ANNUAL SURVEY OF MICHIGAN CONSTRUCTION LAW

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I. INTRODUCTION

Many substantive areas of law converge under the umbrella of construction law. Particularly, contracts, tort, employment, tax, and others are frequently implicated in construction matters.[1] Construction cases are often resolved through alternative dispute resolution (ADR).[2] Construction contracts often include mandatory ADR, either as a condition or alternative to litigation.[3] Due to the specialized and complex nature of construction cases, arbitration is often preferred by clients and practitioners alike.[4] The cases in this *Survey* Article emphasize the value

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1. David K. DeWolf & Matthew C. Albrecht, *Construction Law Practice*, 33 WASH. PRAC. SERIES § 1:3 (2017).

2. *See* Robert C. Prather, Sr., & Joe L. Cope, *Construction*, 2017 TEX. PRAC. GUIDE ALTERNATIVE DISP. RESOL. § 3.22 (2017).

3. *See* Matthew Devries, *Construction Contracts and Arbitration Provisions: Is the Word "May" Mandatory? Maybe!*, BEST PRACTICES CONSTRUCTION L. (Aug. 10, 2017), https://www.bestpracticesconstructionlaw.com/2017/08/articles/alternative-dispute-resolution/arbitration/construction-contracts-and-arbitration-provisions-is-the-word-may-mandatory-maybe-2/.

4. Stephen A. Hilger, *Construction Disputes: Arbitration or Litigation*, HILGER HAMMOND CONSTRUCTION L. BLOG (Aug. 9, 2017),

courts place on arbitration.[5] Consequently, many construction-related cases continue to be resolved outside the court system.[6] The continued boom of the construction and real estate industries in Michigan reflects the trend of creative theories to collect on lien rights and unpaid contract balances.[7] With these considerations, this *Survey* Article examines significant developments in construction law through a selection of published and unpublished cases.

II. SIGNIFICANT MICHIGAN CASES INVOLVING CONSTRUCTION LAW

A. Dancer v. Clark Construction Co., Inc.

Chief Justice Markman, concurring with the Michigan Supreme Court's decision to deny leave to appeal on the basis that genuine issues of material fact precluded summary disposition, offered guidance on the common work area doctrine in *Dancer v. Clark Construction Co., Inc.*[8] Although Justice Markman's concurring opinion is not binding on the definition of "danger creating a high degree of risk" for purposes of the "common work area doctrine," the opinion foreshadows further development in this unsettled area of law.[9] Stakeholders in the construction industry should be aware of this emerging issue and be prepared for additional litigation as Michigan courts refine the common work area doctrine. Chief Justice Markman expressed concern that an overbroad definition of "high degree of risk" would essentially render the common work area doctrine strict liability for general contractors.[10] Chief Justice Markman also cautioned against the effective imposition of a contributory negligence scheme by considering the worker's negligence as included in the "danger."[11] To do so would contradict

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http://hilgerhammondconstructionlawblog.com/2017/08/construction-disputes-arbitration-or-litigation/.

5. *See infra* Sections II.B. and II.F.

6. Elizabeth Kantor, *Emergency Arbitration of Construction Disputes—Choose Wisely or End Up Spoilt for Choice,* WOLTERS KLUWER (Feb. 15, 2017), http://arbitrationblog.kluwerarbitration.com/2017/02/15/emergency-arbitration-construction-disputes-choose-wisely-end-spoilt-choice/.

7. *See* Matthew Dolan, *5 Trends to Watch in Michigan's Economy*, DETROIT FREE PRESS (Jan. 2, 2016) https://www.freep.com/story/money/business/michigan/2016/01/02/5-trends-watch-state-economy/78012668/.

8. Dancer v. Clark Constr., LLC, 500 Mich. 992, 894 N.W.2d 596 (2017) (mem) (Markman, C.J., concurring).

9. *Id.*

10. *Id.* at 992, 894 N.W.2d at 597 (quoting Latham v. Barton Marlow Co., 497 Mich. 993, 995–96, 861 N.W.2d 614, 616 (2015) (Markman, J., dissenting)).

11. *Id.* at 992, 894 N.W.2d at 598–99.

