

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. A05-00199-CK

REPLY BRIEF – APPELLANT

-- ORAL ARGUMENT REQUESTED --



ALFRED J. GEMRICH (P13913)  
Attorney for Plaintiff/Appellant  
GEMRICH LAW PLC  
2347 West Dowling Road  
Delton, Michigan 49046  
269.623.8533

SCOTT GRAHAM (P41067)  
Attorney for Plaintiff/Appellant  
SCOTT GRAHAM PLLC  
1911 West Centre Avenue, Suite C  
Portage, Michigan 49024  
269.327.0585

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. AHRENS' BRIEF CONTAINS NUMEROUS STATEMENTS OR ASSERTIONS PURPORTING TO BE "FACTS" WHICH ARE ERRONEOUS, MISLEADING, AND UNSUPPORTED BY AND/OR CONTRARY TO THE RECORD AND EXPRESS FINDINGS OF THE CIRCUIT COURT.....	1
II. AHRENS CANNOT NOW BE HEARD TO COMPLAIN THAT THE STATUTE OF REPOSE DOES NOT APPLY BECAUSE ITS WORK WAS NOT FOUND TO BE BOTH "DEFECTIVE AND UNSAFE.".....	3
III. THE COURT SHOULD NOT ADD ONE MORE WORD TO THE STATUTE.....	6
IV. TORT REFORM WAS NEVER INTENDED TO BE CONTRACT REFORM. BY HOLDING THE STATUTE OF REPOSE DOES NOT APPLY TO CONTRACTS, THE RIGHT OF THE PARTIES TO CONSTRUCTION CONTRACTS TO CONTRACTUALLY ALLOCATE UNINSURED AND/OR UNINSURABLE RISKS IS PRESERVED.....	7
CONCLUSION.....	10

**TABLE OF AUTHORITIES**

**CASES**

*Arden Hills North Homes Association v Pentom Inc.*  
475 NW 2d 495 (Minn. App. 1991)..... 5

*E.A. Williams Inc. v Russo Development Corp.*  
82 NJ 160, 411 A 2d 697 (1980)..... 5

*Greczyn v Colgate Palmolive*  
183 NJ 5, 11, 869 A2d 866 (2005)..... 6

*Kocisko v Charles Shutrump & Sons Company*  
21 Ohio St. 3<sup>rd</sup> 98, 488 NE 2d 171, 21 OBR 392 (1986)..... 5

*Newark Beth Israel Medical Center v Gruzen and Partners*  
124 NJ 357, 590 A 2d 1171 (1991)..... 7

*Ray & Sons Masonry Contractors Inc. v United States Fidelity & Guaranty Co.*  
353 Ark 201, 114 SW3d 189 (2003)..... 6, 8

*Sherbrook Company v E & H Earth Movers Inc.*  
419 NW 2d 818 (Minn. App. 1988)..... 5

*State of Connecticut v Lombardo Brothers Mason Contractors Inc.*  
51 Conn. Sup 265, 980 A2d 983 (2009)..... 8

**STATUTES**

MCL 600.5839 ..... 2

MCL 600.5839(1) ..... 6

MCL 600.5895(14) ..... 3

**I. AHRENS' BRIEF CONTAINS NUMEROUS STATEMENTS OR ASSERTIONS PURPORTING TO BE "FACTS" WHICH ARE ERRONEOUS, MISLEADING, AND UNSUPPORTED BY AND/OR CONTRARY TO THE RECORD AND EXPRESS FINDINGS OF THE CIRCUIT COURT.**

Appellee's Brief contains numerous alleged "facts" which are misleading, erroneous, unsupported by and/or contrary to the record and express findings of the Circuit Court. These include:

1. "A dripping problem, otherwise referred to as the 'Natatorium Moisture Problem' or "NMP", first appeared inside and outside the Pool...." Appellee's Brief, p. 2 (emphasis supplied). This statement is absolutely without foundation. There is no allegation, evidence, offer of proof, or finding that any moisture problem was ever observed or ever occurred outside the pool room or outside the Natatorium building.

