6013, expressly provides that interest is calculated on the entire amount of a money judgment, including attorney fees and other costs:

⁹ A narrow exception applicable in cases in which the plaintiff seeks equitable relief does not apply in this case. *Stokes, supra* at 669-670.

¹⁰ Defendants may have intended to cite MCL 570.1117(4), which provides “Each person who, at the time of filing the action, has an interest in the real property involved in the action which would be divested or otherwise impaired by the foreclosure of the lien, shall be made a party to the action.”

Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. *Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs.* The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney. [MCL 600.6013(8) (emphasis added).]

Although at one time there was a split of authority concerning whether the grant of prejudgment interest with respect to attorney fees was proper,¹¹ the statute was amended in 1993 to expressly include attorney fees and costs in the calculation of interest. 1993 PA 78; *Ayar v Foodland Distributors*, 263 Mich App 105, 109-110; 687 NW2d 365 (2004). “Before the 1993 amendment, there was no specific provision indicating that interest could be calculated on an award of attorney fees and costs.” *Id.* at 109. Absent some circumstance excepting the award of fees and costs from the statutory provision for prejudgment interest, the denial of prejudgment interest on the entire amount of the money judgment, including attorney fees and other costs, is improper.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Jessica R. Cooper

¹¹ See *Nartron Corp v Gen Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued January 6, 2005, (Docket No. 245942), slip op, p 9, n 4 (discussing split of authority).