Michigan jurisprudence.[12] Chief Justice Markman suggested that the "high degree of risk" analysis should consider the safety equipment available to a worker when faced with an unavoidable danger inherent on a construction site.[13]

B. CNJ Financial Group, LLC v. McKenney

CNJ Financial Group, LLC v. McKenney[14] concerns judicial review of an arbitration award.[15] Before closing occurred, Betty McKenney (Ms. McKenney) refused to sell her property to CNJ Financial Group, LLC (CNJ) and Martin's Construction & Management, LLC (Martin's Construction).[16] Ms. McKenney executed a written agreement whereby she agreed to sell her property in Detroit, Michigan to CNJ and Martin's Construction.[17] Martin's Construction agreed to provide certain improvements to the property as part of the deal.[18] After Martin's Construction expended resources towards completing the agreed-upon improvements, Ms. McKenney refused to sell the property.[19] "CNJ and Martin's Construction filed a complaint alleging breach of contract," which was amended to add "counts of fraud and unjust enrichment."[20] Ms. McKenney countered with claims of "breach of contract against CNJ and Martin's Construction; negligence against R & F Flooring[21] for the repairs it performed; and civil conspiracy against CNJ, Martin's Construction and R & F Flooring."[22]

The parties submitted the matter to binding arbitration on the eve of trial.[23] The arbitration resulted in a finding that "Ms. McKenney breached the real estate transaction agreement when she refused to sell the property to Martin's Construction."[24] Accordingly, the arbitrator

12. *Id. See* Funk v. General Motors, 392 Mich. 91, 113–14, N.W.2d 641, 650–51 (1974) (refusing to adopt contributory negligence in claims brought under the common work area doctrine); Placek v. City of Sterling Heights, 405 Mich. 638, 650, 225 N.W.2d 511, 514 (1979) (replacing contributory negligence with comparative negligence for common-law claims).

13. *Dancer*, 500 Mich. 992, 894 N.W.2d at 599.

14. CNJ Fin. Grp., LLC v. McKenney, No. 327547, 2016 WL 6127690, at *1 (Mich. Ct. App. Oct. 18, 2016).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* R & F Flooring was a subcontractor to Martin's Construction. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

ordered Ms. Kenney to either convey the property to Martin's Construction for $25,000 as provided in the agreement or else reimburse Martin's Construction $65,000 for work it performed.[25]

The Michigan Court of Appeals reviewed the trial court's order that Ms. McKenney transfer the property to Martin's Construction in exchange for payment of the purchase price.[26] The trial court granted Martin's Construction's motion to confirm the arbitration award and entered judgment in its favor.[27] The court of appeals addressed the scope of an arbitrator's authority, reiterating strict limitations on judicial review over an arbitration award.[28]

"[J]udicial review exists over whether the arbitrator acted within the scope of his contractual authority or for an error of law that clearly appears on the face of the award or in the reasons stated for the decision."[29] Michigan law provides that it is the arbitrator's responsibility to assess witness credibility in which conflicting testimony is presented.[30] The court of appeals held that Ms. McKenney sought judicial review of the arbitrator's decision on the merits of the matter.[31] Such a review is impermissible and a court is prohibited from substituting its own judgement for that of the arbitrator.[32] The court of appeals noted that "[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award" under the Michigan Court Rules.[33]

The court of appeals held that the trial court's authority was limited to a confirmation of the arbitrator's award, and that the trial court erred when it modified the award.[34] The arbitration award gave Ms. McKenney two alternatives.[35] She could either sell the house as agreed, or she could reimburse Martin's Construction for its work.[36] The trial court did not adhere to any of the three bases[37] for modifying an arbitration award

25. *Id.*
26. *Id.* at *2.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at *3.
32. *Id.*
33. *Id.* (quoting MICH. CT. R. 3.602(J)(2)).
34. *Id.* at *4.
35. *Id.*
36. *Id.*
37. The Michigan Court Rules allow an arbitration award to be modified.

> [T]he court shall modify or correct the award if: (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award; (b) the arbitrator has awarded on a

when it eliminated one of the alternatives from the arbitration award.[38] This decision reinforces the binding nature of arbitration and the very limited judicial review of such awards permitted in Michigan.

