

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
KATHLEEN JANSEN, JOEL P. HOEKSTRA AND JANE MARKEY

KALAMAZOO COUNTY CIRCUIT COURT
GARY C. GIGUERE, JR.

MILLER-DAVIS COMPANY,

Plaintiff/Appellant,

Supreme Court Case No. 139666

v

Court of Appeals Case No. 284037

AHRENS CONSTRUCTION, INC.

Kalamazoo County Circuit Court
Case No. A05-000199-CK

Defendant/Appellee,

and

MERCHANT BONDING COMPANY,

Defendant.

BRIEF OF *AMICI CURIAE* MICHIGAN ASSOCIATION
OF SCHOOL BOARDS AND MICHIGAN SCHOOL BUSINESS OFFICIALS
SUPPORTING REVERSAL

ORAL ARGUMENT REQUESTED PURSUANT TO MCR 7.306(D)(1)

Christopher J. Iamarino (P53616)
Kirk C. Herald (P60657)
THRUN LAW FIRM, P.C.
Attorneys for *Amici Curiae*
Michigan Association of School Boards and
Michigan School Business Officials
2900 West Road, Suite 400
East Lansing, Michigan 48826-2575
(517) 484-8000

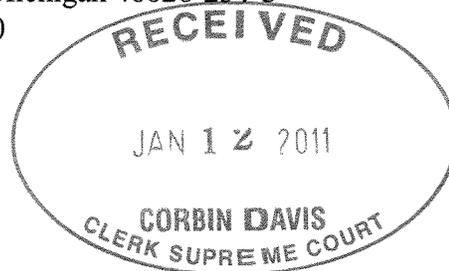


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JURISDICTIONAL STATEMENT

Jurisdiction for the appeal of the above-captioned case to the Michigan Supreme Court arises out of the Order of this Court, dated September 29, 2010, granting leave to appeal. Particularly in that Order, the Court stated:

The motion for leave to file brief *amicus curiae* is GRANTED. Other persons or groups interested in the determination of the issues presented in this case may move the court for permission to file briefs *amicus curiae*.

Further, pursuant to MCR 7.306(D) an *amicus curiae* brief may be filed on a motion granted by this Court, except when filed on behalf of an association representing a public entity, such as both the Michigan Association of School Boards and the Michigan School Business Officials. As such, this brief may be filed without motion. Said brief must conform to MCR 7.212(B), (C), and (D), and MCR 7.309.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether MCL 600.5839, the statute of repose for "any action" against architects, engineers, or contractors to recover damages for "any injury to property, real or personal," governs a general contractor's suit for a subcontractor's breach of contract or is, instead, limited to tort actions?

Plaintiff/Appellant answers: "No"

Defendant/Appellee answers: "Yes"

The Court of Appeals answered: "Yes"

Amici Curiae Parties Michigan Association of School Boards and Michigan School Business Officials do not address this question.

2. Whether this particular case constitutes "any action to recover damages for any injury to property . . . arising out of the *defective and unsafe condition* of an improvement to real property?"

Plaintiff/Appellant answers: "No"

Defendant/Appellee answers: "Yes"

The Court of Appeals answered: "Yes"

Amici Curiae Parties Michigan Association of School Boards and Michigan School Business Officials do not address this question.

3. Whether a claim for breach of a construction contract "accrues" under MCL 600.5807(8) on the date of "substantial completion" specified by the parties, the date the party in breach physically ceases work, the date the party in breach certifies that is has completed work, or some other date?

Plaintiff/Appellant answers: "An action for breach of contract accrues as of the date of substantial completion or as the date otherwise defined in the contract. A breach of the warranty/guarantee accrues upon notice or discovery of the breach within the

warranty/guarantee period and after the warrantor/guarantor provides notice of its inability or unwillingness to fulfill its warranty/guarantee obligations. A breach of a backcharge clause or indemnification clause accrues when, after demand, the subcontractor fails to perform and as a result, the general contractor incurs a loss and/or makes payment of the indemnitor/subcontractor's obligation."

Defendant/Appellee answers: "First wrong"

The Court of Appeals answered: The Court of Appeals did not answer this question below.

Amici Curiae Parties Michigan Association of School Boards and Michigan School Business Officials do not address this question.

4. Whether, alternatively, the "occupancy of the completed improvement, use, or acceptance of the improvement" under MCL 600.5839 is limited to occupancy, use, or acceptance by the owner of the property and whether the Legislature intended the terms "use" and "acceptance" to be otherwise limited in scope.

Plaintiff/Appellant answers: "Yes"

Defendant/Appellee answers: "No"

The Court of Appeals answered: "No"

Amici Curiae Parties Michigan Association of School Boards and Michigan School Business Officials answer: "Yes"

STATEMENT OF INTEREST OF *AMICI CURIAE* AND INTRODUCTION

The Michigan Association of School Boards ("MASB") is a voluntary, non-profit association of local and intermediate boards of education located throughout the state of Michigan. Its membership is comprised of 600 boards of education, representing nearly all public school districts in the state. MASB's mission is to provide quality educational leadership services for all Michigan boards of education and to advocate for student achievement in public education.

The Michigan School Business Officials ("MSBO") is a nonprofit corporation whose purpose is to continually improve the leadership of, and management in, school business and operational services, while enhancing the professional, social, and economic well-being of its members.

One of the key ways in which MASB's member school boards and MSBO's member business officials further the interests of public education is through the construction of school buildings. Public school districts are granted the express authority to undertake the construction of school buildings by the Revised School Code. MCL 380.11a(3)(c). MASB and MSBO jointly submit this Brief on behalf of their respective memberships, as the Opinion of the Michigan Court of Appeals in this case threatens the ability of public school districts in the state of Michigan to enjoy the full rights and protections provided by the Michigan Legislature pursuant to the limitations period identified in MCL 600.5839. Application of that Opinion will have a severe negative impact upon public school districts in the state of Michigan as that Opinion bars school districts from timely pursuing actions against contractors and architects/engineers involved in the construction of school facilities.

