CONSTRUCTION LAW

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I. INTRODUCTION

While the topic of construction law implicates several areas of substantive law including contracts, tort, labor and employment, finance,

and others, the prevalence of alternative dispute resolution (ADR) provisions in many construction-related contracts necessarily results in the fact that most disputes involving the construction industry are resolved outside of Michigan state and federal courts.[1] Moreover, due to the economic downturn beginning in December 2007,[2] the industry struggled as frozen credit markets postponed or terminated capital projects in Michigan.[3] Notwithstanding these factors, this *Survey* Article examines developments in Michigan construction law between June 1, 2012 and May 31, 2013—a time of economic hardship and the historic filing of municipal bankruptcy by the City of Detroit.[4]

II. SIGNIFICANT STATE CASES INVOLVING MICHIGAN CONSTRUCTION LAW

A. Cedroni Associates, Inc. v. Tomblinson, Harburn Associates, Architects & Planners, Inc.

One of the more significant construction law-related cases decided by the Michigan Supreme Court during the *Survey* period, *Cedroni Associates, Inc. v. Tomblinson, Harburn Associates, Architects & Planners, Inc.*,[5] held that "a disappointed [low] bidder on a public contract [did not have] a valid business expectancy necessary" to sustain

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1. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (2010).

2. *Business Cycle Dating Committee*, NAT'L BUREAU OF ECON. RES. (Sept. 20, 2010), http://www.nber.org/cycles/sept2010.html.

3. MICHIGAN ECONOMIC AND WORKFORCE INDICATORS, MICH. DEP'T OF ENERGY, LABOR & ECON. GROWTH, BUREAU OF LABOR MKT. INFO. & STRATEGIC INITIATIVES 2 (2011), http://www.doleta.gov/performance/results/AnnualReports/2010_economic_reports/mi_economic_report_py2011-Winter.pdf ("The recent national recession has altered the economic and workforce landscape for years to come with economists forecasting a long and slow recovery. In Michigan, the impact has been longer and deeper than in other areas of the country, especially in the manufacturing, construction and business service industries.").

4. Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency* (July 18, 2013), http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html.

5. Cedroni Assocs., Inc. v. Tomblinson, Harburn Assocs., Architects & Planners, Inc., 492 Mich. 40; 821 N.W.2d 1 (2012).

"a claim of tortious interference with a business expectancy."[6] In *Cedroni*, a public school district retained the defendant to provide architectural services.[7] "As part of the [services], defendant agreed to assist the school district with the bid selection process[,] . . . [including recommending] which contractor should be awarded the project."[8] Based upon the defendant's recommendation, the school district awarded the construction project to "the contractor that had submitted the second-lowest bid. Plaintiff, the contractor that submitted the [first-]lowest bid, sued defendant for tortious interference with a business expectancy."[9]

The trial court held that even though the plaintiff was the lowest bidder on a public contract, it "did not have a valid business expectancy."[10] In a 2-1 split decision, the Michigan Court of Appeals reversed.[11] The majority found that the mandate imposed on the public agency to award the contract to the lowest responsible bidder created an expectation of contract award in the lowest responsible bidder.[12] "We hold, as a matter of law, that the multiple provisions reserving the right to reject bids are subject to the provision requiring an award to be made to the lowest responsible bidder; otherwise, the 'lowest responsible bidder' provision is rendered meaningless and nugatory."[13] The court of appeals' dissent argued that in order to establish a business expectancy, "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful thinking."[14] The dissent further explained that "when the ultimate decision to enter into a business relationship is, by statute, a highly discretionary decision, a plaintiff cannot establish that its

6. *Id.* at 43.

7. *Id.*

8. *Id.* at 43-44.

9. *Id.* at 44. To establish a claim for tortious interference with a business expectancy, the plaintiff must show "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." BPS Clinical Labs. v. Blue Cross & Blue Shield of Mich., 217 Mich. App. 687, 698-99; 552 N.W.2d 919, 925 (1996) (citing Lakeshore Cmty. Hosp. v. Perry, 212 Mich. App. 396, 401; 538 N.W.2d 24 (1995)).

10. *Cedroni*, 492 Mich. at 44.

11. Cedroni Assocs, Inc v. Tomblinson, Harburn Assocs, Architects & Planners, Inc., 290 Mich. App. 577; 802 N.W.2d 682 (2010).

12. *Id.* at 593-94.

13. *Id.* at 593.

14. Trepel v. Pontiac Osteopathic Hosp., 135 Mich. App. 361, 377; 354 N.W.2d 341 (1984).

'business expectancy' [reflected] a reasonable likelihood or possibility and not merely wishful thinking."[15]

The defendant appealed to the Michigan Supreme Court.[16] The supreme court majority noted Michigan's longstanding legal view that "a disappointed low bidder on a public contract has no standing to . . . challenge the award . . . to another bidder."[17] The *Cedroni* court also noted the established rule that the lowest bidders on public projects who ultimately lose the bid do not have a reasonable business expectancy in a public contract.[18] Further, the supreme court acknowledged that Michigan courts recognize that awarding governmental contracts is a highly discretionary process.[19] Nonetheless, "[t]he exercise of discretion to accept or reject bids [involving public contracts] will only be controlled by the courts when necessary to prevent fraud, injustice or the violation of a trust."[20] But the court determined none of these exceptions existed in this case.[21] Because the plaintiff had mere "wishful thinking" and because there was no evidence that the court's involvement was "'necessary to prevent fraud, injustice or the violation of a trust,'" the plaintiff's claim of tortious interference with a business expectancy failed.[22] Thus, the lowest bidder on a public contract whose bid is subsequently rejected does not have a legal right to recover the profits it could have made—even if the public entity or municipality has language in its charter requiring a bid to be awarded to the lowest responsible bidder.[23]

B. Caron v. Cranbrook Educational Community

In *Caron v. Cranbrook Educational Community*,[24] the Michigan Court of Appeals considered whether a "three-part portable room partition" (PRP) was properly deemed an improvement to real property justifying application of the statute of repose at MCLA section 600.5839.

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15. *Cedroni*, 492 Mich. at 47 (alteration in original) (quoting *Cedroni*, 290 Mich. App. at 623 (K.F. Kelly, J., dissenting)).

16. *Id.* at 44.

17. *Id.* at 46 (citing Detroit v. Wayne Circuit Judges, 128 Mich. 438, 439; 87 N.W. 376 (1901)).

18. *Id.* at 47 (citing EDI-Detroit, Inc. v. Detroit, 279 F. App'x 340, 352 (6th Cir. 2008)).

19. *Id.* at 50-51.

20. *Id.* at 53 (alteration in original) (citing Leavy v. City of Jackson, 247 Mich. 447, 450; 226 N.W. 214 (1929)).

21. *Cedroni*, 492 Mich. at 53-54.

22. *Id.* at 54.

23. *Id.* at 43-54.

24. Caron v. Cranbrook Educ. Cmty., 298 Mich. App. 629; 828 N.W.2d 99 (2012).

The trial court held that the PRPs "'were a capital improvement to the property such that they qualif[ied] under [MCL 600.5839]'"[25] as an improvement to real property.[26] Based on this determination, the trial court held that Michigan's statute of repose barred recovery "[s]ix years after the time of occupancy of the completed improvement, use, or acceptance of the improvement."[27] Therefore, the trial court granted summary disposition in favor of the defendants, and the plaintiff appealed.[28]

In 2009, the plaintiff "suffered serious injuries when a T-shaped [PRP] fell on her while she and a graduate student attempted to move the PRP" to obtain additional space to teach a ceramics class.[29] Cranbrook Educational Community constructed the "art classroom addition" "as part of a larger construction project . . . completed in the fall of 2002."[30] The defendant allegedly "designed, manufactured, and sold the PRP [in question and] other PRPs used in the classroom addition."[31] The "crux of the case" centered around whether the PRP that fell on the plaintiff constituted an "improvement to real property" under MCLA section 600.5839, which states in relevant part,

> (1) A person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real property, or an 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

25. *Id.* at 643 (alterations in original).

