

**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,

v

AHRENS CONSTRUCTION, INC.,

Defendant/Appellee,

and

MERCHANT BONDING COMPANY,

Defendant.

Supreme Court Case No. 139666

Court of Appeals Case No. 284037

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

BRIEF ON APPEAL – APPELLANT

-- ORAL ARGUMENT REQUESTED --



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JURISDICTIONAL STATEMENT

This case is on appeal from a Judgment entered by the Kalamazoo County Circuit Court on February 11, 2008, in favor of Miller-Davis and against Ahrens Construction. (Apx. 28a) (Plaintiff/Appellant's Appendix)¹ The Judgment was based on the Circuit Court's Opinion, Findings of Fact and Conclusions of Law dated December 21, 2007. (Apx. 15a)

On March 3, 2008, Defendant/Appellant filed a timely Claim of Appeal in the Michigan Court of Appeals, Docket No. 284037. (Apx. 11a) Jurisdiction in the Michigan Court of Appeals was conferred by MCL 600.308(1)(a) and MCR 7.203(A)(1).

On August 4, 2009, the Court of Appeals issued a published Opinion reversing the Circuit Court's Judgment. (Apx. 31a) On September 15, 2009, Plaintiff/Appellant filed an Application for Leave to Appeal in this Court. (Apx. 14a)

On September 29, 2010, this Court issued an Order Granting Leave to Appeal. (Apx. 43a) 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

¹ Plaintiff/Appellant's Appendix will hereinafter be cited at "Apx. [#]a".

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.”

Jurisdiction is proper in this Court pursuant to MCL 600.215(3), MCR 7.301(A)(2), and MCR 7.302(G)(1).

STATEMENT OF QUESTIONS PRESENTED

1. Whether the statute of repose, MCL 600.5839(1), applies to an action under MCL 600.5807(8) seeking damages for breach of the express written provisions of a contract?

Plaintiff/Appellant answers: “No”

Defendant/Appellee answers: “Yes”

The Court of Appeals answered: “Yes”

2. Whether the statute of repose, MCL 600.5839(1), applies to a contract action such as the present case where there are no allegations or factual finding that, (a) there is damage to property or bodily injury or wrongful death, (b) arising out of a defective and unsafe condition, (c) resulting from negligence, and (d) the condition is the proximate cause of such negligent condition?

Plaintiff/Appellant answers: “No”

Defendant/Appellee answers: “Yes”

The Court of Appeals answered: “Yes”

3. When does a claim accrue under MCL 600.5807(8) for breach of a subcontractor's obligation to perform work in accordance with the requirements of the contract documents, to perform warranty and guarantee work and correct nonconforming work and/or indemnify the general contractor for loss arising from the subcontractor's failure to correct nonconforming work?

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: The Defendant/Appellee did not answer this question below.

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

4. 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 answers: "Occupancy, use or acceptance" refers to occupancy, use and acceptance by the owner of the improvement or project as defined in the

contract after the project is completed as a whole and the entire project is available for possession by owner for the owner's intended purposes, or as otherwise defined in the contract between the parties.

Defendant/Appellee answers: "Acceptance" or "use" is defined without reference to the owner's purposes or the completed improvement as a whole.

The Court of Appeals answers, by inference: Each subcontractor's work constitutes a separate "improvement" in itself without regard to the contractually defined project and is "completed" when the subcontractor ceases physical work on that particular portion of the project without regard to the subcontractor's other work upon a project. "Occupancy, use or acceptance" refer to the employment of a subcontractor's "improvement" or portion of the project by any other person for any purpose at any time and that "completion" occurs without reference to or regard for the contractual definition of the improvement as a project as a whole, and without regard to the owner's purposes or possession of the same.

INTRODUCTION

This case involves the question of whether the Michigan statute of repose for tort claims, MCL 600.5839(1), applies to an action for breach of express contractual promises brought by a general contractor against its subcontractor, seeking as damages the cost incurred in correcting the defaulting subcontractor's non-conforming work. The subcontractor's work was non-conforming because the subcontractor failed to construct a specified Roof System in conformance with the explicit requirements of the contract documents. This case presents an example of the problems that arise from a misunderstanding of the purpose of the statute of repose (MCL 600.5839(1)) and its misapplication to actions for breach of contract. This is a contract case. The Complaint alleges that the subcontractor breached its contract by failing to build a Roof System in conformance with the project specifications. (Apx. 51a, ¶38) The Complaint does not allege an action in tort, or a "defective and unsafe condition." (Apx. 43a) Plaintiff seeks the application of the statute of limitations for breach of contract as written, without judicial modification through the application of the statute of repose. The Legislature has adopted no period of repose for application in contract actions. The relevant statutes should be applied as written.

Plaintiff contends that, since adoption, the scope of the statute of repose has undergone steady expansion in lower courts until, in *Michigan Millers Mutual Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367; 494 NW2d 1 (1992), the incremental increase in the application of the statute took a quantum leap with the statement in *dicta* that the statute of repose applies to actions for breach of contract between persons in privity. This statement, which embodies the spirit of the decision below, alters the legislative intent behind the adoption

of the statute of repose and reflects a fundamental misunderstanding of the purpose of the statute and the distinction between actions in tort and actions for express contractual breach.

The application of the statute of repose to contract actions is unnecessary, inappropriate and inconsistent with well-reasoned opinions of other courts. It is at odds with the legislative history and wording of the statute and comprehensive system or pattern of general statutes of limitations relating to torts and contracts. Application of the statute of repose to situations in which the parties in privity have negotiated their respective obligations to each other and remedies upon a breach creates uncertainty and does a disservice to the construction industry. This type of application ignores the customary and time-tested contractual solutions regarding allocation of risks, rights, responsibilities and remedies among parties to the construction contract process.

The Court of Appeals in this case, purporting to “apply the law to the facts of the case,” applied the statute of repose to bar the action. (Apx. 42a) In the process, the Court of Appeals rewrote the factual findings of the Circuit Court. The Court of Appeals caused a result which altered the Plaintiff’s cause of action from one in contract to one in tort. It ignored the contractual definitions and provisions agreed to by the parties, including the date of substantial completion and the agreed date for commencement of the subcontractor’s guarantee of its work. (Apx. 322a) The decision below rendered meaningless guarantees that may exceed the statute of repose. It applied the statute of repose despite the absence of any allegation or finding that a “defective and unsafe condition” ever existed, adopted unrealistic and impractical definitions and methods for determining the date for commencement of the repose period.

This case presents the opportunity for this Court to correct inappropriate judicial activism in changing the Plaintiff's cause of action from contract to tort and expanding the application of the statute of repose beyond its intended reach. Just as important, it provides the Court with the opportunity to establish certainty in contracting parties' freedom and ability to make enforceable contractual arrangements in the field of construction law. Reversal solely on the basis that the statute of repose has no application to actions for breach of contract would correct the Court of Appeals' misapplication of the statute of repose and clarify uncertainty created by the opinion below. Reversal on this basis would be consistent with the goals articulated by members of this Court in *Zahn v Kroger Co of Mich*, 483 Mich 34, 45; 764 NW2d 207, 213 (2009) (Markman, Young, JJ, concurring), including reinforcement of the "great principle" of "stability in the law" or "rule of law" and reinforcement of the "fundamental policy of freedom of contract." Miller-Davis urges the Court to 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." *Id.* Miller-Davis respectfully submits that the best resolution would be for this Court to hold that the statute of repose has no application to actions for breach of contract brought under MCL 600.5807. Rather, it would be appropriate for the Court to hold that the statute of repose is confined to actions in tort brought by a third person. Such a ruling would assure parties to construction contracts "that their agreements voluntarily and fairly made shall be held valid and enforceable in the courts," *Id.*, and that warranties, guarantees, bonds, intellectual property protection and indemnification may be established by the parties, even when those dates extend beyond the period of repose.

STATEMENT OF FACTS

A. The Parties and the Project: The parties are Plaintiff/Appellant, Miller-Davis Company (“Miller-Davis”), and Defendant/Appellee, Ahrens Construction, Inc. (“Ahrens”). Original Defendant, Merchants Bonding Company, was the surety for Ahrens’ performance bond. Miller-Davis was an “at-risk” Construction Manager under a Construction Management Agreement with the YMCA Camping and Retreat Services of Battle Creek and Kalamazoo, a Michigan non-profit corporation, d/b/a Sherman Lake YMCA, as the Owner (“Owner”), for construction of a YMCA Outdoor Center Project (“Project”) in Augusta, Michigan. (Apx. 188a) The total Project cost was \$8.8 million. The Project involved construction of various buildings and recreational facilities, including a new Recreation Building containing a Natatorium (“Natatorium”) with an indoor swimming pool. (Apx. 186a – 187a)

B. Ahrens’ Work: Ahrens was a contractor/subcontractor (“Subcontractor”) to the Owner and Miller-Davis on the Project. Ahrens was issued Miller-Davis’ Purchase Order (“Subcontract”) for its work valued at about \$1.6 million. (Apx. 252a) Ahrens’ work (“Ahrens’ Work”) was a “general trades package” which included furnishing labor and materials for the installation of a special “Timber Deck” roof system (“Roof System”) for the Natatorium. The Roof System was covered by an external weather layer consisting of a 10,000 sq. ft. single-color-run, standing-seam, metal roof which was supplied and installed by another subcontractor.