C. Center Street Lofts Condominium Association v. Center Street Partners LLC

In *Center Street Lofts Condominium Association v. Center Street Partners LLC.*,[39] the association of individual owners of the Center Street Lofts Condominium project in Royal Oak, Michigan sued the architecture firm that designed the project, AZD Associates, Inc.[40] Pursuant to a 2003 contract with Center Street Lofts Condominium Association (Center Street), AZD Associates, Inc. (AZD) agreed to "perform the preliminary design, prepare construction documents for the shell, provide interior design services," and perform site administration if desired, on an hourly basis.[41] The architectural design was completed around February 2005.[42] In the middle of 2007, a dispute arose between the general contractor and the developer.[43] A settlement agreement was reached in resolution of that dispute and the association "fully accept[ed]" the general contractor's work and "acknowledged that the work was 'fully complete.'"[44] The settlement agreement contemplated that the general contractor would complete certain warranty work, which began on December 18, 2007.[45]

Center Street filed its complaint against AZD and other defendants on August 9, 2013.[46] Center Street alleged counts of "breach of contract/professional negligence, indemnification, unlicensed practice of architecture, gross negligence, and unjust enrichment."[47] The court of appeals reviewed the trial court's grant of AZD's motion for summary disposition on the basis that Center Street's claims "were time barred

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matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or (c) the award is imperfect in matter of form, not affecting the merits of the controversy.

MICH. CT. R. 3.602(K)(2).

38. *CNJ Fin. Grp.*, 2016 WL 6127690 at *4.

39. Center St. Lofts Condo. Ass'n v. Center St. Partners LLC, No. 328526, 2016 WL 7496614, at *1 (Mich. Ct. App. Dec. 22, 2016).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

pursuant to MCL 600.5839(1)."[48] The court of appeals also reviewed the viability of a private cause of action for the unlicensed practice of architecture.[49]

1. Statute of Limitations

Claims that involve an improvement to real property may be subject to multiple statutes of limitations, so a court must first determine which period applies.[50] To make such determination, Michigan courts examine the complaint to determine "the true nature of the claim[s]."[51] All of Center Street's claims "address the same harm—that AZD *negligently* performed its professional architectural work."[52] Thus, the limitations periods for negligence and malpractice apply.[53]

The court of appeals agreed with the trial court that Center Street's negligence and professional malpractice claims were indeed time-barred.[54] The applicable statute of limitations for negligence and professional malpractice, including claims against state-licensed architects, is six years from the "time of occupancy of the completed improvement, use or acceptance of the improvement."[55] Center Street

48. *Id.* at *1–2; MICH. COMP. LAWS ANN. § 600.5839 (West 2012).

49. *Center St. Lofts Condo. Ass'n*, 2016 WL 749661, at *2–3.

50. *Id.* at *3–4.

51. *Id.* (citing Adams v. Adams, 276 Mich. App. 704, 710, 742 N.W.2d 399, 403 (2007)).

52. *Id.*

53. *Id.*

54. *Id.* at *4–5.

55. MICH. COMP. LAWS ANN. § 600.5839 (West Supp. 2012). MCLA section 600.5839 provides that:

> (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 . . . performing or furnishing the design or supervision of construction of 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.
>
> (b) If the defect constitutes the proximate cause of the injury of 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, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

argued that this statute of limitations did not apply because AZD was not a "state-licensed architect" when AZD failed to comply with the Michigan Occupational Code requirements for architectural firms.[56] The court of appeals reasoned that neither party disputed that the individual performing the work was a state-licensed architect.[57] Nor was it disputed that he performed architectural services for the benefit of AZD.[58] Thus, whether AZD complied with Michigan Occupational Code's requirements for an architectural firm, it was a "state-licensed architect" for purposes of a professional malpractice claim.[59]