26. "An improvement has been defined as a 'permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.'" Pendzsu v. Beazer East, Inc., 219 Mich. App. 405, 410; 557 N.W.2d 127 (1996) (quoting Adair v. Koppers Co., 741 F.2d 111, 114 (6th Cir. 1984)). The test used to determine whether an improvement exists is whether the modification to real property adds value to the realty based on the purpose for which the modification was intended for use; whether the modification is permanent; and whether a component of the modification is "an integral part of the improvement to which it belongs." *Id.* at 410-11. Additionally, the nature of the modification should also be considered in the analysis of whether it constitutes an improvement to real property. *Id.*

27. *Caron*, 298 Mich. App. at 633-34 (quoting MICH. COMP. LAWS ANN. § 600.5839).

28. *Id.* at 634.

29. *Id.* at 632.

30. *Id.*

31. *Id.*

> making the improvement, unless the action is commenced within either of the following periods:
>
> (a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.[32]

The court of appeals stated that "MCL [section] 600.5839 serves as a statute of repose and as a statute of limitations[33] that can result in an action's being time-barred."[34] Based on an earlier decision, *Ali v. Detroit*,[35] the purpose of MCLA section 600.5839 is to "shield architects, engineers, and contractors from stale claims and relieve them of open-ended liability for defects in workmanship."[36]

The court analyzed numerous other state and federal opinions and analyzed four key factors:

> (1) the general nature of PRPs, (2) whether the PRPs were integral components or essential to the operation of the art classroom, (3) whether the purchase, placement, and utilization of the PRPs required the expenditure of labor and money and increased the usefulness or, added value to, bettered, or enhanced the capital value of the art classroom addition in relationship to the structure's intended purpose, and (4) the permanence of the PRPs, taking into consideration whether they were affixed, bolted, mounted, or otherwise physically annexed to the art classroom addition and whether [the PRPs] placement has been, or was intended to be, longstanding or for an indefinite period.

Analyzing these four factors, the court determined "the PRPs were part of the original designs and plans for the construction of the art classroom addition . . . as part of and during the construction [process]."[37] Despite the mere fact that the PRPs were moveable, the court held that the PRPs served as walls in the art classroom addition.[38]

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32. *Id.* at 633 (quoting MICH. COMP. LAWS ANN. § 600.5839(1)).

33. Public Act 162 of 2011 amended MCLA section 600.5839 as well as MCLA section 600.5805 to clarify that MCLA section 600.5839 is only a statute of repose. Thus, for claims accruing after the January 1, 2012 effective date of PA 162, the period of limitations for a negligence action against a contractor is three years from the date of the injury. MICH. COMP. LAWS ANN. § 600.5805(10) (West 2013).

34. *Caron*, 298 Mich. App. at 635.

35. Ali v. Detroit, 218 Mich. App. 581; 554 N.W.2d 384 (1996).

36. *Id.* at 587-88.

37. *Id.* at 639.

38. *Id.* (emphasis omitted).

By comparing the PRPs to interior walls in a building, the court held that "interior walls create hallways, rooms, closets, and other spaces within a structure, and they are typically a significant feature of any building and construction project."[39] Since the PRPs defined spaces, the court held that the PRP, which fell on the plaintiff, "constituted an improvement to real property."[40]

C. Karaus v. Bank of New York Mellon

Karaus v. Bank of New York Mellon[41] involved a "plaintiff's efforts to receive compensation for . . . work . . . he performed on a home owned" first by a business entity controlled by a husband and then later owned by the husband and his wife as individuals (the Couple). The "plaintiff entered into an oral agreement with the [Couple] to perform construction [and repair] work on the" home.[42] The plaintiff alleged that he was not paid in full; he recorded a construction lien on October 6, 2009, claiming that he "first provided labor or materials for improvement to the [project] on May 1, 2004, and . . . last provided labor or materials on October 26th, 2009."[43] He claimed that the total still due was $325,500, including the $500 cost of the claim of lien.[44]

In July 2006, the Couple had refinanced a loan, secured by a $1,000,000 mortgage on the property recorded June 5, 2007, which was subsequently assigned to Bank of New York Mellon (bank).[45] The bank filed for partial summary disposition, arguing the plaintiff's lien was invalid because the plaintiff performed construction and repair work on a residential structure without a written contract.[46] The bank cited MCLA section 570.1114 of the Construction Lien Act, which prohibits a contractor from recording a construction lien on a residential structure unless work is "done pursuant to a written contract.[47]

The plaintiff disputed that the property was residential because the Couple used the structure only as an investment property and leased it to third parties as the repairs made the structure habitable.[48] The bank also filed for partial summary disposition on the plaintiff's unjust enrichment

39. *Id.*
40. *Id.*
41. Karaus v. Bank of N.Y. Mellon, 300 Mich. App. 9; 831 N.W.2d 897 (2012).
42. *Id.* at 11.
43. *Id.*
44. *Id.*
45. *Id.* at 11-12.
46. *Id.* at 12.
47. *Karaus*, 300 Mich. App. at 12.
48. *Id.* at 13.

claim, arguing that the bank received no benefit from the plaintiff and the plaintiff "had an adequate remedy at law."[49] The trial court granted partial summary disposition to the bank, finding that "there was no material issue of fact regarding whether the property was residential."[50] The court also dismissed the unjust enrichment claim because it agreed that the plaintiff had an adequate remedy at law.[51]

The court of appeals reversed in part and remanded on the question of whether the property was residential versus commercial.[52] The determining factor as to "whether a property constitutes a 'residential structure' or a commercial property is whether the owner or lessee contracting for the improvement *intends* to actually reside on the property on completion of construction."[53] The building's status as a single-family dwelling was not determinative; there was a question of fact as to whether the Couple ever actually intended to reside there or use it to lease to third parties for investment purposes only.[54]

The court affirmed the dismissal of the unjust enrichment claim.[55] The decision noted that the bank had received a benefit only as a third party, and there was no suggestion that the bank had misled the plaintiff to perform the work, that the bank had assured the plaintiff that it would be paid for the work, or that the bank even knew the work was being performed; also, because the bank had not yet foreclosed, it was not clear that it had even benefitted.[56]

D. C.D. Barnes Associates, Inc. v. Star Heaven, LLC

C.D. Barnes Associates, Inc. v. Star Heaven, LLC[57] involved the interplay between Michigan's Construction Lien Act (CLA)[58] and its Condominium Act.[59] A defendant bank appealed by leave, challenging the trial court's judgment that the plaintiff, a general contractor

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49. *Id.*
50. *Id.* at 14.
51. *Id.*
52. *Id.* at 25.
53. *Karaus*, 300 Mich. App. at 20 (citing Kitchen Suppliers Inc. v. ERB Lumber Co., 176 Mich. App. 602, 609; 440 N.W.2d 50 (1989), and Titanus Cement Wall Co. v. Watson, 158 Mich. App. 210, 217; 405 N.W.2d 132 (1987)).
54. *Id.* at 20-21.
55. *Id.* at 25.
56. *Id.* at 24.
57. C.D. Barnes Assocs., Inc. v. Star Heaven, LLC., 300 Mich. App. 389; 834 N.W.2d 878 (2013).
58. MICH. COMP. LAWS ANN. §§ 570.1101-,1305 (West 2013).
59. MICH. COMP. LAWS ANN. §§ 559.101-.276 (West 2013).

