

**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

DAVID J. FOGELSON AND CORINNE  
FOGELSON, husband and wife,

Plaintiffs-Appellees/Cross-Appellants,

v.

Court of Appeals No. 35086  
Thirteenth Judicial District Court  
No. D-1329-CV-2010-02239

ERIC WALLACE, MARK BOZZONE,  
WALLEN DEVELOPMENT, INC.,  
DEVELOPMENTS BY WALLEN, LLP,

Defendants-Appellants/Cross-Appellees,

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

SEP 21 2016

*Mark Bozzone*

**PLAINTIFFS-APPELLEES**

**DAVID J. FOGELSON AND CORINNE FOGELSON'S**  
**X REPLY BRIEF TO MARK BOZZONE'S AND ERIC WALLACE'S**  
**ANSWER BRIEF ON CROSS APPEAL**

Appeal from the Thirteenth Judicial District Court, County of  
Sandoval, The Honorable George P. Eichwald

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***Statement of Compliance with Type-Volume Limitations:*** The body of the attached brief exceeds the 15-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionally spaced and the body of the brief contains 4,291 words. The brief was prepared and the word count determined using Microsoft Word 2010.

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**COME NOW** the Plaintiffs, David and Corrine Fogelson, by and through their counsel of record, Hunt & Davis, P.C. (by Catherine F. Davis and Julie J. Vargas) and for their Reply to Mark Bozzone's and Eric Wallace's Answer Briefs on Cross Appeal, state as follows:

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFFS' CLAIM UNDER THE UNFAIR PRACTICES ACT.**

Defendants make three arguments which they assert preclude Plaintiffs' claim under the New Mexico Unfair Practices Act ("UPA.") First, Defendants argue that the Plaintiffs have not properly alleged a misrepresentation, whether at the time of sale or thereafter. Second, Defendants continue to argue that the sale of construction services, along with the real property, does not constitute the sale of goods and services, as contemplated by the UPA. Finally, Defendants argue that Plaintiffs allege damages for nothing more than a breach of contract claim; and, such allegations, absent more, are insufficient to state a claim under the UPA.

In the case before this Court, the Plaintiffs have stated sufficient facts, which if accepted as true, state a claim under the UPA against Defendants Bozzone and Wallace; and, the trial court erred when it dismissed Plaintiffs' UPA claim under Rule 12(b)(6).

**A. Plaintiffs properly pled facts sufficient to state a claim that a misrepresentation was made to them, as required by the UPA.**

Plaintiffs alleged in their First Amended Complaint that the Fogelsons paid \$165,111.00 to Wallen to purchase the Property, including the new home to be constructed thereon, but that prior to completing the construction of the home, Wallen closed its doors. RP 162-98 at ¶¶12-14. At the time it closed, Wallen Development, Inc. had several unfinished homes which were under contract for sale, including the Fogelson home; and, the only homes that were eventually completed were homes on which Defendant Bozzone had provided the construction financing, which homes were eventually sold and the construction financing, paid off. RP 162-98 at ¶¶15-16. Plaintiffs' First Amended Complaint further alleges that Wallen failed to pay for labor and materials used in the construction of the Fogelson home and allowed liens to be filed against the Property. RP 162-98 at ¶¶17-18. Instead, funds paid by the Fogelsons for construction of their home were used to pay charges on other homes and to pay salaries and expenses of Wallen with Defendant Bozzone instructing Wallen employees as to which bills should be paid and which should not, with Bozzone intentionally causing the Fogelsons' monies to be diverted from payment for the construction of Fogelson home. RP 162-98 at ¶¶19-21.

Plaintiffs also have the benefit of testimony presented at trial and Findings and conclusions entered by the trial court following a trial on Plaintiffs' remaining



claims. Included among the evidence was the fact that even before the Plaintiffs signed a contract with Wallen, Wallen was having financial problems as early as February, 2008 and began laying off employees at that time. TR-I: 83 at 1-21. By April, 2008, Wallace, Bozzone and Filener decided to delay payment to vendors, notwithstanding that those vendors would be entitled to lien properties on which work was performed. TR-I: 93-94. This was, again before the Plaintiffs had signed a contract.

In May, 2008, the Plaintiffs signed their Contract, and it provided that the Fogelsons would pay cash for the construction of their home by paying a non-refundable deposit and subsequent progress payments when construction reached defined benchmarks. TR-I: 28-30, Exhibit 24. The cash paid by the Fogelsons was to be applied toward the construction and purchase of the home and it was reasonable for the Fogelsons to believe that subcontractors would be paid and their money would be used to build their home. TR-I: 103-104.