Applying the six-year statute of limitations to the facts of the case, the court of appeals noted that the period began to run at "the time of occupancy of the completed improvement, use, or acceptance of the improvement."[60] As is common with construction projects, it is unclear exactly when the limitations period began to run.[61] However, certificates of occupancy were issued in early 2007.[62] Moreover, Center Street "acknowledged in June 2007 that the construction work was 'fully completed' and 'fully accept[ed]' it."[63] Thus, the limitations period could not have ended any later than June 2013.[64] It is noteworthy that the court of appeals did not include AZD's performance of warranty work in its calculation of the limitations period.[65] The discovery extension for gross negligence claims offered no relief to Center Street because it was aware of "a flashing issue with the design and construction, which contributed to the water intrusion" by August 2011.[66] Any claim based on the discovery rule became untimely as of August 2012, rendering the August 2013 complaint untimely by any measure.[67]

2. Unlicensed Practice of Architecture

The Michigan Occupational Code governs the practice of architecture, requiring that an architectural firm "have no less than 2/3 of its principals be licensed architects."[68] The Occupational Code does not

56. *Center. St. Lofts Condo. Ass'n*, 2016 WL 7496614, at *4.
57. *See id.*
58. *See id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *See id.* at *1 (stating warranty work did not begin until December 18, 2007).
66. *Id.*
67. *Id.*
68. *Id.* at *2 (citing MICH. COMP. LAWS § 339.2010(1) (West 2015)).

provide a private cause of action, except as to an action seeking injunctive relief "to restrain or prevent a person from practicing an occupation without a license."[69] Regardless of the truth of Center Street's allegations that AZD had two principals, only one of whom was a licensed architect, Center Street could not maintain its private cause of action, because neither party was a "natural person" under the Act.[70] Thus, the court of appeals affirmed the trial court's grant of summary disposition as to the unlicensed practice of architecture claim.[71]

D. Pepperco-USA, Inc. v. Fleis & Vandenbrink Engineering, Inc.

Pepperco-USA, Inc. v. Fleis & Vandenbrink Engineering, Inc.[72] addressed questions of standing and who is a proper party to bring a lawsuit in the absence of a clear contractual relationship.[73] Pepperco-USA, Inc. (Pepperco) alleged that Fleis & Vandenbrink Engineering, Inc. (F&V) did not comply with Pepperco's directions regarding construction of a hydroponic greenhouse site plan.[74] F&V prepared a site plan pursuant to two written agreements, to which Pepperco was not party.[75] Pepperco claimed that it directed F&V to prepare a "balanced" site plan, which meant that "the property had to be graded solely using materials readily located and available on the property."[76] F&V prepared the site plan at a grade that would not allow the property to be balanced.[77] Pepperco claimed that it was forced to expend significant costs to obtain materials needed to achieve the specified grade.[78] Pepperco alleged breach of contract, engineering malpractice, negligence, and breach of warranty against F&V.[79] The court of appeals reversed the trial court's decision when it held that Pepperco did have standing, despite not being a party to either the proposal letter or professional services agreement.[80]

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69. *Id.* at *3 (quoting Claire-Ann Co. v. Christenson & Christenson, Inc., 223 Mich. App. 25, 30, 556 N.W.2d 4, 6 (1997)).

70. *Id.* at *2.

71. *Id.* at *3.

72. Pepperco-USA, Inc. v. Fleis & Vandenbrink Eng'g, Inc., No. 331709, 2017 WL 685669 at *1 (Mich. Ct. App. Feb. 21, 2017).

73. *Id.* at *1, *4.

74. *Id.* at *1.

75. *See id.* at *7.

76. *Id.* at *1.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at *7.

In March 2010, F&V sent a proposal letter to Mastronardi Produce.[81] The proposal letter noted Mastronardi's core business using greenhouses to hydroponically grow produce.[82] F&V agreed to provide engineering services to prepare a site evaluation report for a property in Coldwater, Michigan that Mastronardi was interested in acquiring.[83] Subsequently, Mastronardi and F&V entered into a professional services agreement that incorporated the proposal letter.[84] The professional services agreement stated that "there are no third party beneficiaries to this PSA and the Services provided herein are exclusively for the direct benefit of . . . [Mastronardi]."[85] Although Pepperco was a separate legal entity, some evidence suggested that Pepperco and Mastronardi were related.[86] However, F&V maintained that there was "no contract or agreement between an entity named Pepperco" and F&V.[87] Further, F&V stated that it performed all services pursuant to the professional services agreement and proposal letter.[88]