(Contractor), had a valid construction lien with priority over the defendant's mortgage interest.[60]

The *C.D. Barnes* case arose from an unsuccessful construction project undertaken by a developer using financing from the defendant bank.[61] The Contractor was hired by the developer to serve as the project's general contractor.[62] In early 2005, the developer purchased a partially completed apartment project consisting of nineteen buildings that contained or were planned to contain ten apartments of various sizes, a pool, and a club house.[63] The nineteen buildings were all in various stages of completion.[64] After the developer purchased the project, the developer began marketing it as a "high end condominium project."[65] The developer hired the Contractor to complete construction on the buildings and upgrade previously completed units and structures in a manner consistent with a "high-end condominium project."[66] Instead of entering into a fixed-price contract, the Contractor and the developer entered into a time and materials contract requiring the Contractor to "submit monthly invoices with supporting documentation to [the developer] for work performed at the site."[67] In turn, the developer would pay each invoice within thirty days of receipt.[68]

The Contractor performed the first actual physical improvement[69] on or about August 10, 2005 and filed a notice of commencement in accordance with the Construction Lien Act at MCLA section 570.1108, on October 4, 2005.[70] On May 2, 2006, the Contractor executed a sworn statement[71] at the request of the developer, and in that sworn statement the Contractor stated that the subject property was free from construction

60. *See Barnes*, 300 Mich. App. at 395.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Barnes*, 300 Mich. App. at 395.
67. *See id.*
68. *Id.*
69. Under the Construction Lien Act, an actual physical improvement is generally defined as being visible, on-site construction work that has started on the subject property. *See* MICH. COMP. LAWS ANN. § 570.1103(1) (West 2013); MSA 26.316(103)(1).
70. *See Barnes*, 300 Mich. App. at 396.
71. According to the State of Michigan Department of Licensing and Regulatory Affairs, a sworn statement is "an itemized list of all individuals and companies who have provided improvements, materials, or labor towards the construction project and an accounting of all monies due to those parties." *Sworn Statement*, MICH. DEP'T OF LICENSING AND REG. AFF., http://www.michigan.gov/lara/0,4601,7-154-35299_61343_35395_35438-132035--,00.html (last visited May 17, 2014).

liens.[72] On May 16, 2006, the developer recorded the master deed for the construction project, and subsequently, on May 23, 2006, the defendant bank and the developer closed on their loans, and the defendant's mortgage was recorded on May 23, 2006.[73]

Before ceasing work due to lack of payment, the Contractor "completely enclosed all 19 buildings, with two of the buildings achieving 'occupancy' status, and another 11 or 12 of the buildings being completed to 'white box[]' condition, such that each unit in each building was complete with all mechanical, electrical, and plumbing and was 'roughed-in' with drywall."[74] The last day on which the Contractor provided labor and materials was May 5, 2008.[75] On May 8, 2008, the Contractor recorded a total of nine claims of lien totaling $360,909.11.[76] Six of the nine claims of lien referred to specific units within the project, whereas three of the nine liens were filed against the entire project.[77] The three claims of lien against the entire project used metes and bounds descriptions of the entire property (as described in the notice of commencement dating from 2005) but did not specify "dates on which labor or materials were provided to any individual condominium unit within the project."[78]

The Contractor filed the subject complaint seeking to foreclose on its liens under the Construction Lien Act and also claimed that the developer had breached its contract and was unjustly enriched by the Contractor's work on the project.[79] Also named in the suit was the defendant bank, who maintained that its mortgage held priority over the Contractor's liens on the subject property.[80]

1. Validity of Claims of Lien

The trial court rejected the defendant's argument that the Contractor's claims of lien were ineffective because they had described the subject property using metes and bounds rather than by individual condominium unit.[81] The court of appeals affirmed.[82] Agreeing with the

72. *See Barnes*, 300 Mich. App. at 396.
73. *Id.*
74. *Id.* (alteration in original).
75. *Id.*
76. *Id.*
77. *Id.*
78. *See Barnes*, 300 Mich. App. at 396.
79. *Id.*
80. *Id.*
81. *Id.* at 403.
82. *Id.* at 408.

trial court's conclusion, the court emphasized that section 107 of the CLA states, "'A construction lien under this act attaches to the entire interest of the owner or lessee who contracted for the improvement, including any subsequently acquired legal or equitable interest.'"[83]

The court also noted that section 107 addresses the notice of commencement,[84] stating, "If all improvements relate to a single project only one notice of commencement need be recorded,"[85] and "[t]he notice of commencement shall contain the . . . the legal description of the real property on which the improvement is to be made."[86] Also, section 111 states that "the form for a valid claim of lien" is the "'legal description of real property from notice of commencement.'"[87]

However, the defendant argued that section 126 of the CLA,[88] coupled with sections 61[89] and 132[90] of the Condominium Act, "required [the Contractor] to file separate liens against each individual condominium . . . for work performed on that unit" and thus prohibited the filing of "a lien against the entire project."[91] The defendant also noted that section 126 of the CLA and section 132 of the Condominium Act provide that "a construction lien for an improvement furnished to a condominium unit attaches only to [that] unit to which the improvement was furnished."[92] Further, section 61 of the Condominium Act reads, "'[E]ach condominium unit . . . shall be a sole property subject to . . . all types of juridical acts . . . independent of the other condominium units.'"[93]

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83. *Id.* at 409 (quoting MICH. COMP. LAWS ANN. § 570.1107) (emphasis omitted).

84. A Notice of Commencement serves as an announcement that work is set to begin on a construction project, such as home-building, remodeling, or physical improvement to a building. Notice of Commencement (Commercial Property), MICH. DEP'T OF LICENSING AND REG. AFF., https://www.michigan.gov/lara/0,4601,7-154-35299_61343_35395_35438-132083--,00.html; *Notice of Commencement (Residential Property)*, MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, http://www.michigan.gov/lara/0,4601,7-154-35299_61343_35395_35438-132088--,00.html (last visited May 17, 2014). The purpose of a Notice of Commencement is to provide "interested parties with information needed to follow the construction lien procedures properly." *Id.*

85. *See Barnes*, 300 Mich. App. at 409-10 (quoting MICH. COMP. LAWS ANN. § 570.1108(1)) (emphasis omitted).

86. *Id.* at 410 (quoting MICH. COMP. LAWS § 570.1108(2)(a)) (emphasis omitted).

87. *Id.* (quoting MICH. COMP. LAWS § 570.1111(2)).

88. MICH. COMP. LAWS ANN. § 579.1126 (West 2013).

89. MICH. COMP. LAWS ANN. § 559.161 (West 2013).

90. MICH. COMP. LAWS ANN. § 559.232 (West 2013).

91. *See Barnes*, 300 Mich. App. at 410-11.

92. *Id.* at 411 (citing MICH. COMP. LAWS ANN. §§ 559.232, 570.1126(1)).

93. *Id.* (quoting MICH. COMP. LAWS ANN. § 559.161) (emphasis omitted).

Noting that the CLA is a remedial statute,[94] the court stated that the Contractor's liens substantially complied with the CLA because the notice of commencement had likewise utilized "a metes and bounds description for the entire property."[95] However, because the master deed was filed after the notice of commencement—"which redefined the project as a condominium project"—the defendant maintained that section 132 of the Condominium Act required separate lien filings "against each individual condominium unit within the project."[96]

But this view was incorrect. The court stated that when the Contractor "performed its first actual physical improvement," it "was providing material and labor for a construction project [set] by the metes and bounds . . . [of] the notice of commencement."[97] The court emphasized the importance that the CLA places on the date of the first actual improvement with respect to determining priority and noted that the Contractor began working on the project nearly ten months before the master deed was not recorded.[98] The court opined that the defendant's view would place an undue burden on contractors to monitor whether a property owner alters a project to a condominium project at any point and thus would run contrary to the remedial purpose of the CLA.[99]

2. Substantial Compliance of the Sworn Statement

The defendant also challenged that the sworn statement from the Contractor had not substantially complied with the statutory requirements.[100] The defendant complained that while the Contractor had "represented that the property was 'free from claims of construction liens,'" it did not state that "it was 'free from the *possibility* of construction liens.'"[101] Further, this additional language, assuring against "possible" liens, is included in the "exemplar form" of attestation under MCLA section 570.1109.[102]

Contrary to the defendant's assertion, this would not render the Contractor's construction lien *invalid*, but rather only preclude entitlement to payment, complaint, cross-claim, or counterclaim prior to

94. *Id.*
95. *Id.*
96. *Id.* at 412.
97. *See Barnes*, 300 Mich. App. at 413.
98. *Id.*
99. *Id.* at 414.
100. *Id.* at 416.
101. *Id.*
102. *Id.*

the sworn statement being provided.[103] Importantly, the Contractor did provide a sworn statement prior to instituting the action here.[104] Further, the defendant did not allege that this sworn statement was in any way deficient regarding the names, amount paid, or any amount owed for any subcontractor, supplier, or laborer with whom the plaintiff had contracted; nor did the defendant allege that that the statement omitted the improvements furnished or their total contract price.[105] Instead, the defendant complained solely that the "possibility of construction liens" language was missing.[106] But given that the purpose of the sworn statement is "to advise the owner of outstanding amounts owed . . . *as of the date of the statement*," the court of appeals agreed with the trial court that the Contractor's sworn statement was substantially compliant.[107]