The Opinion issued by the Michigan Court of Appeals in the present case provides an incomplete interpretation of MCL 600.5839. The Court of Appeals interpreted that statute only in

light of the very limited facts of the present case. By doing so, the Court of Appeals substantially limited the meaningful application of that statute in dissimilar fact scenarios. By failing to consider the statute's broader application, the Court of Appeals failed to give the full meaning to the language and legislative intent of MCL 600.5839. This is contrary to the plainly-stated purpose of judicial statutory interpretation under Michigan law and, therefore, requires a reversal of the Court of Appeals' decision.

In its decision, the Michigan Court of Appeals wrongly ruled that the statute of limitations for the underlying case began to run when Appellee completed its work and another trade contractor began to build onto that work, rather than when the relevant owner occupied, used, or accepted the improvements. *Miller-Davis Company v Ahrens Construction, Inc*, 285 Mich App 289, 309-10; 777 NW2d 437 (2009). The position of the Court of Appeals with respect to the triggering event of MCL 600.5839 leads to an absurd result, the type of which should be rejected by this Court. A closer examination of the statutory language, legislative history, construction industry standards, cited case law, and practical implications all require this Court to reach the opposite conclusion.

In their *amici curiae* capacities, MASB and MSBO jointly submit this Brief in support of Plaintiff/Appellant's argument for reversal of the aforementioned Court of Appeals' decision.

STANDARD OF REVIEW

The questions of this case involve questions of statutory interpretation, which the Supreme Court reviews *de novo*. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006), citing *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250-251; 632 NW2d 126 (2001). The primary goal of judicial interpretation of a statute is to ascertain and give effect to the intent of the Legislature. *New Properties, Inc v Geo D Newpower, Jr, Inc*, 282 Mich App 120, 136; 762 NW2d 178 (2009). When interpreting statutes, the Michigan Supreme Court presumes that the Legislature intended the meaning clearly expressed. *DiBenedetto v West Shore Hsp*, 461 Mich 394, 402; 605 NW2d 300 (2000). The Court of Appeals in the case at bar aptly acknowledged that:

When reading a statute, the Court must assign to every word or phrase its plain and ordinary meaning unless otherwise defined in the statute, or unless the Legislature has used technical words or phrases that "may have acquired a peculiar and appropriate meaning in the law" MCL 8.3a; *Alvan Motor Freight [Inc v Department of Treasury*, 281 Mich App 35, 40; 761 NW2d 269 (2008)]. Additionally, the court may not read a whole or phrase of a statute in isolation but must read each word or phrase and its placement in the context of the whole act. *Id.*; *Village of Holly v Holly Twp*, 267 Mich App 461, 470; 705 NW2d 532 (2005).

Miller-Davis, supra, at 300.

Though aptly stating the standards of review, the Court of Appeals in the present case failed to properly apply those standards, which requires reversal of the Court of Appeals' decision.

STATEMENT OF FACTS

Amici Curiae Parties MASB and MSBO defer to the Statement of Facts provided by Plaintiff/Appellant Miller-Davis Company.

ARGUMENT

A. THE COURT OF APPEALS SHOULD, AND DOES, IMPLY THE PHRASE "BY THE OWNER" INTO MCL 600.5839.

Initially, it should be mentioned that an exceedingly important issue to the entire statewide construction industry is relegated to a five-sentence argument in Appellee's brief. Particularly, Appellee asserts that the statute of limitations for claims related to real property improvements is triggered by *anyone's* use of that improvement, or component thereof, rather than use by the project owner. Appellee's Brief, p 16. Appellee's argument hinges entirely on the Legislature's "decision" to not use the three-word phrase "by the owner" in the 1986 amendment to the statute. Nevertheless, the Court of Appeals in this very case was willing to read "by the owner" into the statute with respect to the similarly bare triggering event of "occupancy," without challenge or dire consequence.

The relevant triggering language of the statute of limitations is highlighted below:

No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than **6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement . . .**

MCL 600.5839 (emphasis added).

Without analysis or explanation, the Court of Appeals ruled that the statute "obviously" implied occupancy "by the owner," but that a similar result could not be reached with respect to "use" or "acceptance." The Court of Appeals stated:

The triggering event of "occupancy of the completed improvement" certainly implies "occupancy" by the owner, or at least one having the right to occupy the completed improvement. But the statute does not so limit "use, or acceptance of the

improvement" It is contrary to the rules of statutory construction to read into a statute a provision that is not within the manifest intention of the Legislature as derived from the language of the statute itself.

Miller-Davis, supra, at 310.

The court's choice to imply "by the owner" for at least a portion of MCL 600.5839 undermines Appellee's simplistic argument that "those 3 words should not be written into the statute," Appellee's Brief, p 16, and that "this Court should rely upon the text of the statute as written by the Legislature and determine the questions of occupancy, use and acceptance from the perspective of the party bring [sic] the lawsuit." *Id.* The very decision that Appellee seeks to enforce does exactly what Appellee cautions against, though in an inconsistent and arbitrary fashion.

More importantly, however, the court's ruling begs the question, why it is "obvious" to imply "by the owner" with respect to "occupancy," but to refuse to uniformly imply that same meaning as it relates to "use" or "acceptance?" The Court of Appeals' refusal to imply "by the owner" as it relates to "use" or "acceptance" is especially concerning given the terms of the parties' contract and the general understanding within the construction industry.

The construction contract documents created by the American Institute of Architects, and used by the parties in the present case, are routinely used throughout the country and reflect the practice of the construction industry. The AIA General Conditions of the Contract specifically and expressly addresses and restricts a contractor's authority to "use" or "accept" a prior contractor's work. Section 6.2.2 of the General Conditions provides in its entirety:

If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to

report shall constitute an acknowledgment that the Owner's or separate contractors' completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

Appellant's Appendix, p 290a.