Wallen's financial condition remained dire through the summer; and in August, 2008, Wallace and Bozzone were still operating under a policy of pushing back or delaying payment to vendors and accumulating cash, which policy was again ratified in October, 2008 by Wallace and Bozzone. Exhibit 46; TR-I: 128-29, Exhibit 59. RP 1270-93 at ¶¶51, 52, 53.. About a month later, Wallen was served with a foreclosure action by Bank of America and had its construction

financing cut off by Wachovia. Exhibit 49. Exhibit 55. Despite the fact that Wallace and Bozzone had decided not to pay Wallen's vendors, Bank of America was foreclosing, and Wachovia was pulling Wallen's construction financing, Wallen required a progress payment of \$50,625 on September 23, 2008 from the Fogelsons. TR-I: 32-33, Exhibit 53. Indeed, the trial court found that he decision to push payables and not pay vendors timely and Bozzone's ratification was reckless and without regard to the rights of Fogelsons. RP 1270-93 at ¶54.

Notwithstanding Wallen's complete financial disarray and Wallace and Bozzone's continued reaffirmation of their policy to withhold payments to vendors (including those working on the Fogelson project) and stockpile cash (including Fogelsons' cash), Wallen continued to require additional progress payments from Fogelsons. On November 5, 2008, the Fogelsons wrote another check to Wallen for \$55,493 for the construction services on their home. TR-I: 33-34, Exhibit 61.

By December, 2008, Wallen's financial condition had further worsened, and it was experiencing a huge cash crunch, with its construction credit with Charter Bank and Compass Bank expiring. Exhibit 67, Exhibit 68. Jenice Montoya testified that Bozzone, Wallace and Filener knew or should have known that the Fogelsons had purchased the property and were paying cash for it. TR-I: 85-86. While Wallen fell further into an apparently dire financial condition, and Wallace and Bozzone's year-long policy to withhold payments due to vendors continued,

on February 9, 2009, Wallen required another progress payment from the Fogelsons in the amount of \$55,493 for its construction of the home. TR-I: 34-35. By this time, Wallace, Filener and Bozzone knew that unpaid vendors were contacting homeowners and Wallen was getting claims from vendors about liens. TR-I: 143, Exhibit 79. Bozzone became directly involved in decision about which liens to pay; and, notwithstanding that the Fogelsons had paid cash for the construction of their home, vendor payments on other homes were put ahead of the Fogelsons home at the instruction of Bozzone. TR-I: 146-48.

Soon thereafter, Bozzone told Jenice Montoya that Wallen would be closed down; and, Bozzone rejected Montoya's request to keep a skeleton crew to finish up the few homes, including the Fogelsons', that were within 30 days of completion. TR-I: 154-55. After learning that Wallen had closed, Fogelsons discovered that there were numerous claims of lien filed against the home being constructed for them, totaling approximately \$60,000.00. TR-I: 45. The Fogelsons received nothing in exchange for their payments totaling \$165,111. TR-I: 55. The trial court concluded that Defendants Bozzone and Wallace engaged in numerous acts of wrongful conduct in their dealings with the Fogelsons. RP 1285-87 ¶¶7, 8. Among Bozzone's and Wallace's wrongful conduct, the trial court found that Wallace and Bozzone actively participated in the tortious acts against Fogelsons by directing, approving, and ratifying late payments to vendors and that

Bozzone, individually, took an active role in the management and decision making of Wallen. RP 1270-93 at ¶¶106, 107, 108. Based on their active participation in management, the trial court concluded they were personally liable because they acted recklessly with utter indifference to the consequences to Fogelsons. RP 1291 ¶25.

After Wallen was shut down, lots it continued to own were moved into another company created by Wallace and Filener, sold, and the proceeds were used to pay bills of Wallen and to refund deposits. TR-III: 105-107. Other lots owned by Wallen were transferred to yet another Wallen company called GM Investments, which made a profit on the sale of those lots to DR Horton. TR-III: 134-35. The Fogelsons did not receive any of the monies from the sale of the lots; instead, Wallen management, including Wallace, Filener, and Bozzone, believed that refunding the construction deposits would prevent any further investigation by the Attorney General's Office. TR-III: 132-133.

Plaintiffs' First Amended Complaint alleges, in support of their UPA claim:

46. Defendants engaged in an unfair or deceptive trade practice by knowingly misrepresenting that they intended to provide construction services for the construction of a home upon the Property to Fogelsons.