3. Limitations of Claims of Lien

The defendant also appealed the trial court's ruling that the Contractor's claims of lien were not limited "to work and material actually provided to each unit within 90 days of the filing of the claims of lien."[108] Emphasizing that section 111 terminates a construction lien created by the Act unless it is recorded within ninety days of "the lien claimant's last furnishing . . . of improvement," the court of appeals declared that this time limit is determined "pursuant to the lien claimant's contract."[109] Thus, the court ruled that the contract under which the labor or material is provided necessarily defines the scope regarding the timeliness for lien filings under the CLA.[110]

Here, the Contractor had no written contract regarding the labor and materials it was contributing as improvements.[111] But the CLA does not require a written contract; "it permits a contract 'of whatever nature.'"[112] Because all the evidence presented here suggested that the defendant retained the Contractor as a general contractor, its improvements were deemed to be "in furtherance of *the entire* project."[113] Accordingly, since

103. *See Barnes*, 300 Mich. App. at 416.
104. *Id.* at 417.
105. *Id.*
106. *Id.*
107. *Id.* (citing Erb Lumber, Inc. v. Gidley, 234 Mich. App. 387, 399 n.5; 594 N.W.2d 81 (1999)).
108. *Id.* at 418.
109. *See Barnes*, 300 Mich. App. at 418 (emphasis omitted) (quoting MICH. COMP. LAWS ANN. § 570.1111(1)).
110. *Id.* at 419.
111. *Id.*
112. *Id.* (quoting MICH. COMP. LAWS ANN. § 570.1103(4)).
113. *Id.* at 419.

the Contractor filed its claims of lien within ninety days of "its last provision of labor or materials to the project," the claims of lien were considered timely and applied to the entire project.[114] However, the court's opinion noted "that the circumstances of the instant case differ from instances in which the parties contract on a unit-by-unit basis."[115]

The defendant also appealed the trial court's ruling that the amount of the lien would not be reduced "for work and materials provided to units that were subsequently sold."[116] Again, the court of appeals affirmed the trial court.[117] Under section 107, "'a construction lien attaches to the entire interest of the owner . . . who contracted for the improvement.'"[118] The defendant maintained that section 126 of the CLA and section 132 of the Condominium Act required apportionment from the enforceable lien amount on the remaining property because an "improvement" had been "furnished to a condominium unit" within the meaning of those sections.[119] However, the court of appeals reiterated that "the scope of an 'improvement' is defined by the contract," and as the court previously resolved, the contract addressed the entire project, not the individual condominium units.[120]

4. Attorney Fees Under the CLA

The defendant also challenged the attorney fees award under the CLA.[121] Section 118(2) permits—though does not mandate—the award of "reasonable attorneys' fees to a lien claimant who is the prevailing party."[122] The trial court concluded that the Contractor was not entitled to fees up and through "the granting of its motion for partial summary disposition [as to] the first priority of its lien."[123] However, it did find that the defendant's continued litigation without a subordination agreement[124] "became unreasonable and warranted [the] award of . . .

114. *Id.* at 420.
115. *See Barnes*, 300 Mich. App. at 420.
116. *Id.*
117. *Id.*
118. *Id.* at 421 (omission in original) (emphasis omitted) (quoting MICH. COMP. LAWS ANN. § 570.1107).
119. *Id.* (emphasis omitted) (quoting MICH. COMP. LAWS ANN. § 570.1126(1)(a))
120. *See Barnes*, 300 Mich. App. at 420.
121. *Id.* at 425.
122. *Id.*
123. *Id.*
124. Defendant submitted that the loan officer "was no longer with the company" and "that the documents supporting the closing of the loan had moved several times [during] the [three and a half] years since the loan's closing." *Id.* at 398. Also, although it had not

fees."[125] The defendant argued that its defense of the action was justified; however, the only requirement needed for a trial court to award fees under its discretion was that the lien claimant be the prevailing party.[126]

But the trial court did err in combining the awarded attorney fees with the amount of the construction lien.[127] The court of appeals reasoned that because the CLA "expressly states that the amount of the lien is limited to the amount owed for the work performed," any award of attorney fees cannot be added to the amount of the construction lien, but rather the fees must be awarded by a separate judgment apart from the lien.[128]

The defendant alternatively argued that if an award of attorney fees was proper, then it should be against "the contracting party"—here, the project developer.[129] But the Contractor prevailed against the defendant, not the developer; the developer never challenged the Contractor's lien.[130] Hence, the court of appeals did not find that the award of fees against the defendant was improper, though it did agree that the award should not include any fees for work unrelated to the defendant.[131]

5. Resolution

Ultimately, the court of appeals affirmed the validity and priority of the Contractor's construction lien, but it remanded to the trial court to remove the attorneys' fees award from the lien, enter an independent judgment as to the fees, and determine the amount of fees attributable solely to the defendant's actions after the deadline the trial court set had expired, permitting the defendant additional time to locate the purported subordination agreement.[132]

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yet found one, the defendant argued that it firmly believed a subordination agreement existed, but had not yet located it. *Id.* at 399.

125. *See Barnes,* 300 Mich. App. at 426.

126. *Id.* at 427 (citing Vugterveen Sys., Inc. v. Olde Millpond Corp., 454 Mich. 119, 133; 560 N.W.2d 43 (1997)).

127. *Id.* at 427.

128. *Id.* at 428.

129. *Id.*

130. *Id.*

131. *See Barnes*, 300 Mich. App. at 428.

132. *Id.* at 429.

E. Price v. City of Royal Oak

In *Price v. City of Royal Oak*,[133] the court of appeals analyzed whether the plaintiffs were third-party beneficiaries to a contract between a private corporation and the City for replacement and repair of a sidewalk.[134] The plaintiffs in this case alleged that the private corporation had breached its duty of care when it created and left a missing piece of sidewalk unsecured, resulting in one of the plaintiffs sustaining injuries.[135] In *Price*, the court opined that "the mere fact that [a] defendant acted in furtherance of a contract or even that the parties' [sic] specifically contemplated a particular hazard under the terms of [a] contract does not necessarily immunize the defendant from liability for the harms that its actions or omissions may have caused."[136]

Accordingly, the *Price* majority determined that once the corporation agreed to fix the sidewalk at issue, "it had a common law duty—a duty . . . separate and distinct from its contract—to perform that replacement with 'due care' so as 'not to unreasonably endanger the person or property of others.'"[137] Thus, the plaintiffs "adequately alleged a duty . . . separate and distinct from [the corporation's] contractual duties."[138]

F. Ibrahim v. Joseph Philip Craig & Sons, Inc.

This case involved an agreement for the disbursement of loan funds by a bank to a builder.[139] The agreement provided that the borrower gave "irrevocable authorization" to the lender—here, the bank—to make disbursements directly to the general contractor as well as to

133. Price v. City of Royal Oak, No. 296483, 2012 WL 2160971 (Mich. Ct. App. June 14, 2012).

134. *Id.* at *1.

135. *Id.* at *3.

136. *Id.* (citing Loweke v. Ann Arbor Ceiling & Partition Co., 489 Mich. 157, 169; 809 N.W.2d 553 (2011)).

137. *Id.* (quoting Clark v. Dalman, 379 Mich. 251, 261; 150 N.W.2d 755 (1967)). Michigan courts recognize that a plaintiff cannot sustain a tort action when the cause of the plaintiff's injury is "based solely on the nonperformance of a contractual duty." *Id.* at *1 (citing Fultz v. Union-Commerce Assocs., 470 Mich. 460, 466; 683 N.W.2d 587 (2004)). The analysis used to determine if a duty is separate and distinct from a duty set forth in contract turns on the threshold question of "whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Price*, 2012 WL 2160971, at *1 (citing *Fultz*, 470 Mich. at 467).

138. *Id.* at *3.