As reflected in the foregoing, and perhaps from common sense, a contractor hired to perform a particular job does not have the necessary expertise to accept or pass upon the sufficiency of the prior contractor's separate work. A following contractor is to notify the architect if suspicious conditions exist in the performance of a prior contractor's work, who will make the final decision.¹

Even though a following contractor does not have sufficient expertise or authority to determine the proper performance of a prior contractor, and the parties' contract and the construction industry both acknowledge that to be the case, the Court of Appeals' decision effectively has made any following contractor the final arbiter regarding "acceptance" and "use" of prior work for purposes of MCL 600.5839. In other words, such a following contractor could "accept" and "use" the work of a prior contractor, concealing and potentially exacerbating the prior contractor's defective work, and that unqualified "acceptance" or "use" would trigger the limitations period applicable to the owner, who would have no say or control in the decision. The Court of Appeals' interpretation is obviously flawed.²

¹ In the school construction context, the statutorily-required supervisor of construction under the School Building Construction Act, MCL 388.851, *et seq.*, would make that determination. The supervisor of construction is often, but not always, the architect. That supervisor cannot be a contractor performing work on the project. OAG, 1957, No 3028, p 555 (December 27, 1957).

² Even more, while the parties' contract and industry standard acknowledges a contractor's *inability* to make decisions to "accept" or "use" a prior contractor's work, they expressly acknowledge the owner's authority and ability to do so. *See, e.g.*, Section 9.9 and Section 12.3 of the General Conditions dealing with "use" and "acceptance," respectively. Appellant's Appendix, pp 294a and 298a. In sum, the Court of Appeals' decision turned the analysis entirely upside down, placing supreme relevance on an unqualified contractor's actions and stripping the owner of traditional,

Even more, and as explained in greater detail below, the Court of Appeals' refusal to consistently imply "by the owner" creates an absurd, unwieldy, and discriminatory result.

B. THE STATUTE APPLIES TO "IMPROVEMENTS," NOT COMPONENTS OF IMPROVEMENTS.

The Court of Appeals' decision veers off track when it concluded that an improvement may consist of a component of a larger overall project. It then proceeded to examine construction of individual "components." For the reasons stated below, there is no justification in the statute itself, prior case law, or common sense for artificially subdividing the construction of a single project in this manner.

The Court of Appeals makes logical missteps when it concludes that an "improvement" within the meaning of MCL 600.5839 includes an improvement of merely a "component" of a larger system of improvements. The Court of Appeals cites to *Travelers Ins Co v Guardian Alarm Co*, 231 Mich App 473; 586 NW2d 760 (1998), for the proposition that a component of a larger system is an "improvement" for purposes of MCL 600.5839. Particularly, the Court of Appeals cites and emphasizes the following quote from *Travelers*:

Furthermore, if a component of an improvement is an integral part of the improvement to which it belongs, then the component constitutes an improvement to real property.

Travelers, supra, at 478.

This quote is generally attributed to *Pendzsu v Beazer East, Inc*, 219 Mich App 405; 557 NW2d 127 (1996). Nevertheless, a closer review of *Pendzsu* and the particular language cited evidences a nearly opposite conclusion:

common sense authority and control.

The issue is whether a component of a system which is definitely an improvement to real property is an improvement to real property itself. However, to artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property. Frequently, as in this case, an improvement to real property is going to consist of a complex system of components.

Pendszu, supra, at 411.

Far from concluding that a component is itself an "improvement," the *Pendszu* court stated that a component should *not* be extracted from a larger improvement and viewed in isolation as it would be "unrealistic" and "impractical" to do so. It concluded that an "improvement" consists of a "system of components." *Pendszu* does not stand for the proposition that a component is itself an improvement, but that a component is but a part of an improvement. Or, in other words, the very position supported by this *Amici* brief.

While "component" improvements in *Travelers* and *Pendszu* were both deemed to be "improvements" for purposes of triggering the limitations period of MCL 600.5839, an important and telling distinction exists. In both *Travelers* and *Pendszu*, the component improvements were "upgrades" to already existing systems and constituted the only improvements made. In other words, the component improvements were the *entire project*.

More particularly, the improvement in *Travelers* was the installation of a 42-circuit electrical panel box, replacing a 12-circuit panel box. There was no other work done to the electrical system. That component was the entire project. The *Travelers* court correctly concluded that "the new circuit panel box and transformer were integral components of an electrical system that was essential to the operation of the facility." *Travelers, supra*, at 478-479. In other words, the contractor in that case did not need to install the entire electrical system in order for its work to be considered an

improvement. *Travelers* most certainly did not say that the contractor's installation of an electrical box as a part of the installation of an entire electrical system would itself be a stand-alone improvement.³

Similarly, *Pendszu* involved the relining of already-existing coke ovens. The *entire project* consisted of relining the ovens. The *Pendszu* court held that the relining upgrade was an "improvement" for purposes of the limitations period despite consisting of less than the entire oven. Indeed, the *Pendszu* court considered whether the upgrade was merely a "repair," showing once again that the contractor's work was a stand-alone project, not a piece of a larger, ongoing project. For that purpose and in that limited context, it is reasonable to conclude that a discrete element would be an "improvement" for purposes of MCL 600.5839, but not if that element were part of a larger project.

While the above-referenced quotes from *Travelers* and *Pendszu* may seem compelling out of context, there is nothing in either of those cases to suggest that a contractor's performance of *less than the entire project* triggers the statute of limitations. In other words, the use or acceptance of a "component" in those cases is a triggering event *only when* the component improvement is the entire project at issue. By way of analogy, if Ahrens was asked to return five years later and install only a series of vent penetrations in the roof decking, installation of those vents would be an "improvement" despite being only a component of the entire roof system because such vents would

³ *Travelers* also addressed a fire alarm improvement made by another contractor that was also separate from the overall electrical system. That improvement occurred a year before the panel box upgrade and was also a separate, stand-alone project. "Acceptance" of the fire alarm system triggered the statute of limitations despite being only a "component" of the already-existing electrical system. *Travelers, supra*, at 481.

be the only portion of the project. That was not the case in the instant matter, where Ahrens' work was but a portion of a larger, ongoing project.