47. Defendants committed an unfair or deceptive trade practice by knowingly misrepresenting that they were paying subcontractors for monies

received from Fogelsons and intended to convey the property to Fogelsons free and clear of any and all liens.

48. Defendants engaged in an unfair and deceptive trade practice by knowingly failing to deliver the Property as provided for in the Purchase Agreement.

49. Bozzone made decisions and took actions on behalf of Wallen Development, Inc. with full authority to do so, which actions and decisions constituted an unfair practice.

50. Defendants' trade practices were unconscionable in that they took advantage of the lack of knowledge, ability or experience of the Fogelsons to a grossly unfair degree.

51. Defendants' actions were unconscionable because it resulted in a gross disparity between the value received by Fogelsons for the monies they paid since they have not received the Fogelson Home.

RP 162-198.

Defendants argue that because Plaintiffs concede that Bozzone and Wallace had not made any representations to them, either at or after the sale, Plaintiffs' UPA claim is barred. New Mexico law is clear that, to constitute a violation of the UPA, a misrepresentation or other deceptive statement may be made indirectly.

*Lohman v. Daimler-Chrysler Corporation*, 2007-NMCA-100 ¶¶23-26, 142 N.M. 437, 166 P.3d 1091.

Plaintiffs have alleged that Defendants Wallace and Bozzone made decisions and took actions on behalf of Wallen Development, Inc. with full authority to do so, which actions and decisions constituted an unfair practice. RP 162-98 at ¶49. In their position as decision-makers for Wallen, Bozzone and Wallace knew or should have known that Wallen employees continued to collect progress payments from cash purchasers, including the Fogelsons, continued to allow those cash purchasers to believe that their progress payments were being used for construction services, while at the same time, instructing Wallen staff to delay payment of vendors until such time as Wallen closed its doors. The UPA imposes a duty to disclose material facts reasonably necessary to prevent any statements from being misleading. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027 ¶15, 135 N.M. 265, 87 P.3d 545. Bozzone's and Wallace's continued instructions to delay payments to vendors, including those for cash purchasers like the Fogelsons, knowing that those cash purchasers reasonably expected their monies to be used to pay for the construction of their homes violated the duty imposed by the UPA to disclose material facts reasonably necessary to prevent statements from being misleading. *Id.*

Further, whether the misrepresentation was made at the outset of the relationship between the parties, or at a later time, is inapposite. The legislature, when enacting the UPA, anticipated situations where the representation would not be intentionally unfair or deceptive at the outset, but would become a false or misleading representation at some time during the life of the transaction. *Ashlock v. Sunwest Bank*, 1988-NMSC-026 ¶5, 107 N.M. 100, 753 P.2d 346. “If purity of intent at the moment of making the representation were a complete defense, without regard to the conduct of the representing party before the deal is consummated, the Act would become toothless.” *Id.* at ¶6. In this case, it is irrelevant whether the Defendants intended to misuse Plaintiffs’ money at the outset of the transaction. Over the course of the transaction, Defendants’ continued instructions to refrain from paying vendors, while still allowing the collection and retention of Plaintiffs progress payments, contrary to the reasonable understanding of Plaintiffs, satisfies the requirement that the Plaintiffs plead a misrepresentation on the part of the Defendants. Plaintiffs have properly stated a misrepresentation sufficient to satisfy the requirement of the UPA; and, this Court should reverse the trial court’s order dismissing Plaintiffs’ UPA claim and remand the case for further proceedings.

**B. Nothing in the UPA exempts construction services; and, the trial court erred when it dismissed Plaintiffs' UPA claim because it involved the construction of a home.**

Relying on *McElhannon v. Ford*, 2003-NMCA-091, the Defendants argue that the Plaintiffs' UPA claim must fail because the UPA "does not apply to real estate or contracts for the construction of homes to be sold as part of real estate." Answer Brief at 16. Defendants overstate the court's ruling in *McElhannon*, which held that a completed house, as a form of realty, cannot be "goods" or "services as defined by the UPA. The court did not address construction services, as those were not relevant to the facts of the case before the *McElhannon* Court. Further, Defendants argue that the exclusion of real property transactions from the UPA "makes perfect sense because real estate and real estate related transactions are already governed by a myriad of state and federal statutes." Answer Brief at 17-18.