Ahrens’ contractual obligations were memorialized in its contract with Miller-Davis which incorporated by reference the applicable Project Plans and Specifications, the American Institute of Architects (“AIA”) A201 General Conditions of the Contract 1987 Edition “General

Conditions,” the Project Manual, and a separate written Guarantee of Ahrens’ Work. (Apx. 252a-276a, 277a-304a, 390a-441a)

Under the Subcontract, Ahrens agreed: (a) to furnish the necessary supervision, labor, materials, tools, work, cartage and services to completely install the Roof System, (b) to install all products in accordance with the manufacturer’s instructions and recommendations whether conveyed in writing or not, (c) that “materials and/or work furnished ... shall comply with the terms and requirements of the plans and specifications,” (d) that if Ahrens failed, after notice, to complete or correct its work, Miller-Davis could complete or correct any nonconforming work, backcharge Ahrens, and receive from Ahrens the cost of such work even if the costs exceed any balance due, (e) to indemnify Miller-Davis from and against claims, damages, losses, actions, and expenses caused by any act, omission, fault, negligence, breach by the Subcontractor, and (f) that “no act or omission of Miller-Davis...or any third party shall in any way relieve...[Ahrens] or alter...[its] responsibility and liability for the quality and performance of any work, materials, equipment. . . .” (Apx 252a–259a)

The General Conditions (Apx. 277a–304a) defined various terms including: (a) the “Project” as the “total construction of which the work performed under the contract documents may be the whole or a part and which may include construction by the owner or separate contractors” (Section 1.1.4), (b) the “Contract Documents” (Section 1.1.1), (c) the “Work” (Section 1.1.2), (Apx. 282a) and (d) “Substantial Completion” as “the stage of Work when the Work or a 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. (Section 9.8.1) (Apx. 293a)

Under the General Conditions, Ahrens further agreed: (a) to perform work in accordance with the contract documents (Section 3.2.2), (b) to inspect work “to determine such portions are in proper condition to receive subsequent work,” (Section 3.3.4), (c) to warrant work to be of “good quality,” “free from defects” and to “conform to the requirements of the Contract Documents,” (Section 3.5.1), (d) that nonconforming work “may be considered defective,” (Apx. 284a) (e) to correct work that “fails to conform to the requirements of the Contract Documents whether observed before or after Substantial Completion,” (Section 12.2.1), (f) to bear the cost of correcting nonconforming work, (Section 12.2.1), (Apx. 297a) (g) to correct at its expense after notice of any work “found to be not in accordance with the Contract Documents” within: (i) one year after the date of Substantial Completion, (ii) after commencement of warranties established under the agreement, or (iii) by the terms of an applicable warranty period required by the Contract Documents, (Section 12.2.2) (Apx. 297a-298a) (h) that the contract documents were “complementary” and “include all items necessary for the proper execution and completion of the Work and what is required by one shall be binding as if required by all,” (Section 1.2.3), (Apx. 282a) (i) that final payment did not waive claims for “failure of the Work to comply with the requirements of the Contract Documents,” (Section 4.3.5) (Apx. 288a) (j) that Ahrens’ obligation to correct nonconforming work was triggered by notice “after discovery of the condition,” (Section 12.2.2) (k) that Ahrens’ obligation to correct nonconforming work survived “acceptance of the Work under the Contract and termination of the Contract,” (Section 12.2.2), (Apx. 297a-298a) (l) that, after notice, Miller-Davis had the right to correct Ahrens’ nonconforming work at Ahrens’ expense, (Section 12.2.4 and 12.2.5) (Apx. 298a) (m) that Ahrens’ obligation to correct nonconforming work extended

beyond the one year period after Substantial Completion with respect to portions of the work “first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work,” (Section 12.2.2) (Apx. 297-298a) (n) that “no action or failure to act by the Owner, Architect, or Contractor [would] constitute a waiver of a right or duty afforded them under the Contract... except as may be specifically agreed in writing,” (Section 13.4.2) (o) that the “duties and obligations imposed by the contract documents and rights and remedies available... [would] be in addition to...[those] otherwise imposed or available by law.” (Section 13.4.1) (Apx. 298a), (p) that warranties would “...commence on the date of Substantial Completion ...unless otherwise provided in the Certificate of Substantial Completion. (Section 9.8.2) (Apx. 294a), and (q) that the warranty period would be a “rolling” period or automatically extended as corrective work was performed. (Section 12.2.2) (Apx. 297a-298a)

Ahrens gave a separate written Guarantee which commenced on June 11, 1999². (Apx. 322a)

The agreed time for the date of accrual of a breach of Ahrens’ obligations was the *last to occur* of: “any act or failure to act...(a) pursuant to any warranty provided in Paragraph 3.5, (b) the date of any correction of any Work or failure to correct the Work...under Paragraph 12.2, or

²The Guarantee states: “We hereby agree that all work furnished to the project is guaranteed against deficiencies and defects in materials and/or workmanship for a period of one (1) year, as described in the Contract Documents. *The guarantee period shall commence on the Date of Substantial Completion, which is established as June 11, 1999.* We agree to satisfy such obligations, which appear within the guarantee period without cost to the owner. Nothing contained in this agreement shall be construed to establish a period of limitation with respect to any other obligation we may have under the Contract Documents or alter any longer period of time as may be prescribed by law of [sic or] the Contract Documents.” (Emphasis Supplied)

(c) the date of actual commission of any other act or failure to perform any duty or obligation by ... [Ahrens or Miller-Davis]. General Conditions Section 13.7.1.3. (Apx. 299a)

“Partial occupancy or use” and “acceptance” of any completed portion of the Work and of nonconforming work could occur only by specific written agreement (General Conditions Sections 9.9.1 and 9.9.3). (Apx. 294a) No such agreement was ever made either before or after Substantial Completion.

C. Substantial Completion of the Project and Final Payment: Ahrens ceased work on the Roof System February 18, 1999, but continued to perform work on the Project through April, 1999. Ahrens’ final pay request was dated May 28, 1999, not on April 26, 1999, as stated by the Court of Appeals. (Apx. 41a) A Temporary Certificate of Substantial Completion was issued on June 11, 1999, a Certificate of Substantial Completion was issued on June 25, 1999, (Apx. 323a) and a Certificate of Occupancy issued on August 2, 1999. Ahrens’ separate Guarantee commenced June 11, 1999. Ahrens received final payment on February 17, 2000, not “the day after April 26, 1999,” as the Court of Appeals stated. (Apx. 130a ¶13)

D. Problems with Ahrens’ Work: During the first winter, and less than one year after Substantial Completion, the Owner experienced substantial and excessive condensation conditions in the Natatorium. The problem was so severe that at times it appeared to be “raining” in the pool area. The condition was referred to as the Natatorium Moisture Problem (“NMP”). (Apx. 18a) The NMP was promptly and timely reported by Miller-Davis to Ahrens by letter dated January 28, 2000, well within the one year Guarantee period. (Apx. 325a)

During the next several winters, various unsuccessful efforts were attempted seeking to solve the NMP. Ahrens returned to the Project to correct a number of problems with its nonconforming work beginning in February, 2000, and continued to perform various aspects of work through at least February, 2002; meeting with Miller-Davis regarding the NMP at various times, including July 1, 2002. Ahrens represented that its work was done in compliance with the contract, but it was impossible for Miller-Davis to verify this without opening the roof. Opening of the roof was considered the last resort or “nuclear option” because it involved compromising the integrity of the roof and the risk that if the metal roof was damaged in removal it would be impossible to match the color run of the metal roof which had been installed over Ahrens’ work. (Apx. 18a)

Eventually there was no choice but to conduct a partial roof tear-off of the metal roof. When the roof was opened on February 26, 2003, significant, multiple deficiencies were found in Ahrens’ installation of the Roof System. As the Circuit Court found, the Roof System “was not installed according to the contract.” (Apx. 23a) The deficiencies were pervasive and confirmed when the Roof System was later removed and reinstalled as part of the corrective work ordered by the Architect. (Apx. 335a - 345a) The Architect determined Ahrens’ installation was not in substantial compliance with the Contract and that removal and reinstallation of the Roof System, using to the extent possible salvageable materials, was necessary and the most reasonable and economical method for performing corrective work. (“Corrective Work”). (Apx. 336a)

There ensued various communications, exchanges of information and meetings regarding the Corrective Work and Ahrens agreed to develop a plan for performance of the work. Because of Michael Ahrens (President of Ahrens Construction) individual indemnification

obligations to Merchants under Ahrens' performance bond, Ahrens' sought to obtain release of the bond, but Miller-Davis refused. (Apx. 311a-315a, 330a) Nonetheless, Michael Ahrens' as indemnitor under Ahrens' bond, retained the ability to refuse to consent to Merchants' honoring its commitment to Miller-Davis on Merchant's bond. On June 27, 2003, Miller-Davis and Ahrens met. Ahrens received the architect's specifications for corrective work and the estimated quantities. Ahrens stated it would review the information and promised to provide a plan for performance of corrective work by July 2, 2003, but Ahrens failed to respond as agreed. (Apx. 462a)

E. Ahrens' Ultimate Default and Miller-Davis' Performance of Corrective Work: Hearing nothing further from either Ahrens or the bonding company, on July 15, 2003, Miller-Davis gave Ahrens and Merchants formal written notice of Ahrens' default, terminated Ahrens' right to complete its contract, and demanded Merchants perform under the bond. (Apx. 332a) On July 3, 2003, Merchants gave Miller-Davis notice of Merchants' waiver of the right to perform on the bond. (Apx. 24a, 334a) Upon Ahrens' and Merchants' default and demand from the owner to avoid litigation, Miller-Davis entered into an Agreement with the Owner for Corrective Work dated August 27, 2003, to undertake correction of Ahrens' nonconforming Work. (Apx. 335a). On December 8, 2003, an independent consultant certified that Miller-Davis satisfactorily completed the required Corrective Work. (Apx. 362a-363a)

F. The Circuit Court Action: After protracted negotiations with Merchants proved unfruitful, Miller-Davis filed suit against Ahrens and Merchants on May 12, 2005. Miller-Davis' Complaint contained three (3) counts: one count for breach of contract, a second count for indemnification, and a third count against Merchants on the bond. (Apx. 44a) Before trial,

Ahrens filed a motion for summary disposition claiming Miller-Davis' claims were barred by the statute of repose (MCL 600.5839(1)) (Apx. 69a). The Circuit Court denied the motions finding that Ahrens, "stopped physical work at the site in 2002." (Apx. 139a) The Court found that, "Ahrens continued to discuss corrective measures and promised to respond to corrective plans until July of 2003. (Apx. 140a) Ahrens filed an application for an interlocutory appeal. The application was denied by the Court of Appeals. (Apx. 185a)

After an 8-day trial, the Circuit Court rendered its Opinion, Findings of Fact, and Conclusions of Law dated December 21, 2007, (Apx. 15a) which stated, among other things: (1) discovery and confirmation of Ahrens' nonconforming work occurred February 26, 2003 when there was a partial tear-off of the roof; (2) "Ahrens materially and substantially breached its contract by performing non conforming and defective work...[the Trial Judge said it was "not even a close call;"]...upon notice and opportunity given, Ahrens failed to correct its work, or otherwise cause it to come into conformance. Miller-Davis then fulfilled its own contractual obligation to the Owner by bringing the roof system in conformance with the contract documents at its own expense, thereby suffering damages caused by Ahrens. Miller-Davis mitigated its damages by performing the corrective work in the least expensive manner possible;" (3) A Certificate of Substantial Competition for the Project was issued by the Architect on June 25, 1999; and (4) A Certificate of Occupancy was issued for the Project on August 2, 1999. (Apx. 25a-26a)

The Circuit Court made no mention of the statute of repose, no finding regarding negligence, no finding that an unsafe condition existed, and no finding of damage to property. Miller-Davis never asked the Circuit Court to make such findings because Miller-Davis' case

was based on the breach of an express written contract. The Circuit Court rejected Ahrens' claim it ceased work and involvement on the Project at any time prior to July, 2003, specifically, noting that "From March 12, 2003 until July, 2003 the parties engaged in a series of meetings which culminated in a July 15, 2003 letter from Miller-Davis to Ahrens and Merchants demanding performance under the performance bond, declaring a contractor's default, and terminating Ahrens' right to perform under the contract." (Apx. 19a)

Judgment entered on February 11, 2008, in favor of Miller-Davis and against each of the Defendants, Ahrens and Merchants, in the amount of \$348,851.50. (Apx. 28a)

G. Ahrens' Appeal, Merchants' Appeal, and Miller-Davis' Cross-Appeal:

Ahrens appealed the Circuit Court's Judgment to the Court of Appeals, asserting various errors, including the claim that Miller-Davis' claim was barred by the statute of repose, MCL 600.5839(1). Merchants and Miller-Davis settled their dispute. Ahrens' appeal and Miller-Davis' cross-appeal continued in the Court of Appeals.

