

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS**

**(Kathleen Jansen, P.J., Joel P. Hoekstra and Jane Markey, JJ.)**

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MILLER DAVIS COMPANY,

Plaintiff-Appellant,

v

Docket No. 139666

AHRENS CONSTRUCTION, INC.,

Defendant-Appellee,

and

MERCHANT BONDING COMPANY,

Defendant.

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**Brief on Appeal - Appellee**

**ORAL ARGUMENT REQUESTED**

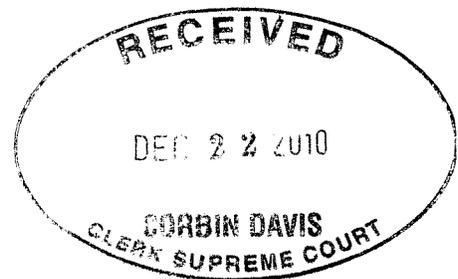
DATED: December 21, 2010

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**STATEMENT OF BASIS OF JURISDICTION**

Jurisdiction for the above-captioned appeal was granted by the Supreme Court on September 29, 2010 (Apx 43a).

**QUESTIONS PRESENTED FOR REVIEW**

**QUESTION 1**

DOES THE STATUTE OF REPOSE, MCL 600.5839, GOVERN ALL ACTION AGAINST ARCHITECTS, ENGINEERS, AND CONTRACTORS TO RECOVER DAMAGES FOR ANY INJURY TO PROPERTY, REAL OR PERSONAL?

The Court of Appeals said: ..... "YES"

Plaintiff-Appellant says: ..... "NO"

Defendant-Appellee says: ..... "YES"

**QUESTION 2**

DOES THIS PARTICULAR CASE CONSTITUTE ANY ACTION TO RECOVER DAMAGES FOR ANY INJURY TO PROPERTY ... ARISING OUT OF THE DEFECTIVE AND UNSAFE CONDITION OF AN IMPROVEMENT TO REAL PROPERTY?

The Court of Appeals did not directly address the issue

Plaintiff-Appellant says: ..... "NO"

Defendant-Appellee says: ..... "YES"

**QUESTION 3**

WHEN DOES A CLAIM FOR BREACH OF A CONSTRUCTION CONTRACT "ACCRUES" UNDER MCL 600.5807(8)?

The Court of Appeals did not address the issue

Plaintiff-Appellant says: ..... "Last wrong"

Defendant-Appellee says: ..... "First wrong"

**QUESTION 4**

IS OCCUPANCY, USE, OR ACCEPTANCE OF THE IMPROVEMENT" UNDER MCL 600.5839 LIMITED TO OCCUPANCY, USE OR ACCEPTANCE BY THE OWNER OF THE PROPERTY?

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The Court of Appeals impliedly said: .... "NO"

Plaintiff-Appellant says: ..... "YES"

Defendant-Appellee says: ..... "NO"

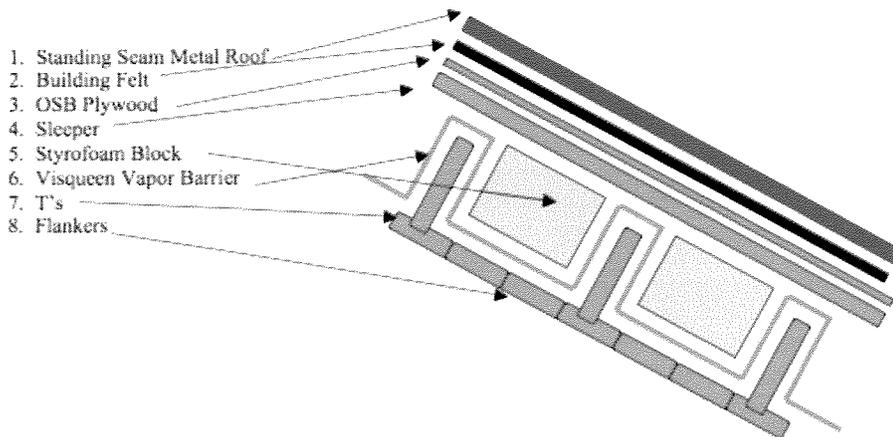
### STATEMENT OF FACTS

There were eight (8) issues presented to the Court of Appeals in the case at bar involving many facts. The Court of Appeals ruled in favor of Ahrens Construction on the 8th issue and that decision made the first 7 moot. This Court has granted leave for consideration of four (4) specific questions arising out of the Court of Appeals decision on Issue #8. The facts relevant to those issues are as follows.