As remedial legislation the UPA must be interpreted liberally to facilitate and accomplish its purposes and intent. *Truong v. Allstate Insurance Co.*, 2010-NMSC-009, ¶30, 147 N.M. 583, 227 P.3d 73, quoting *State ex rel. Stratton v. Gurley Motor Co.*, 105 N.M. 803, 808, 737 P.2d 1180, 1185 (Ct. App. 1987). Nothing in the UPA indicates, first, that construction services were not intended to be included within the purview of the Act. Furthermore, nothing in the Act



indicates that its remedies were to be displaced by remedies provided by other state or federal legislation.

Indeed, in *Kreischer v. Armijo*, 1994-NMCA-118, 118 N.M. 671, 884 P.2d 827, this Court considered the Plaintiffs' claims against the owner of a corporation that had contracted with the Plaintiffs to construct an addition on the Plaintiffs' property, but failed to do so, notwithstanding that the corporation had received payment. In dicta, the Court addressed the propriety of Plaintiffs' UPA claims against the individual defendant. *Id.* at ¶8. Noting that while Plaintiff failed to raise the issue on appeal, the Court stated that Plaintiffs' tort claims, if proven, could support a cause of action for unfair and deceptive trade practices against the Defendant, individually. *Id.* at 8. In support of its conclusion, the Court cited several Texas decisions decided under Texas' Deceptive Trade Practices Act ("DTPA"), which this court noted was similar to New Mexico's UPA. The New Mexico Court of Appeals cited *Smith v. Baldwin*, 611 S.W.2d 611 (Tx. 1980), in which the Supreme Court of Texas held that the Plaintiff properly brought a DTPA claim against a contractor who had entered into a contract for the construction of a home represented that the house, when completed, would qualify for VA approval for purposes of obtaining permanent financing. Similarly, in *Light v. Wilson*, 663 S.W.2d 813, 815 (Tx. 1983) the Supreme Court of Texas upheld a decision of the trial court under the DTPA awarding damages to Plaintiffs who sued their

contractor, who took the Plaintiffs' down payment to construct a home, but failed to provide any construction services. Again, in *Great American Homebuilders v. Gerhart*, 708 S.W.2d 8, 11 (Tx. Ct. App. 1986) the Court of Appeals of Texas held that a Defendant contractors' empty assurances that work would be done, gave rise to his individual liability under the DTPA.

The Ohio Appellate Courts reached a similar conclusion in *Keiber v. Spicer Constr. Co.*, 619 N.E.2d 1105 (1993), concluding that the Ohio Uniform Consumer Sales Practices Act ("OCSPA") applies to a contract to provide construction services to build a new home, especially when those services involve the design and construction of the dwellings. *Id.*

This Court's dicta in *Kreischer*, the Ohio decision of *Keiber v. Spicer*, and the Texas cases allowing claims under the DTPA arising out of construction services, taken with the required liberal interpretation of the UPA as a remedial act, mandate that the UPA be interpreted to allow Plaintiffs' claim arising out of construction services. The trial court's ruling should be reversed and this matter remanded for further proceedings on Plaintiffs' UPA claim.

**C. Plaintiffs' damages arose from Defendants' tortious conduct, for which the court found the Defendants liable and which is actionable under the UPA.**

In their Answer Brief, the Defendants claim, "To pursue a UPA claim, a Plaintiff must allege more than a breach of contract." Answer Brief at 12 and 16.

In the case before this Court, Plaintiffs have asserted more than a breach of contract claim. First, the evidence at trial was that Plaintiffs had no contractual relationship with Bozzone and Wallace. Plaintiffs allege in their complaint, that while Bozzone and Wallace were operating Wallen, they continued to allow Wallen employees to require progress payments from customers, while at the same time, directing Wallen employees not to pay invoices associated with the construction for which the progress payments were made, all the while knowing that Wallen's financial condition was quickly deteriorating to the point the business had to be closed. Evidence that the Plaintiffs clearly alleged that their damages arose from more than a simple breach of contract claim is the fact that a Court has already found the Defendants individually liable for their tortious conduct. RP 1150-74, 1258-61, and 1262-93.

In a similar case, the New Mexico Court of Appeals considered the individual liability of the Defendant president of a construction company when he misrepresented the type of construction project to permitting authorities and the trial court found him liable on breach of contract, fraud and unfair practices theories. *Kaveny v. MDA Enterprises*, 2005-NMCA-118, 138 N.M. 432, 120 P.3D 854. The Defendant in *Kaveny* argued that the Court must look to whether the gravamen of Plaintiffs' complaint lies in contract or in tort, contending that

Plaintiffs' cause of action arises out of contract and that such contractual obligations do not impose tort liability on him individually. *Id.* at ¶22.

