

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
KATHLEEN JANSEN, JOEL P. HOEKSTRA AND JANE E. 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.,
Defendant/Appellee,

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

and

MERCHANT BONDING COMPANY,
Defendant.

BRIEF OF *AMICUS CURIAE*

THE ASSOCIATED GENERAL CONTRACTORS OF MICHIGAN

Dated: January 12, 2011

Submitted by:

Kevin S. Hendrick (P30710)
Thomas M. Keranen (P32506)
Brian P. Lick (P71577)
Clark Hill PLC
Counsel for *Amicus Curiae* AGC of Michigan
500 Woodward Ave., Ste. 3500
Detroit, MI 48226
(313) 965-8300



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STATEMENT OF THE QUESTIONS PRESENTED

On September 29, 2010, this Court issued an Order Granting Leave to Appeal. The Court ordered the parties to include among the issues to be briefed:

1. “[W]hether 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 to recover damages for a subcontractor’s breach of contract, or is instead limited to tort actions;”

2. “[W]hether 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;” (Emphasis in the original.)

3. “[W]hether 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 it has completed work, or some other date;” and

4. [W]hether, alternatively, the “occupancy of the completed improvement, use or acceptance of the improvement” under MCL 600.5839(1) 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.”

The Associated General Contractors of Michigan, confines its Brief Amicus Curiae to the fourth issue above by addressing the following questions presented:

1. Is the Statute of Repose under MCL 600.5839 triggered by the “occupancy, use, or acceptance” of a particular component before the improvement is completed as a whole, despite the date of “Substantial Completion” to which the parties have bargained, agreed, and defined in the standard construction contract as the date the improvement is sufficiently complete so that the Owner can occupy or utilize the work for its intended purpose, and as the date from which the warranties of all subcontractors begin to run?

Plaintiff/Appellant would answer “No.”

Defendant/Appellee would answer “Yes.”

Court of Appeals would answer “Yes.”

Amicus Curiae would answer “No.”

2. Does the use of a particular component of an improvement to real property by a third party subcontractor, trigger the running of the Status of Repose for claims relating to the particular component?

Plaintiff/Appellant would answer “No.”

Defendant/Appellee would answer “Yes.”

Court of Appeals would answer “Yes.”

Amicus Curiae would answer “No.”

3. Is “occupancy, use or acceptance” of an improvement to real property as defined under MCL 600.5839(1), limited to “occupancy, use or acceptance” by the owner of the improvement or otherwise limited to a completed improvement as a whole?

Plaintiff/Appellant would answer “Yes.”

Defendant/Appellee would answer “No.”

Court of Appeals would answer: “No.”

Amicus Curiae would answer “Yes.”

4. Does freedom of contract permit parties to exercise their fundamental right to contractually allocate risks, and define the commencement, duration, and enforcement of rights and obligations under a contract for the improvement to real property by contractually determining the date on which the Statute of Repose begins to run?

Plaintiff/Appellant would answer “Yes.”

Defendant/Appellee would answer “No.”

Court of Appeals would answer: “No.”

Amicus Curiae would answer “Yes.”

STATEMENT OF JURISDICTION

Amicus adopts by reference the jurisdictional statement of Plaintiff/Appellant Miller-Davis Company.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of Michigan (“AGC”) consists of general contractors (and affiliate members) working in the residential and commercial construction industry throughout Michigan. In 2007, the Michigan Chapter AGC (founded in 1927) and the AGC, Greater Detroit Chapter (founded in 1916), merged to become the AGC of Michigan. The statewide organization represents more than 400 businesses and individual members promoting the AGC values of skill, integrity and responsibility in the construction industry. AGC of Michigan is a proud chapter of the Associated General Contractors of America. AGC of America represents more than 32,000 firms, organized into approximately 100 chapters throughout the fifty states and Puerto Rico. The AGC, and its affiliate chapters, is recognized as an authority in construction-related matters. The AGC is the nation's largest and oldest construction trade association, established in 1918 after a request by President Woodrow Wilson. President Wilson recognized the construction industry's national importance and desired a partner with which the government could discuss and plan for the advancement of the nation. AGC has been fulfilling that mission through a variety of means for the last 85 years.

AGC of Michigan members negotiate contracts throughout the State of Michigan on a daily basis on significant construction projects that extend over several years and utilize multi-layered subcontractors. AGC of Michigan was organized and exists to assist employers in the development and maintenance of high standards of business ethics, general business practices, and the promotion of skill, integrity and responsibility in the providing of construction services. A significant aspect of AGC of Michigan’s activities is representing the interests of its members before the Courts, Congress, Michigan legislature and state agencies. AGC of Michigan appears before this Court as a representative of several hundred private business concerns, all of whom are potentially affected by the issues currently before this Court. This Court’s decision in this

case will have an important influence on the law of this state and on general contractors in particular. Ultimately, the Court of Appeals interpretation will have a devastating effect on the Michigan construction industry, and the economy as a whole.

The issues addressed in the Court of Appeals' published opinion are of great interest to the AGC because of the significant financial burden the Court of Appeals would impose on general contractors, owners, and the public. While the Statute of Repose, MCL 600.5839, was created to "shield architects, engineers, and contractors from stale claims and relieve them of open-ended liability for defects in workmanship," the Court of Appeals' opinion in this case creates an unpredictable date at which claims against subcontractors regarding individual components of a project would be barred. The Court of Appeals has applied the Statute of Repose inequitably among contractors, subcontractors, and owners. If the Court of Appeals' decision, that the six year Statute of Repose applies from the date each individual component of a project is accepted or used (despite a clear and unambiguous contractually agreed-upon date of substantial completion, from which warranty and indemnity provisions run) is left in place, general contractors may be barred from commencing litigation against the sub-contractor responsible for the defect, even though the general contractor may be liable to the owner or a third party. Similarly, owners, subcontractors and the public may be prevented from seeking compensation or enforcing contractually agreed upon warranty provisions which have been abrogated by the Court of Appeals' decision.

The potential impact of the decision of the Court of Appeals cannot be overstated. Contractors assess and allocate risks on a continual basis. Standardized contract provisions have developed by responding to barriers to efficient and effective contractual relationships in the construction industry. Contracts in the construction industry assign each particular risk to the

responsible party for a reasonable length of time. Although standardized contract provisions have established a single “substantial completion” or “certificate of occupancy” triggering date for the running of warranty and indemnity clauses, the decision of the Court of Appeals would impose upon general contractors the costly duty to keep track of multiple “acceptance” and “use” Statute of Repose triggering dates on a single project.

In a single opinion, the Court of Appeals has eviscerated the otherwise unambiguous provisions of contractual liability, and abrogated bargained-for warranty and indemnity clauses in construction contracts that have developed over many years in the construction industry. On each project, general contractors and subcontractors assess the risks and benefits of entering into a contractual relationship, and determine the duration for which each party should assume the risks associated with the particular work to be performed. The Statute of Repose should not bar claims based upon and brought during the bargained for warranty, indemnification, and continuing duty to cure periods provided by construction contracts because the claims cannot be considered stale or “open ended” as the parties bargained for and appropriately allocated the risk. The interpretation of the Court of Appeals has effectively destroyed the ability of the contracting parties to establish these essential contract terms and appropriately allocate risk through the efficient and time tested definitions and provisions that have developed in the construction industry. The Court of Appeals decision will disturb the balance that exists today in the industry, and would increase the risk of liability and cost associated with every construction project, to the detriment of general contractors, owners, and the public at large. A greater risk of exposure will necessarily translate into higher construction costs, either directly, or indirectly, in an effort to offset rising insurance premiums that flow from recognition of a greater risk. Those increases, together with the costs of keeping track of multiple triggering dates and the additional litigation

which the Court of Appeals' decision will engender, will only have an inflationary effect on the already high costs of construction in this State. Additionally, the increased risk that the Court of Appeals decision will impose on every construction contract will render Michigan a less appealing construction location.