The professional services agreement expressly stated that no construction services were included.[89] Pepperco claimed that it hired F&V to prepare a site plan and perform certain construction services after Pepperco became the owner of the property in 2014.[90] This agreement was allegedly "oral with follow-up emails further explaining" the various tasks.[91] By contrast, F&V maintained that it performed all services under the same project number and description "Mastronardi—2014 Pepperco. Greenhouse Site Design."[92]

The court of appeals addressed the issue of standing and whether a party to a lawsuit is a real party in interest in the complex construction context when a project involves multiple entities. "[T]o have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected."[93] "[A] real party in interest is the one who is vested

81. *Id.* at *1.
82. *Id.*
83. *Id.* at *1–2.
84. *Id.* at *2.
85. *Id.*
86. *Id.*, at *7.
87. *Id.* at *3, *4, *7.
88. *Id.* at *7.
89. *Id.* at *2.
90. *Id.* at *3.
91. *Id.*
92. *Id.* at *5.
93. *Id.* at *5 (citing Barclae v. Zarb, 300 Mich. App. 455, 483, 834 N.W.2d 100, 119 (2013)).

with the right of action on a given claim, even though the beneficial interest may be in another."[94]

The court of appeals reversed the trial court's decision when it held that Pepperco had standing because Pepperco's interests were at stake in the litigation.[95] "Pepperco owned the property, built and operated the greenhouse, utilized and relied on F&V's site plan, took steps to address the grade and the alleged balancing issues related to the site plan."[96] "Pepperco asserted a monetary injury flowing from the alleged defects in F&V's site plan."[97] These facts evidenced Pepperco's standing to request adjudication.[98]

E. Stock Building Supply, LLC v. Crosswinds Communities, Inc.

Stock Building Supply, LLC v. Crosswinds Communities, Inc.[99] arose out of construction liens and mortgages held on property that went into foreclosure.[100] As such, the litigation was complicated and involved many parties.[101] Third-party plaintiffs, Church & Church, Inc. (Church) appealed the trial court's order granting summary disposition to third-party defendants, which were primarily purchasers who bought foreclosed units within the Eton Street Station condominiums.[102] Crosswinds Communities, Inc. (Crosswinds) and Hitchingham Development Company, LLC (Hitchingham) hired many contractors, including Church, "to construct the Eton Street Station condominium project in Birmingham, Michigan."[103] Citizens Bank issued a loan to fund the project, secured by a mortgage on the entire project.[104] Church provided supplies to Hitchingham for the Eton Street project.[105] Church asserted construction liens on several units and Church received four separate mortgages for work it performed on Units 24, 30, 72, and 73.[106]

Litigation began in 2008 "when contractor Stock Building Supply, LLC" (Stock) "sued Hitchingham, its guarantor, and Crosswinds, after

94. *Id.*
95. *Id.* at *7–8.
96. *Id.* at *7.
97. *Id.*
98. *Id.*
99. Stock Bldg. Supply, LLC v. Crosswinds Communities, Inc., 317 Mich. App. 189 893 N.W.2d 165 (2016).
100. *Id.* at 193–94, 893 N.W.2d at 167–68.
101. *See id.*
102. *Id.* at 192, 196, 893 N.W.2d at 167, 169.
103. *Id.* at 193, 893 N.W.2d at 167.
104. *Id.*
105. *Id.*
106. *Id.*

Crosswinds and Hitchingham defaulted on their contract to pay Stock for construction services on the Eton Street project."[107] Stock initiated a lien foreclosure action.[108] "Citizens Bank, as senior mortgage holder, filed a cross-complaint requesting foreclosure of all mortgages on the project, including those mortgages belonging to Church for Units 24, 30, 72, and 73."[109]

O'Keefe and Associates (O'Keefe) as the appointed receiver, "reported to the trial court that it had an offer to buy Unit 24."[110]

> The trial court entered an order approving the sale that stated "the property was to be conveyed free and clear of all claims, liens and encumbrances without redemption periods, with the proceeds received therefrom to be distributed in accordance with the same priorities as held prior to consummation of such sales."[111]