139. Ibrahim v. Joseph Philip Craig & Sons, Inc., No. 303207, 2012 WL 2335915 (Mich. Ct. App. June 19, 2012).

subcontractors.[140] Despite the plain language of the agreement, the plaintiff argued that the final draw request was invalid because it had been executed without all of the terms filled in a year before the final disbursement.[141] However, that document also expressly warned the borrowers against signing the document in advance.[142] The court of appeals upheld the disbursement, noting that absent fraud or deception, the plaintiff was presumed to have read the document it signed.[143]

The court of appeals, like the trial court before it, also rejected the argument that the bank had waived or modified the agreement in the course of performance by sending invoices to the plaintiffs for approval before dispersing funds to the builder.[144] However, as both courts recognized, the statute of frauds bars such a claim, per MCLA section 566.132(2).[145]

G. Arlington Transit Mix, Inc. v. MGA Homes, Inc.

In *Arlington Transit Mix, Inc. v. MGA Homes, Inc.*,[146] a mortgage lender foreclosed on a home and obtained a quitclaim to the property.[147] A building material supplier alleged that the lender was unjustly enriched when the lender "foreclosed upon and took title to the property for which [the supplier] furnished building materials and did not receive payment.[148] The supplier asserted that because at the time the lender foreclosed on the property it knew "that the financing it had provided . . . had not been used to pay [the supplier] for the materials it had supplied . . . , an inequity would result if [the lender] were permitted to retain the benefit without paying [the supplier] for that value."[149]

However, there was "no indication that the lender was part of the decision-making process with respect to contractors on the project, subcontractors, or material suppliers, or that it encouraged" non-payment of the supplier.[150] There was "no allegation or proof that [the lender] was an active participant in the decision to use the materials provided by [the supplier] or even that the materials were used after the foreclosure

140. *Id.* at *1.
141. *Id.* at *5.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Ibrahim*, 2012 WL 2335915, at *5 (citing MICH. COMP. LAWS ANN. § 566.132(2)).
146. No. 295530, 2012 WL 2402124 (Mich. Ct. App. June 26, 2012).
147. *Id.* at *1.
148. *Id.*
149. *Id.*
150. *Id.* at *3.

occurred."[151] Thus, there was no showing of "receipt of a benefit by" the lender *from* the supplier.[152] Importantly, "'where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person.'"[153]

H. Envision Builders, Inc. v. Citizens Insurance Co. of America.

Envision Builders, Inc. v. Citizens Insurance Co. of America involved an insurance coverage dispute between the plaintiff builder and defendant insurers.[154] The plaintiff sought to recover under a standard occurrence-based commercial liability policy for loss to its own work caused by the negligence of its subcontractor.[155] In this case, the claimed incident was "the collapse of roof trusses due to wind."[156] The construction specifications required the builder to provide bracing, and the investigation "revealed that the 'roof trusses . . . collapsed due to lack of adequate temporary bracing.'"[157] The collapse was due to the subcontractor's failure to satisfy the contract—"i.e., [its] failure to install tresses as needed during the erection process."[158] This failure did not constitute an "occurrence" as defined by the policy.[159]

Even if this were a covered "occurrence," the court of appeals stated that an exclusion would apply.[160] There was "no genuine issue of material fact" that the property was damaged while operations were being performed, and thus the "performing operations exclusion" would also preclude coverage.[161]

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151. *Id.*

152. *Arlington Transit*, 2012 WL 2402124, at *3 (quoting Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187, 196; 729 N.W.2d 898 (2006)).

153. *Id.* at *3-4.

154. Envision Builders, Inc. v. Citizens Ins. Co. of Am., No. 303652, 2012 WL 3020738, at *1 (Mich. Ct. App. July 24, 2012), *appeal denied*, 493 Mich. 929; 825 N.W.2d 61 (2013).

155. *Id.* at *2.

156. *Id.*

157. *Id.* (alteration in original).

158. *Id.*

159. *Id.* at *1 -3.

160. *Envision Builders*, 2012 WL 3020738, at *3.

161. *Id.* at *4.

I. Ben's Supercenter, Inc. v. All About Contracting & Excavating, LLC

In April 2009, homeowners and the defendant, a contractor, entered into a contract "for the construction of a pole barn on [the homeowners'] property."[162] The homeowners paid the contractor the entire cost of the contract including upgrades; however, "the contractor abandoned the job before completion."[163] A supplier who provided construction materials to the contractor for the project filed a claim of lien against the property.[164]

The supplier filed suit against the homeowners, who argued that the CLA "prohibit[s] the attachment of a construction lien to a residential structure."[165] The supplier responded that the pole barn did not meet the qualifications of a "residential structure."[166] MCLA section 570.1106(3) defines a "residential structure" as "an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, and all appurtenances, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement."[167]

The court of appeals held that the plain language of this statute indicated that the homeowners' house, and the property upon which it sat, fell within the definition of a "residential structure."[168] The fact that "the pole barn itself [did not] qualify as a residential structure" did not mean the project, which gave rise to the lien, was not "an improvement to a residential structure."[169] Therefore, the court held that for purposes of the CLA, improvements made to a pole barn constitute an improvement to a residential structure.[170]

J. Johns v. Wixom Builders Supply, Inc.

A father and son were involved together in several drywall businesses and agreements, including a non-disclosure and limited non-

162. Ben's Supercenter, Inc. v. All About Contracting & Excavating, LLC, No. 302267, 2012 WL 3101837, at *1 (Mich. Ct. App. July 31, 2012).
163. *Id.*
164. *Id.* (citing MICH. COMP. LAWS ANN. § 570.1101).
165. *Id.*
166. *Id.*
167. *Id.* at *3 (citing MICH. COMP. LAWS ANN. § 570.1106(3)).
168. *Ben's Supercenter*, 2012 WL 3101837, at *3 (emphasis omitted).
169. *Id.*
170. *Id.* at *3-4.

compete covenant.[171] The son had a supply agreement with the father's company to purchase a certain quantity of drywall board.[172] However, the son stopped buying the drywall board after he concluded that the father's company had substantially breached the non-compete and non-disclosure agreements.[173]

The non-compete agreement prohibited the father's company from engaging in business with any "protected customers," a list of which was attached as an exhibit to the agreement.[174] Among the dozens of protected customers listed were MJC Chesterfield LLC, MJC-Legacy, and MJC Weschester.[175] The son alleged that the father's company violated this provision, but the defendants argued that their dealings with an entity named "MJC" were permissible because that entity name did not appear on the list of protected customers, and, thus, there was no breach.[176]

The trial court rejected this argument, ruling that the defendants had not breached, but the court of appeals disagreed.[177] The court of appeals held "that the contract [was] ambiguous with regard to whether 'MJC' itself was a protected customer or whether the parties intended only that defendants could not bid on work for MJC jobs at Chesterfield, Legacy, or Weschester."[178] Thus, "there was a genuine issue of fact about whether defendants breached the non-compete agreement with regard to [their dealings with] MJC."[179] There was also a genuine issue of material fact as to whether the defendants bid with another protected customer because the agreement stated that if inadvertent breach occurred, the defendants had the opportunity to cure if the plaintiff notified the father's company of the breach.[180]

The defendants further "contend[ed] that the trial court erred in holding that plaintiffs did not need to fulfill their buying obligations under the supply agreement because of defendants' breaches of the covenant not to compete."[181] Given the "defendants' conduct in

171. Johns, Jr. v. Wixom Builders Supply, Inc., No. 299542, 2012 WL 3854792, at *1 (Mich. Ct. App. Sept. 4, 2012), *appeal denied*, 493 Mich. 921; 823 N.W.2d 607 (2012), *reconsideration denied*, 494 Mich. 872; 823 N.W.2d 243 (2013).

172. *Id.*

173. *Id.*

174. *Id.* at *2.

175. *Id.* at *3.

176. *Id.* at *1, *3.

177. *Johns*, 2012 WL 3853792, at *2-3.

178. *Id.* at *3.