H. The Court of Appeals Decision: The Court of Appeals' opinion dated August 4, 2009, reversed the Circuit Court's decision and held that Miller-Davis' claims were barred by the statute of repose. (Apx. 31a) In summary, the decision held that the statute of repose, MCL 600.5839(1): (1) applied to contract claims, (2) Miller-Davis' claim arose out of a "defective and unsafe condition," (Apx. 36a, 37a, and 42a) (3) the Roof System as a "component" of the larger project should be considered separately, (4) the Roof System was an "integral part of the improvement to which it belongs," (Apx. 37a) the "completed improvement" and the repose period commenced when Ahrens ceased to work "by the end of February 1999," (Apx. 42a) (5) the repose period commenced by the end of April 1999 when Miller-Davis "accepted

Defendant's certification that its work on the roof had been completed and paid Defendant for that work, and (6) Miller-Davis' claim was barred by the statute of repose because it was filed May 12, 2005, more than six (6) years after February, 1999. (Apx. 42a)

ARGUMENT

I. THE MICHIGAN STATUTE OF REPOSE APPLICABLE TO TORT CASES DOES NOT APPLY TO ACTIONS FOR BREACH OF THE EXPRESS TERMS OF A CONTRACT.

A. STANDARD OF REVIEW.

The same standard of review applies to each argument contained in this Brief because each argument relates to the Court of Appeals' application and interpretation of the statute of repose, MCL 600.5839(1). The Court reviews statutory interpretation *de novo*, *City of Detroit v Ambassador Bridge Co*, 481 Mich 29, 36; 748 NW2d 221 (2008), citing, *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378, 383; 617 NW2d 310 (2000). The Court will review a trial court's factual findings for clear error. *Ambassador Bridge Co, supra*, at 36, citing MCR 2.613(c), and *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). The Court will find clear error only when it is "left with the definite and firm conviction that a mistake has been made," *Ambassador Bridge Co, supra*, at 36, quoting, *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

B. SUMMARY OF PLAINTIFF/APPELLANT'S ARGUMENT.

Miller-Davis' argument to this Court is summarized as follows:

1. The statute of repose, MCL 600.5839(1), has no application to causes of action based on claims of breach of express contract terms. The general contract statute of limitations, MCL 600.5807, which governs "any action to recover damages or sums due for breach of

contract,” and MCL 600.5807(8), which defines the period for bringing an action for breach of contract, apply and control this case, which is an action between the parties to a written contract in which the Plaintiff seeks to recover damages or sums due for breach of express promises contained in the contract. As a result, because the statute of limitations began to run no earlier than June 11, 1999, and the Complaint for Breach of Contract was filed on May 12, 2005, (Apx. 44a) Miller-Davis’ action was timely filed under MCL 600.5807(8). If the Court finds that MCL 600.5807(8) governs the time for accrual and period of limitations in this case, it should be unnecessary to consider Miller-Davis’ other arguments.

2. The statute of repose, MCL 600.5839(1), applies only to actions in tort. The general tort statute of limitations, MCL 600.5805, which governs “an action to recover damages to persons or property” and the specific reference to the statute of repose, MCL 600.5839(1), contained within the general tort statute of limitations at MCL 600.5805(14), limits application of the statute of repose exclusively to tort actions and because there is no similar reference to MCL 600.5839(1), contained anywhere in the general statute of limitations for contract actions MCL 600.5807, the statute of repose, MCL 600.5839(1) has no application to this case. While tort actions against architects, engineers and contractors have a statute of repose, actions for breach of contract in actions against architects, engineers or contractors have only a period of limitations under MCL 600.5807(8), but no period of repose under MCL 600.5839(1). If the Legislature had intended that the statute of repose apply to contract actions it would have amended the relevant contract statute of limitations to say so.

3. The statute of repose, MCL 600.5839(1) has no application to this case because the elements for its application are not present. This was the case because of the nature of the contract claim contained in Miller-Davis' Complaint.

4. Even if the statute of repose, MCL 600.5839(1), has application to this case, Miller-Davis' complaint was timely filed under the facts, including the terms of the contract providing for the time for accrual of actions, the customary usage and practices in the industry and a reasonable construction of the statute's terms and Ahrens' separate Guarantee.

To the questions the Court requested to be addressed in the Court's Order Granting Leave to Appeal dated September 29, 2010, Miller-Davis presents the following summary of argument:

1. The statute of repose, MCL 600.5839(1), has no application to and does not govern a general contractor's suit for a subcontractor's breach of contract, but rather the statute of repose is limited to tort actions.

2. This case does not constitute an action to recover damages arising out of a "*defective and unsafe condition*" of an improvement to real property as demonstrated by Miller-Davis' Complaint, the evidence presented at trial and the trial court's findings of fact. (Apx. 15a, 44a)

3. A claim for breach of a construction contract accrues under MCL 600.5807(8) on the later of: (a) the date of "Substantial Completion" as defined in the contract, or (b) when the breaching party after demand, fails and refuses: (i) to perform a contractual obligation that continues beyond the date of Substantial Completion, such as the obligation to correct nonconforming work observed or discovered after the date of Substantial Completion, (ii) to honor warranties or guarantees during any period extending beyond Substantial Completion, or

(iii) to honor backcharge or indemnity obligations which do not arise until the contractor or indemnitee performs the corrective work or incurs the loss.

4. The “occupancy, use or acceptance” of an improvement under MCL 600.5839(1) refers to and does not occur until: (a) the improvement or project, as defined in the contract, is completed as a whole, and (b) substantial completion, as defined in the contract and the project owner receives possession and beneficial enjoyment for the owner’s intended purposes. Further, “partial” “occupancy, use or acceptance” does not and cannot occur at the time when any particular component, fraction, or lesser portion of a project is incorporated into an owner’s project, and nonconforming work can never be “accepted” unless there is a formal written agreement to that affect and all as set forth and consistent with contract definitions, customs and practices in the construction industry.

C. THE COURT OF APPEALS’ DECISION CONTAINS NUMEROUS FACTUAL ERRORS, SEEKS TO CONVERT THIS CONTRACT CASE INTO A TORT CLAIM AND REFLECTS A FUNDAMENTAL MISUNDERSTANDING OF THE CASE.

Miller-Davis never alleged, and the Circuit Court never found, that this case involved “injury to person or damage to property” which was “proximately caused” by a “defective and unsafe condition” to some improvement to real estate brought by an innocent third person who was never a party to the contract for the design, supervision or construction of the improvement. Totally absent from the Circuit Court’s findings are: (a) any reference to any “tort,” “negligence,” or “negligent breach,” (b) any reference to “proximate cause,” (c) any “defective and unsafe condition,” (d) a “damage to person or property.”

Despite this, the Court of Appeals’ determined that: (1) Miller-Davis’ “breach of contract action” (Apx. 32a) and its “claims against Defendant, for both breach of contract and

indemnity rest on the allegation that Defendant's defective workmanship on the Natatorium's roof *caused* the NMP." (Apx. 37a) (emphasis supplied) This finding is not supported by the record and is irrelevant. It was a breach of contract case for failure to perform work conforming to the requirements of the contract documents. The "cause" of the NMP was irrelevant and immaterial. If Ahrens breached its contract to perform work in conformance with the contract documents, Ahrens was liable to Miller-Davis for the cost of correction whether or not the nonconforming work "caused" and whether or not the corrective work "cured" the NMP. The Circuit Court knew it was unnecessary to find Ahrens' nonconforming work was the "cause" of the NMP, only that Ahrens breached its contract and Miller-Davis incurred the cost of correction of Ahrens' nonconforming work.

The Court of Appeals said: the "lawsuit...[was] for an injury to property...arising out of a defective *and unsafe* condition of an improvement to real property" which was governed by the statute of repose, MCL 600.5839 [Emphasis supplied]. (Apx. 36a, 42a) This is incorrect. No defective and unsafe condition was claimed or found by the Circuit Court. Failure to perform in a workmanlike manner is a breach of contract. *Mayfield v Swafford*, 106 Ill App 3d 610; 435 NE2d 953 (1983). There is no basis for the Court of Appeals' recharacterization of the record which contradicts the Circuit Court's explicit findings that "Ahrens materially and substantially breached its contract ...and upon notice and opportunity given, Ahrens failed to correct its work or otherwise come into conformance." (Apx. 25a) In so doing, the Court of Appeals attempted to convert a breach of contract claim into some form of "negligent performance" and impermissibly changed the Circuit Court's findings of fact without showing there was any error whatsoever, let alone, "clear error." The Circuit Court recognized the important distinction

between Ahrens' dual breaches, the initial breach of failing to perform work in accordance with the contract documents and later breach of failing to correct its nonconforming work. A breach of a warranty/guarantee of future performance is a separate and independent breach of contract.