The decision of the Court of Appeals to abrogate the bargained for warranty, guarantee, and indemnity periods, and impose a specious period of limitations and repose running from the date an individual component is used, accepted or occupied, rather than the completion of the improvement as a whole, will undermine the quality of construction in Michigan. Standard warranty periods have developed based on expectations of quality. Typical warranties run from the date of substantial completion. It is not unusual for warranties on certain components to extend 20 years or beyond. The warranty provisions serve as incentives to subcontractors to provide labor and materials that meet or exceed the industry safety and quality standards. Under the Court of Appeals' interpretation of the Statute of Repose, bargained for warranty, guarantee and indemnity periods cannot exceed six years after the particular component to which it applies, is accepted by implication, used by a third party, or occupied. If contractors are able to avoid all liability for damages arising out of an improvement to property six years after the use, acceptance or occupancy as defined by the Court of Appeals, contractors will have little incentive to provide quality workmanship and materials that last longer than six years. The adverse affect on quality will not only negatively impact the value the owner receives, but may also jeopardize public safety and benefit as well. Disturbing the extended warranty provisions deprives the parties of the fundamental quality and price factors bargained for when entering the contract. Consistent with the principles articulated by this Court in *Zahn v Kroger Co of Mich*, 483 Mich 34, 45; 764 NW2d 207, 213 (2009) (Markman, Young, JJ, concurring), contractors,

subcontractors, and owners as competent and sophisticated entities, should be permitted “the utmost liberty of contracting and that their agreements voluntarily assumed and fairly made shall be held valid and enforced by the courts.”

Finally, the decision of the Court of Appeals encourages anticipatory litigation within six years of the “acceptance” or “use” of each component of a project, rather than resolving disputes through the contractually agreed-upon warranty, indemnity, and other contractual obligations to cure defects in the work. In the case at bar, Plaintiff and Defendant had been discussing approaches to remedy the defective work with the understanding that the running of the Statute of Repose was not triggered until the date of substantial completion. The interpretation of the Court of Appeals will create an unnecessary tax on Michigan’s courts and economy as contractors are forced to protect themselves from unanticipated liability.

AGC and its member Contractors have an obvious interest in the principled, reliable and harmonious application of Michigan law as it relates to claims against those engaged in the Construction industry. As a principal voice of the construction industry in the State of Michigan, the AGC has a strong interest in ensuring that the body of state law under which the industry functions remains predictable and consistent with settled legal principles that protect all those engaged in the construction industry. The AGC seeks nothing more than to see the judicial system ensure that each statute is read in a manner to advance the underlying legislative intent which fosters predictability, and the economic stability that predictability engenders.

In light of the foregoing, and mindful of its public obligations as described above, AGC, as Amicus Curiae herein, respectfully request that this Court reverse the Opinion issued by the Court of Appeals and hold that the Statute of Repose runs from the acceptance, use, or occupancy of the completed improvement, as defined and bargained for by the parties, and

reaffirm the principle emphasized in *Zahn* that “competent persons shall have the utmost liberty of contracting and that their agreements voluntarily assumed and fairly made shall be held valid and enforced by the courts.”

II. INTRODUCTION

The AGC of Michigan supports a predictable application of MCL 600.5839. A predictable and uniform triggering date for the running of the Statute of Repose would allow for the allocation of risk among the contracting parties for a reasonable length of time while still preventing stale claims against architects, engineers and contractors.

The Court of Appeals’ published decision will have a tremendous impact on all transactions involving construction contracts in Michigan. Despite express contractual provisions which establish the date of “substantial completion” as the date warranty and indemnification responsibilities of a subcontractor begin to run, under the Court of Appeals interpretation of MCL 600.5839 a general contractor would have to keep track of multiple of triggering dates on a single project in order to protect itself from liability which may result from the defective workmanship of a subcontractor. The Court of Appeals’ interpretation would force contractors to keep track of multiple triggering dates spread out over the entire period of design and construction of a single project. Even if a general contractor kept track of the “acceptance” and “use” of each component on a project as defined for the first time by the Court of Appeals in this case, the general contractor may still get stuck holding the bag for defective work of a subcontractor without recourse.

The Court of Appeals determined the Statute of Repose trumps clear and unambiguous contractually agreed-upon warranty and indemnification periods and bars all claims arising out of the improvement to real property six years after the date each component of the improvement was first “used,” “accepted” or “occupied.” Therefore, despite the parties’ bargained for

warranty and indemnification provisions, contractors may be barred from commencing litigation against a sub-contractor responsible for the defect, even though the general contractor may be liable to the owner or a third party. Under the Court of Appeals' interpretation there would be a gap between the expiration of the Statute of Repose for subcontractors whose work was done before the completion of the project, and the Statute of Repose for the general contractor's liability which would expire six years after completion of the project as a whole. If the owner brings a lawsuit against the general contractor just before the expiration of the statute of limitations/repose, six years after the date the owner took occupancy, the general contractor would be barred from bringing a suit against the responsible subcontractor if the subcontractor's component was "accepted" or "used" by another subcontractor before the completion of the project. In fact, according to the Court of Appeals' interpretation, the work of architects, and engineers is often "accepted" and "used" long before the actual physical improvement is completed or has even begun. The Court of Appeals' interpretation may bar actions against architects, engineers and other initial subcontractors altogether, who complete their respective component work six years before the project is completed and defects are discovered.

A contractor would therefore need to insure against the risk that it may be liable for the defective work of a subcontractor from which it may be barred from seeking indemnification from the responsible party. Contractors would inevitably pass the costs associated with keeping track of the triggering dates, the risk of liability, and cost of anticipatory litigation on to owners and subcontractors. Therefore, the Court of Appeals' interpretation would substantially increase the cost of entering into a construction contract in Michigan and would have a devastating effect on the economy.

On the other hand, allowing the parties to modify the Statute of Repose by contract in accordance with Michigan precedent, and/or establishing a single triggering date, as already provided for in most standard construction contracts for the running of the statutes of limitations and repose under MCL 600.5839, would ensure that claims may be brought against the appropriate responsible party, while still protecting architects, engineers, and contractors from stale claims and relieve them of open-ended liability. At a minimum, this Court should hold that the Statute of Repose runs from the acceptance, use, or occupancy by the owner of the completed improvement as a whole, as contractually defined as the date of substantial completion, and that the Statute of Repose does not abrogate warranties that extend beyond six years of the acceptance, use, or occupancy.