Defendant/Appellee Ahrens Construction was hired to, among other things, install in 1998 and 1999 the roofs on the Gymnasium, Dining Hall, and Pool (or Natatorium) at the Sherman Lake YMCA in Augusta. The roof was a unique product with the trade name "TimberDeck". It is a "honeycomb" structure filled with Styrofoam blocks (Apx 306a-310a).

The architects for the Pool were Jim Derks and Jon Rambow (Apx 20a). Plaintiff/Appellant Miller Davis was the General Contractor for the entire project. Ahrens Construction completed the Natatorium roof before February 18, 1999(Apx 18a). Miller Davis paid Ahrens Construction for various work, including the Natatorium roof on April 27, 1999(Apx 18a). A 30 Day Temporary Certificate of Occupancy was issued June 11, 1999, and the final Certificate of Occupancy was issued August 2, 1999(Appendix 324a).

The roof has performed perfectly over the Dining Hall and Gymnasium. A dripping problem, otherwise referred to as the "Natatorium Moisture Problem" or "NMP", first appeared inside and outside the Pool when the weather became cold in the winter of 1999-2000. It was ultimately understood what caused the NMP. The following schematic shows the component parts of the TimberDeck Roof that Ahrens Construction assembled.

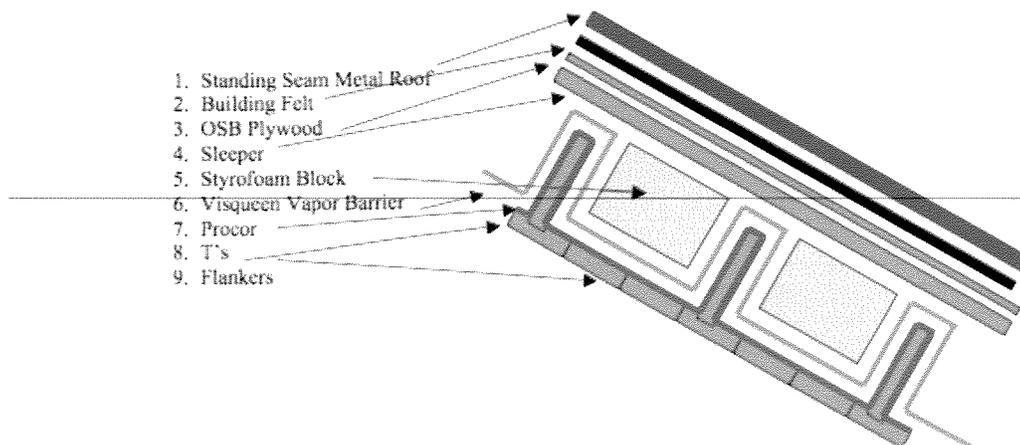


The purpose for Element #4, the "Sleepers", was to allow circulation of outside air under the metal roof.

The air in the Pool is very moist compared to the Gymnasium and Dining Hall due to evaporation from the pool surface. That moist air migrated through the joints in the "Flankers" (Element #8). The moist air continued to move under the Visqueen Vapor Barrier (Element #6) up the side of the T's (Element #7). When that moist air reached the top of the T's, the only thing separating the moist air from the outside winter air circulating

through the Sleeper area (Element #4) was the Visqueen. As a result, the moisture condensed into water droplets on the frigid Visqueen and fell back through the gaps between the Flankers into the Pool. The same did not happen in the Gym and Dining Hall was because the air in those rooms was not moist in winter.

Realizing the design error, Jim Derks and Jon Rambow redesigned the roof for the Pool to solve the NMP. They added a new element into the design known as "Procor" (Apx 347a, ¶1). This product is a spray-on flexible waterproofing substance that absolutely sealed the joints and cracks between the Flankers. That way the moist air from the Pool could not migrate through the Flankers and get to the top of the T's. The redesign solved the NMP. The undesirable aspect of this cure was that it required that the roof be completely disassembled to apply the Procor and then put back together. The following Schematic shows the location of the Procor in the redesign.



Once the Architects and Miller Davis decided on this redesign, they demanded that Ahrens Construction, at its own expense, perform the reconstruction. Recognizing that the Corrective Work was a redesign, not a repair, Ahrens Construction refused to do the work at its own expense.

If this Court has any doubt about the foregoing, it need only review the Contract between Miller Davis, the Architect, and the Owner. (Ahrens was not a party to this contract.)