2. "The following schematic shows the component parts of the Timber Deck Roof that Ahrens Construction assembled." Appellee's Brief, p. 2. This statement and the "schematic" which was never an exhibit at trial are both misleading and inaccurate. Ahrens' work did not include and Ahrens did not provide, "assemble" or install the "Building Felt" or the "Standing Seam Metal Roof." The "schematic" fails to show a crucial fact: the ceiling was of "tongue and groove construction." Most significantly, the "schematic" fails to mention or show the 1,000 to 1,200 wooden Sub T's that were nailed in place as a structural part of the Timber Deck Roof System. (See Apx 310a regarding the requirement and installation of Sub T's)

3. The conjectural and speculative explanation of the "cause of the NMP" appearing on pages 2 and 3 of Appellee's Brief is contrary to the express findings of the Trial Court regarding the cause of the NMP which state:

This Court finds that this deficiency, [improper installation of the block insulation], along with the shoddy installation of the vapor barrier (specifically, the rips, tears and lapping issues), was the cause of the NMP. Apx 23a -24a.

4. References to a “design error” or “redesign” and that the use of “Procor” constituted a “redesign,” as stated at pages 3 and 4 of Appellee’s Brief, is contrary to the following express findings of the Circuit Court, which stated:

...this Court finds that the introduction of Procor and spray urethane into the system as part of the corrective action was necessary to avoid costly removal of the wooden components of the Timber Deck System, and by so doing it lowered the overall costs of the repair. In short, introduction of these components was a mitigation of damages.” Apx 24a.

In fact, application of the Procor allowed the reinstallation of the vapor barrier and foam block insulation without removal of the 1,000 to 1,200 wooden Sub T’s that were nailed in place at right angles to the T’s and which comprised an important structural component of the Timber Deck Roof System. Removal of the Sub T’s would have compromised the structural integrity of the pool ceiling and roof deck system. Leaving the Sub T’s in place substantially reduced the cost of the corrective work and thereby was important in mitigating damages.

5. Ahrens’ statement that the “Legislature recognized that there are several legal theories potentially applicable to construction law suits including [claims based on] (1) ... negligence, (2) ...contract... (3) Uniform Commercial Code, (4) product liability, and (5) ...fraud[,]” appearing in Appellee’s Brief, p. 6, is without support in the legislative history of MCL 600.5839. Miller-Davis’ counsel has reviewed all known and/or available documents in the Michigan Archives, the Michigan State Library, the Michigan State Bar Library, the Senate and House journals and judiciary committee activities relating to the statute and has found reference only to the legal theories of tort, malpractice and negligence. All three of First, Second and Third Legislative Analyses of SB 278 which amended what is now MCL 600.5839 to

include protection for contractors to make reference in the first paragraph to “the standard tort statute of limitations.” The most detailed review and criticism of the extension of the statute of repose to contractors is contained in the Senate Judiciary Committee files regarding SB 278. It is a “Statement in Opposition” provided by the Michigan Trial Lawyers Association. It contains no reference to contractual liability, but the word “negligent” or “negligence” appears at least 19 times within the 4-page document and refers to third party tort claims and a 1981 collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri that killed 113 people and injured 212 others. All or both the First and Second Legislative Analyses regarding SB 478 which became what is now MCL 600.5895(14) state:

“The bill would ensure that, in future claims against engineers, architects, and contractors, the interpretation of the dissenting judge 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 performance of the work.” (emphasis supplied)

There is no mention in the legislative history of any legal theories other than those based upon tort, malpractice or negligence and, in particular, none relating to “contract.”

6. Statements that “...water dripping from the roof onto...the sidewalk outside the building...” and “[d]ripping water outside, which occurred during winter weather, causes ice on the sidewalk,” appearing at Appellee’s Brief, p. 12, are unsupported by any portion of the record.

The NMP was a phenomenon that occurred entirely within the pool room.