As set forth below, in addition to having a tremendous impact on Michigan's jurisprudence, the Court of Appeals' published opinion is inequitable, ignores existing contrary precedent, and is contrary to the language and intent of the statute. The Court of Appeals' interpretation adds more confusion and uncertainty to MCL 600.5830, which will lead to an increase in litigation, and will substantially increase the risk and associated costs of entering into construction contracts in Michigan. Furthermore, the Court of Appeals' interpretation encourages anticipatory litigation before the running of the statute repose and prevents general contractors from relying on the contractually bargained for warranty, indemnity, and clauses requiring the cure of defects, standard in construction documents. Accordingly, *amicus curiae* AGC of Michigan, strongly urges this Court to grant Plaintiff/Appellant's application for leave to appeal and reverse the decision of the Court of Appeals.

III. STATEMENT OF FACTS

Amicus curiae AGC of Michigan incorporates the factual statements set forth in Plaintiff/Appellant's application, the key facts being (1) Plaintiff, Miller-Davis Company

(Miller-Davis”), entered into express contracts with Defendant Ahrens Construction, Inc. (“Ahrens”), to complete a Natatorium Roof System and other components of a construction project for the construction of a YMCA Outdoor Center (“Project”); (2) The contractual obligations of Ahrens were defined by the Miller-Davis Purchase Order which incorporated by reference all the Project Plans and Specifications, and various American Institute of Architects (“AIA”) documents including the AIA General Conditions, A201, 1998; (3) The contract required Ahrens to defend, hold harmless and indemnify Miller-Davis, against all claims made against Miller-Davis arising out of negligence or breach of the contract, in the same manner and to the same extent that Miller-Davis was required; (4) Ahrens also guaranteed the work against all defects in material and workmanship for a period of 1 year after the date of Substantial Completion, established as June 11, 1999; (5) The Roof System consisted of several components which required the installation in stages, including a wood ceiling, a configuration of structural connecting tees and subtees, a vapor barrier, foam blocks, 2x4 sleepers, oriented strand board (OSB) sheeting, and roof felt; (6) Ahrens breached the contract by failing to construct the Roof System according to the Plans and Specifications; (7) Ahrens was notified of the defective work and Ahrens promised to provide a plan for corrective action on July 2, 2003; (8) On July 15, 2003, Miller-Davis notified Ahrens that it had declared a contractor default; and (9) Miller-Davis claims Ahrens further breached the contract by failing and refusing to cure the defective performance and to “defend and save harmless and to indemnify Miller-Davis” for the defective performance after Miller-Davis had performed corrective work.

IV. PROCEDURAL HISTORY

Miller-Davis commenced an action on May 12, 2005, within 6 years from the date of Substantial Completion and Certificate of Occupancy, alleging breach of contract for failing to install the Roof System in compliance with the Plans and Specifications, and for failing to

reimburse and indemnify Miller-Davis for the cost associated with completing the corrective work. Miller-Davis alleged that Ahrens breached its independent contractual obligation to perform corrective work and indemnify Miller-Davis for the costs it incurred. The Circuit Court addressed Ahrens' argument that the Statute of Repose barred Miller-Davis' claim in the hearing on Ahrens' motion for summary disposition. The Court specifically found that Ahrens continued physically working on the site in 2002, and participated in discussions of corrective measures as late as June 27, 2003. The Circuit Court held that Miller-Davis' claims were not barred by MCL 600.5839.

At trial, the Circuit Court held that Ahrens was liable to Miller-Davis, specifically finding that Ahrens breached the contract by performing nonconforming and defective work.

V. HISTORY OF MCL 600.5839

Although contractors, owners and subcontractors have consistently relied upon the industry created standard contracts that define the extent to which each party shall be liable, the Court of Appeals' interpretation has added another complicated and confusing twist to MCL 600.5839; a statute which has continually evolved and has been expansively interpreted since its inception in 1967. The AGC of Michigan provides the following brief history of MCL 600.5839.

In response to the eroding of the privity requirement for actions against architects and engineers, the Michigan legislature enacted MCL 600.5839, which established a period of repose, so that six years after use, occupancy or acceptance of an improvement to real property, no claims arising out of defective and unsafe condition of an improvement could accrue. "The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement and

thereby limit the impact of recent changes in the law upon the availability or cost of the services they provided." *O'Brien v Hazelet & Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980).

Originally, MCL 600.5839's protection applied only to design professionals. Michigan contractors could therefore be sued for claims of ordinary negligence and breach of contract many years after project completion, because a claim accrues on the date on which the damages first occurred to the plaintiff and the cause of action was complete. *Connelly v Paul Ruddy's Equipment Repair & Service Company*, 388 Mich 146; 200 NW2d 70 (1972); see also *American States Insurance Company v Employees Mutual*, 352 F Supp 197 (1972); *Cartmell v Slavik*, 68 Mich App 202; 242 NW2d 66 (1976); *Filcek v Utica Building Co*, 131 Mich App 396; 345 NW2d 707 (1984). During the period of 1967 through 1986, MCL 600.5839 conclusively barred claims against the design professional where the damages first occurred six years after use, occupancy or acceptance. This led to a circumstance where a claim, which first accrued more than six years after use, occupancy or acceptance of the improvement, could be pursued against the project contractors, but not against the project architects or engineers. When contractors eventually challenged the constitutionality of MCL 600.5839 on due process and equal protection grounds, the Michigan Supreme Court held that the statute was constitutional. *O'Brien*, at 1. However, the Legislature amended § 5839 to include construction contractors in its protections the following year.

Next the Michigan Supreme Court was called upon to determine whether the legislature intended the Statute of Repose to apply to all claims arising out of the defective and unsafe condition of an improvement to real property, or only to third-party tort claims. In *City of Marysville v Pate, Hirn & Bogue, Inc*, 154 Mich App 655; 397 NW2d 859 (1986) the Court held that MCL 600.5839 did not apply to contract claims brought by project owners. The *Marysville*

court found that “the Legislature never intended this statute to fix the period of limitation in which an owner of an improvement to real property must bring an action against the architect or engineer for professional malpractice committed in the planning or building of the improvement which results in deficiencies to the improvement itself.” *Marysville* at 660. Subsequently, Courts in *Burrows v Bidigare/Bublys*, 158 Mich App 175; 404 NW2d 650 (1987) and *Midland v Helgar*, 157 Mich App 736; 403 NW2d 218 (1987) likewise held that MCL 600.5839 was not applicable to “a suit for deficiencies in an improvement itself,” brought by the owner of the project. *Burrows* at 182; *Midland* at 741. However, Judge Burns, dissenting in *Burrows*, criticized the statutory interpretation set forth in *Marysville* and recognized that “Such broad language indicates the Legislature’s intent to make the statute applicable to any action for damages when defective building design is involved.” *Burrows* at 191-192.

The following year, the Legislature adopted Judge Burns’ dissent and enacted 1988 PA 115, effective May 1, 1988, amending MCL 600.5805. The amendment added subsection (10), currently numbered subsection (14), which stated, “The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.”

In *Michigan Millers v West Detroit Building Company*, 196 Mich App 367; 494 NW2d 1 (1992), a case in which the injury occurred eight years after project completion and the suit was filed nine years after project completion, both contractor defendants argued that the decisions in *Marysville*, *Burrows* and *Midland* were effectively overruled by the addition of subsection (10) to MCL 600.5805, and that the Legislature intended to eliminate any difference between third-party claims and claims made by owners against an architect, engineer, or contractor. After a thorough review of the rules of statutory construction, the *Michigan Millers* court found that the

legislative intent behind the new § 5805(10) was to eliminate the previous distinction courts had recognized between claims brought pursuant to contract rights by owners and tort claims brought by third parties. After the enactment of § 5805(10), all claims against architects, engineers and contractors arising out of the defective and unsafe condition of an improvement to real property were subject to the restrictions of MCL 600.5839.