179. *Id.*

180. *Id.*

181. *Id.* at *5.

submitting at least one competing proposal to a protected customer, using confidential information . . . , and interfering with plaintiffs' attempts to purchase drywall from competitors," the court of appeals agreed that the defendants' "'breach ha[d] effected such a change in essential operative elements of the contract that further performance by the other party [was] thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party.'"[182] The court opined that the plaintiff could not be expected to continue purchasing material in light of the defendants' pattern of conduct, given it "specifically and substantially violate[d] the parties' agreement and undermine[d] plaintiffs' business."[183] Thus, the court of appeals affirmed in part, holding that "the trial court correctly ruled that [the plaintiff was] relieved from his obligations under the supply agreement."[184]

K. Detroit Land Development & Holdings, LLC v. MLK-Buchanan Community Development Corp.

In this contract dispute, the plaintiff alleged that the defendant owed it a remaining balance under a development agreement.[185] The parties had agreed to "jointly participate in the construction and operation of a housing development."[186] The contract entitled plaintiff to twenty percent of the development fee—estimated at $1,000,000—paid to the defendants.[187] However, the plaintiff alleged that it had only received $94,052.23 out of the $200,000 to which it was entitled.[188]

The defendants responded by asserting that while the agreement estimated that "the development fee would be $1,000,000, . . . only $520,260 was ever paid to defendants."[189] Accordingly, the defendants argued that the plaintiff's twenty percent fee was only $104,520, and that they paid this amount to the plaintiff.[190] The defendants further argued that the "plaintiff's claim for additional funds was not ripe unless and

182. *Id.* (citations omitted in original) (quoting McCarty v. Mercury Metalcraft Co., 372 Mich. 567, 574; 127 N.W.2d 340 (1964)).

183. *Johns*, 2012 WL 3854792, at *6.

184. *Id.*

185. Detroit Land Dev. & Holdings, LLC v. MLK-Buchanan Cmty. Dev. Corp., No. 307629, 2013 WL 331649, at *1 (Mich. Ct. App. Jan. 29, 2013), *appeal denied*, 494 Mich. 885; 834 N.W.2d 499 (2013).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

until [the defendants] received payment of additional development fees" and that the "plaintiff lacked standing to bring the claim because it had not filed an annual report since 2005 as required of limited liability companies."[191]

The court of appeals noted that the defendants cited the incorrect statutory provision—MCLA section 450.1922(1) of the Business Corporation Act[192]—regarding their standing argument[193] because the plaintiff was a limited liability company, not a corporation.[194]

> Unlike the Business Corporation Act, the Limited Liability Company Act does *not* provide for automatic dissolution as a penalty for a company's failure to file its annual statements. Although [an LLC] that fails to file annual statements for a period of two consecutive years and [that does not] cure this defect "is not in good standing," it "remains in existence and may continue to transact business in this state."[195]

Thus, the "[p]laintiff's past noncompliance with the annual filing requirement of MCL [section] 450.4207 did not divest it of standing to sue."[196]

However, summary disposition favoring the defendants was nonetheless appropriate because "the contract clearly stated that plaintiff was entitled to receive 20 percent of the development fees *paid* to defendants," whereas the $1,000,000 estimated fee was merely a projection.[197] Given that the plaintiff failed to show "the existence of a genuine issue of disputed fact," the court did not reach the ripeness argument and affirmed summary disposition favoring the defendants, with costs.[198]

L. Hosey v. JE Hemphill, Inc.

In *Hosey v. JE Hemphill, Inc.*, the plaintiffs argued they were "entitled to recover, as third-party beneficiaries," from the defendant title company as a result of its "breach of its promise to Fifth Third to obtain

191. *Detroit Land Dev.*, 2013 WL 331649, at *1.
192. MICH. COMP. LAWS ANN. § 450.1922(1) (West 2013).
193. *Detroit Land Dev.*, 2013 WL 331649, at *2.
194. *Id.*
195. *Id.* (citation omitted) (quoting MICH. COMP. LAWS ANN. § 450.4207a(2)-(3)).
196. *Id.*
197. *Id.*
198. *Id.* at *2-3.

the necessary sworn statements and lien waivers."[199] The court of appeals disagreed, ruling that the "[d]efendant's agreement with Fifth Third was one of agency and principal, making the third-party beneficiary argument largely irrelevant."[200]

The plaintiffs also argued that "even in absence of a contract, defendant owed them a common-law duty to protect against attachment of construction liens."[201] Again, the court of appeals disagreed with the plaintiffs, holding that the title company "owed no independent tort duty to plaintiffs," and "even if there [was] such a duty, plaintiffs waived any right to make a claim against defendant when they signed a release of liability," which was enforceable.[202]

M. Edington v. Union Square Development, Inc.

In *Edington v. Union Square Development, Inc.*, the plaintiff was injured on a construction site and brought suit. The defendant gave notice of nonparty fault of a business entity, whose employee may have removed a guardrail leading to the plaintiff's fall.[203] While the plaintiff presented circumstantial evidence that the business entity's employees removed the guardrail, the business entity prevailed on summary disposition because the plaintiff could provide no evidence beyond conjecture. The business entity then filed a motion seeking costs and fees.[204]

The trial court awarded costs, but it denied attorney fees under MCR section 2.405(D)(3)'s "interest of justice" exception.[205] However, at trial with other defendants, the plaintiff requested that evidence of the business entity's potential fault not be introduced and that the jury not be permitted to allocate to the business entity any percentage of fault; the trial court granted both requests.[206] As a result, the jury in the trial court apportioned one-hundred percent of the fault to parties other than the business entity.[207] On appeal, the plaintiff then relied on the fact that the jury did not consider the business entity's liability to determine that the

199. Hosey v. JE Hemphill, Inc., No. 306177, 2013 WL 1149975, at *2 (Mich. Ct. App. Feb. 14, 2013).
200. *Id.*
201. *Id.*
202. *Id.*
203. Edington v. Union Square Dev. Inc., No. 303876, 2013 WL 1442223, at *1 (Mich. Ct. App. Apr. 9, 2013).
204. *Id.* at *2.
205. *Id.* at *2, *4.
206. *Id.* at *3.
207. *Id.*

business entity was at least partially liable for the plaintiff's injuries.[208] The court reasoned that the plaintiff was "attempting to relitigate and undermine the jury's decision regarding the allocation of damages. We find that the plaintiff's belated challenge to the apportionment of fault, after he proceeded to trial and after he requested that the jury not consider [the business entity]'s role in the accident, is meritless."[209]

Accordingly, because the plaintiff failed to establish a genuine issue of material fact in his dispute with the business entity, the court of appeals affirmed the business entity's summary disposition against the plaintiff. But the court of appeals reversed and remanded for a determination and award of attorney fees to the business entity.[210]

N. Apache Carpet & Floor Covering, LLC v. Banah Corp.

Apache Carpet & Floor Covering, LLC v. Banah Corp. was a construction lien foreclosure action.[211] The court of appeals affirmed summary disposition favoring the defendant bank, "denying [the corporation]'s cross-motion for summary disposition, and releasing [the corporation]'s construction lien on the ground that it was invalid [for failing to] comply with the sworn statement requirement of MCL [section] 570.1110" of the CLA.[212] The analysis focused on interpretation and application of MCLA section 570.1110.[213]

Here, the corporation did not provide a sworn statement within one year of recording its lien, but it did provide "an unsworn 'cost list.'"[214] The corporation also provided the sworn statement before the bank moved for summary disposition.[215] The corporation relied on *Alan Custom Homes, Inc. v. Krol*,[216] but the majority ultimately found that case distinguishable.[217] The majority focused on the fact that the sworn statement the corporation submitted was provided only after the litigation was initiated.[218] The dissent noted that *Alan Custom Homes* contained direct language stating that the submissions could constitute substantial

208. *Id.*
209. *Edington,* 2013 WL 1442223, at *3.
210. *Id.* at *5.
211. Apache Carpet & Floor Covering, LLC v. Banah Corp., No. 305550, 2013 WL 1748587 (Mich. Ct. App. Apr. 23, 2013).
212. *Id.* at *1 (citing MICH. COMP. LAWS ANN. § 570.1110).
213. *Id.*
214. *Id.* at *2.
215. *Id.* at *3.
216. Alan Custom Homes, Inc. v. Krol, 256 Mich. App. 505; 667 N.W.2d 379 (2003).
217. *Apache,* 2013 WL 1748587, at *6 .
218. *Id.* at *5.

compliance, but the panel majority considered this to be non-binding dicta.[219] The majority also held that the corporation did not meet the requirements for its motion for reconsideration.[220]