Even though the Court of Appeals cites to *Travelers* and *Pendszu* for the proposition that a "component" can be, in and of itself, an "improvement" within the meaning of MCL 600.5839, a closer look at those cases actually requires the opposite result. In both, the contractor fully performed the entire scope of work at issue. By analogy to a larger new-build construction project, the whole building (including the work of *all* contractors) would have been completed.

In addition to the plain language of the statute and prior case law, legislative history also evidences that MCL 600.5839 was never intended to apply to less than a complete and integrated project. Prior to 1986, contractors were not covered within the scope of MCL 600.5839. Instead, the language of the statute provided in pertinent part:

No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of such improvement more than 6 years after the time of occupancy of the completed improvement, use or acceptance of such improvement.

Amici Appendix, p 1c.

In that context, the meaning of "the completed improvement, use or acceptance of such improvement" unquestionably applied to the entire project (*i.e.*, the completed improvement or "such" improvement). There was no basis in that language to parse out an individual element of a greater project and use that individual element as the trigger for the six-year period.

Further, the architect or engineer that provided the design was governed by the same trigger event (occupancy of the completed improvement, use, or acceptance of such improvement) that applied to the architect or engineer responsible for the supervision of construction. Of course, the duties of the design architect would have to be completed before supervision of the construction, since the design drawings are what guide both the construction and the supervision. Notably, however, the statute did not create an earlier trigger event for the designer. Instead, the Legislature was accepting of the fact that both designers and supervising architects/engineers were governed by the same project-based trigger events, regardless of when their own discrete tasks on that project were completed.

When the amendments made by Public Act 188 of 1985 (SB 278) to MCL 600.5839 took effect in 1986, the changes implemented were minimal. The following shows how the statute reads today, with edit marks showing the changes from the pre-1986 text:

No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of **such the** improvement, **or against any contractor making the improvement**, more than 6 years after the time of occupancy of the completed improvement, use or acceptance of **such the** improvement . . .

Importantly, nothing in the statutory amendment indicates any intent to allow a parsing of a project into individual components as the description of "improvement" remains unaltered. Further, in the First Analysis of Senate Bill 278 (which became Public Act 188 of 1985), the Senate Analysis Section identified the following rationale for that bill:

Public Act 203 of 1967 [MCL 600.5839] prohibits anyone from suing a licensed architect or registered engineer for any injury or property damage arising out of his

or her performance, furnishing of designs or supervision of construction of a real property improvement once six years have passed from the time the improvements are accepted or the improvement is occupied or used. The theories underlying this prohibition apparently are that **any defects in an improvement which could lead to damage or injury are likely to become apparent within six years** and that evidence to refute charges of liability become increasingly difficult to muster with the passage of time. **Michigan does not extend this same protection from lawsuits to contractors . . .**

Amici Appendix, p 3c.

That analysis further states a supporting argument for passage of the bill as:

It is unfair for a contractor to be vulnerable to lawsuits years after a project has been completed, while architects are protected by law.

* * *

Six years is a reasonable period of time in which to establish the soundness of a construction project, a fact recognized by the legislature in the statute of repose for suits against architects and engineers. In fact, 90% of the suits filed against contractors fall within the six-year period the bill would establish. The limit is a practical way to ensure that the building industry so vital to our state's economic revitalization is not crippled by frivolous court actions, and that our court resources are not tied up in the futile exercise of trying "stale claims" for which evidence to come to a fair conclusion about liability is no longer available. In the case of contractors, the record makes clear that injuries related to **a building that has been used for longer than six years** almost always can be traced to faulty maintenance. (Emphasis added).

Amici Appendix, pp 3c-4c.

The Senate Analysis Section recognized that the purpose of the proposed bill that became Public Act 188 was to put contractors on the same footing as architects and engineers. Nothing in either that analysis or in the language of the amending act indicated a desire to put contractors on a *better* footing than that of architects and engineers. As such, MCL 600.5839 should be read to mean that the occupancy, use, or acceptance of the entire improvement, rather than a mere component of an improvement, is the triggering event for the six-year limitations period of MCL 600.5839. To

read the statute as the Court of Appeals does would be to put contractors in a better position than architects and engineers, as the Court of Appeals would wrongly have a contractor's statute of limitations begin well before the occupancy, use, or acceptance of the overall project, unless the contractor at issue happened to be the finishing contractor.

Further, that analysis speaks to a "*building*" as well as a "*construction project*" that has been used for longer than six years. Not a component. Not an element. Of course, if a construction project consists of a preexisting building for which only a component or an element is added, then basing the analysis on that limited element is reasonable *when that component is the entirety of the project*. But where a project is a new building or a multi-component renovation, the Legislature plainly intended the trigger to be the occupancy, use, or acceptance of that overall project.

C. AFFIRMING THE COURT OF APPEALS' DECISION WILL BE SEVERELY DETRIMENTAL TO CONSTRUCTION PROJECTS STATEWIDE.

If the Court of Appeals' decision is affirmed, and limitations periods are triggered by anyone's use of a single contractor's work within a larger project, construction projects will be severely and detrimentally impacted by unwieldy, discriminatory, and unreasonable limitations periods.

1. A Patchwork of Limitations Periods for a Single Project Will Result.

If the Court of Appeals' decision is upheld, a single construction project could be hampered by literally dozens of overlapping and intertwined limitations periods. For example, a standard new-build major construction project, such as the construction of a school building that includes a metal roof similar to that built for the YMCA building in the present case, may have more than twenty-five (25) different bid categories, including, for example: earthwork and site utilities, site concrete, steel, asphalt paving, fencing, masonry, carpentry, roofing, sealants/waterproofing, doors and hardware,

glass/glazing, drywall, painting, terrazzo, casework, mechanical, electrical, bleachers, fire protection, athletic equipment, and signage/display.