The Contractor [Miller Davis] does not acknowledge that its or any of subcontractor's non-conforming work or materials were or are a contributing or the sole cause of the NMP.  
(Apx 337a)

The Architect [Jim Derks and Jon Rambow] has represented and warranted to the Owner [Sherman Lake YMCA] and Contractor that the NMP will be solved and corrected by the Corrective Action and further that no additional insulation and no other work or materials are necessary to correct the NMP **except for the addition of certain supplemental waterproofing, the cost and expense of which supplemental waterproofing will be the responsibility that of the Architect and not the responsibility of the Contractor.**  
(Apx 337a)

**The Architect shall bear the full cost of any Waterproofing.** Neither the Owner nor the Contractor shall be responsible for the payment, reimbursement or sharing, directly or indirectly, of the cost of the Waterproofing.  
(Apx 338a-339a)

The Contractor denies responsibility for the NMP.  
(Apx 341a)

These contractual provisions between the Architect, Owner and Miller Davis beg the obvious question. Why is the NMP the

fault of Ahrens Construction when the roof he was hired to assemble did not include the Procor waterproofing?

The time line for the Corrective action is as follows. Miller Davis sent a carbon copy of its letter dated May 5, 2003, stating that Ahrens was in default of its obligations under the construction contract(Apx 327a). The specifications for the Corrective Work were finalized on August 1, 2003(Apx 346a). On August 27, 2003, Miller Davis and the Owner entered in the Agreement for Corrective Work (Apx 335a). The performance of the Corrective Work was monitored by an independent engineer. That Verification shows that performance of the Corrective Work started August 29, 2003, and ended on October 22, 2003. (Apx 362a-363a).

This lawsuit was filed May 12, 2005, almost 19 months after completion of the Corrective Work. The date of filing was also 6 years and 83 days after Ahrens Construction completed the roof. That filing date was also 6 years and 15 days after Miller Davis paid Ahrens Construction for the roof. The Court of Appeals ruled that the lawsuit was filed after the expiration of the Statute of Repose as set forth in MCL 600.5839.

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## LAW AND ARGUMENT

### I. MCL 600.5839 APPLIES TO ANY AND ALL ACTIONS AGAINST ENGINEERS, ARCHITECTS, OR CONTRACTORS TO RECOVER DAMAGES AND IS NOT LIMITED TO TORT ACTIONS.

The Court of Appeals thoroughly analyzed this issue and ruled that MCL 600.5839 applies to all actions against engineers, architects, or contractors to recover damages, even those brought by owners or general contractors for damage to the improvement itself. Ahrens Construction could do little to improve on that analysis and incorporates it by reference.

From a policy point of view, Ahrens Construction submits that it is precisely the type of argument offered by Miller Davis that resulted in the decision by the Legislature to adopt the Statute of Repose. The Legislature recognized that there are several legal theories potentially applicable to construction lawsuits including (1) claims based upon negligence, (2) claims for breach of contracts, (3) claims pursuant to the Uniform Commercial Code, (4) claims based upon product liability, and (5) sometimes even claims based upon fraud. Each theory potentially has its own statute of limitation. MCL 600.5805 specifies the statute of limitation for negligence and tort claims. MCL 600.5807 has the period of limitations for most contract claims. MCL 440.2725 contains the statute of limitations for claims brought under the Uniform

Commercial Code. MCL 600.5813 contains the omnibus statute of limitations for remaining claims.

Ahrens Construction submits that the "Legislative Intent" of MCL 600.5839 was to resolve confusion created by the various theories and claims by adopting a comprehensive solution:

(1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

It is undisputed that Defendant-Appellant Ahrens Construction is a "contractor" as defined in MCL 600.5839(4).

In Michigan Millers Mutual v West Detroit Building Co, 196

Mich App 367; 494 NW2d 1 (1992), the Court of Appeals stated:

The Legislature's intent ... was to apply the statute of limitations contained in §5839(1) to all actions brought against contractors on the basis of an improvement to real property, including those brought by owners for damage to the improvement itself.  
494 NW2d at 6-7.

In this way, the statute is intended to prevent "theory shopping". A plaintiff is not permitted to select the desired statute of limitation by the manner in which it frames the allegations of the complaint. All claims against engineers, architects and contractors for building defects have the same Statute of Repose.

In Travelers Insurance v Guardian Alarm, 231 Mich App 473; 586 NW2d 560 (1998) the Court of Appeals stated:

The statute of repose is triggered by the time of occupancy or use or acceptance of the improvement. MCL 600.5839(1) ... Only one of the criteria set forth in the statute of repose must be met to trigger the running of the period of limitation. Here, the six-year limitation period began to run when Troy Design used or accepted the alarm system.