The Court of Appeals erroneously held, "...it does not matter that Plaintiff's legal theory is based on an express promise when it is a claim for injury (harm or damage) to or caused by an improvement to real property a contractor has made." (Apx. 39a) This holding eliminates the distinction between tort and contract and rewrites the entire the statutory scheme. The Court of Appeals said Ahrens' work was an "integral component of the natatorium's roof," (Apx. 40a) "...the wooden deck system was in use by Plaintiff as the construction manager directing the work of the various subcontractors for the purpose of completing the entire project," (Apx. 40a) "The triggering event of occupancy of the completed improvement by the owner, or at least one having the right to occupy the 'completed improvement' certainly implies 'occupancy' by the owner, or at least one having a right to occupy the 'completed improvement' but the statute does not so limit 'use,' or 'acceptance' of the improvement," (Apx. 40a) and "... it reasonable to construe the word 'use' in the statute as 'use' of the 'improvement' for its intended purpose by any lawfully authorized person or entity. So construed, the improvement that Defendant made, ...was used by authorized persons and entities in February, 1999 for the purpose it was intended when Plaintiff and Plaintiff's designated subcontractor completed the roof's construction by installing roofing felt and the outer steel skin," (Apx. 41a) and the statute of repose "commenced running on 'use' by Plaintiff, other subcontractors, or the owner by the end of February, 1999." (Apx. 42a) It concluded: "Further we hold that the facts establish that Plaintiff 'accepted' the improvement by the end of April, 1999 when Plaintiff accepted Defendant's certification that its

work on the roof had been completed and paid Defendant for that work.” (Apx. 42a). This not only used as an unrealistic and impractical “component“ approach rejected by other panels of the Court of Appeals, but ran counter to the express language of the contract that said there could be no partial occupancy, use or acceptance of a portion of the Work and there was never any “acceptance” of nonconforming work. It ignored and rewrote the contract, which defined the “Project” “as the total construction of which the work performed under the contract documents may be the whole *or a part* and which *may include construction by the owner or separate contractors.*” General Conditions Section 1.1.4 (Apx. 282a), and provided further there was no partial occupancy, use or acceptance” of Ahrens Work and never any “acceptance” of nonconforming work, General Conditions 9.9.3 (Apx. 294a), and that “occupancy, use, acceptance” and “completion” was expressly by the Owner. General Conditions 9.8.1. (Apx. 293a)

The Court of Appeals stated that Ahrens “submitted its final request for payment on April 26, 1999, and Miller-Davis paid Ahrens the very next day.” This is incorrect. Ahrens’ final pay request was dated May 28, 1999, and Miller-Davis did not make final payment to Ahrens until February 27, 2000. The Court of Appeals went on to say: “Although Plaintiff asserts it never ‘accepted’ Defendant’s work on the roof, Plaintiff’s own actions in accepting Defendant’s certification that the roof had been completed, and then paying for that work, speaks louder than its litigation protests. In sum, we conclude the facts establish that by the end of April, 1999, Plaintiff’s actions constituted “acceptance” of the “improvement” Defendant made to real property triggering the running of the 6-year limitations period §5839(1).” (Apx. 42a)

These “findings” are in direct contradiction to the facts found by the Circuit Court, which, after hearing all of the evidence at trial, the Circuit Court specifically found that:

From March 12, 2003 until July 2003 the parties engaged in a series of meetings which culminated in a July 15, 2003 letter from Miller-Davis to Ahrens and Merchants demanding performance under the performance bond, declaring a contractor’s default, and terminating Ahrens right to perform under the contract. (Apx. 19a)

The Court of Appeals’ findings run contrary to and ignore the express provisions of the contract that there could be no acceptance of nonconforming work, General Conditions Section 9.9.3 (Apx. 294a) and “final payment” did not waive claims for “failure of the work to comply with the requirements of the contract documents” General Conditions Section 4.3.5.2 (Apx. 288a). Ahrens’ obligation to correct nonconforming work survived “acceptance of the Work” General Conditions Section 12.2.2, “no action or failure to act by the Owner, Architect, or Contractor shall constitute a waiver of a right or duty afforded them under the Contract...except as may be specifically agreed in writing.” General Conditions Section 13.4.2 (Apx. 298a) and that the General Conditions Section 9.8.1 (Apx. 293a) and Ahrens’ guarantee specifically stated that date of completion commenced on June 11, 1999. (Apx. 322a) The Court of Appeals rendered of no effect and destroyed the one-year warranty and guarantee obligations, which commenced June 11, 1999 and extended beyond the date of Substantial Completion. See: *Benning Construction v Lakeshore Enterprises, Inc v RL Sanders Roofing Company*, 240 Ga 426, 428; 241 SE2d 184, 187 (1977), where the court held that “[s]uch a result...[made]...a guarantee of this kind meaningless.” (See also: *The President and Directors of Georgetown College v Madden*, 660 F2d 91, 95 (4th Cir 1981).)

Miller-Davis respectfully submits the Court of Appeals' Opinion is replete with errors upon which the Court relied in an effort to contort the facts of this case into a situation to which the statute of repose would apply. The resulting errors should result in reversal.

D. MILLER-DAVIS' "ACTION TO RECOVER DAMAGES OR SUMS OF MONEY DUE FOR BREACH OF CONTRACT" UNDER MCL 600.5807(8), BROUGHT AGAINST A PARTY TO A WRITTEN CONTRACT FOR BREACH OF EXPRESS PROMISES CONTAINED WITHIN THE CONTRACT WAS TIMELY FILED WITHIN THE PRESCRIBED PERMISSIBLE PERIOD OF LIMITATIONS UNDER MCL 600.5807(8).

This is a breach of contract case in its purest form. It is not a tort case. A review of the text of the Miller-Davis' Complaint for Breach of Contract, contained at Apx. 44a - 54a, demonstrates the nature of the claims in this case. This is an action brought to "recover damages or sums of money for breach of contract" under MCL 600.5807(8). The contract in question is part of a sophisticated and complex negotiated bargain, arrived at in the context of industry practices, which allocated rights, risk and responsibilities between the general contractor and subcontractor. (Apx. 252a-276a, 277a-304a, 390a-442a) The contract specifically defined standards of performance, the subcontractor's obligations to correct nonconforming work, the dates upon which certain warranty/guarantee obligations would commence and the period for accrual of specific rights and obligations.

The lawsuit is between parties in direct and undeniable privity to a substantial commercial contract involving more than \$1.6 million worth of work, (Apx. 252a-276a) as an integral part of a larger \$8.8 million construction project. (Apx. 220a) It was brought by the general contractor against a defaulting subcontractor for failure to properly install a roof system. (Apx. 50a) It is a case in which the defaulting party is attempting to escape responsibility for the breach of its express promises and avoid payment for the economic consequences of its breach.

The fact that it is a breach of contract case is confirmed by: (a) the Plaintiff's Complaint which includes Count I for "Breach of Contract" and Count II for "Indemnification." (Apx. 50a) At no time did Miller-Davis ever claim any of the following: (a) a "defective and unsafe condition" existed or was created by Ahrens' Work; (b) Ahrens' Work "caused" the NMP; or (c) any "injury to property" upon the Project arose out of any "defective and unsafe condition." Miller-Davis only claimed that Ahrens' Work was incomplete and nonconforming, and that "Ahrens failed to fulfill its promise under the Contract because it failed to complete the Roof System in conformance with the Project Specifications." (Apx. 51a, ¶38) There was no claim, evidence, or other proof presented by any party that Ahrens' nonconforming work resulted in a "defective and unsafe condition." Miller-Davis never claimed that Ahrens was obligated to cure the NMP, only that Ahrens was obligated to perform its work in conformance with the Contract Documents. Miller-Davis never claimed there was "damage to property" or that any property was "damaged" by the installation of the Roof System. Miller-Davis only sought damages for the expense incurred in opening the roof, removing the work which did not conform to contract specifications, and properly reinstalling the roof system. A review of that portion of the Circuit Court's Opinion contained at Apx. 25a shows exactly what Miller-Davis claimed and why the Court found that a breach of contract occurred.

Miller-Davis claimed that Ahrens' obligation to correct Ahrens' nonconforming Work arose under various express contractual provisions including written warranties, a Guarantee, backcharge and contractual indemnification obligations. Miller-Davis claimed the right to enforce backcharge and indemnification obligations did not arise until after demand and Ahrens

refused to perform and then only after the cost to perform Corrective Work was incurred by Miller-Davis. (Apx. 51a-52a)

After hearing the testimony and receiving into evidence hundreds of pages of exhibits, the Circuit Court found “[t]his is a breach of contract action[,]” (Apx. 16a) that Ahrens was in material breach of its obligations owing to Miller-Davis under the contract.” (Apx. 25a) In evaluating the most vigorously contested factual question in the case, whether block insulation was installed in a manner which was placed “tight” within wood “cells,” a crucial specification, the Circuit Court found that the insulation was not tight, “and that, in fact, making this determination was not even a close call.” (Apx. 23a) The Circuit Court further found:

Ahrens agreed to complete its work in conformance with the plans and specifications contained within the contract. The contract was in all ways valid and enforceable between the parties.

Ahrens materially and substantially breached this contract by performing nonconforming and defective work described above, and upon notice and opportunity given, Ahrens failed to correct its work, or to otherwise cause it to come into conformance. Miller-Davis then fulfilled its own contractual duty to the Owner by bringing the roof system into conformance at its own expense, thereby suffering damages caused by Ahrens. Miller-Davis mitigated its damages by performing corrective work in the least expensive manner. (Apx. 25a)

E. THE GENERAL TORT STATUTE OF LIMITATIONS, MCL 600.5805, WHICH GOVERNS “AN ACTION TO RECOVER DAMAGES TO PERSONS OR PROPERTY” AND THE SPECIFIC REFERENCE TO THE STATUTE OF REPOSE, MCL 600.5839(1), FOUND AT MCL 5805(14), LIMITS APPLICATION OF THE STATUTE OF REPOSE TO TORT ACTIONS. BECAUSE THERE IS NO REFERENCE SIMILAR TO MCL 600.5839(1) CONTAINED IN THE GENERAL STATUTE OF LIMITATIONS FOR CONTRACT ACTIONS, MCL 600.5807, THE LEGISLATURE DID NOT INTEND FOR THE STATUTE OF REPOSE TO APPLY TO BREACH OF CONTRACT CASES. WHILE TORT ACTIONS AGAINST ARCHITECTS, ENGINEERS AND CONTRACTORS HAVE A STATUTE OF REPOSE, ACTIONS FOR BREACH OF CONTRACT AGAINST ARCHITECTS, ENGINEERS OR CONTRACTS ARE SUBJECT TO A PERIOD OF LIMITATIONS, BUT NOT A PERIOD OF REPOSE.

1. A Statute of Repose Distinguished from a Statute of Limitations.

A statute of repose is a statute of duration, and provides a date upon which the action no longer exists, whether it accrued by that date or not. A statute of repose extinguishes an injured person’s right of action even before it accrues. A statute of repose is neither an avoidance nor a defense to a cause of action because the cause of action does not exist once the period of duration is passed. In contrast, a statute of limitation is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of limitation bars the remedy. It does not extinguish the underlying obligation. A statute of repose, on the other hand, cuts off the right to a cause of action before it accrues. Statutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes providing a simple procedural mechanism to dispose of stale claims. Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer

exists. *Ray & Sons Masonry Contractors, Inc v United States Fidelity & Guaranty Co*, 353 Ark 201, 114 SW3d 189 (2003). The application of a statute of repose is especially pernicious because it not only bars an action, but also prevents an action from ever accruing. “Where the injury occurs after the passage of applicable time period, the injured party ‘literally has *no* cause of action. The harm that has been done is *damnum absque injuria* - a wrong for which the law affords no redress.” *Smith v Quality Const Co*, 200 Mich App 297, 301; 503 NW2d 753 (1993), citing *O’Brien v Hazelet & Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980), which quoted *Rosenberg v Town of North Bergen*, 61 NJ 190; 293 A2d 662 (1972).