In 1994, the Court of Appeals found that the Legislature did not intend to abrogate the effect of the general statutes of limitations under § 5805 by the enactment of § 5839. *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994). The Court held that where a claim did not accrue within six years of the date of use, occupancy or acceptance of the completed improvement, it was time barred by the repose effect of MCL 600.5839. *Witherspoon* identified the statute of limitations period as that running from the date of the accrual of a claim to the end of the period as prescribed by § 5805. Under *Witherspoon*, claims against architects, engineers, land surveyors and contractors needed to be filed within six years of the occupancy, use or acceptance of the improvement, and within the applicable time periods set out in § 5805.

However, the Michigan Supreme overturned *Witherspoon* and held that “MCL 600.5805(14) unambiguously directs that the period of limitations for actions against architects is provided by MCL 600.5839(1)”. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 46; 709 NW2d 589 (Mich 2006). The Court found that the six-year period of MCL 600.5839(1) operates as both a statute of limitations and a Statute of Repose with primacy over other arguably applicable periods of limitation, running from the time of discovery, whose effect would defeat the repose aspect of MCL 600.5839. *Id.* Although MCL 600.5805(10) provides a three-year period of limitations for general negligence actions, the Court held that actions against state

licensed architects for personal injury arising from an improvement to property are subject to a six year limitations period under the Statute of Repose.

On February 14, 2008, the Michigan Senate passed Bill 865, and on January 27, 2009, the bill was reintroduced as Senate Bill 35. Senate Bill 35 would restore the statute of limitations for actions against architects, engineers and contractors arising out of improvements to real property, to the applicable period of limitations in MCL 600.5805. Although MCL 600.5839 currently applies to all claims against architects, engineers and contractors arising out of the defective and unsafe condition of an improvement to real property, including contract actions under *Michigan Millers*, Bill 35 does not address contract actions. It is unclear whether the Legislature intends to subject breach of contract actions arising out of the improvement to real property, to MCL 600.5805(10) or MCL 5807(8), the statute of limitations for breach of contract.

If the Legislature passes the amendments in Bill 35, or subsequently re-introduces and passes a similar bill, the time period within which contractors, subcontractors and owners must bring actions arising out of improvements to real property will be rendered even more unclear. Under the Court of Appeals' interpretation, contractors will need to keep track of multiple triggering dates for the running of the Statute of Repose on a single project. If Bill 35 passes, contractors will then have to keep track of multiple triggering dates for the Statute of Repose, and an additional set of triggering dates for the running of the applicable Statute of Limitations based on the date the cause of action accrues.

Therefore, it is of vital importance to the Michigan construction industry and the economy, that this Court reverse the Court of Appeals, and hold that the uniform triggering date for the Statute of Repose is acceptance, use, or occupancy of the

completed improvement as a whole, as contractually defined as the date of substantial completion. A uniform triggering date is necessary to ensure a predictable application of the statute which equitably protects engineers, architects, and contractors from stale claims. At a very minimum, parties should be able by contract to alter the periods of repose and limitation. When the Court of Appeals trumped the contractually agreed-upon triggering date in Ahrens, it effectively abrogated the bargained-for warranty and indemnity provisions in the construction contracts and held that warranty, guaranty and indemnity agreements for individual components of an improvement that extend beyond six years from the acceptance, use or occupancy of the particular component, are invalid. Because of the uncertainty, and costs associated with keeping track of the triggering dates and resulting anticipatory litigation the Court of Appeals' decision will create, this interpretation ultimately defeats the purpose of MCL 600.5839, which is "to protect engineers, architects, and contractors from stale claims and to eliminate open-ended liability for defects in workmanship." The Court of Appeals' decision will merely shift the costs associated with defective workmanship to the subcontractors by reducing the amount contractors are willing to pay for service that may no longer be warranted for the standard period that has developed in the industry. Under the Court of Appeals' holding, Contractors will need to account for the increase risk that they may be barred from seeking compensation for defective workmanship when entering into contracts with subcontractors. Ultimately, the decision of the Court of Appeals will have a chilling effect on the construction industry in Michigan.

VI. THE COURT OF APPEALS DECISION

The Court of Appeals reversed the trial Court's decision and held that MCL 600.5839 barred the contract claims of Miller-Davis. Despite provisions in the contract that the project was substantially completed on June 11, 1999, at which time a certificate of occupancy was issued, the Court of Appeals found that Miller-Davis' claims were barred by the expiration of the

period of limitation because another subcontractor “used” the roof system to install the outer steel roof covering in February 1999. The Court found that because another subcontractor relied on the existing structure to complete its work, the Statute of Repose began to run for claims against Ahrens.

An appellate court is not to substitute its own judgment for that of the trial court unless it finds that the trial court's factual findings are clearly erroneous. *See* MCR 2.613(C); *Morris v Clawson Tank Co*, 459 Mich 256, 275, 587 NW2d 253 (1998). Rather than applying the appropriate, deferential standard of review to the trial court's factual findings, the Court of Appeals actually undertook a de novo review of the evidence and determined that Miller-Davis “used” the roof for its intended purpose when a subcontractor completed the roof’s construction by installing roofing felt and the outer steel skin in February 1999. The Court of Appeals also found that the actions of Miller-Davis in making a payment to Ahrens constituted “acceptance” of the improvement in April 1999, despite the facts that Miller-Davis refused to release Ahrens’ bond, repeatedly demanded that Ahrens cure the defective work, and never actually accepted the work. As discussed below, the Court of Appeals’ interpretation of the facts and law is both unreasonable and impracticable.

The Court of Appeals threw out the historical, practical, and time tested solutions the industry has developed and inaccurately substituted the default formula provided by the Statute of Repose. Despite the ability to contractually modify the periods of limitation and repose, established by Michigan precedent, the Court of Appeals determined that the Statute of Repose trumps the clear and unambiguous contractual language defining the obligations of the contracting parties, the definition of the “work”, “substantial completion”, and the specific provision that partial occupancy or use of a portion of the work does not constitute acceptance of

work not complying with requirements of the contract documents. See Section 9.8.1 of AIA General Conditions of the Contract for Construction attached as Plaintiff/Appellant's Brief.

Although the Court of Appeals acknowledged that policy arguments could be advanced for an interpretation that the period of limitations is only triggered by the owner's occupancy, use, or acceptance, it stated that it was required to give the statute a reasonable construction consistent with its purpose. The Court of Appeals supported its interpretation of the statute by reasoning "[t]his reading of the statute is consistent with its purpose 'to protect engineers, architects, and contractors from stale claims and to eliminate open-ended liability for defects in workmanship.'" However, as discussed below, the Court of Appeals interpretation of the Statute of Repose will result in multiple triggering dates on each project and the abrogation of bargained for warranty periods. The unanticipated imposition of an obligation to keep track of multiple triggering dates will make entering into construction contracts in Michigan overly complicated, confusing and risky. Ultimately, the Court of Appeals' interpretation will have a devastating effect on the Michigan construction industry and the economy as a whole.