**II. AHRENS CANNOT NOW BE HEARD TO COMPLAIN THAT THE STATUTE OF REPOSE DOES NOT APPLY BECAUSE ITS WORK WAS NOT FOUND TO BE BOTH “DEFECTIVE AND UNSAFE.”**

Ahrens acknowledges the statute of repose applies only to conditions that are both “defective and unsafe.” Miller-Davis never maintained in pleadings or at trial that Ahrens’ work was “defective and unsafe” and from the outset Ahrens denied and continued to deny its work

was “defective”- much less “unsafe.” Ahrens had a full evidentiary hearing on its motion for summary disposition contending the statute of repose applied, but never claimed or created any record that its work was “defective and unsafe.” Ahrens took an interlocutory appeal of the denial of its motion, but never claimed its work was “defective or unsafe.” During the eight days of trial, Ahrens had ample opportunity in which to present evidence, make an offer of proof or otherwise create a record to show that its work was “defective and unsafe.” Nonetheless Ahrens steadfastly maintained its work was not “defective” and did not cause the NMP and failed to present evidence or offer any proof that its work was “defective and unsafe.” After the Trial Court presented its findings of fact and conclusions of law, Ahrens filed a post-trial motion, but never sought to supplement such findings or request the trial court make any finding that Ahrens’ work was “defective and unsafe.” Now, Ahrens has reversed its position arguing that the allegations of the parties, the proofs presented during the eight-day trial, and the explicit findings of the Circuit Court are insufficient to establish whether its work created a condition that was “defective and unsafe.” Ahrens’ claims it should have some further opportunity to show or somehow make a record to establish its work was in fact both “defective and unsafe.” Ahrens cannot have it both ways. Whether by waiver, failure of preservation or proof, silence, inaction, assertion of inconsistent and contradictory claims or other means Ahrens has attempted to lay a trap for Miller-Davis or the Trial Court. Ahrens now finds itself hoisted on its own petard and cannot now be heard to complain.

Cases in other jurisdictions with similar statutes requiring that a condition be both “defective and unsafe” have clearly acknowledged and required that both conditions be present for application of the statute of repose and found that the allegations contained in the pleadings are sufficient to determine the application of the statute of repose to claims. In *Arden Hills*

*North Homes Association v Pentom Inc.*, 475 NW 2d 495 (Minn. App. 1991), claims regarding defectively installed and deteriorating siding were not barred by the statute of repose because while the work was “defective,” both requisite conditions of being “defective and unsafe” were not present and the argument that because the negligent construction resulted in physical deterioration of the siding, the court should have found the townhouses “unsafe” was rejected. In *Sherbrook Company v E & H Earth Movers Inc.*, 419 NW 2d 818 (Minn. App. 1988), a claim for breach of contract against an excavator for defective work in failing to grade, grub and render property suitable for building foundations was not barred by the statute of repose because the claim was based solely on a defective improvement, rather than a “defective and unsafe condition.” In *Kocisko v Charles Shutrump & Sons Company*, 21 Ohio St. 3<sup>rd</sup> 98, 488 NE 2d 171, 21 OBR 392 (1986), a claim to correct a roof, leaking from the time of installation, brought 11 years after completion was governed by the 15-year contract statute of limitations and not barred by the 10-year statute of repose because “No ‘injury’ to person or property arising out of a defective and unsafe improvement to real property is alleged.” *Id* at 99. In *E.A. Williams Inc. v Russo Development Corp.*, 82 NJ 160, 411 A 2d 697 (1980), a statute of repose applying to any “action brought in contract, tort or otherwise” that required both a “defective and unsafe” condition did not bar claims against a surveyor for defective survey work resulting in the wrongful location of a building because while the survey was admittedly erroneous and “defective,” it did not result in creation of a hazardous or unsafe condition and “the adjectival clause relating to ‘defective and unsafe conditions’ qualified all of the situations mentioned in the statute.” *Id* at 170.

While Ahrens’ nonconforming work might have been “defective,” totally absent from the record is any allegation, evidence, offer of proof, or finding that it was “unsafe.” The NMP

resulted in conditions described as similar to a “rain forest” effect within the Natatorium. People swimming in the indoor pools are required to shower before entering the pool area. If they are not wet enough before they enter the pool area, they get wetter when they enter the pool. The floor around a swimming pool is always wet from persons coming and going to and from the showers and the pool and splashing from the swimmers’ water activities. There was no evidence or any report of any accident or injury because of the NMP or any complaint by the Owner that the NMP created any health hazard or increased risk to persons using the Natatorium. The statute of repose does not cover all actions and has no application in this case.