In understanding why there should be no period of repose in contract actions, it is important to distinguish between the public and private interests at stake in tort and contract actions. The public is interested in protecting innocent third persons who have no representation in the construction bargain and the public is further interested in assuring that injured persons may recover damages for, “defective and unsafe conditions” in completed construction projects arising out of and caused by the negligence of participants in the design and erection of structures. Thus, the public is concerned with duties “imposed by law” which give rise to tort liability. Whether a third person (not a party to a contract) has an action in tort against a party to a contract generally will depend upon whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant’s contractual obligations. *Fultz v Union Commerce Assocs*, 470 Mich 460; 683 NW2d 587 (2004). The statute of repose is part of the overall statutory scheme establishing or extinguishing rights in this type of action.

The parties who negotiate a construction contract and who act in privity are interested in defining and allocating risks, right and responsibilities in the undertaking. These parties

negotiate contractual or “consensual duties” or obligations which are voluntarily assumed for good and valuable consideration, the breach of which gives rise to a claim for damages for breach of contract. The public interest here is in providing the parties to the undertaking freedom to allocate rights, risks, and responsibilities in an efficient, reasonable and fair manner by parties knowledgeable with practices and customs in the construction industry. The contract defines standards of performance and promises exchanged which constitute the bargain of the parties. The absolute right to enter into such bargains must be preserved. *Zahn v Kroger Co of Mich*, 483 Mich 34, 45; 764 NW2d 207, 213 (2009) (Markman, Young, JJ, concurring) A breach of a contractual promise may have no adverse consequence to a third person while being crucial to the contracting parties. For example, a foundation as poured may be structurally sound and pose no risk of injury or damage to third persons. However, no matter how sound the foundation may be, if it is in the wrong place, wrongly configured, out of alignment or otherwise not in conformance with plans and specifications, it may well have major consequences for the parties to the contract. Conversely, a contractor may be excused from liability to a third person injured by the erection of a structure which built in accordance with plans and specifications if the injury is proximately caused by a design defect rather than by a contractor error. See: Annotation: Modern Status of Rules Regarding Tort Liability of Building and Construction Contractors for Injury after Completion and Acceptance of Work: “Completed and Accepted Rule.” 74 ALR 5th 523, 574.

Both the public and parties to the construction undertaking, namely architects, engineers and contractors, have a shared interest in protecting architects, engineers and contractors from being subjected to “stale claims” and “open-ended liability” from third persons for tort claims

brought after a structure has been in service and used without adverse incident for a sufficient period that the structure may be presumed to be structurally sound. This shared interest has resulted in the adoption of statutes or repose. The policy bases supporting the adoption of such statutes do not apply to the actions between the parties who negotiated their own agreement, including their own rights and remedies. The distinction is crucial and controls in this case.

2. The Adoption, Amendment and Expansion of the Michigan Statute of Repose.

The Michigan statute of repose has three (3) chapters in its legislative history. None reflect any legislative intent directed at actions for the breach of express contractual provisions. The first chapter came with the statute's adoption in 1967 as a response to the increase in actions against architects and engineers and established a six (6) year period of repose so that, six (6) years after occupancy, use, or acceptance of an improvement to real property, no action for damages to persons or property arising out of a defective and unsafe condition of the improvement could accrue. The 1967 statute of repose afforded protection only to design professionals with the result being that Michigan contractors still could be sued for claims of ordinary negligence many years after project completion. *Connelly v Paul Ruddy's Equip Repair & Service Co*, 388 Mich 146; 200 NW2d 70 (1972); see also *American States Insurance Co v Employees Mutual*, 352 F Supp 197 (1972); *Cantrell v Slavik*, 68 Mich App 202; 242 NW2d 66 (1976); *Filcek v Utica Building Co*, 131 Mich App 396; 345 NW2d 707 (1984).

The second chapter was written in 1985, when the statute of repose was amended to extend to contractors the protection previously available only to architects and engineers.

The third chapter came in 1988, when the general tort statute of limitations, MCL 600.5805, was amended to include reference to the statute of repose, MCL 600.5839(1), at what

is now MCL 600.5805(14). The rest of the book on the statute of repose continues to be written by the Courts and Miller-Davis contends that this case presents an important opportunity for this Court to provide much needed clarification regarding the inapplicability of the statute to breach of contract claims.

The analysis and application of statutes of repose have often been difficult. Michigan held its statute of repose constitutional in *O'Brien v Hazelet & Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980), describing it as “experimental social legislation.” *Id* at 19. Other states have split in deciding whether such statutes are constitutional. The Ohio Supreme Court, after finding its statute constitutional, changed its position and four (4) years later overruled its previous decision and declared its statute unconstitutional. *Brennaman v RMI Co*, 70 Ohio St 3d 460; 639 NE 2d 425 (1994). Minnesota, which had a statute of repose that included contracts later, amended it to remove reference to contracts for indemnification. After the collapse of a portion of Interstate 35 Bridge in 2007, which killed 13 persons and injured 100 more, the amended statute was applied retroactively to allow \$36 million of indemnification claims against the design professionals who designed the structure in 1967. *In re Individual 35 W Bridge Litigation*, 787 NW2d 643 (Minn App 2010).

Michigan’s experience with the statute of repose has been adventuresome. Since adoption the scope of the statute of repose has been expanded steadily to cover an ever-widening array of actions including the following: (a) claims against producers of prefabricated, modular homes manufactured off-site, *Frankenmuth Mutual Insurance Co v Marlette Homes Inc*, 456 Mich 511; 573 NW2d 611 (1998); (b) various types of machines, systems and equipment, *Roskam Baking Co, Inc v Lanham Machinery Co, Inc*, 288 F3d 895 (CA 6, 2002);

Travelers Ins Co v Guardian Alarm Co of Mich, 231 Mich App 473; 573 NW2d 611 (1998); (c) material suppliers, *Pendzsu v Beazer East, Inc.*, 219 Mich App 405, 411; 557 NW2d 127 (1996); (d) unlicensed contractors, *Matthew v Belloit Corp*, 807 F Supp 1289 (W.D. Mich, 1992); and (e) construction activities as opposed to improvements to real property, *Citizens Ins Co v Scholz*, 268 Mich App 659, 669; 709 NW2d 164 (2005); *Abbott v John E Green Co*, 233 Mich App 194; 592 NW2d 96 (1998). The statute of repose has been held to control or “trump” other statutes including MCL 600.5851(1) to bar “claims” of minors or prevent such actions from ever accruing, *Smith v Quality Const Co*, 200 Mich App 297, 301; 503 NW2d 753 (1993).

The most troublesome and unwarranted extension of the scope of the statute of repose appears in *Michigan Millers Mutual Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367; 494 NW2d 1 (1992), where one panel of the Court of Appeals, in *dicta*, stated that the statute of repose “applies to all actions against a contractor based upon an improvement to real property, including actions based on contract.” *Id.* at 377-378. This statement is later cited in *Travelers Ins Co v Guardian Alarm Co of Mich*, 231 Mich App 473; 573 NW2d 611 (1998), where the Court held that the statute of repose applied to the plaintiff’s breach of contract and breach of warranty claims in a fire damaged building. This statement was made despite the fact the legislative history quoted in *Michigan Millers* said only that “The bill would insure that, in the future claims against engineers, architects, and contractors...should be protected from suits charging *malpractice* or *negligence* in building improvements.” [Emphasis supplied]. *Michigan Millers, supra*, 196 Mich App at 375.

The various rulings by different panels of the Court of Appeals have blurred or even destroyed the critical distinction between third party tort claims and contract claims between parties to an express contract, and in the process have ignored the customary documentation and practices in the construction industry. Rather than looking at the interplay between the statute of repose and tort actions, the Courts have looked at the wording of the statute of repose and often have taken an approach of judicial activism by expanding the scope of the statute far beyond any arguable legislative intent. No court has explained why the scope of statute of repose should be expanded to contract actions when the Legislature could have included a period of repose in the breach of contract statutory scheme and chose not to do so.

In Ostroth v Warren Regency GP LLC, 474 Mich 36; 709 NW2d 589 (2006) this Court held that the statute of repose “operates as both a statute of limitations and a statute of repose” and thus MCL 600.5839(1) controls or “trumps” both MCL 600.5805(6) and MCL 600.5805(14). However, the Court has not held that the statute of repose MCL 600.5839(1) has any application to the statute of limitations for express contracts MCL 600.5807(8), much less controls, governs or trumps the statute of limitations in contract cases which governs “all actions to recover damages or sums due for breach of contract.” Nothing in *Ostroth* or the legislative history of the statute of repose or any amendment to MCL 600.5805(14), requires an extension of the statute of repose to claims for breach of an express contract or in any other way or manner that would otherwise disturb the customary contractual arrangements regarding construction projects and those parties who are in undeniable “privity” to the various and myriad construction documents.

Miller-Davis requests that this Court clarify the application of the statute of repose, MCL 600.5839(1), and hold the statute of repose has no application to actions for breach of contract under MCL 600.5807. In other words, there is no such thing as a statute of repose for contracts. Any extension or application of the statute of repose that defeats or alters the express contractual promises and allocation of the rights and obligations of the parties to construction contract documents is: (a) contrary to the legislative history and expressed purposes of the statute of repose which was intended to apply to third-party, tort liability and not to replace the general statute of limitations applicable to contracts, (b) contrary to the express wording of the statutes, (c) unnecessary, erroneous, and constitutes an unwarranted judicial extension or “amendment” of MCL 600.5807 by reading into the general contract statute of limitations MCL 600.5839(1), and (d) it is contrary to the interests of justice, undermines and destroys the customary, fundamental, time-tested, effective and practical contractual arrangements that have been developed by the industry to allocate risks and responsibilities associated with construction projects, encourages litigation and discourages voluntarily and flexible non-judicial resolution of construction disputes. These points are addressed below.

If this Court determines the statute of repose is inapplicable to contracts then this will be dispositive of the major questions in this case and the decision of the Court of Appeals must be reversed and the trial court’s judgment reinstated.

3. The Purpose of the Statute of Repose, MCL 600.5839(1), is to Protect Architects, Engineers and Contractors from Tort Claims for Defective and Unsafe Conditions in the Improvements Brought by Third Persons who are not Parties to the Construction Contract.