Aside from the earthwork and site utilities contractor, which is generally the first contractor in a construction project's critical path time line, not one of the contractors that undertakes one or more of those bid categories is independent of the trade contractor(s) that appear earlier in the construction process. The concrete contractor is dependent on and must place its foundations and footings on the work of the earlier earthwork contractor; the mason must place its block work on the foundations of the concrete contractor; the steel contractor must tie its steel joists and roof decking to the block wall of the mason; the carpenter must lay the roof base atop the roof decking and joists; and the metal roof contractor must lay its metal roof atop the roof base constructed by the carpenter. Each component is used by the subsequent contractor, which "use", according to the Court of Appeals, would commence a new and distinct limitations period. The result is perhaps dozens of separate limitations period for a single project. This is true although, for new building construction, none of these components in and of themselves are meaningful or have value on their own. Their meaning and value come only as a part of a whole project.

The question of "value" is one that has been used as a basis for determining the applicability of MCL 600.5839. In *Dominguez v Lanham Machinery Co, Inc*, 122 F Supp 2d 852 (WD Mich, 2000), the federal court analyzed what constituted an "improvement to real property." That court relied on the decision in *Adair v Koppers Co*, 741 F2d 111, 114 (CA 6, 1984), which was adopted by *Pendzsu, supra*, to identify four factors to make a "value" determination:

- 1) whether the modification adds value to the property for purposes of the property's intended use,
- 2) the nature of the improvement,

- 3) the relationship of the improvement to the land and its occupants, and
- 4) the improvement's permanence.

Dominguez, supra at 855.

In applying each of those factors to the underlying wooden decking structure for a standing seam metal roof, such as the one constructed by Ahrens, it becomes clear that the individual component does not become an "improvement to real property" until it is fully integrated into the completed overall project. First, the wooden deck system would add no value by itself, as it is neither weatherproof nor waterproof. Second, a wooden deck system is intended to be a part of an overall roofing system for a complete building. Third, a wooden deck system is not intended to be a final product and cannot serve its purpose to the overall building or its occupants as a stand-alone item. Fourth, while certainly a permanent part of an overall improvement, a wooden roof deck without integration would decay in short order as it is not intended to be exposed to the elements.

It is the full and completed project that provides the value of what is ultimately the "improvement" described in MCL 600.5839. Without that completion, or an acceptance by the Owner of the incomplete improvements as permitted by the General Conditions,⁴ there is no meaningful value and the time line of MCL 600.5839 is not triggered.

⁴ It is possible that an owner could choose not to finish a project in terms of undertaking all that is designed (*e.g.*, an abandoned or reduced-scope project). In such circumstances, the decision of that owner to move no further in finishing the project would effectively define the work to that point as "complete" for purposes of MCL 600.5839.

2. Unreasonably Short Limitations Periods for Project Owners Will Result.

Aside from the patchwork nature of the limitations periods that the Court of Appeals' decision would force upon construction projects, that decision also would severely shorten the limitations periods meaningfully available to a construction project owner for certain contractors.

As noted above, a construction project demands that trade contractors perform their work in a staggered manner, with each later contractor building onto the work of earlier contractors. The Court of Appeals held that inherent nature of each step building on the previous step to be "use" for purposes of triggering the six-year limitations period of MCL 600.5839. *Miller-Davis, supra* at 309-310. As a result, the Court of Appeals would require that the limitations period associated with the work of early contractors begin to run substantially before the project is anywhere near completion. For example, the work of foundations/footings contractors is generally completed before any significant portion of the remaining structure is built.

The foundations/footings contractor hypothetical exemplifies the substantive shortcoming of the Court of Appeals' approach. The purpose of a foundation or footing is to bear the weight of the building and its contents. Until the full intended load of a building and its contents are bearing down on that foundation/footing, the foundation/footing is not truly being "used" for its intended purpose. Any "use" prior to that (*e.g.*, the setting of masonry block or structural steel) is merely preliminary and incidental to continued construction, as foundations and footings for a building will not bear the full intended loads until the project as a whole is substantially complete. Despite that, the Court of Appeals would have the limitations period for that foundations/footings contractor begin to run when a following trade contractor connects the first structural steel column or first block of

masonry wall to the foundation/footing, rather than when the work is actually being used in its intended state. This distinction could shave years off any meaningful limitations period with respect to the foundations/footings contractor, placing the owner at a distinct disadvantage to detect and evaluate latent defects relating to the inability to bear the full weight of the structure.

The early triggering of the limitations period results in less than the full six years provided by MCL 600.5839 for an owner to identify the defect before the limitations period expires. As such, the Court of Appeals' decision would run contrary to the purpose of MCL 600.5839.

A federal district court has considered when "use" of an improvement occurs for the purpose of a construction statute of limitation. In *Great Northern Ins Co v Architectural Environments, Inc*, 514 F Supp 2d 139 (D Mass, 2007), the federal district court considered the meaning of "use" for the purpose of the Commonwealth of Massachusetts' corollary to MCL 600.5839. That court quoted Mass Gen Laws ch 260, §28:

Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property... shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) **the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.**

Great Northern, supra at 141 (emphasis added). In analyzing the concept of "opening of the improvement to use," the *Great Northern* court stated:

[T]he certificate of occupancy, which grants the owner the right to occupy the premises, determines the date upon which the improvement was open to use, as well as the date it was occupied. *See Aldrich v. ADD, Inc.*, 437 Mass. 213, 221-222, 770 N.E.2d 447 (2002). In this case, the temporary and permanent certificates of occupancy were issued, in August and December of 1999, respectively. The

Magistrate Judge concludes that the premises were open to use under the temporary certificate of occupancy and, thus, the August, 1999 date is the operative date.

Great Northern, supra at 142.