(citations omitted)

583 NW2d at 763.

There are 4 dates that need to be calculated to evaluate the application of the Statute of Repose (MCL 600.5839): (1) use, (2) acceptance, (3) occupancy, and (4) discovery. All the foregoing are known and undisputed in the case at bar.

**Use:**

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The first step to analyze the issue of "Use" is to identify the "improvement". This term is used in MCL 600.5839 to recognize that a particular contractor, architect or engineer may be responsible for all or just one or more parts of a construction project. In its Opinion the trial court stated:

The roof over the natatorium portion of the recreation building is the subject of this litigation.  
(Apx 17a)

The trial Court also stated:

Ahrens completed the natatorium roof by February 18, 1999.  
(Apx 17a-18a)

Ahrens Construction submits that this undisputed fact constitutes "use" within the meaning of MCL 600.5839.

**Acceptance:**

Page 8 of the contract contained the following language:

Payment will be made each month equal to 90% of the work satisfactorily completed and material delivered to the job.  
(Apx 260a)

The trial court stated in its Opinion:

Ahrens submitted its final request for pay on April 26, 1999, and Miller-Davis paid Ahrens the very next day.  
(Apx 18a)

Ahrens Construction submits that this undisputed fact constitutes "acceptance" within the meaning of MCL 600.5839.

**Occupancy:**

The trial court stated in its Opinion:

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A Certificate of Substantial Completion for the Project was issued by the prime architect on June 25, 1999, and a Certificate of Occupancy was issued on August 2, 1999.  
(Apx 18a)

Ahrens Construction submits that these facts constitutes "occupancy" within the meaning of MCL 600.5839.

**Discovery:**

On May 5, 2003, John Van Stratt on behalf of Miller Davis stated in no uncertain terms:

Please consider this notice that Miller-Davis Company is declaring Ahrens Construction, Inc. in default ...  
(Apx 327a)

Ahrens Construction submits that the letter of May 5, 2003, proves "discovery" by any definition of the term.

Analysis of the foregoing requires the conclusion that the Statute of Repose bars this litigation against Ahrens Construction. This lawsuit was filed May 12, 2005. (Apx 1a) That date is more than 6 years following "**Use**"; it is more than 6 years following "**Acceptance**"; it is more than 1 year following "**Discovery**".

Finally, it should be noted that no injustice of any nature is created in the case at bar by the Decision of the Court of Appeals. By its own admission, Miller Davis was completely done with the Corrective work on October 22, 2003 (Apx 362a). It had the entire year of 2004 (and then some) to file its claim. It ~~is inexplicable why it waited until after expiration of the~~ Statute of Repose to file suit.

**II 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."**

All throughout its Brief, Miller Davis keeps repeating that this case was limited to the cost of the "Corrective Work". Apparently, Miller Davis hopes that if it keeps saying what is not true that the falsehood will be accepted. The fact of the matter is that Miller Davis sought and was awarded damages for costs beyond the scope of the Corrective Work. That was the subject matter of Point V of Ahrens' Brief on Appeal to the Court of Appeals. Those facts and arguments are incorporated by reference.

This Court has instructed that Ahrens Construction address the question whether the "condition" was both "defective and unsafe". Presumably Miller Davis would say that the roof is "defective", but that it never alleged the roof was "unsafe". That, of course, is because no one was actually injured.

Ahrens Construction submits that the question whether the ~~alleged defect makes the condition unsafe must be determined by~~ a Court and cannot be based upon the allegations of a potential plaintiff. In the case at bar, therefore, the question is not whether Miller Davis specifically alleged the defect created an "unsafe condition", but whether a Court determines whether the defect alleged creates an unsafe condition.

In the case at bar, no court has considered whether the alleged defect created an unsafe condition. Were one to do so, Ahrens Construction submits that the response would be obvious. The alleged defect is water dripping from the roof onto the pool deck inside the building and the sidewalk outside the building. Dripping water inside the building makes the deck slippery creating an unsafe risk of falling. Dripping water outside, which occurred during winter weather, causes ice on the sidewalk. Ahrens Construction is confident that upon consideration in this Honorable Court, or upon remand for hearing to a lower court, the outcome would be the same. Sidewalk ice and a wet floor create a condition that is unsafe.