The legislative history and the decisions of the Supreme Court clearly indicate the purpose of the statute of repose, MCL 600.5839(1), was to deal with tort claims or claims for

negligence or malpractice torts asserted by those who are not in privity to a contractual party or project. This has been recognized and noted in several decisions of the Supreme Court:

The instant legislation [MCL 600.5839(1)] was enacted in 1967 in response to the then recent developments *in the law of torts*. The waning of the privity doctrine as a defense against *suits by injured third parties* and other changes in the law increased the likelihood that persons taking part in the design and construction of improvements to real property might be forced to defend against claims arising out of alleged defects in such improvement, perhaps many years after construction of the improvement was completed. [Emphasis supplied]. *O'Brien*, Mich 410 at 14.

“The expansion of potential *tort liability* in the construction industry is of recent vintage.” [Emphasis supplied]. *Id.* at 19.

By enacting a statute which grants architects and engineers (later amended to include contractors) complete repose after six years rather than abrogating the described causes of action *in toto*, the legislature struck what it perceived to be a balance between eliminating altogether the *tort liability* of these professions and placing no restriction other than general statutes upon the ability of injured plaintiffs to bring *tort actions* against architects and engineers. [Emphasis supplied]. *Ostroth v Warren Regency GP LLC*, 474 Mich 36, 46; 709 NW2d 589 (2006) citing *O'Brien*, 410 Mich at 16.

O'Brien repeatedly states the purpose of the statute of repose was to apply to tort actions and tort liability referring to “victims of the negligence of architects and engineers” and “victims of other tortfeasors,”... and “the duration of the contractor’s tort liability.” *O'Brien, supra*, 410 Mich at 18. MCL 600.5839(1) essentially replicates in part the language of MCL 600.5805 the general statute of limitations for torts. The language of the statute of repose is that of tort referring to:

- (a) “damages for any injury to property... or for bodily injury or wrongful death,”
- (b) arising out of the defective and unsafe condition of an improvement to real property,
- (c) any action for contribution and indemnity for damages sustained as a result of such injury,
- (d) provided the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of the gross negligence on the part of the contractor, licensed architect or professional engineer.” MCL 600.5839(1).

Other jurisdictions recognize that statutes of repose do not apply to contracts. *Fidelity & Dep Co of Maryland v Bristol Steel*, 722 F2d 1160 (4th Cir 1983); *President & Directors of Georgetown College v Madden*, 660 F2d 91 (4th Cir 1981); *City of Bluefield, West Virginia v Autotrol Corp v Babcock Contractors, Inc*, 723 F Supp 362 (1989). In addition, in *Powers & Sons Construction Co Inc v Healthy East Chicago*, 919 NE2d 137 (Ind App 2009), the Court found that a complaint by a construction manager/general contractor against a subcontractor for failure to build in accordance with the contract, even though the claim involved a deficiency in the construction, was governed by the longer contract statute of limitations rather than a shorter negligence or malpractice statute and was not barred by the statute of repose even though the statute of repose referred to contracts. Similarly, the statute of repose regarding construction defects does apply to breach of an express indemnification provision even though the statute of repose refers to “contract.” *Ray & Sons Masonry Contractors, Inc v United States Fidelity & Guaranty Co*, 353 Ark 201, 114 SW3d 189 (2003). See also: *Travelers Casualty & Surety Co v Bowman*, 229 Ill 2d 461, 893 NE2d 583, 323 Ill Dec 311 (2008).

Nothing in the legislative history of MCL 600.5839(1), indicates that the statute of repose was ever intended to replace, alter or otherwise create a statute of repose applicable to contracts. The 1988 Amendment to MCL 600.5805 resulted in making specific reference to MCL 600.5839(1) at MCL 600.5805(14). The “Argument” in support of the bill as contained in the Legislative Analyses to Senate Bill 478 which resulted in the 1988 amendment to MCL 600.5805(14), confirmed it was concerned with “negligence” and confined to tort actions when stating:

“The bill would ensure that, in future claims against engineers, architects, and contractors, the interpretation of the dissenting Judge [Burns] in the *Burrows* case would prevail. Architects, engineers, and contractors should be *protected from suits charging malpractice or negligence in building improvements* after a significant time has passed since the actual performance of the work...” (Emphasis supplied).

The 1988 amendment to MCL 600.5805(14) may have effectively made the period for bringing an action under the tort statute of limitations the same as the period of the statute of repose MCL 600.5839(1) so that the Supreme Court could say in *Ostroth* “the statute of repose operates as both a statute of limitations and a statute of repose.” *Ostroth v Warren Regency GP LLC*, 474 Mich 36, 46; 709 NW2d 589 (2006). However, there was and is no similar provision or amendment which includes reference or injects MCL 600.5839(1) into the general statute of limitations for actions for breach of contract, MCL 600.5807. If the intention was to amend MCL 600.5807, the general statute of limitations applying to actions for breach of contracts, then the legislature could and should have inserted a comparable reference to MCL 600.5839(1) within MCL 600.5807. It did not do so. Because there is no mention of, reference to, or any other indication of any intention to amend the general statute of limitations for actions for breach of contract, MCL 600.5807, or otherwise apply the statute of repose MCL 600.5839(1) and there is in fact no reference to the statute of repose, MCL 600.5839(1) within the general statute of limitations relating to actions for breach of contracts, MCL 600.5807, it cannot be said that the “statute of repose operates as a both a statute of limitations and a statute of repose” when it comes to claims for breach of contract. This should conclude the matter. Parties in privity should be free to set and adjust their own warranty/guarantee periods, define the events and manner of accrual of actions, periods of limitations and enter into tolling agreements. This does not violate any legislative or public policy by permitting parties to “contract out” of the statute of

repose. Rather it recognizes that the statute of repose does not apply to contracts and permits of freedom of contract.

This Court has never held that MCL 600.5839(1) was intended to be read so expansively to extend to contract cases or otherwise alter, amend or replace MCL 600.5807(8) the applicable statute of limitations in contract cases. Any attempt to apply the statute of repose to contracts constitutes warranted and impermissible judicial legislation. It is submitted that any case applying or suggesting MCL 600.5839 or MCL 600.5805 apply to express contracts are simply wrongly decided.

4. Extension of the Statute of Repose to Contract Claims is Unnecessary and Erroneous.

The statute of repose, MCL 600.5839(1), contains the phrase “any action to recover damage for any injury to property, real or personal, or for bodily injury or wrongful death.” The general statute of limitations relating to tort claims, MCL 600.5805(6), contains a similar phrase, “an action to recover damages for injury to persons or property.” In contrast, the general statute of limitations relating to contract claims, MCL 600.5807, contains no such phrase, but rather states, “all other actions to recover damages or for sums due for breach of contract.”

In holding that the statute of repose applied to Miller-Davis’ contract claims, the Court of Appeals misconstrued or read into the statute of limitations relating to contracts, MCL 600.5807, the phrase “injury to property” which appears in both the tort statute of limitations, MCL 600.5805(1) and (14), and the statute of repose, MCL 600.5839(1). It also misconstrued MCL 600.5807 by reading into the statute reference to the statute of repose, MCL 600.5839(1), which appears only under the general statute of limitations dealing with tort claims at MCL 600.5805(14). The Legislature adopted no similar provision for contract actions. The Court of

Appeals not only ignored, but also abolished any distinction, between tort and contract actions in total disregard of the statutory provisions.

The Court of Appeals' decision assumes an unnecessary conflict between the statute of repose, MCL 600.5839(1), incorporated into the statute of limitations relating to torts under MCL 600.5805(14) and the statute of limitations relating to contracts, MCL 600.5807. Such conflict is unnecessary and erroneous. (See: *Garden City Osteopathic Hospital v HBE Corp*, 55 F3d 1126 (6th Cir. 1995) and *City of Litchfield v Union Construction Co*, Docket No. 189823, October 17, 1997, WL 33344061 (Unpublished)(Apx. 38a)). Both of these decisions are consistent with this Court's holding in *Huhtala v Travelers Insurance Co*, 401 Mich 118; 257 NW2d 640 (1977), and explain why there is no need to apply the statute of repose to contract claims. Under the reasoning of *Huhtala*, where the nature and origin of an action is founded upon a "consensual" duty or obligation or breach of an "express promise" as opposed to an action founded "non-consensual" duty or one "imposed by law," such action is not an action "to recover damages for injuries to persons or property," but rather to recover damages for breach of contract and is therefore governed by the general six year statute of limitations, MCL 600.5807(8) and not MCL 600.5839(1).

Decisions from other jurisdictions have refused to apply the statute of repose to breach of express contract claims in construction cases. *Ray & Sons Masonry Contractors, Inc v United States Fidelity & Guaranty Co*, 353 Ark 201, 114 SW3d 189 (2003); *Travelers Casualty & Surety Co v Bowman*, 229 Ill 2d 461, 893 NE2d 583, 323 Ill Dec 311 (2008). *Fidelity & Dep Co of Maryland v Bristol Steel*, 722 F2d 1160 (4th Cir 1983); *The President and Directors of Georgetown College v Madden*, 660 F2d 91, 95 (4th Cir 1981)

There is neither legislative history, well-reasoned precedent, nor any other sound reason to hold that the statute of repose MCL 600.5839(1) ever applies to, controls or otherwise “trumps” actions for breach of express contract, MCL 600.5807(8), ever creates or imposes a statute of repose regarding or on the statute of limitations for breach of contract contained in MCL 600.5807(8). To do so is unnecessary and erroneous. The Court should expressly declare there is no “statute of repose” for contract actions.

5. Extension of the Statute of Repose to Actions on Contractual Promises Undermines and Destroys the Customary, Fundamental, Time-Tested, Effective, Contractual Arrangements that Have Been Developed by the Industry to Allocate Risks, Responsibilities and Rights Associated with Construction Projects.

Modern construction involves large investment, risk and increasingly sophisticated technology. The parties are involved in mutual undertaking which may span considerable time, and their respective roles and the process of construction are governed by a complex network of standardized contracts. The contracts represent the collective wisdom and experience of persons within the industry as to how to best handle the myriad risks and problems, which appear in the very real world of differing circumstances and often unpredictable events.

Sophisticated institutional owners investing in multimillion-dollar facilities and equipment whether in industrial plants, hospitals, colleges, universities, public schools, public works, or other projects, regularly expect, demand and receive project, product, material and equipment guarantees, warranties, and equipment maintenance contracts that may extend well beyond the six (6) year repose period. Mechanical, plumbing, electrical and heating, ventilating and air conditioning (HVAC) equipment may have performance specifications that cannot and are not evaluated or adequately tested until well after completion of a project. Complex HVAC

systems in multistory buildings with a hundred thousand square feet or more may take several heating seasons or even years to balance. Boiler warranties frequently average between 12-15 years; weather sealing and plumbing system warranties average 20 years; decking material warranties may extend up to 25 years; cement based siding and roofing systems and materials regularly have warranties between 10 and 30 years. The payback period or projected amortization period for return of cost savings on “green technology” such as deep geothermal wells or heat exchange pump systems may not begin until 15 years after project completion.