Rather than find that a following subcontractor's act of building onto a prior subcontractor's construction component was "use," the *Great Northern* court ruled that "use" for purposes of the Massachusetts' statute must be use of the overall project, which constituted a single "improvement." That is the exact conclusion properly reached by the trial court in the present case. See also, *Kozikowski v Toll Bros*, 354 F3d 16, 22 (CA 1, 2003) ("statute of repose begins to run when a Certificate of Occupancy is issued and the owners move into the home"); *Schwetz v Minnerly*, 220 Cal App 3d 296, 309 (1990) ("The ultimate 'work of improvement' to real property is the development or construction of a dwelling for use by the public. The date of substantial completion of the work of improvement or the development which triggers the 10-year period of [Cal Code Civ Proc] Section 337.15 was correctly applied in this case as being the date the valid notice of completion was recorded").

The timing differences in the completion by early contractors and late contractors on a construction project can be significant. When undertaking large building projects (*e.g.*, a multi-story high school), a three-year construction period is quite common. In those instances, early foundation/footing contractors may have their work complete years before the building is used or occupied, and before those foundations are truly "in use" for their intended purpose. In fact, the Internal Revenue Code acknowledges and provides for construction periods of up to five years for large and complex projects funded with tax-exempt municipal bonds. Treasury Regulation §1.148-2(e)(2)(ii) expressly provides:

In the case of proceeds expected to be allocated to a capital project involving a substantial amount of construction expenditures . . . , a 5-year temporary period applies in lieu of the 3-year temporary period if the issuer satisfies the requirements of paragraph (e)(2)(i) of this section applied by substituting "5 years" in each place that "3 years" appears, and both the issuer and a licensed architect or engineer certify that the longer period is necessary to complete the capital project.⁵

The Court of Appeals' decision in this case will effectively shorten the limitations period applicable to early contractors that work on major construction projects. Given the particular facts of this case, the Court of Appeals likely did not consider the broader implications of its interpretation of MCL 600.5839. However, interpretation of that statute must not occur without consideration of these broader implications.

The practical impact of the Court of Appeals' failure to consider the impact of its decision on long-term construction projects is likely to cause more lawsuits based upon less information. Using a five-year project as an example, a potential claim against a contractor performing initial subsurface or foundational work would need to be filed within a year of project completion, which completion is the first time the foundations would be bearing the intended final weight load. Foundation cracks that present themselves in that sixth year could be harmless and caused by normal settling; however, a building owner could not risk treating them as such. That owner would not have the luxury of time to make an extensive review of how those cracks respond to seasonal changes or whether the building suffers from significant foundational shifts. Instead, the owner would be forced to file a claim within that single year without the benefit of diligent review, otherwise the owner

⁵Under the regulations implementing the IRS Code, a "temporary period" is established by a municipal project owner (such as a public school district) for the reasonably expected period in which the proceeds of municipal bonds are to be expended for the construction of a capital project, such as a school building. Under the standard rule, that "temporary period" is not to exceed three years. Treasury Regulation §1.148-2(e)(2)(i). However, as noted above, that period can be extended for large and/or complex projects.

would be shackled with potentially extraordinary remedial costs should the cause turn out to be more sinister.

The Court of Appeals' decision forces owners of long-term construction projects to be faced with a Morton's Fork of either filing a premature claim to preserve its rights or risk the loss of an opportunity to pursue a claim because of the unreasonably short effective limitations period. And, while this scenario is dire enough, a phased project taking six or more years, for example, would provide absolutely no opportunity to see the initial contractor's work before the limitations period expired. The result would promote judicial inefficiency and guesswork, rather than justice and judicial economy.

3. Unworkable Limitations Periods against Architects Will Result.

In addition to the unwieldy and discriminatory affect the Court of Appeals' decision has on claims against various contractors, it also would create an unreasonable situation if that same analysis were applied to claims against architects and engineers. Taking this case as an example, the Court of Appeals ruled that the statute of limitations began running when Ahrens' work – a portion of a larger roof system – was utilized by a subsequent contractor who added metal roof panels. The statute of limitations was triggered because the subsequent contractor "used" Ahrens' work. A review of the statutory language again reveals an unworkable inconsistency, this time as it relates to claims against the architect or engineer.

If the Court of Appeals' reasoning were applied to performance by an architect or engineer, it would require the owner to be clairvoyant as to architectural claims. Particularly, MCL 600.5839 makes no distinction between contractors and architects/engineers as it pertains to claim "triggers." If the limitations period for claims against either are activated upon any entity's "use" of that work,

as the Court of Appeals requires, the limitations period for claims against that architect/engineer would commence before the design is implemented.

As discussed previously, the legislative history of MCL 600.5839 evidences an intent that architectural design and supervision be considered in light of the entire completed project. Indeed, common sense would require this conclusion, as an important part of an architect's work is the integration of separate building components. In that sense, the work of an architect cannot truly be evaluated until the entire building has been completed, a position consistent with that urged by this Brief.

Nevertheless, the Court of Appeals' decision would require either a global commencement of the limitations period against an architect for a period substantially shorter than six years or the application of multiple limitations periods to the same architect for the same project, just as would be required for the various contractors. While this creates an absurd result, it is the result demanded by the Court of Appeals.

Moreover, in the present case Ahrens constructed only a portion of a larger roof system designed by the architect. In other words, even if Ahrens fully and properly completed its work, it would result in half of a roof. Per the Court of Appeals' decision, claims relating to the architect's design would commence as to Ahrens' portion of the work before the full roof was even completed and at a time when it would have been impossible to analyze or even see the practical implications of the architect's roof design. Consequently, even as to a single component, such as a roof, the

project architect would either be subject to multiple limitations periods or any meaningful limitations period would be substantially shorter than intended by MCL 600.5839.⁶

Such a result would turn the purpose of a six-year limitations period on its ear and would substantively distort the intent of MCL 600.5839 with respect to claims against an architect or engineer.

⁶ In fact, there is a real possibility that the Court of Appeals' reasoning could trigger the limitations period for claims against an architect at the time bid documents are released, well in advance of construction even beginning, as bidders "use" those documents to formulate their bids. Such a triggering exposes the Court of Appeals' approach as being unworkable.