The reasoning set forth by the AGC of Michigan would equally advance the purpose of the statute, in a reasonable and equitable manner. Because the courts have applied MCL 600.5839 to contract actions as well as those based in tort law, a uniform triggering date is necessary to ensure a predictable and equitable application of the statute. At a very minimum, courts should not be allowed to trump the contractually agreed-upon triggering date, and effectively abrogate the bargained-for warranty and indemnity provisions contained in construction contracts.

VII. ARGUMENT

A. **The Statute of Repose Begins to Run from the Acceptance, Use, or Occupancy by the Owner of the Completed Improvement as a Whole, as Bargained for and Defined in Contract Documents as the Date of Substantial Completion**

1. Freedom of Contract Under Established Michigan Law Permits Owners, Contractors and Subcontractors in the Construction Industry to Define the “Acceptance, Use, and Occupancy” that Triggers the Running of the Statute of Repose and Allocate Risk to the Responsible Parties Through Bargained for Warranty and Indemnity Provisions that Run from the Date of Substantial Completion and Extend Beyond Six Years from Acceptance, Use or Occupancy

“A statute of repose limits the liability of a party by setting a fixed time after . . . which the party will not be held liable for . . . injury or damage Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage occurs.” *Ostroth*, at 43, quoting *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 513 n 3; 573 NW2d 611 (1998). MCL 600.5839 is both a statute of limitation and repose. *Ostroth* at 43. The Court of Appeals explained, “for actions which accrue within six years from occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. When more than six years from such time have elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing.” *Citizens Ins Co v Scholz*, 268 Mich App 659, 664; 709 NW2d 164 (2005).

“A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. Although at one time limitations provisions were looked upon with disfavor because of the harsh results worked by their application, the modern view treats them as statutes of repose.” *Lothian v Detroit*, 414 Mich 160, 166; 324 NW2d 9 (1982) (citations omitted). The statute of limitations is an affirmative defense. *Id.* This affirmative defense may be waived by failure to plead it, by express agreement not to assert it, or by conduct which estops

the defendant from interposing it.” *Id* at 167. *See also Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 562 NW2d 648 (1997)(insurer was estopped from asserting the statute of limitations as a bar where parties agreed to cooperate regarding the processing of an insurance claim).

It is well established in Michigan law that contractual provisions limiting the time to bring an action are valid and enforceable, even where the time limit is shorter than the statute of limitations. *Timko v Oakwood Custom Coating*, 244 Mich App 234, 244; 625 NW2d 101 (2001). “An unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy.” *Rory v Cont'l Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). Michigan no longer follows the “reasonableness” test provided in *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14, 20; 456 NW2d 857 (1997). Overruling *Herweyer*, the Supreme Court stated, “a mere judicial assessment of ‘reasonableness’ is an invalid basis upon which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of the contract provision.” *Rory* at 470. The determination of Michigan's public policy must be clearly rooted in the law and reflected in the Michigan constitution, statutes and common law. *Id*. Michigan has “no general policy or statutory enactment . . . which would prohibit private parties from contracting for shorter limitations periods than those specified by general statutes.” *Id*.

Similarly, agreements to lengthen the period of limitation are also enforceable. *Pitsch v Blandford*, 474 Mich 879; 704 NW2d 695 (Mich 2005). In *Pitsch*, this Court held that “The parties' unambiguous agreement to toll the statute of limitations is to be enforced as written.” This Court explained, “Inasmuch as defendant could have waived his statute of limitations affirmative defense, MCR 2.111(F)(3), it does not appear to offend any established public policy for defendant to take a less drastic step of tolling a statute of limitations by agreement.” *Citing*

Rory, at 470-471. This Court found that the “Court of Appeals’ independent assessment of the “reasonableness” of the parties’ tolling agreement was unwarranted. *Id.* As noted by the Appellant, tolling agreements reduce litigation and the burden on the judiciary by promoting cooperative and cost effective resolutions to disputes arising out of construction contracts. However, under the Court of Appeals opinion, contracting parties are unable to extend the period of limitations or repose for claims arising out of a component of the improvement beyond six years from the date the particular improvement was accepted, used, or occupied, by entering into tolling agreements, warranties, or otherwise defining what constitutes use, acceptance, occupancy and completion.

Standard construction contracts have developed over the past century to define the contractual relationship between owners, general contractors and subcontractors. These contracts have been revised in response to and as a catalyst for new developments in the law and industry. Standard contracts are used to allocate responsibility and risk among multiple layers of owners, general contractors, subcontractors, suppliers and laborers. The contracts are comprehensive, and may include hundreds of pages covering every stage of preconstruction, construction, and the resolution of post-construction disputes. The contracts may also incorporate by reference multiple documents including industry standard general conditions of the AIA. Standardized contract provisions have developed by responding to barriers to efficient and effective contractual relationships in the construction industry. Contracts in the construction industry assign each particular risk to the responsible party for a reasonable length of time and the contracting parties voluntarily bargain for and assume the risk for valuable consideration. Standard warranty periods have developed based on expectations of quality. Typical warranties run from the date of substantial completion. It is not unusual for warranties on certain

components to extend 20 years or beyond. The warranty provisions serve as incentives to subcontractors to provide labor and materials that meet or exceed the industry safety and quality standards. Under the Court of Appeals' interpretation of the Statute of Repose, bargained for warranty, guarantee and indemnity periods cannot exceed six years after the particular component to which it applies, is accepted by implication, used by a third party, or occupied.

Subcontract agreements often contain a "flow-down" clause, which incorporates all of the terms and conditions of the contract between the owner and general contractor. The flow-down clause binds the subcontractors and suppliers to all of the provisions of the general contract and any other referenced documents.

Construction contracts define the scope of the work to be performed by the general contractor and each subcontractor. A subcontractor's work is not considered accepted or used by anyone until the "substantial completion" of the entire project. Substantial completion is the date from which the warranties of all subcontractors begins to run, regardless of when each subcontractor completed the performance of individual component work. Substantial completion is a construction industry term of art, and is defined in the AIA A201 General Conditions (incorporated into the contract before the Court) as "the stage of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the *Owner can occupy or utilize the Work for its intended use.*" See Section 9.8.1 of AIA General Conditions of the Contract for Construction, attached as Exhibit 7 to Plaintiff/Appellant's Application for Leave to Appeal at page 17. Furthermore, the contract between the parties incorporated section 9.9.3 of the AIA General Conditions, which expressly states "unless otherwise agreed upon, partial occupancy or use of a portion or portions of the

Work shall not constitute acceptance of Work not complying with requirements of the Contract documents.” *Id* at 9.9.3.

“Where the Legislature uses a term of art which has a specific meaning within the industry affected by the statute, the industry’s commonly accepted definition of that term is instructive in determining what meaning the Legislature intended for a term not otherwise defined in the statute.” *GTE Sprint Communications Corp v Department of Treasury*, 179 Mich App 276, 283; 445 NW2d 476 (Mich Ct App 1989). Although the Michigan Legislature did not specifically utilize the construction industry’s terms of art, the terms “occupancy of the completed improvement, use, or acceptance of the improvement” should be interpreted according to the analogous terms of art adopted in the industry. Therefore, “occupancy, use or acceptance” of an improvement under MCL 600.5839 does not occur until the improvement, as defined in the contract, is completed as a whole, and upon substantial completion, the owner is able to occupy or utilize the improvement for its intended purpose.