Construction failure problems involve varying degrees of seriousness. Some may create relatively minor difficulties in building function, use or capacity causing only additional operational expense, inconvenience or inefficiency that the owner lives with. Other problems may present a hazard to public health and safety unless corrected. Problems may not surface until after several years of use of a project or facility. The need for intellectual property protection against unauthorized use of architectural design continues well beyond six (6) years.

A post-completion construction problem is frequently difficult to solve because it may have multiple possible or contributing causes and multiple possible solutions. It may require expensive and time-consuming investigation, testing of materials, evaluation and analysis by numerous experts. Analysis of a problem is generally complicated because the activity or function of the building must continue without interruption or interference during investigation and testing. The problem may occur only when particular climatic or weather events or other special conditions are present. A problem may be particularly troublesome especially if certain work, systems or materials are “covered” or “hidden” in which case verification of the true condition can only be accomplished by invasive testing or partial destruction of portions of the

improvement. In such instances the parties usually attempt to exhaust all reasonable alternative solutions, which may involve lesser damage to the improvement before engaging in invasive testing. Major problems may have different possible fixes the respective costs of which must be estimated, weighed and negotiated by responsible parties. Under those and other circumstances it is not uncommon for the parties to enter into tolling agreements to extend the time for investigation, testing, and analysis. Tolling agreements in contract cases are in the public interest because they foster cooperation, reduce costs, encourage creative alternate dispute resolution, minimize litigation and reduce the burdens on an already overworked judiciary and judicial system.

If the statute of repose is applicable to the contractual arrangements among the parties to the construction contract and the parties desire to enter into a tolling agreement until the full nature and extent of the problem can be determined, the parties will be unable to do so. Rather, they will be forced to institute suit because if the statute of repose applies to express contracts it will apply to tolling agreements and make it impossible to preserve an action that “never accrues” or “exists” once the period of repose expires.

Construction agreements contain extensive indemnification clauses, which allocate responsibility among the various parties to the construction documents. Insurance rates may be set depending upon the allocation of risk under the indemnification clauses. Indemnification obligations are not triggered until a claim for loss occurs which may be well after completion of a project. The application of the statute of repose to express contractual claims in the construction industry will interfere with and destroy the traditional ability of the parties to contractually allocate these risks and obligations.

II. THE STATUTE OF REPOSE MCL 600.5839(1) SHOULD NOT BE APPLIED TO THE FACTS OF THIS CASE.

Under the express wording of the statute of repose, MCL 600.5839(1), all of the following must be present for the statute to apply: (a) an action for damages for injury to property, bodily injury or wrongful death, (b) arising out of a defective and unsafe condition of an completed improvement to real property, (c) which is the result of the negligence of the contractor, (d) and “provided that defect is the ...proximate cause of the damage for which the action is brought...” In its literal application of the statute of repose, the Court of Appeals failed to note that “*defective and unsafe condition*” is “conjunctive and not “disjunctive.” “Defective and unsafe,” as compared to “defective or unsafe” condition language is critical to application of statute of repose. Courts have recognized this distinction. *Arden Hills North Home Ass’n v Pentom Inc*, 475 NW 2d 495 (Minn App 1991) affd 505 NW 2d 50 (Minn 1991); *Kosikso v Charles Shutrump & Sons Co*, 21 Ohio St 3d 98; 488 NW 2d 171 (Ohio 1989); *Newark Beth Israel Medical Center v Gruzen & Partners*, 124 NJ 357, 590 A2d 1171 (1991).

The pleadings in this case contain no allegation by the plaintiff or defendant that both a defective and unsafe condition existed regarding the improvement to the property. (Apx. 44a-54a) There is absolutely no claim or finding trial court that any “defective and unsafe condition” ever existed. The word “unsafe” never appears in the Circuit Court’s opinion. There is no claim, finding, or mention of negligence. There is no claim or finding that any defective and unsafe condition proximately caused any damage. There is absolutely no claim or finding that Miller-Davis suffered damage to its person or property. Rather Miller-Davis’ claim was for the cost of correction of Ahrens’ nonconforming work, which consisted of removing and reinstalling the roof deck system. Quite simply, the Court of Appeals clearly erred when it applied the

statute of repose, MCL 600.5839(1) predicated upon a finding that both a defective and unsafe condition existed when there was no evidence or finding of fact on the record that a defective and unsafe condition ever existed.

III. UNDER MCL 600.5839(1), “OCCUPANCY OF THE COMPLETED IMPROVEMENT,” “USE OR ACCEPTANCE OF THE IMPROVEMENT” AND “IMPROVEMENT” REFER TO THE COMPLETED IMPROVEMENT AS A WHOLE BY THE OWNER OF THE IMPROVEMENT WHEN THE OWNER OBTAINS BENEFICIAL USE FOR THE OWNER’S INTENDED PURPOSE. THE LEGISLATURE DID NOT INTEND THAT THE STATUTE APPLY TO SOME “COMPONENT” OF THE IMPROVEMENT THE DEFINITIONS MUST BE CONSISTENT WITH CUSTOMARY INDUSTRY PRACTICE AND MUST RESPECT THE CONTRACTING PARTIES’ RIGHT TO ENTER INTO AGREEMENTS

The statute of repose requires as one of its elements that an improvement be “completed.” One prominent authority in the field of construction law refers to statutes of repose as “completion statutes.” Sweet on Construction Industry Statutes, 2009, Section 23.25 p. 1215. Sweet’s reference to the term “completion statutes” highlights that there is a “trigger event” rather than an “accrual date” for the commencement of the running of the period of repose. Use of the phrase “accrual date” tends to result in confusion because, under a statute of repose, there can be no “accrual” of an action which never exists.

Some statutes of repose use the words “substantial completion” as the trigger date for commencement of the period of repose. “Acceptance of the project usually involves the owner taking possession of the completed project.” Sweet, Legal Aspects of Architecture, Engineering and the Construction Process 6th Ed 2000, p. 266. This date is generally documented by an architect’s certificate of substantial completion. It may be argued that reference to “substantial completion” tends to bring “contract” notions into what are tort statutes and result in confusion of the purpose of the statute of repose. Michigan’s statute of repose does not use “substantial

completion,” but is undeniably a “completion statute” because it refers to “occupancy of the *completed improvement*” and refers to “use or acceptance” of “such [completed] improvement.” Michigan recognizes the analogous doctrine of “full performance” and that it is the owner’s use that is determinative. *Gutov v Clark*, 190 Mich 386, 387; 157 NW 49 (1916)

“Complete” or “completed” as an adjective generally refers to having all parts or elements, lacking nothing, whole, entire, full, total, having all complementary elements. “Completed improvement” for architects and engineers offers few problems because it refers to the design and construction of the completed project as a whole and use by the owner for the owner’s intended purpose. However, when “contractor” was added to the statute of repose the opportunity for confusion crept in. A construction project may have not only multiple construction managers, and/or multiple general contractors, but dozens and possibly hundreds of subcontractors, sub-subcontractors, suppliers and downstream parties all of whom provide labor, materials and other services or have a role in the completion of the improvement. This is further complicated by the fact that components of any project have no value to an owner in isolation. Roof trusses, open web bar joists, structural steel, electrical, plumbing, heating, ventilating and air conditioning (HVAC) equipment, etc., are fabricated off-site for delivery, assembly and incorporation into the project. Any attempt to break a “completed improvement” down into its component parts and then redefine “completed improvement” with regard to each, single participant’s work and use the date any single participant “finishes” its work on the completed improvement as the trigger date for commencement of the repose period is fraught with problems. The Court of Appeals acknowledged “ambiguity” in the statute of repose, (Apx. 40a) but in viewing “acceptance” or “use” of a single “component” of a construction project to start

the running of the statute of repose, the Court of Appeals used a “component” approach. The result of such an approach is confusion compounded. Other panels of the Court of Appeals have specifically rejected and refused to adopt a “component” approach when defining an “improvement” to real property or construction project in applying the statute of repose, criticizing and rejecting a “component” approach as “artificial, unrealistic and impractical” and held that an “improvement” or project must be viewed “as a whole.”

At least three (3) different panels of the Court of Appeals have recognized that improvements “consist of a complex system of components” and that “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 an improvement to real property is.” *Citizens Ins Co v Scholz*, 268 Mich App 659, 669; 709 NW2d 164 (2005); *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 411; 557 NW2d 127 (1996); *Fennell v Nesbitt, Inc*, 154 Mich App 644, 650-651; 398 NW2d 481 (1986). See also *Adair v The Koppers Co, Inc*, 741 F2d 111 (CA 6, 1984). This interpretation is “according to the rules of grammar in common usage... [and the] analysis is consistent with the purpose of Michigan’s statute of repose.” *O’Brien v Hazelet & Erdal*, 410 Mich 1, 14; 299 NW2d 336 (1980); *Pendzsu, supra*, 219 Mich App at 410-411. “[O]ur previous decisions, ...consider the project as a whole and not as isolated components in determining whether the injury involves an improvement to real property.” *Citizens*, 268 Mich App at 666. [T]his is a “common-sense analysis.” *Id.* at 667.

Thus, an “improvement to real property” means the completed project “as a whole” and not as isolated series of discrete components in determining application of the statute of repose in the first instance and consistency demands that the terms “use,” “acceptance” and “occupancy”

be defined in the context of the “project as a whole.” Further it must be defined in terms of the *Owner’s use* of the completed project. The goal of all construction bargains is successful use of the resulting work. The owner bargains for a completed project – not just components. The whole is greater than the sum of its parts and an owner is never said to meaningfully “occupy,” “use,” “accept,” or otherwise receive the beneficial use and enjoyment of a project until it is completed “as whole.” “Use, acceptance or occupancy” have meaning only in terms of completion of a project “as a whole” and then can be measured only in terms of the owner’s intended use. You never know if a boat will float until it is launched upon the water. So it is with a construction project. All of the components are never put to the test until the project is completed, the owner obtains occupancy, the equipment and mechanical, electrical, heating, ventilating, and air-conditioning (HVAC) and other systems are activated, and the project is tested by the elements, sun, wind, water, snow and ice as the seasons cycle.

The impracticality of the “component approach” to the completion of an “improvement” or construction project becomes readily apparent when extended to its logical conclusion. If “use” and “acceptance” are not defined in light of the function and benefit to be derived by the owner from completion of “a complex system of components” or the “completed improvement” or project “as a whole,” then every single brick, nail, board, shingle, pipe and wire may be said to be “used” or “accepted” the minute they are put in place without regard to their integration, ultimate function, use, application, and suitability in relation to all other components which comprise the project “as a whole.”