Considering the Defendants' argument, the Court of Appeals held that it was unnecessary to analyze the gravamen of the Plaintiffs' claims in light of the fact that the trial court had already found that Plaintiffs' tort allegations were meritorious. *Id.* Similarly, in the case before this Court the trial court found that for the Plaintiffs on several of their tort claims and awarded them damages for those claims. As such, Plaintiffs have shown that Defendants' conduct extended beyond a simple breach of contract claim; and, Plaintiffs' claim under the UPA is proper.

**II. THE SUBSTANTIAL EVIDENCE PRESENTED AT TRIAL IS CONTRARY TO THE COURT'S CONCLUSION THAT PLAINTIFFS FAILED TO PROVE THEIR CONVERSION CLAIM, THE TRIAL COURT SHOULD BE REVERSED AND JUDGMENT ENTERED IN FAVOR OF PLAINTIFFS ON THAT CLAIM.**

In support of their claim that Plaintiffs' conversion claim must fail, Defendants essentially make three (3) arguments. First, Defendants claim that the Plaintiffs failed to show an independent duty arising in tort sufficient to support their conversion claim and that the harm they allege is not merely the inability to obtain the benefit of their contractual bargain. Second, the Defendants argue that Plaintiffs' claim fails because Plaintiffs cannot show that Wallen refused to refund the Plaintiffs' money after demand because the evidence shows that Plaintiffs'

demand was wrongly addressed and never received by Defendants. Finally, Defendant Bozzone contends that he was not in a position to refund Plaintiffs' monies because he was not responsible for post-closing decisions and any post closing funds he received were received months after Plaintiffs' demand for the return of their money. In light of the Court's finding that the Defendants were liable in tort to Plaintiffs' damages, Defendants arguments are unpersuasive; and, this Court should reverse the order of the trial court dismissing Plaintiffs' conversion claim and order that judgment be entered for the Plaintiffs on that claim.

**A. Plaintiffs properly established a duty sufficient to support their conversion claim and damages beyond their inability to obtain the benefit of their contractual bargain.**

Defendants argue that the Plaintiffs' conversion claim fails because they have failed to establish a duty separate from the contractual duties owed to them and because the harm they allege is nothing more than their inability to obtain the benefit of their contractual bargain. Answer Brief at 24, 29. Defendants' argument ignores the fact that, following a trial on the merits, the trial court found that the Defendants had violated several duties arising in tort owed to the Plaintiffs. Specifically, the trial court entered its findings of fact and conclusions of law and order of the court, finding that Bozzone actively participated in the commission of *prima facie* tort, intentional interference of contractual relations, and civil

conspiracy against Fogelsons. The trial court found Bozzone individually liable for his own tortious acts, and found Bozzone and Defendant-Appellee Eric Wallace ("Wallace") jointly and severally liable for the damages of the Fogelsons. [RP 1150-1174]. These findings and conclusions satisfy any requirement that the Plaintiff establish an independent duty and damages beyond Defendants' duties arising in contract.

**B. Demand is not always required to establish a claim for conversion; however, if demand was necessary, Plaintiffs properly sent demand to the Defendants.**

As Justice Minzner pointed out in her dissent in *Case Credit Corp. v. Portales Nat'l Bank*, 1998-NMSC-035 ¶13, 126 N.M. 89, 966 P.2d 1172, New Mexico Courts have recognized at least three different types of conversion, noting that the Restatement (Second) of Torts §223 actually recognized seven ways by which conversion could be committed. *Id.* New Mexico appellate courts have traditionally limited the types of conversion by which a Plaintiff may recover to these three distinct types: 1) the unlawful exercise of dominion and control over personal property belonging to another in exclusion or defiance of the owner's rights; or, 2) acts constituting an unauthorized and injurious use of another's property; or, 3) a wrongful detention after demand has been made. *Muncey v. Eyeglass World, LLC*, 2012-NMCA-120 ¶22, 289 P.3d 1225. *See also, In re Yalkut*, 2008-NMSC-009, ¶25, 143 N.M. 387, 176 P.3d 1119. Only one of the

three types of conversion defined by New Mexico Courts requires that Plaintiffs make demand for the return of wrongfully detained property.