O. Complete Animal Control Solutions, LLC v. Wolney

In *Complete Animal Control Solutions, LLC v. Wolney*, the court of appeals affirmed sanctions against the plaintiff-appellant and its counsel.[221] In *Complete Animal Control Solutions*, the attic of the defendants' residence was infested with "bats, bat feces and urine, and debris," which the plaintiff agreed to remediate and restore.[222] The plaintiff ceased working at some point and brought claims for breach of contract, quantum meruit, open account, and fraud.[223]

The defendant argued that the plaintiff's claims were barred because it was an unlicensed residential builder and thus "lacked the legal capacity to sue."[224] The plaintiff responded by arguing that it was licensed for animal control, that the work it did at the residence did not need a building permit, and "that it was [also] exempt from licensure requirements under MCL [section] 339.2403(e) because 'it was working under contract with a licensed residential builder.'"[225]

The trial court granted the defendants' summary disposition, explaining that the Residential Builders Act (RBA) required that the plaintiff have certain licenses to perform the contracted work, and "its failure to [obtain such licenses] precluded . . . relief either in law or equity."[226] The trial court also awarded sanction fees to the defendants and against the plaintiff and its counsel.[227]

The court of appeals affirmed.[228] It found that the RBA license requirements were implicated here because the "extensive restoration services and remodeling of defendants' home" included "demolition; floor covering (ceramic tiling); various carpentry work; insulation work; painting; siding work; work with cabinetry and the soffit, fascia, and

219. *Id.* at *6-7.
220. *Id.* at *6.
221. Complete Animal Control Solutions, LLC v. Wolney, No. 310535, 2013 WL 1830847 (Mich. Ct. App. Apr. 30, 2013).
222. *Id.* at *1.
223. *Id.* at *2.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Complete Animal Control*, 2013 WL 1830847, at *3.
228. *Id.* at *1.

gutters of the home[;]" and also the roof.[229] The court also affirmed the award of sanctions against the plaintiff's attorneys, agreeing that the plaintiff's claim was frivolous in that the "plaintiff's legal position was devoid of arguable legal merit," given that the plaintiff was not licensed.[230]

P. Dan's Excavating, Inc. v. Department of Transportation

Dan's Excavating, Inc. v. Department of Transportation involved a breach of contract dispute.[231] The plaintiff won a bid for construction projects along two interstate roads.[232] The projects' plans required cofferdams to stay in place after completion, but bid materials and Department of Environmental Quality (DEQ) permits included with those materials provided that the cofferdams would be removed upon completion of the project (apparently cofferdams were of considerable value to the plaintiff).[233] The plaintiff was awarded the bid on the projects in part because it provided one of the lowest bids—however, the plaintiff's bid was based on the cofferdams being removed after the work on the two interstate roads was completed.[234]

After the defendant discovered that the plaintiff intended to remove the cofferdams, the defendant requested that the DEQ change the permits to allow the cofferdams to remain in place.[235] The DEQ granted the defendant's request, amending the permits.

When the defendant failed to pay for the plaintiff's losses resulting from having to leave the cofferdams in place, the plaintiff sued in the court of claims, which granted the plaintiff summary disposition and denied the defendant summary disposition.[236] In this case, because the original DEQ permits were included as part of the bid materials, the plain language of the contract dictated the terms of the original DEQ permits. That required the cofferdams to be completely removed to prevail over "any conflicting terms located in the plans."[237] On appeal, the defendant argued that some bid materials indicated that the cofferdams were to remain in place after the projects' completion, thus creating ambiguity.

229. *Id.* at *4.
230. *Id.* at *6 (citing MICH. COMP. LAWS ANN. § 600.2591(3)(a)(iii)).
231. Dan's Excavating, Inc., v. Dep't of Transp., No. 310901, 2013 WL 2319483, at *1 (Mich. Ct. App. May 28, 2013).
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Dan's Excavating, Inc.*, 2013 WL 2319483, at *3.

However, the bid materials referenced by the defendant were not of "equal" priority level to the DEQ permits. The court reasoned that "any statement saying that the work was to comply with the plans must be interpreted such that the plans yield to any specific conflicts in any higher priority documents."[238]Accordingly, the court affirmed the award to the plaintiff, including the award of damages and the ability to tax costs against the defendant.

Q. Epps v. 4 Quarters Restoration, L.L.C.

In *Epps v. 4 Quarters Restoration, L.L.C.*, the employee defendant falsely stated that he was a licensed residential builder to restore the plaintiffs' home after a flood.[239] This misrepresentation rendered contracts void between the two parties and nullified a simultaneous grant of power of attorney.[240] Without the power of attorney, the employee defendant could not accept delivery of, endorse, or negotiate checks on the plaintiffs' behalf.[241] Thus, the plaintiffs were entitled, as matter of law, to check proceeds paid to the employee defendant by a co-defendant check-cashing business.[242] The employee defendant's license had been revoked, yet he endorsed all the checks from the insurance carrier.[243] The plaintiffs alleged that the employee defendant did this without their knowledge or approval.[244]

The contractor co-defendants argued that the employee defendant's lack of a license should not deprive the contractor entity of funds it was already paid for work completed.[245] The court of appeals agreed and held that the trial court erred in determining that MCLA section 339.2412(1) required the contractor defendants to return any proceeds they already received on the basis that the employee defendant had no license, but it would have barred them from seeking non-payment from the owners.[246]

However, the contract was void *ab initio* because of the fraudulent inducement, and this required return of the payments.[247] Thus, the court

238. *Id.*
239. Epps v. 4 Quarters Restoration, L.L.C., No. 305731, 2013 WL 2460119, at *1 (Mich. Ct. App. June 6, 2013), *appeal granted*, 838 N.W.2d 707 (Mich. 2013).
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at *2.
245. *Epps*, 2013 WL 2460119, at *2.
246. *Id.* at *4.
247. *Id.* at *5.

of appeals affirmed, but on alternative grounds.[248] Also, the check-cashing defendant defaulted yet then tried to argue that "it was entitled to a jury trial on damages," but this was not necessary because it was a "sum certain."[249]

R. Polaris Construction, Inc. v. Delicata

In *Polaris Construction, Inc. v Delicata*, the plaintiff performed remediation on water damage to a commercial building.[250] The lessee of the building was to maintain insurance for water damage.[251] The issue became whether there was a contract with the defendant, the building owner, for "remediation work on the non leased portion of building."[252]

The plaintiff filed a claim of lien against the property and a complaint "seeking foreclosure of lien and alleging breach of contract, unjust enrichment, and fraud."[253] The defendant filed for summary disposition, arguing that there was no enforceable contract, there was no fraud because no statement was ever false at the time it was made, and there was no unjust enrichment because there was no direct benefit.[254] The defendant also argued that the "plaintiff's lien foreclose claim failed because plaintiff did not serve . . . notice of furnishing . . . required by MCL [section] 570.1111(4)."[255]

The trial court granted the defendant's motion for summary disposition.[256] The court of appeals reversed both the breach of contract dismissal—finding that there was a genuine issue of material fact regarding the existence of a unilateral contract—and the unjust enrichment claim.[257] The court of appeals affirmed dismissal of the fraud in inducement claim because the plaintiff was trying to enforce the contract.[258]

The court of appeals also affirmed summary disposition for the defendant on the lien foreclosure, analyzing MCLA section 570.1109 and MCLA section 570.1111(4).[259] While no notice of furnishing was

248. *Id.*
249. *Id.* at *6.
250. Polaris Constr., Inc. v. Delicata, No. 308254, 2013 WL 3107537, at *1 (Mich. Ct. App. June 20, 2013).
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Polaris*, 2013 WL 3107537, at *1.
257. *Id.* at *2-3.
258. *Id.* at *4.
259. *Id.*

required, MCLA section 570.1110 did require a sworn statement.[260] Thus, the trial court reached the right result, but for the wrong reason.[261] Furthermore, while attorney fees are available to a prevailing defendant under a CLA claim if the lien foreclosure is deemed "vexatious," here the court of appeals reversed the award of fees as an abuse of discretion because there was nothing in the lower court record to indicate that the plaintiff filed its claim without any reasonable basis to believe there was a meritorious issue to be determined.[262]