To view each component in “isolation” is not only “unrealistic and impractical,” but utterly contrary to the customs and practices in the construction industry, which are codified in

various standardized construction documents and represent the collective experience, practical wisdom, and time-tested solutions to common problems, which arise on construction projects.³ Standardized construction documents recognize the need to establish a single, identifiable date for project completion, final payment, commencement of guarantees and post-completion obligations. To avoid the problems posed by a component approach to project completion or the terms “occupancy,” “use” or “acceptance,” standard construction documents provide for a “date of substantial completion” which is generally determined by the project architect or design professional. Depending upon the jurisdiction, the “date of substantial completion” typically coincides with the date the local building authority issues a “certificate of occupancy,” which is never granted until all inspections have been completed including inspections by the State Fire Marshall and other local building inspectors.⁴

³ Standard documents include those generated by and in common use by various industry groups including those of the American Institute of Architects (AIA), the Association of General Contractors (AGC), the American Builders and Contractors (ABC), the Engineers Joint Contract Document Committee (EJCDC), Construction Management Association of America (CMAA), and governmental agencies, including the State of Michigan. Standard forms include “General Conditions” may be of such length they have indexes which may make reference to hundreds of pages of detailed plans and specifications, as well many detailed drawings and documents generated during the construction of the project. The AIA standard forms are the most widely used and of such detail, extent and complexity they are the subject of a 2 volume set: Sweet on Construction Industry Contracts: Major AIA Documents, 5th Edition by Justin Sweet and Jonathan J. Sweet, published by Aspen Law & Business and another 2 volume set, Legal Guide to AIA Documents, by Werner Sabo, 5th Edition also published by Aspen Law & Business.

⁴ Substantial Completion was defined in Miller-Davis’ Contract Documents AIA General Conditions, 1987 Edition, Section 9.8.1: Substantial Completion is the stage in the progress 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.* [Emphasis supplied]. For comparison see the definition of “Substantial Completion” contained in State of Michigan Department of Management and Budget Form, Project Construction Management Services, Contract for Construction Management Services (Apx. 14a, No. 50, p.7, Ex. 31) Substantial Completion: Shall mean the standard document form (DMB-445) for the Project work, or a portion of the Project work designated in the Prime Professional Services Contractor (Architect/Engineer) firm’s final design Contract Documents/architectural and/or engineering drawings and specifications as eligible for separate Substantial Completion, has been completed in accordance with the design intent of the Prime Professional Services Contractor, (Architect/Engineer) firm’s final design Contract

In *Male v Mayotte, Crouse & D'Haene Architects, Inc*, 163 Mich App 165, 169; 413 NW2d 698 (1987), the certificate of substantial completion “drafted and accepted by the State” was determinative of the date for the running of the applicable statute of limitation or repose. Similarly, the Court of Appeals should have held that the contractually established, defined and agreed “date of substantial completion” (Apx. 322a-322) of the Sherman Lake YMCA Project was determinative and binding on all parties including the project owner, the construction manager, Miller-Davis Company, and the contractor/subcontractor, Ahrens.

The Court of Appeals erred when it ignored this precedent, the parties’ agreed definitions, the contractually defined date, and the codified industry definitions and the collective wisdom, time-tested and practical experience of the industry. The Court of Appeals’ Opinion is at odds with the opinions of other panels of the Court of Appeals because it artificially extracted components and looked at an isolated component as the basis for determining “use, acceptance, or occupancy” of the construction project. In so doing it adopted and applied an unrealistic and impractical method of determining the time for commencement of the statute of repose.

Documents/architectural and/or engineering drawings and specifications, *to the extent that the Department of Management and Budget, Facilities Administration, Design and Construction Division and the State/Client Agency can use or occupy the entire Project work., or the designated portion of the Project work, for the use intended without any outstanding, concurrent work at the Project work site, except as may be required to complete or correct the Project work Punch List items.* Prerequisites for Substantial Completion, over and above the extent of Project work, completion required, shall include the following items; (a) Receipt by the Department of all required Contract operating and maintenance documentation; (b) All systems have been successfully tested and demonstrated by the Construction Contractor for their intended use; and (c) Receipt by the Department of Management and Budget, Facilities Administration, Design and Construction Division of all required contract certifications and /or occupancy approvals from the State of Michigan and those of political subdivisions having jurisdiction over the Project work. Receipt of all required Contract certifications and/or occupancy approvals from those political subdivisions with jurisdiction in and of itself does not necessarily imply Substantial Completion. [Emphasis supplied].

Under the facts of this case and the express terms of the agreement, there never was and never could be occupancy of the completed improvement, use, or acceptance of all or any portion of Ahrens' work prior to Substantial Completion. Because Ahrens' work was nonconforming, even Substantial Completion could not relieve Ahrens from its obligation to correct the nonconforming work. The Court of Appeals interpretation and the application of the phrase "occupancy of the completed improvement, use or acceptance of the improvement," is totally unsupported under the facts and circumstances of this case, is directly at odds with the standard documentation and industry practice.

Therefore contrary to any suggestion or conclusion of the Court of Appeals, there could never be and never was at any time or in any manner "occupancy, use or acceptance" by any party of Ahrens' nonconforming work prior to Substantial Completion. The Court of Appeals' use of a "component approach" should be rejected and its opinion reversed.

IV. MILLER-DAVIS' COMPLAINT WAS TIMELY FILED UNDER MCL 600.5807(8) AND UNDER THE CONTRACTUAL PROVISIONS BETWEEN THE PARTIES PROVIDING FOR THE ACCRUAL OF ACTIONS.

A. The Legal Principles Regarding Accrual of Actions for Breach of Contract:

The applicable period of limitations for a claim for breach of contract is six (6) years. MCL 600.5807(8). "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues." MCL 600.5827. A claim for breach of contract accrues "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." MCL 600.5827. A breach of contract claim generally accrues when the contract is breached. *AFSCME v Highland Park Bd of Ed*, 457 Mich 74, 90; 577 NW2d 79 (1998), *Boyle v General Motors Corp*, 468 Mich 226, 231; 661 NW2d 557 (2003).

Obligations for breach of contract that arise upon demand for performance do not accrue until demand is made and refused, or a reasonable amount of time has elapsed without demand. *Jackson v Estate of Green*, 484 Mich 209; 771 NW2d 675 (2009); *Smith v Smith Estate*, 91 Mich 11; 51 NW 694 (1892). A claim for breach of an express warranty is a promise of future performance and accrues after notice of the claim within the warranty period and after the warrantor refuses to fulfill its warranty obligation. *Day Masonry v Independent School District*, 781 NW2d 321 (Minn 2010); *Vlahos v R & I Construction of Bloomington, Inc*, 676 NW2d 672, 678 (Minn 2004). An action on an express contract of indemnification accrues or runs from the time “when the indemnitee sustained the loss.” *Ins Co of North American v Southwestern Electric Co, Inc*, 405 Mich 554, 557; 275 NW2d 255 (1979) or “when the promisor fails to perform under the contract.” *Cordova Chem Co v Dep’t of Natural Resources*, 212 Mich App 144; 536 NW2d 860 (1995) as cited in *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008). The parties to a contract may reasonably shorten the period of limitations by conduct or agreement. *Zahn, supra, Rory v Continental Ins Co*, 473 Mich 467; 703 NW2d 23 (2005), overruling *Camelot Excavating Co v St Paul Fire & Marine Ins Co*, 410 Mich 118; 301 NW2d 275 (1981). The parties to a contract may establish their own dates for claims commencement. *Male v Mayotte, Crouse & D’Haene Architects, Inc*, 163 Mich App 165, 169; 413 NW2d 698 (1987). A claim for “breach of warranty of quality or fitness accrues at the time the breach of the warranty is discovered or reasonably should be discovered.” MCL 600.5833.

B. Summary of Accrual Dates Confirming Miller-Davis’ Timely Filing:

The time for bringing an action did not begin until the “*last to occur*” of (a) the date of Substantial Completion, (b) Ahrens’ failure to act pursuant to any warranty, or (c) Ahrens’

failure to perform any other duty or obligation owing under the Contract Documents. (Apx. 299a) Substantial Completion occurred on the Guarantee date of June 11, 1999. (Apx. 322a-323a) Ahrens failed and refused to perform in July 2003. (Apx. 19a, 140a) Miller-Davis' suit was timely filed on May 12, 2005 or within six (6) years after June 11, 1999. (Apx. 44a)

The Guarantee dated June 11, 1999, and the General Conditions Section 12.2.2 provided that the one-year warranty period commenced June 11, 1999. (Apx. 297a, 322a) Ahrens received notice of the problems with its work well within the one-year warranty period, acknowledged its warranty obligations and returned to correct various problems with the Roof System, but denied any contract breach. (Apx. 18a-19a) The defective workmanship was discovered during the partial roof tear-off on February 26, 2003. In July of 2003, after notice, Ahrens manifested its inability and unwillingness to honor its obligations. Miller-Davis' suit was timely filed within six (6) years thereafter on May 12, 2005. (Apx. 44a)

Miller-Davis' right to perform, backcharge and to be indemnified for the cost of the correction of Ahrens' nonconforming work accrued no earlier than December 8, 2003 when Miller-Davis completed the corrective work. (Apx. 362a) Miller-Davis' suit was timely filed within six (6) years thereafter, on May 12, 2005. (Apx. 44a) The dates for accrual and time for commencement of all of Miller-Davis' contractual claims occurred and the action was under the statutory and extended contractual periods provided for in the Contract Documents.

The Court of Appeals erroneously determined completion dates for Ahrens' work. The Court Appeals used those findings and dates as the trigger events for commencement of the statute of repose. However, the Court failed to recognize that, on June 11, 1999, Ahrens gave a separate written Guarantee of its work setting a trigger date for promises at June 11, 1999. (Apx. 322a) This Guarantee promised future performance, independent of any possible repose period. Any repose period does not apply to the Guarantee, so Ahrens' subsequent breach of the Guarantee in July 2003 did not fall within any period of repose.

CONCLUSION AND RELIEF REQUESTED

Plaintiff/Appellant Miller-Davis submits: (1) the general statute of limitations relating to contracts, MCL 600.5807(8), governs this contract case and its complaint was timely filed, (2) the statute of repose, MCL 600.5839(1), does not apply to the express contractual obligations between the parties to a construction contract, (3) the elements of the statute of repose are not present here, and (4) the statute of repose did not bar Miller-Davis' Complaint because the parties negotiated specific contractual provisions for the accrual of actions which were not rendered meaningless by the statute. Miller-Davis respectfully requests that this Court reverse the decision of the Court of Appeals.

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