An owner does not receive a benefit from the improvement until all of the components sufficiently comply with the contract plans and specifications and the owner is able to use the improvement as intended. Therefore, whether a structure is substantially complete is fact specific and depends on the use for which the structure is intended. For example, although an office building may be considered substantially complete even though the wrong lighting or plumbing fixtures were installed, a prison would not be considered substantially complete and prisoners could not be placed in cells with fixtures that did not comply with the plans and specifications because they might be fashioned into weapons or otherwise create a dangerous condition. Contrary to the reasoning of the Court of Appeals, it is not reasonable to construe the word “use” in the Statute of Repose as use by any lawfully authorized person or entity,

especially in the face of express contractual provisions defining and limiting the ability to “occupy”, “use”, or “acceptance” to the owner upon substantial completion.

Michigan case law similarly defines substantial performance and compliance:

While it is difficult to state what the term "substantial performance" or "substantial compliance" as applied to building and construction contracts means, inasmuch as the term is a relative one and the extent of the nonperformance must be viewed in relation to the full performance promised, it may be stated generally that there is substantial performance of such a contract where all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed are performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. *P & M Constr Co v Hammond Ventures, Inc*, 3 Mich App 306, 314; 142 NW2d 468 (1966).

Similarly, a structure cannot be considered occupied, used or accepted until inspected and approved by a building inspector. If the structure and its components are in compliance with the Building Codes, the inspector may issue a certificate of occupancy. Substantial completion is the date by which the general contractors and subcontractors have contractually agreed that the Work or any component thereof, is accepted and used for its intended purpose. The date of substantial completion conclusively establishes when the work is “used” and “accepted” for the purposes of the running of warranty periods, indemnification and continuing duty to cure defects.

2. The Court of Appeals’ Abrogation of Contractually Bargained for Warranty Provisions and Definitions of Acceptance, Use, and Occupancy is Inconsistent with the Freedom of Contract and Will have a Devastating Effect on the Construction Industry in Michigan

Because of the complexity of certain projects and their individual components, a warranty period may extend beyond six years from the date of Substantial Completion. As pointed out by the Plaintiff, although certain components of a project are installed in the first stages of construction, they may not be tested until the project has been completed. Heating, ventilation and air conditioning (HVAC), plumbing and electrical components are often installed early on in a project and have extended warranties that run from the date of substantial

completion. The foundation of a skyscraper must be able to support the entire structure above it, but whether the foundation complies with the plans and specifications would not be known until the last floor is completed.

The Court of Appeals' interpretation prevents contractors, engineers, architects, and owners from allocating risk to an appropriate party beyond six years from the date of use, acceptance or occupancy. Commercial roof warranties typically extend beyond twenty years from the date of substantial completion. Other equipment and material warranties typically extend between five and fifteen years from the date of substantial completion. According to the Court of Appeals, contractors, engineers and architects are prevented from enforcing all rights and warranties that contractually extend beyond six years from the date of "use", "acceptance", or "occupancy." This interpretation of the Statute of Repose impermissibly impedes the parties' ability to modify the period of limitation and is contrary to Michigan case law.

When the Court of Appeals interpreted the period of repose under MCL 600.5839 as being triggered from the date each individual component was "used" by another subcontractor, or "accepted" by the general contractor's payment, the Court eviscerated the contract between the parties and abrogated the contractor's and owner's bargained for rights under the warranty and indemnity provisions. The Court of Appeals effectively held that the parties are not permitted to define the "project" or "improvement" as the completed project. Under the Court of Appeals' interpretation, contractual definitions regarding the person for whose benefit the project is being constructed, and whose "use," "acceptance" or "occupancy" will trigger warranty, guarantee, duty to cure and indemnification obligations, will be null and void of any meaning or effect. Indemnification obligations, which arise after a claim has been made against one party to the contract, would be abrogated six years after the specific component was used, accepted, or

occupied under the Court of Appeals interpretation. Similarly, parties would not be able to enforce design, workmanship, material or equipment warranties and guarantees which extend beyond six years from the date of use, acceptance, or occupancy.

The Court of Appeals determined that abrogation of the parties' warranty and indemnification rights and obligations is necessary to further the purpose of MCL 600.5839 to protect architects, engineers and contractors from stale claims. However, claims brought pursuant to bargained for rights and obligations cannot be considered stale. The parties entering into a construction contract take into consideration the possibility that claims will arise after the work is completed and appropriately allocated the risk through warranty, indemnity and duty to cure provisions. If claims arise within the agreed upon period of continuing obligations, the claims cannot be considered stale.

When the Court of Appeals' reasoning is applied to settlement agreements, the flaws in its logic are further revealed. Because the Court of Appeals has determined that all claims against engineers, architects and contractors arising out of the improvement to real property are barred by MCL 600.5839, settlement agreements entered into between contractors and subcontractors would also be unenforceable six years after the use, acceptance or occupancy, even if entered into one day before the six year period expires. While a settlement agreement or novation would normally extend the enforceability of an obligation with the new statute of repose and statute of limitation running from a breach of the settlement agreement, under the Court of Appeals' interpretation, the parties would be prevented from modifying the period of repose in any way and even a settlement agreement may be unenforceable. Similarly, owners and third parties may also be prevented from enforcing settlement agreements entered into with the contractor responsible for their damages after six years, or otherwise be prevented from

modifying the period of repose. Therefore, if the parties entered into or attempted to enforce an agreement settling claims that arose out of the improvement to real property six years after the “use” or “acceptance” of the improvement, the responsible party would be able to use the lure of settlement as a red herring to avoid the obligation without recourse. In fact, it appears that this is what Ahrens may have done in this case.

Even if the contract did not contain warranty and indemnity obligations running from the date of substantial completion, under the Court of Appeals’ interpretation of the statute, if a subcontractor completed defective work on a component of a project early on in the construction process, a gap would exist between the expiration of the period of repose for the subcontractor and the period of repose for the general contractor. Although the period of repose for claims against the contractor may not expire until six years from the completion of the entire project, the period of repose for claims against the subcontractors would expire six years from the date another subcontractor used the component for the next stage of construction. The Court of Appeals would also deem a subcontractor’s work “accepted” upon payment, despite the contractual duty to cure, indemnify and warrant the work for an agreed-upon period. Therefore, a contractor may be barred from seeking fair reimbursement from the responsible subcontractors, even though that contractor may remain liable to the owner for the subcontractors’ defective workmanship.

The Court of Appeals’ interpretation of MCL 600.5839 will eliminate a general contractor’s ability to seek compensation from a subcontractor which completed its defective work on a component of the project early in the construction process. For example, architects, designers, excavation contractors, foundation contractors, and others, often complete work early in the construction process. Some projects take several years from design to completion. If a

subcontractor completed its defective work on a component of the project five years before substantial completion, the period of repose for claims against the subcontractor would expire five years before the period of repose expired for claims against the general contractor. The Court of Appeals' decision may even prevent claims against early contractors altogether, if the work is considered used or accepted six years before the project as a whole is occupied, used or accepted.