S. Triangle Associates Inc. v. LI Industries

Triangle Associates Inc. v. LI Industries was a "declaratory judgment action arising from construction defects."[263] The plaintiff was the general contractor for construction of a hall on the campus of a university.[264] Copings began falling off the roof, and an architecture and engineering firm hired to investigate the issue determined it was because a subcontractor had failed to install them per the requisite specifications.[265] The plaintiff then fixed the copings and made demand to the subcontractor and project insurer for payment.[266] The plaintiff filed a suit against the subcontractor and project insurer when neither made payment.[267]

The project insurer-defendant sought summary disposition, "alleging that, under the language of the policy . . . there was no 'occurrence' because the only property damage that occurred was" due to faulty workmanship performed by the subcontractor.[268] In response, the plaintiff "noted that this case was unlike . . . those cited by [the project insurer] because [the plaintiff] was an additional insured, not a named insured, and there were no binding precedents in Michigan with similar facts."[269]

The trial court denied the project insurer's motion for summary disposition.[270] It noted that the contract between the plaintiff and the

260. *Id.*
261. *Id.*
262. *Polaris Constr.*, 2013 WL 3107537, at *4-5.
263. Triangle Assocs. Inc. v. LI Indus., No. 307232, 2013 WL 4081124, at *1 (Mich. Ct. App. Aug. 13, 2013).
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Triangle Assocs.*, 2013 WL 4081124, at *1.
270. *Id.*

subcontractor required the subcontractor "to provide insurance coverage for [the plaintiff] in connection with its work on the project," and thus the court assessed the language of the insurance contract between the subcontractor and project insurer, under which the plaintiff was an additional insured.[271] "The trial court found a genuine issue of material fact existed regarding whether [the plaintiff's] claims fell outside the coverage provided by the policy," especially since the record raised many reasons why the subcontractor's faulty work was not necessarily attributable to the plaintiff.[272] Thus, in viewing the record in the light most favorable to the plaintiff, this was not a case of the subcontractor as the insured wanting coverage for its own faulty work, but rather the plaintiff as the insured wanting damages for the subcontractor's defective work, which was a claim that "was not necessarily precluded from being an occurrence under the policy."[273]

After case evaluations, the plaintiff dismissed the subcontractor-defendant.[274] The project insurer-defendant then "filed multiple motions to exclude certain evidence and defenses from trial, including 'evidence or testimony relating to the insurance policies that had expired before [2008] on the basis that, having expired, they could not possibly provide coverage.'"[275] The trial court granted the motion, but it gave the plaintiff the chance to amend its pleading.[276]

Plaintiff filed an amended complaint, alleging that

> an accident, or occurrence as defined by the policies, occurred whereby damages were sustained to the coping stones . . . [and] was caused by a combination of defective installation/faulty workmanship by [the subcontractor], faulty brackets/clips which were intended to hold the stones in place, and/or the freeze/thaw cycles from 2006 to 2008.[277]

Plaintiff also maintained that, because the faulty work was that of the subcontractor and not the plaintiff, "the exclusions in the policy did not apply."[278]

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271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at *2.
275. *Triangle Assocs.*, 2013 WL 4081124, at *2.
276. *Id.*
277. *Id.* (first and second alterations in original) (quoting amended complaint) (internal quotation marks omitted).
278. *Id.*

The plaintiff "subsequently moved for summary disposition alleging that the unambiguous policy language granted it coverage."[279] The project insurer opposed that motion and

> requested summary disposition in its favor on the grounds that the trial court had excluded reference to all policies except the one in force [in 2008]; that [the plaintiff's] amended complaint only referenced the date of the falling stones as the "occurrence" triggering coverage; that [the plaintiff] was not an additional insured under the 2008 Policy; and that because the only damage was to [the subcontractor's] work, there was no "occurrence" under [the subcontractor's] policy.[280]

The trial court denied the plaintiff's motion and granted summary disposition in favor of the project insurer-defendant,[281] as the plaintiff had

> conceded that it was not an "additional insured" under the 2008 Policy . . . in effect at the time the coping stones fell, and that the only "occurrence" alleged was the faulty work of [the subcontractor], which by law could not constitute an occurrence.[282] It noted that had [the plaintiff] been an additional insured at the time the stones fell, there were sufficient factual issues precluding summary disposition, but that because [the plaintiff] was not an additional insured at the time of the incident, there could be no occurrence because [the plaintiff] was relying on the defective work product of [the insured subcontractor].[283]

On appeal, the plaintiff argued "multiple reasons why it believed the trial court erred in granting summary disposition," but the court of appeals affirmed.[284] The court explained that when the project insurer "originally moved for summary disposition, [the plaintiff] was filing suit for damages caused by [the subcontractor's] faulty workmanship as an additional insured."[285] This "procedural posture was quite different from

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279. *Id.*
280. *Id.*
281. *Triangle Assocs.*, 2013 WL 4081124, at *2.
282. *Id.*
283. *Id.*
284. *Id.* at *2-4.
285. *Id.* at *4.

any Michigan case law, binding or otherwise," as "the trial court recognized and expressly addressed" in its denial of the project insurer's original summary disposition motion.[286] "However, once the trial court granted [the project insurer's] motion to exclude evidence of any policies [prior to] the 2008 Policy, the procedural posture . . . reverted to the traditional pattern of the insured seeking damages for the insured's own defective work."[287]

Importantly, the plaintiff did not appeal the trial court's evidentiary ruling and likewise did not provide the transcript to the motion hearing "to permit a determination of the breadth of that evidentiary ruling," thus limiting "both the trial court and [the court of appeals] to viewing the complaint solely from the standpoint of the coverage provided by the 2008 policy."[288]

> From that standpoint, there [was] no dispute that [the plaintiff was] not an additional insured under [that policy] or that the alleged occurrence happened . . . when that policy was in effect. As a result, the only cognizable claim remaining was a claim of defective work by [the subcontractor] under the 2008 policy where [the subcontractor] was the only insured. Having reverted to the more traditional procedural posture, the trial court's conclusion that Michigan law held that under such facts there was no occurrence resulting in coverage was correct . . . .[289]

Thus, summary disposition favoring the project insurer was proper.[290]

III. CONCLUSION

Breach of contract actions and the interpretation of contractual language undoubtedly provided the most disputes requiring resolution during the *Survey* period.[291] As practitioners, it is important to keep in mind the need for specificity in contractual language and the import that

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286. *Id.*
287. *Triangle Assocs.*, 2013 WL 4081124, at *2.
288. *Id.*
289. *Id.* at *4.
290. *Id.*
291. *See, e.g.*, Karaus v. Bank of N.Y. Mellon, 300 Mich. App. 9; 831 N.W.2d 897 (2013); Detroit Land Dev. & Holdings, LLC v. MLK-Buchanan Cmty. Dev. Corp., No. 307629, 2013 WL 331649 (Mich. Ct. App. Jan. 29, 2013); *Triangle Assocs.*, 2013 WL 4081124; Polaris Constr., Inc. v. Delicata, No. 308254, 2013 WL 3107537 (Mich. Ct. App. June 20, 2013); Epps v. 4 Quarters Restoration, L.L.C., No. 305731, 2013 WL 2460119 (Mich. Ct. App. June 6, 2013), *appeal granted*, 838 N.W.2d 707 (Mich. 2013).

terminology can have on the outcome of construction disputes.[292] Additionally, practitioners should note that if a contractor is not properly licensed, said contractor will be unable to recover for breach of contract under Michigan law.[293]

As noted above, given the proclivity of most actors in the construction industry to rely upon alternative dispute resolution provisions, many, if not most, of the construction disputes during the *Survey* period were decided through non-precedential awards.[294] Moreover, unlike the state court system, which has progressed towards e-filing, alternative dispute resolution awards are not typically disseminated to the public and, therefore, are not easily accessible or searchable.[295] Thus, while construction law is diverse and impacts numerous substantive areas of law, the development of construction law in Michigan is primarily accomplished through the few published and unpublished cases decided outside of alternative dispute resolution.[296]

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292. *See* Ibrahim v. Joseph Philip Craig & Sons, Inc., No. 303207, 2012 WL 2335915 (Mich. Ct. App. June 19, 2012).

293. *Epps*, 2013 WL 2460119, at *4.

294. *See* Stipanowich, *supra* note 1.

295. Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 362 (2007).

296. *See* Stipanowich, *supra* note 1.