CONCLUSION

For the foregoing reasons, the Court of Appeals erred in concluding that the limitations period of MCL 600.5839 is triggered by the "use" or "acceptance" of real property improvements by other than the project owner. The Michigan Association of School Boards and the Michigan School Business Officials respectfully request that this Court reverse and vacate the decision of the Court of Appeals. Alternatively, the Michigan Association of School Boards and the Michigan School Business Officials respectfully request that this Court limit the applicability of the Court of Appeals' decision to claims among contractors and subcontractors and further clarify that the application of the limitations period of MCL 600.5839 begins to run for claims of a project owner for defects or deficiencies in its real property improvements from the date of completion, use, or acceptance of the total project by the project owner.

RELIEF REQUESTED

Amici Curiae Parties MASB and MSBO submit that the limitations period provided in MCL 600.5839 begins to run at the time of completion, occupancy, or use of the entire improvement by the owner, as opposed to the use of a mere component of the improvement by a contractor working on the improvement, in the instance of a new construction project or a multi-component construction project. As such, *Amici Curiae* Parties MASB and MSBO respectfully request that this Court reverse the decision of the Court of Appeals.

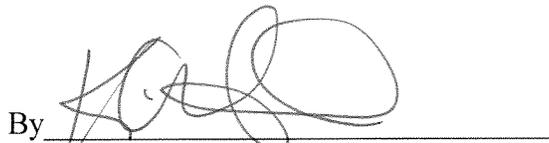
Respectfully submitted,

THRUN LAW FIRM, P.C.
Attorneys for *Amici Curiae* Parties
Michigan Association of School Boards and
Michigan School Business Officials

Dated: January 12, 2011

By 
Christopher J. Iamarino (P53616)

Dated: January 12, 2011

By 
Kirk C. Herald (P60657)

BUSINESS ADDRESS
2900 West Road, Suite 400
P.O. Box 2575
East Lansing, Michigan 48826-2575
TELEPHONE: (517) 484-8000

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Claim for medical malpractice in severing plaintiff's femoral nerve during appendectomy was discovered as matter of law by plaintiff, for statute of limitation purposes, when she was informed by defendant surgeon immediately following surgery that defendant had severed nerve and she experienced paralysis and numbness in her right leg. *Patterson v. Estate of Flick*, 69 Mich App 101.

Malpractice action against licensed physician must be brought within two years of time when physician discontinues treating or otherwise serving plaintiff, or within two years of time when plaintiff discovers, or in exercise of reasonable diligence should have discovered, alleged malpractice, whichever is later. *Patterson v. Estate of Flick*, 69 Mich App 101.

In light of structure and operation of professional corporations engaged in practice of profession, including podiatry, and to implement corporate liability provision contained in Professional Service Corporation Act, professional corporation would be held to be "person" within meaning of provision of this section respecting limitations of actions for malpractice. *Peters v. Golds*, 366 F Supp 150.

In malpractice action against podiatrists practicing as professional corporation, where all individual defendants were members of and had proprietary interest in corporation, and one member was alleged to have treated plaintiff within two years prior to time suit was filed, it would be held that acts of person having proprietary interest in such corporation would constitute "treating or otherwise serving the plaintiff" and would extend running of statute of limitations as to liability in his individual capacity and for and on behalf of the professional corporation. *Peters v. Golds*, 366 F Supp 150.

So far as accrual of cause of action for malpractice was concerned, date of last treatment or service by any member of professional service corporation would be held to be date of last treatment by corporation. *Peters v. Golds*, 366 F Supp 150.

ALR notes. When statute commences to run against actions against physicians, surgeons, or dentists for malpractice, 74 ALR 1317; 80 ALR2d 368.

When statute of limitations begins to run upon action against attorney for malpractice, 18 ALR3d 978.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 ALR3d 7.

NCCA note. Computation of limitation period in actions against physicians, surgeons and dentists for malpractice, 13 NCCA (NS) 582.

Digest reference. See Callaghan's Mich Dig, Limitations of Actions, §82.

Textbook reference. See Callaghan's Mich Civ Jur, Medicine and Surgery §101.

Committee Notes

Committee comment. Section [27A.5838] is based on the rule stated and followed in the Michigan case of *DeHaan v. Winter*, 258 Mich 293.

§ 27A.5839 Injury or death from defective or unsafe improvements; time for action; definitions.] SEC. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of such improvement more than 6 years after the time of occupancy of the completed improvement, use or acceptance of such improvement. This limitation shall not apply to actions against any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement consti-

tutes the proximate cause of the injury or damage for which the action is brought.

(2) No person may maintain any action to recover damages based on error or negligence of a state licensed land surveyor in the preparation of a survey or report more than 6 years after the delivery of the survey or report to the person for whom it was made or his agent.

(3) As used in this section, the term "state licensed architect or professional engineer" or "land surveyor" means any individual so licensed, or any corporation, partnership or other business entity on behalf of whom the state licensed architect, professional engineer or land surveyor is performing or directing the performance of such architectural, professional engineering or land surveying service. (MCL §600.5839.)

History. Added by Pub Acts 1967, No. 203, eff November 2.

Textbook references. See Callaghan's Mich Civ Jur, Buildings §68; Limitations of Actions §§27-29, 82-86.

§ 27A.5841 Accrual of claim; to person other than person bringing the action.] SEC. 5841. If the claim first accrues to an ancestor, predecessor, or grantor of the person who brings the action or makes the entry, or to any other person from or under whom he claims, the periods of limitations shall be computed from the time when the claim first accrued to the ancestor, predecessor, grantor, or other person, except as otherwise provided by law. (MCL §600.5841.)

History. This section is derived from Pub Acts 1915, No. 314, ch IX, §2 (former §27.594), which reenacted section 2 of RS 1846, ch 139, being CL '57, §5351; as amended by Pub Acts 1863, No. 227, eff January 1, 1864, CL '71, §7138, How §8699, CL '97, §9715.