"Church's attorney signed the order without objection" and the property was conveyed on August 18, 2009.[112] "In September 2009, Church entered into a confidential settlement agreement with Citizens Bank in which Church agreed to extinguish its [construction] liens" in exchange for a lump sum payment.[113] The settlement agreement included a clause that stated: "It is expressly understood that this Agreement shall have no effect on the [Church] Mortgages, which shall remain in full force and effect."[114] Following execution of the settlement agreement, Church was dismissed from the case with prejudice.[115]

The remaining three units subject to Church's mortgages were eventually sold.[116] As for Unit 24, O'Keefe presented the trial court with the offers to purchase and the trial court approved each sale.[117] Every order contained the same "free and clear" language.[118] Church received "notice of the orders permitting the sales of the units and the distribution of the sale proceeds from each property to Citizens Bank as senior lienholder."[119] Nearly three years later, Church "moved the trial court to

107. *Id.*
108. *Id.*
109. *Id.* at 194, 893 N.W.2d at 168.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 195, 893 N.W.2d at 168.
117. *Id.*
118. *Id.*
119. *Id.*

reopen the case, arguing that it still maintained mortgages on Units 24, 30, 72, and 73."[120]

"Church asserted that the settlement agreement between it and Citizens Bank explicitly stated that the mortgages on the four units were still in full force and effect and that it never foreclosed on those mortgages or voluntarily discharged them."[121] Citizens Bank argued "that Church's motion was untimely because the disputed units were sold more than three years earlier."[122] Citizens Bank further asserted "that it was entitled to the proceeds from the sales of the units because it held the senior mortgage," which remained unsatisfied.[123] Several third-party defendants filed motions asserting that the mortgages were extinguished upon the entry of the trial court's orders approving the sales and that "Church's claims should be barred by the doctrine of laches because Church's three-year delay in asserting any rights prejudiced them."[124]

The Michigan Court of Appeals held in favor of the third party defendants, reasoning that the trial court had the authority under the Construction Lien Act[125] to discharge Church's mortgages via a sale by a receiver. The court also held that the language of the trial court's orders selling the property "free and clear of all claims, liens and encumbrances" extinguished Church's mortgages.[126] The Construction Lien Act[127] allows a receiver to petition the court for authority to sell real property under foreclosure for "cash or on other terms as may be ordered by the court."[128] The court noted that "the plain language of the statute requires only that the subject property be under a foreclosure and that MCL section 570.1123 permits the trial court to grant a petition for sale brought by an appointed receiver."[129]

Next, the court of appeals turned to whether the Construction Lien Act[130] authorizes a court to discharge mortgages as part of the terms of sale.[131] In rejecting Church's arguments, the court of appeals reasoned that Church's interpretation would limit the trial court's authority to "determining what consideration was acceptable for the sale of property

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 196–97, 893 N.W.2d at 169.
125. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).
126. *Stock Bldg. Supply*, 317 Mich. App. at 197–98, 893 N.W.2d at 170–71.
127. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).
128. *Stock Bldg. Supply*, 317 Mich. App. at 200, 893 N.W.2d at 171 (quoting MICH. COMP. LAWS ANN. § 570.1123(2) (West 2007)).
129. *Id.* at 203, 893 N.W.2d at 173.
130. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).
131. *Stock Bldg. Supply, LLC*, 317 Mich. App. at 203, 893 N.W.2d at 173.

in receivership."[132] Moreover, evidence was submitted that it was common practice in the metropolitan Detroit area for trial courts to authorize receiver sales of "distressed properties free and clear of all liens and encumbrances."[133]

"Church's mortgages were among many encumbrances on the Eton Street project."[134] Even if Church's mortgages had remained valid, the Church mortgages were junior to Citizens Bank.[135] After the sales, Citizens Bank's mortgage remained unsatisfied and thus as junior lienholder, Church would not have received any of the proceeds.[136]