This inequitable interpretation does not only impact a general contractor's ability to bring an action against a responsible subcontractor, but also impacts owners, subcontractors, suppliers, laborers, and injured third parties as well. This interpretation is particularly troubling because defects in components may not be discoverable until the entire project is completed. Because of the complex nature of construction projects, with multiple interrelated components and participants, an owner may not be aware that an individual component does not comply with the plans and specifications, and the *intended use*, until after the entire project is complete and can be tested by actual use. For example: if upon completion it is discovered that a parking structure was designed with insufficient room for a vehicle to navigate the turns, rendering the entire structure useless, the Court of Appeals' interpretation may bar claims against the engineer or architect if the design was completed six years before the completion of the structure. Similarly, the roofing system in the case at bar was not merely intended to hold the roof felt and steel roof skin. It was designed specifically for the moisture conditions a natatorium roof would encounter, and could not be accurately tested until the public was actually swimming in the pool. Although Ahrens' initial work was finished before the entire structure was completed, the moisture problem was not discovered until after occupancy, and after it was used as intended. Miller-Davis was unaware of Ahrens' defective workmanship and was not able to determine the cause

of the moisture problem until a thorough investigation was conducted by removing part of the roof structure. Upon investigation, it was determined that Ahrens did not comply with the plans and specifications.

As discussed above, because non-compliance with a construction contract may not be discovered by an owner or contractor until long after the entire improvement is used as intended, construction contracts include warranty, indemnification, and duty to cure defect provisions, that run from the date of substantial completion. The contracting parties determine how long the warranty provisions should run based on their experience and assessment of the risk that a particular component would likely show a defect within a reasonable time. During that time period, the contracting parties agree that the risk should remain with the subcontractor responsible for the component. The Court of Appeals' interpretation would destroy the parties' ability and right to allocate those risks by contract.

For the reasons stated above, the Court of Appeals' interpretation does not further the purpose of the statute. In fact, the Court of Appeals' interpretation of the statute runs contrary to the positive trends in the industry for better quality, greater durability, and increased responsibility in the manufacturing of construction materials and workmanship provided, which results in safer buildings and structures. If the interpretation of the Court of Appeals is allowed to stand, the progress made by the industry over the last century will be significantly eroded and the industry as a whole will be taking a step backward. Ultimately, the public will be directly and indirectly affected in a negative way by this decision. Under the Court of Appeals' interpretation of the Statute of Repose, bargained for warranty, guarantee and indemnity periods cannot exceed six years after the particular component to which it applies, is accepted by implication, used by a third party, or occupied. If contractors are able to avoid all liability for

damages arising out of an improvement to property six years after the use, acceptance or occupancy as defined by the Court of Appeals, contractors will have little incentive to provide quality workmanship and materials that last longer than six years. The adverse affect on quality will not only negatively impact the value the owner receives, but may also jeopardize public safety and benefit as well. Disturbing the extended warranty provisions deprives the parties of the fundamental quality and price factors bargained for when entering the contract. Consistent with the principles articulated by this Court in *Zahn v Kroger Co of Mich*, 483 Mich 34, 45; 764 NW2d 207, 213 (2009) (Markman, Young, JJ, concurring), contractors, subcontractors, and owners as competent and sophisticated entities, should be permitted “the utmost liberty of contracting and that their agreements voluntarily assumed and fairly made shall be held valid and enforced by the courts.”

B. The Component Approach Has been Previously Rejected by Michigan Courts and Will Impose an Overly Burdensome Duty on Owners, Contractors, and Subcontractors

The Court of Appeals cites *Beauregard-Bezou v Pierce*, 194 Mich App 388, 390; 487 NW2d 792 (1992) for the proposition that the period of repose starts running upon the use of individual components of an improvement by a subsequent contractor. “Only one of the criteria set forth in the statute of repose must be met to trigger the running of the period of limitation.” *Beauregard-Bezou*, at 393. In *Beauregard-Bezou*, the court found that the statute of limitation started running when plaintiff began using the home (by occupying it), before an actual certificate of occupancy was issued. *Id.* However, in *Beauregard-Bezou*, although the plaintiff was injured on the staircase, an improvement which was “used” during the construction process under the Court of Appeals’ interpretation in *Ahrens*, the court held that the statute of limitations began to run when the plaintiff used the completed project as a whole. *Id.*

Similarly, although the Court of Appeals in this matter relied on *Michigan Millers* in its opinion, it failed to acknowledge that the panel in that case analyzed the claims against the general contractor based on defective roof trusses from the date of occupancy. Although the defective roof trusses would have been “used” and “accepted” under the interpretation in *Ahrens* before completion of the project, the court only referred to the date of occupancy. *Michigan Millers*, at 367. Therefore, the cases relied on by the Court of Appeals do not support the component approach to the Statute of Repose.

Although the Court of Appeals acknowledged that “occupancy of the completed improvement” implies occupancy by the owner, the Court determined that “use” and “acceptance” are not similarly limited. *Ahrens* at 10. However, the courts and Legislature have actually read MCL 600.5839 to be “six years after occupancy, use, or acceptance of the completed improvement.” The statute was restated in *O'Brien*, at 15: “for actions which accrue within six years from occupancy, use, or acceptance of the **completed improvement**, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations.” *See also Fennell v John J. Nesbitt, Inc*, 154 Mich App 644, 649; 398 NW2d 481 (Mich Ct App 1986); *Male v Mayotte, Crouse & D'Haene Architects, Inc*, 163 Mich App 165, 169; 413 NW2d 698 (Mich Ct App 1987); *Citizens*, at 664; *see also* Analysis of Senate Bill 35, to amend 1961 PA 236, as Reported by Committee (July 15, 2009), found at:

[http://www.legislature.mi.gov/\(S\(gcxkevjkubthq45ccjmxful\)\)/mileg.aspx?page=getObject&objectName=2009-SB-0035](http://www.legislature.mi.gov/(S(gcxkevjkubthq45ccjmxful))/mileg.aspx?page=getObject&objectName=2009-SB-0035).

The Court of Appeals’ refusal to apply the term “completed” to modify “use” and “acceptance” in MCL 600.5839 is an unreasonable and novel reading of the statute. The Court of Appeals remarked that the Legislature failed to specify whose “use” of the improvement

triggers the running of the period of repose. However, the Court of Appeals' interpretation did not further clarify whose "use" would trigger the running of the period of repose. Because the Court of Appeals has not provided any guidance on what type of use, and by whom the use would be sufficient to trigger the Statute of Repose, further litigation will arise to resolve the ambiguity. However, as discussed above, "use" should be read as provided by the contract in the definition of substantial completion. Because an improvement is not substantially complete until the owner can use it as intended, the only use which should trigger the Statute of Repose is the owner's. Furthermore, the contract between the parties incorporated section 9.9.3 of the AIA General Conditions, which expressly states **"unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with requirements of the Contract documents."**

Contrary to the Court of Appeals' interpretation, the term "completed" must be read to apply to "the improvement" which must be occupied, used or accepted for the period of repose to begin. Whereas the statute begins by referring to "an improvement to real property," the repose clause refers to "the improvement." Because "the improvement" must be completed when occupied, "the improvement" must also be completed when used or accepted. The Court of Appeals defended its interpretation by stating that the statute must be given a reasonable construction consistent with its purpose. However, reading the statute to incorporate the concept of a "completed project" for application, also shields architects, engineers and contractors from stale claims, and more importantly, allows parties to determine with specificity the date on which the period of limitations begins to run.