The section appeared as a part of RS 1838, ch 1, §2, p 573 (Title VI), with the following exceptions: "ancestor, predecessor, or grantor" was "ancestor or predecessor," and "person from or under whom" was "person from, by or under whom," and "grantor," fourth from the last word, was omitted.

The section as it appeared in former §27.594 was enacted by Pub Acts 1863, No. 227, p 389.

Comparable provision. Ill Rev Stats c 83, §1 ("or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises").

Analysis of Note.

1-10. [Reserved for use in future supplementation.]

- 11. Successive possessions.
- 12. Tacking.
- 13. — periods which may be tacked.
- 14. — predecessor's possession permissive.
- 15. — parol transfer of rights.
- 16. — scope of conveyance.
- 17. — tacking possession of adjacent land.

ALR notes.
Digest references.
Textbook references.
Committee notes.

11. Successive possessions. Under former practice, separate successive disseizins could not be tacked so as to constitute one and a single continuous possession unless there was privity or estate between the successive parties in possession, each coming in as the transferee of the possessory rights of his predecessor. *Sheldon v. Michigan Cent. R. Co.*, 161 Mich 503; *Wilhelm v. Herron*, 211 Mich 339.

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SENATE ANALYSIS SECTION

Office of the Secretary of the Senate • Lansing, Michigan 48909 • (517) 373-9200

Senate Bill 278 (as reported with amendment)
 Sponsor: Senator Alan Cropsey
 Committee: Judiciary

RATIONALE

Public Act 203 of 1967 prohibits anyone from suing a licensed architect or registered engineer for any injury or property damage arising out of his or her performance, furnishing of designs, or supervision of construction of a real property improvement once six years have passed from the time the improvements are accepted or the improvement is occupied or used. The theories underlying this prohibition apparently are that any defects in an improvement which could lead to damage or injury are likely to become apparent within six years and that evidence to refute charges of liability becomes increasingly difficult to muster with the passage of time. Michigan does not extend this same protection from lawsuits to contractors, however, unlike the 46 other states whose statutes provide parallel protection for architects, engineers, and contractors. Contractors' protection from liability, in contrast, begins three to four years after an injured party becomes aware of the injury upon which the lawsuit is based (the standard tort statute of limitations.) Contractors maintain that the same theories underlying the six-year deadline for suing architects and engineers also apply to them and that, without equal protection, contractors are vulnerable to being sued in cases where an architect or engineer is actually at fault.

CONTENT

Senate Bill 278 would amend the Revised Judicature Act to provide that an action against a contractor (or subcontractor) for personal injury or property damage arising out of the defective and unsafe condition of an improvement to real property would have to be brought within six years after the occupancy, use, or acceptance of the improvement. That provision for immunity already applies to architects and professional engineers who design or supervise construction of real property improvements. "Contractor" would mean an individual, corporation, partnership, or other business entity which provided an improvement to real property.

FISCAL INFORMATION

Fiscal information on the bill is not available at this time. (6-11-85)

ARGUMENTSSupporting Argument

It is unfair for a contractor to be vulnerable to lawsuits years after a project has been completed, while architects and engineers are protected by law. As a result of this inequity, contractors frequently become the victims of lawsuits that should be directed at a project engineer or architect.

Six years is a reasonable period of time in which to establish the soundness of a construction project, a fact recognized by the legislature in the statute of repose for suits against architects and engineers. In fact, 90% of the suits filed against contractors fall within the six-year period the bill would establish. The limit is a practical way to ensure that the building industry so vital to our state's economic revitalization is not crippled by frivolous court actions, and that our court resources are not tied up in the futile exercise of trying "stale claims" for which evidence to come to a fair conclusion about liability is no longer available. In the case of contractors, the record makes clear that injuries related to a building that has been used for longer than six years almost always can be traced to faulty maintenance. One glaring example among hundreds is a suit filed against a contractor in 1981 by someone who claimed to have fallen on the crumbling steps of the 14-year-old Oakland County courthouse. Although the condition of the steps was directly attributable to excessive salting of the steps over a long period of time, the contractor wound up in court. Even when contractors ultimately succeed in defending themselves against claims such as this (as this particular one did), the defense itself is a costly and unfair burden. The bill would protect contractors from suits such as this, putting them on the same footing as architects and engineers.

Opposing Argument

It is admittedly inequitable that contractors are finding themselves subject to lawsuits that would be more appropriately filed against engineers and architects, but that problem would be better addressed by removing the immunity that now exists for architects and engineers than by making the victim's present disadvantage absolute. If we immunize contractors from lawsuits after six years, will we be lobbied next by owners who are being sued for problems caused by the immunized engineers, architects, or contractors? There is an elaborate system of law in place to determine liability equitably and it makes no sense arbitrarily to prevent it from operating with respect to a few professions.

Contractors' complaints about frivolous lawsuits and the necessity of keeping exhaustive records to defend against them would be more persuasive if they were somehow prevented from making their case in court. In fact, frivolous lawsuits are thrown out of court every day, and the effect of the passage of time on availability of records and witnesses is as much of a disadvantage to victims as it is to defendants and is one of the factors which is considered in court in reaching a determination on liability. Keeping good records is just sound business practice for anyone in business.

Opposing Argument

The bill masquerades as a statute of limitations bill. In effect, it is a "statute of repose" or, immunity, bill extending complete protection from suit to contractors once they have gotten by a magical six-year period of vulnerability, no matter how great or obvious their degree of negligence or how tragic the injury their negligence causes. Statutes of limitations promote justice when they are structured to limit the amount of time people have to file suit once they become aware of an injury. Statutes of repose forestall justice, however, when they impose an artificial deadline that can just as easily fall before injuries or damages occur. The tragic collapse of a pedestrian bridge at a Kansas City hotel that killed and injured hundreds is a case in point. Experts have testified that it took a particular confluence of factors—a certain number of people and a particular pattern of rhythmic swaying—to precipitate that accident. The timing of those factors was a matter of chance.