F. Ronnisch Construction Group, Inc. v. Lofts on the Nine, LLC

In the contractor-favorable decision *Ronnisch Construction Group, Inc. v. Lofts on the Nine, LLC*,[137] the Michigan Supreme Court ruled that the Construction Lien Act[138] allows a lien claimant to seek attorney fees when it prevails on a breach of contract claim in an arbitration proceeding.[139] Ronnisch Construction Group, Inc. (RCG) pursued attorney fees pursuant to the Construction Lien Act[140] after receiving an arbitration award on its breach of contract claim, even though its foreclosure claim was never adjudicated.[141] The supreme court held that RCG may be awarded attorney fees because it "was a lien claimant who prevailed in an action to enforce a construction lien through foreclosure."[142]

"RCG entered into a construction contract with Lofts on the Nine, LLC"[143] (LOTN) "to construct a condominium building."[144] Following completion of the project, "LOTN withheld payment for a portion of the contract amount" on the basis that "RCG breached the contract by providing defective construction, dishonestly charged LOTN, and failed to complete the project on time."[145] RCG accordingly recorded a claim of

132. *Id.* at 205, 893 N.W.2d 173.
133. *Id.* at 205, 893 N.W.2d at 174.
134. *Id.* at 206, 893 N.W.2d at 174.
135. *Id.*
136. *Id.*
137. Ronnisch Constr. Grp., Inc. v. Lofts on the Nine, LLC, 499 Mich. 544, 886 N.W.2d 113 (2016).
138. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).
139. *Ronnisch Constr. Grp., Inc.*, 499 Mich. at 549, 886 N.W.2d at 115.
140. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).
141. *Ronnisch Constr. Grp., Inc.*, 499 Mich. at 549–50, 886 N.W.2d at 115–16.
142. *Id.* at 549, 886 N.W.2d at 115.
143. *Id.*
144. *Id.*
145. *Id.*

lien in the amount of $626,163.73.[146] RCG then filed a lawsuit that sought foreclosure of the lien and raised claims for breach of contract and unjust enrichment.[147] As mandated by their contract, the parties agreed to stay proceedings and submitted the matter to arbitration.[148] The arbitration resulted in a net award in RCG's favor.[149] The arbitrator reserved RCG's issue of attorney fees for the trial court.[150]

LOTN paid the arbitration award in full before RCG filed its motion requesting confirmation of the arbitration award and actual attorneys' fees.[151] The trial court denied the motion, finding that the arbitration award was satisfied when LOTN paid it, and that RCG was not a prevailing party within the meaning of the Construction Lien Act[152] (CLA) because it prevailed only on the breach of contract action, noting that the lien foreclosure action was never adjudicated.[153]

"On appeal, the [c]ourt of [a]ppeals vacated the portion of the trial court's order denying RCG's request for attorney fees and remanded for further proceedings."[154] The court of appeals held that RCG "substantially prevail[ed] on the amounts it sought under the claim of lien made it a prevailing party under the CLA."[155] LOTN appealed to the Michigan Supreme Court.[156]

The supreme court noted the purpose of the Construction Lien Act[157] is to protect "the interests of contractors, workers, and suppliers through construction liens" and at the same time, "shield owners from excessive costs."[158] The supreme court considered three questions in its determination that RCG was entitled to receive attorneys' fees.[159] First, whether RCG was a lien claimant.[160] Second, whether the lawsuit and related arbitration constituted "an action to enforce a construction lien through foreclosure."[161] Third, whether RCG was the prevailing party.[162]

146. *Id.* at 549–50, 886 N.W.2d at 115.
147. *Id.* at 550, 886 N.W.2d at 115.
148. *Id.*
149. *Id.*
150. *Id.* at 550, 886 N.W.2d at 116.
151. *Id.*
152. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).
153. *Ronnisch Constr. Grp., Inc.*, 499 Mich. at 550, 886 N.W.2d at 116.
154. *Id.* at 550–51, 886 N.W.2d at 116.
155. *Id.* at 551, 886 N.W.2d at 116 (quoting Ronnisch Constr. Grp., Inc. v. Lofts on the Nine, LLC, 306 Mich. App. 203, 211, 854 N.W.2d 744, 748 (2014)).
156. *Id.*
157. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).
158. *Ronnisch Constr. Grp., Inc.*, 499 Mich. at 552, 886 N.W.2d at 117.
159. *Id.* at 554, 886 N.W.2d at 118.
160. *Id.*
161. *Id.*
162. *Id.*