**III. A CLAIM FOR BREACH OF A CONSTRUCTION CONTRACT "ACCRUES" UNDER MCL 600.5807(8) ON THE DATE SPECIFIED IN MCL 600.5827, I.E., WHEN THE WRONG WAS DONE REGARDLESS WHEN DAMAGE RESULTS.**

Plaintiff/Appellant Miller Davis claims that the applicable period of limitations for its claim for breach of contract is specified in MCL 600.5807(8) and is six (6) years. Let us consider the consequence of that position.

The applicable text of the statute is:

No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

(8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.

To figure out when the 6 year period would expire, it is necessary to determine when, "the claim first accrued". To determine when accrual occurred, it is necessary to read MCL 600.5827:

The claim accrues at the time the wrong upon which the claim is based was done regardless of the time when the damage results.

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Miller Davis has suggested several times when a "wrong" was done. Some of those times are:

1. When Ahrens is alleged to have improperly assembled the Timber Deck roof.
2. When Ahrens completed all of the work of any nature it performed at the project.

3. When the Owner first occupied the premises
4. When the NMP was discovered.
5. When the cause of the NMP was determined.
6. When Miller Davis demanded that Ahrens perform corrective work
7. When Ahrens refused to do the Corrective Work
8. When Miller Davis completed the Corrective Work

The question to be determined is which of those dates to use. The answer is found in the text of MCL 600.5807.

No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim **first** accrued ...

It cannot be disputed when that first event occurred. As the trial court correctly noted, the roof was completed by February 19, 1999 (Apx 18a). Using that "first" date, Miller Davis had until February 19, 2005, to file its suit. Miller Davis did not, of course, do so.

This Court may wish to consider if the foregoing analysis afforded Miller Davis a reasonable time within which to get its lawsuit filed. The facts are that the independent consultant certified completion of the "Corrective Work" on October 27, 2003. (Apx 363a) February 19, 2005 was 481 days later. Miller Davis actually waited until May 12, 2005. As a result, even under its own analysis of the statute, its claim against Ahrens Construction was time barred if the date the claim "first accrued" is used.

To interpret these statutes any other way would be to abolish the concept of the "Statute of Limitations". Miller Davis has actually argued that it has a contractual right at any time it may find what it considers to be non-conforming work, to demand Ahrens Construction perform additional corrective work. At that time, if Ahrens fails to do the work, Miller Davis can take whatever time it deems appropriate to do that work. After completion, Miller Davis would have 6 years to commence suit.

Who is to say that Miller Davis will not decide in 20 years that the roof over the Dining Hall is defective and not in conformance with the "Plans and Specifications"? According to its analysis, it would have the right at that time to demand further "Corrective Action". It would then, according to the absurd analysis of Miller Davis, have another 6 years to sue. Ahrens Construction submits that such a result was never intended by the Legislature.

The legal problem with the claim of Miller Davis is that MCL 600.5807 gives 6 years after the claim "first" accrues, not ~~6 years after it "last" accrues.~~ Miller Davis has offered no excuse for its failure to file this lawsuit in a timely fashion and must be barred from proceeding by the statute of limitations and/or the statute of repose.

**IV. MCL 600.5839 DOES NOT REQUIRE THAT OCCUPANCY, USE, OR ACCEPTANCE OF THE IMPROVEMENT IS LIMITED TO OCCUPANCY, USE OR ACCEPTANCE BY THE OWNER.**

Defendant/Appellee does not want to appear to be glib, but the result of this issue seems apparent. There are exactly 177 words in MCL 600.5839. If the Legislature had intended to limit the Statute of Repose to occupancy use or acceptance **by the owner**, it could easily have added those 3 words and made the statute 180 words long. It did not, and those 3 words should not be written into the statute by this Honorable Court. This Court should rely upon the text of the statute as written by the Legislature and determine the questions of occupancy, use and acceptance from the perspective of the party bring the lawsuit.

**RELIEF SOUGHT**

Defendant-Appellee Ahrens Construction, Inc. submits that this Honorable Court should affirm the Decision of the Court of Appeals in its favor and against Plaintiff-Appellant Miller Davis.

In the event this Honorable Court should determine that MCL 600.5839 does not apply, Defendant-Appellee Ahrens Construction, Inc. submits that the claim of Plaintiff-Appellant Miller Davis should be barred by MCL 600.5807(8) and MCL 600.5827 as it was filed more than 6 years after the claim first accrued on February 19, 1999.

Finally, in the event this Honorable Court should determine that the claim of Plaintiff-Appellant Miller Davis is not barred by either the Statute of Repose or the Statute of Limitations, then the matter should be remanded to the Court of Appeals for consideration of the other 7 issues presented for appeal.

DATED: December 21, 2010

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