### **III. THE COURT SHOULD NOT ADD ONE MORE WORD TO THE STATUTE.**

Appellee’s Brief, p. 16 states: “If the Legislature had intended to limit the Statute of Repose to occupancy or use by the owner, it could easily have added those 3 words...It did not, and those 3 words should not be written into the statute by this Honorable Court.” Some states’ statutes of repose specifically provide that they apply to “contracts.” See *Ray & Sons Masonry Contractors Inc. v United States Fidelity & Guaranty Co.*, 353 Ark 201, 114 SW3d 189 (2003); *Greczyn v Colgate Palmolive*, 183 NJ 5, 11, 869 A2d 866 (2005). Michigan’s statute of repose MCL 600.5839(1) contains no reference to “contracts.” Applying Ahrens’ own logic, it may be said that, “If the legislature had intended Michigan’s statute of repose to include ‘contracts’ it could have easily added one more word. It did not. Therefore that word should not be written into the statute by this Honorable Court.”

**IV. TORT REFORM WAS NEVER INTENDED TO BE CONTRACT REFORM. BY HOLDING THE STATUTE OF REPOSE DOES NOT APPLY TO CONTRACTS, THE RIGHT OF THE PARTIES TO CONSTRUCTION CONTRACTS TO CONTRACTUALLY ALLOCATE UNINSURED AND/OR UNINSURABLE RISKS IS PRESERVED.**

In the ultimate analysis, statutes of repose shift the burden of loss from design professionals and contractors to the owners and the unarticulated, underlying issue is generally who will bear the loss of uninsured or uninsurable risks as opposed to insured or insurable risks. This shifting of risk to an owner after a suitable period is considered equitable because the longer the structure is in use by the owner, the greater the likelihood that defects are the result of the owner's action or inaction, improper or deferred maintenance, natural causes, ordinary wear and tear, etc. If the shifted risks involve claims by third parties for injury or damage from defective and unsafe conditions in the structure, these are generally insurable risks and the owner in possession should, can and does cover such risks by insurance. The problem is with the uninsurable risks or claims that do not arise out of injuries to third persons caused by defective and unsafe conditions. Such claims may be by and between an owner, design professional, contractor and/or person engaged in the construction process for defects in the construction itself. These claims generally involve risks that are uninsurable or difficult to insure. The defects may not manifest themselves or be discoverable, discovered, or fully identified, diagnosed and the resulting claims may not "ripen" or be quantifiable until a considerable period of time after project completion. Such claims may be very substantial, and require considerable effort to correct. The often unspoken issue behind the application of the statute of repose to such claims is who will bear the risk of such uninsurable losses. See *Newark Beth Israel Medical Center v Gruzen and Partners*, 124 NJ 357, 590 A 2d 1171 (1991), involving \$1 million claims for costs incurred in correction of a structure that was part of phased construction and safe and

functionally sound as built, but 12 years after completion, it was discovered to be inadequately designed to safely support and permit an expansion that was part of an original master plan. If a statute of repose applies to contracts, then at the expiration of the repose period, uninsurable risks are shifted from the design professionals and contractors to the owner irrespective of guarantees that extend beyond the repose period. If the statute of repose applies to indemnification contracts, then the risk of indemnification obligations is also shifted to the owner and away from the party responsible for the loss. See *Ray & Sons Masonry Contractors Inc. v United States Fidelity & Guaranty Co.*, 353 Ark 201, 114 SW3d 189 (2003) in which the statute of repose specifically applied to “an action in contract,” but the court distinguished between an action for damages for breach of a construction contract and deficiencies in construction stated in the contract and an action for breach of an indemnification provision in a construction contract and refused to apply the statute of repose to bar the action for indemnity. Thus, a subcontractor could not avoid its contractual indemnification obligations for correction of \$1.5 million of its defective work.