In fact, the cases cited in support by the Court of Appeals, did not hold that the period of repose began to run when the improvement was used by a subcontractor, even though the

individual component was used or accepted before occupancy. Because the terms “use”, “acceptance” and “occupancy” may not each apply to the same improvement, it is likely that the legislature included the terms as alternatives to apply to different types of improvement. The term “use” should apply to those improvements that cannot be occupied. The term “accept” should apply to those improvements that cannot be “used” or “occupied.” The Court of Appeals’ interpretation relying solely on “use”, renders the term “occupancy” nugatory, because an improvement will almost always be accepted or used before it is occupied.

Furthermore, the Court of Appeals has repeatedly rejected the component approach when defining an improvement to real property for the purposes of applying the Statute of Repose. In *Citizens*, the Court acknowledged that Michigan Courts “consider the project as a whole and not as isolated components in determining whether the injury involves an improvement to real property.” 268 Mich. App. 659, 666. The court found that “§ 5839(1) applies regardless of whether the claim accrues during construction and is based on the contractor's workmanship rather than on the completed improvement.” *Id.* However, regardless when the claim accrues or whether it is based on workmanship or the completed improvement, the court specifically found that the Statute of Repose is triggered when the improvement is completed. *Id. at 671.* The court cited *Abbott v John E Green Co*, 233 Mich App 194; 592 NW2d 96 (1998), which found that “an action accrues when all the elements of an action for personal injury, including damages, are present, rather than when the improvement to real property was completed.” *Citizens* at 670-671. However, the “*Abbott* Court declined to separate the construction of the improvement from the improvement itself”...*Id.* “MCL 600.5805(14) unambiguously directs that the period of limitations for actions against architects [engineers, surveyors, or contractors] is provided by MCL 600.5839(1)”. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 46; 709 NW2d 589

(Mich 2006). The Court found that the six-year period of MCL 600.5839(1) operates as both a statute of limitations and a Statute of Repose with primacy over other arguably applicable periods of limitation, running from the time of discovery, whose effect would defeat the repose aspect of MCL 600.5839. *Id.* **“Given this analysis, it is clear that an action under § 5839(1) may accrue before the improvement is completed, but the period of limitations nonetheless commences at ‘the time of occupancy of the completed improvement, use, or acceptance of the improvement.’”** *Id.* at 670-671.

The *Citizens* court also cited *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 411; 557 NW2d 127 (1996), where the Court adopted a common-sense analysis used by other courts in construing the term "improvement" *Id.* The Court found that:

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. *Id.*

The court noted that "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." *Id.* at 667 (citing *Travelers Ins Co v Guardian Alarm Co*, 231 Mich App 473, 478 (1998)). The court reasoned "because a new electric circuit panel box and transformer were integral components of an electrical system that was essential to the operation of the engineering and manufacturing facility, the Court concluded that they constituted an improvement to real property for the purposes of MCL 600.5839(1)." *Id.* Likewise, a fire alarm system installed by the defendant alarm company was an improvement to real property. *Id.* Because a fire alarm system and the new electrical panel box were improvements to an existing structure, it makes sense that the period of repose began to run from the date the improvement was accepted or used.

However, the Court of Appeals interpretation in *Ahrens* alters previous Michigan case law by holding that the period of repose runs from an implied “acceptance” and/or “use” of an individual component by a third party subcontractor, instead of the date the improvement as a whole was completed.

Although standardized contract provisions have established a single “substantial completion” or “certificate of occupancy” triggering date for the running of warranty and indemnity clauses, the decision of the Court of Appeals would impose upon general contractors the costly duty to keep track of multiple “acceptance” and “use” Statute of Repose triggering dates on a single project. The Court of Appeals’ interpretation would force contractors to keep track of multiple triggering dates spread out over the entire period of design and construction of a single project. Even if a general contractor kept track of the “acceptance” and “use” of each component on a project as defined for the first time by the Court of Appeals in this case, the general contractor may still get stuck holding the bag for defective work of a subcontractor without recourse.

Furthermore, when the Court of Appeals’ interpretation is extended to the extreme, it is revealed to be both impractical and illogical. In this case, the Roof System consisted of several components which required the installation in stages. Just as the Court of Appeals determined that components of the Roof System were “used” by other subcontractors when installing the roof felt and outer steel skin, each individual brick, column, or wall would be considered “used” as soon as another subcontractor relied on it. Each individual brick could be considered an improvement for the purpose of the running of the Statute of Repose. Under the Court of Appeals’ interpretation in *Ahrens*, the Statute of Repose may begin to run the day an individual component was installed. For example, a door could be considered in “use” merely because it

provides shelter from the elements. The windows and doors could be considered “used” the day another subcontractor opens or closes each. However, just because a subcontractor performs work utilizing the work of subcontractors before, does not mean that the component has been used for its intended purpose by the owner. Additionally, under the Court of Appeals’ interpretation, subsequent use by the same subcontractor that installed the individual component may trigger the running of the Statute of Repose, forcing general contractors to keep track of multiple triggering dates for work performed by each subcontractor on a single component of the project. For example, the period of repose for actions based on the “Tees” and “SubTees” might be triggered by Ahrens’ subsequent use thereof to install the vapor barrier. Ahrens’ installation of the “OSB” might trigger the period of repose for actions based on the foam block insulation. This Court should not impose an unrealistic burden on contractors by requiring them to keep track of the date each component of a project is used by the same or another subcontractor.

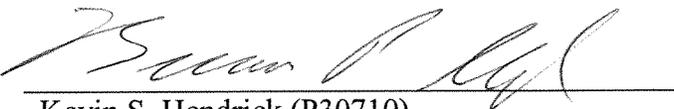
VIII. CONCLUSION

The decision of the Court of Appeals is a drastic departure from Michigan precedent. With one fell swoop, the Court of Appeals has abrogated the standard construction contract provisions that have developed over the last century to appropriately allocate risk between the parties. Under the Court of Appeals interpretation, warranty, indemnity, and obligations to cure defects in materials and workmanship cannot be enforced beyond six years from the date each individual component of an improvement is used or accepted. Similarly, the standard provisions and definitions regarding acceptance, use, occupancy and completion, in construction contracts have been rendered meaningless. This not only disrupts the bargained for allocation of risk between the parties, but also forces contractors to keep track of multiple triggering dates on a single project. Furthermore, the date on which the Statute of Repose may be triggered remains unclear due to the lack of additional guidance on what “use” and by whom the “use” would be

sufficient. The AGC urges the Michigan Supreme Court to reverse the decision of Court of Appeals in favor of a predictable application of the Statute of Repose. A predictable and uniform triggering date for the running of the period of repose would allow for the allocation of risk among the contracting parties for a reasonable length of time while still preventing stale claims against architects, engineers and contractors. Consistent with Michigan precedent, the parties to a construction contract should be able to contractually modify the periods of limitation and repose. At a minimum, this Court should hold that the Statute of Repose is triggered by the date of substantial completion, or alternatively by the owner's use, acceptance, or occupancy of the completed improvement. If left to stand, the decision of the Court of Appeals will have a devastating effect on the Michigan economy by increasing the costs and risks associated with entering into construction contracts, disturbing the balance that exists today in the industry, and undermining the quality of construction in Michigan.

Respectfully submitted,

CLARK HILL PLC

By: 

Kevin S. Hendrick (P30710)
Thomas M. Keranen (P32506)
Brian P. Lick (P71577)
Attorneys for AGC of Michigan
500 Woodward Ave., Ste. 3500
Detroit, MI 48226
(313) 965-8300

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