Indeed, this Court considered the demand requirement as it pertains to conversion claims in *Muncey v. Eyeglass World, LLC*, 2012-NMCA-120, 289 P.3d 1225. The Muncey Court considered the propriety of instructions given to the jury at trial. Noting that the “demand and refusal” form of conversion was not of the type given to the jury, the Court held that demand is not a prerequisite to establish exclusion or defiance conversion. *Id.* at ¶28. Similarly, conversion resulting from the unauthorized and injurious use of another’s property does not contain a demand requirement.

While the Court’s decision in *Muncey v. Eyeglass World, LLC*, 2012-NMCA-120 ¶28, 289 P.3d 1225, clearly holds that demand is not a prerequisite to recover for exclusion or defiance conversion, Plaintiffs have satisfied the requirement of demand for wrongful detention after demand conversion.

At the trial on the merits, David Fogelson testified that he sent an e-mail to Bozzone asking what was going to happen with his house. RP 1280 ¶85, TR-I: 37, Exhibit 98. He did not receive any information that the e-mail had not been delivered. TR-I: 38-39. When he received no response from Mr. Bozzone, Mr. Fogelson sent an e-mail to Wallen’s general manager, Jenice Montoya. TR-I: 39, Exhibit 103. Jenice Montoya reported to Mark Bozzone, Eric Wallace and Larry

Filener, equally. RP 1271 ¶5. Plaintiffs subsequently instructed their attorney to make a demand for the return of the money they had paid to Wallen. RP 1281 ¶88, TR-I: 41. Exhibit 105. Copies of the demand were sent to Bozzone and Wallace. RP 1281 ¶89, TR-I: 43. After sending Exhibit 105, Plaintiffs' counsel received a response from Thomas Gulley, advising that he was representing Wallen. RP 1281 ¶90, TR-I: 43. In light of the Court's finding that Bozzone and Wallace were active at high levels of management in the business, RP 1272 ¶¶16-17, and the fact that Wallen's attorney responded to neither Bozzone nor Wallace can deny having received demand from the Plaintiffs.

**C. Whether Bozzone was in a position to refund Plaintiffs' monies is irrelevant to Plaintiffs' Claim of Conversion.**

Defendant Bozzone contends that he was not in a position to refund Plaintiffs' monies because he was not responsible for post-closing decisions; and, any post closing funds he received were received months after Plaintiffs' demand for the return of their money. Defendants' contention is irrelevant and in no way affects his personal liability to the Plaintiffs.

The facts developed at trial clearly show that Bozzone and Wallace were active at high levels of management in the business, RP 1272 ¶¶16-17. Indeed, the Court found that Jenice Montoya, the general manager of Wallen, who oversaw the day-to-day functions of Wallen, reported equally to Mark Bozzone, Eric Wallace and Larry Filener. TR-I: 77 at 14-18; TR-I: 78-79. Based on Bozzone's



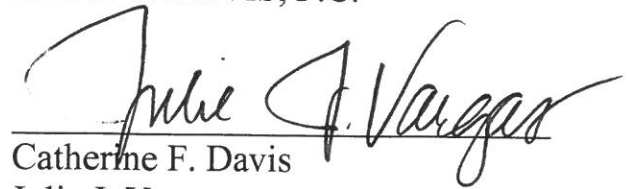
and Wallaces' roles in high level management at Wallen, his claim that he was unable to refund Plaintiffs' monies is incredible.

Finally, whether Bozzone or Wallace was able to return Plaintiffs' money to them is inapposite to the issues before this Court. Upon establishment of a claim of conversion against Defendants, Plaintiffs are entitled to an award of damages against them, irrespective of whether they are in a position to return the converted property. Defendants' claim that they were not in a position to return the money is not a defense to Plaintiffs' conversion claim. This Court should remand the matter back to the trial court, directing that court to enter judgment against the Defendants and in favor of the Plaintiffs and awarding damages in the amount of the monies paid by Plaintiffs for the construction of the home.

### **CONCLUSION**

For the foregoing reasons, the Plaintiffs pray that this Court reverse the decision of the trial court to dismiss their claims under the UPA and for conversion and remand this matter for entry of judgment on Plaintiffs' conversion claims and for further proceedings on their UPA claims.

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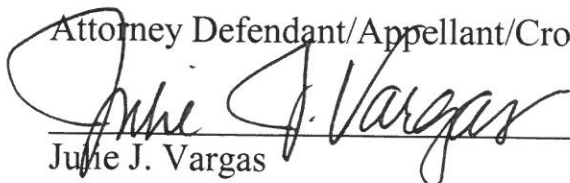
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