By holding that Michigan’s statute of repose does not apply to contracts, these difficult problems are avoided and the owner, design professionals and contractors are free to negotiate and allocate these generally uninsurable risks between themselves. The case of *State of Connecticut v Lombardo Brothers Mason Contractors Inc.*, 51 Conn Sup 265, 980 A2d 983 (2009) suggests that leaving such matters to the parties to a construction contract is not only permissible, but fair and prudent. In *Lombardo*, the State of Connecticut brought an action alleging breach of contract against a construction manager (“CM”) and others in connection with the design and construction of the University of Connecticut Law School Library more than 16 years after commencement of design and more than 12 years after contract completion. The

contract contained: (1) “a period of repose provision” of 7 years after substantial completion, (2) “a limitation of remedies provision,” and (3) “a specific articulation of the liability considerations pursuant to which the parties negotiated the contract limitations and allocation of risk.” The contract: (a) made specific reference to Connecticut’s statute of repose which included “contracts,” and (b) enumerated considerations upon which the liability provisions as between the State and the CM were based. The State of Connecticut argued vigorously that the ancient maxim that “no time runs against the king” applied and the court acknowledged: “A long established common-law principle in Connecticut holds that ordinary statutes of limitation do not apply to government claims.<sup>1</sup>” Nonetheless the Connecticut Supreme Court rejected the State’s arguments stating:

“The contract plainly states that [the CM] and the state premises the contract’s limitations and allocation of risk on a host of considerations that the state now claims do not apply to the states...Contract provisions that limit the time in which a lawsuit can be brought are an enforceable perquisite with respect to liability. These conditions are a separate concept from the statute of limitations and therefore must be met as a predicate to any legal action...The provision in the contract incorporating a period of repose functions as a contractual limitation to which the doctrine nullum tempus simply does not apply. Specifically, contraction obligations must bind governmental entities in the same manner those provisions bind any other contracting party.” *Id* at 280-282.

By holding Michigan’s statute of repose does not apply to contracts, the fundamental right and freedom of the parties to the construction agreement to allocate risks and

---

<sup>1</sup> For perspective on statutes of repose adopted by different states and the District of Columbia, it should be noted the repose periods vary from 4 years to 15 years, with 10 years being perhaps a most common period. One state has a “two-tier” repose period with a shorter period for patent and a longer period for latent defects. New York has no statute of repose. A study reported at 367 Hearings in H.R. 6527, H.R. 6678 and H.R. 11544 before Subcomm. No. 1 of the House Comm. on Dist. of Columbia, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. 28 (1977) based on 570 random suits against architects found 37.1% of all claims were brought within 1 year, 56.3% within 2 years, 73.1% within 3 years, 84.3% within 4 years, 89.7% within 5 years, 93% within 6 years, 97.9% within 7 years, 98.7% within 8 years, 99.2% within 9 years, and 99.6% within 10 years. Some statutes of repose specifically refer to contracts. Some specifically exclude express contracts of indemnification as opposed to common law indemnification. Many states provide that the repose period commences upon “substantial completion.” The Model Statute of Repose endorsed by the American Institute of Architects, the American Council of Engineering Companies, the American Society of Civil Engineers and the National Society of Professional Engineers uses “substantial completion” as the trigger for commencement of the repose period which it defines as “when the construction is sufficiently complete so that an improvement may be utilized by its owners or lawful possessor for the purposes intended.” Some statutes refer to “defective and unsafe conditions; others refer to “defective or unsafe conditions.”

responsibilities among themselves is preserved. The statute of repose was never intended to apply in this instance. Tort reform was never intended to be contract reform.

**CONCLUSION**

Miller-Davis respectfully requests that this Court reverse the decision of the Court of Appeals.

**Date: January 10, 2011**

**GEMRICH LAW PLC**

By:   
Alfred J. Gemrich (P13913)  
Attorney for Plaintiff/Appellee

Business Address:  
2347 West Dowling Road  
Delton, Michigan 49046  
(269) 623-8533

**SCOTT GRAHAM PLLC**

By:   
Scott Graham (P41067)  
Attorney for Plaintiff/Appellee

Business Address:  
1911 West Centre Avenue, Suite C  
Portage, Michigan 49024  
(269) 327-0585