The Construction Lien Act[163] defines a "lien claimant" as "a person having a right to a construction lien under [the] act."[164] "RCG had a valid [lien claim] that attached to LOTN's interest in the property."[165] Neither party disputed that LOTN did not tender the full payment of the contract amount to RCG before the arbitration award.[166] The fact that the project owner, in this case LOTN, did not pay the full contract balance was a key factor in determining that RCG was a "lien claimant" within the meaning of the Construction Lien Act.[167]

RCG brought an action to enforce a construction lien through foreclosure and thus satisfied the second element.[168] Based on the language of the Construction Lien Act,[169] it is clear that the legislature contemplated that "an action to enforce a construction lien" might involve multiple, separate claims.[170] "[T]he phrase 'action to enforce a construction lien through foreclosure' refers to a civil judicial proceeding in which foreclosure of a construction lien is sought, and it is comprised of all the claims asserted in the action, including any related claim for breach of contract."[171] The court reasoned that the Construction Lien Act does not require a judgment in a foreclosure action in order to be considered a prevailing party.[172] The court also noted the integral relationship between lien foreclosure claims and claims for breach of an underlying contract.[173]

The court held that RCG was a prevailing party because the net arbitration award was in its favor.[174] RCG obtained an enforceable award in a proceeding that conclusively determined the parties' respective rights and obligations.[175] Any lack of judicial imprimatur in the trial court's failure to confirm the arbitration did not bar RCG from

163. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018).

164. *Ronnisch Constr. Grp., Inc.*, 499 Mich. at 554, 886 N.W.2d at 118 (quoting MICH. COMP. LAWS ANN. § 570.1105(2) (West 2007)).

165. *Id.*

166. *Id.*

167. *Id.* at 554–58, 886 N.W.2d at 118–20. The Construction Lien Act contains additional requirements for a valid lien claim, including recording certain documents. *See* MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp. 2018). RCG satisfied all requirements. *See Ronnisch Constr. Grp., Inc.*, 499 Mich. at 554 n.22, 886 N.W.2d at 118 n.22.

168. *Ronnisch Constr. Grp., Inc.*, 499 Mich. at 558–62, 886 N.W.2d at 120–22.

169. MICH. COMP. LAWS ANN. §§ 570.1101–570.1305 (West Supp 2018).

170. *Ronnisch Constr. Grp., Inc.*, 499 Mich. at 558, 886 N.W.2d at 120.

171. *Id.* at 559–60, 886 N.W.2d at 121.

172. *Id.* at 560, 886 N.W.2d at 121.

173. *Id.* at 561–62, 886 N.W.2d at 122.

174. *Id.* at 563, 886 N.W.2d at 123.

175. *Id.*

recovering attorney fees.[176] Nor did LOTN's prompt payment of the award amount "obviate the need to confirm the award."[177] "[A] party cannot avoid confirmation by paying an arbitration award before the confirmation proceeding."[178]

On the basis that his interpretation of the statute limited attorneys' fees to a party who prevailed in a lien foreclosure action, Chief Justice Young dissented.[179] The majority disagreed with Chief Justice Young because RCG would have had to refuse LOTN's "proffered payment and continue to litigate the foreclosure claim to remain eligible to seek attorney fees."[180] Indeed, requiring a final disposition of the lien foreclosure action, which typically is not available through arbitration, would encourage litigation.[181] More practically, requiring complete litigation in a lien foreclosure action could devalue contractually mandated arbitration provisions.

G. Brunt Associates, Inc. v. Department of Treasury[182]

Companies involved in fabrication and resale of products designed for installation must note the complexities that can arise with their classification for purposes of calculating sales and use tax.[183] Brunt Associates, Inc. (Brunt) produced and installed custom furniture, primarily for commercial applications.[184] During a period under a sales and use tax audit, Brunt reported no use tax, but remitted sales tax.[185] After the audit, Brunt was assessed for unpaid use tax plus accrued interest because it was a real property contractor that did not make any retail sales.[186]

Brunt's business was described as installing furniture, fixtures, cabinets, shelves, and decorative panels.[187] Brunt claimed that these items retained "the character of tangible personal property after installation," were removable without lowering the real property's value,

176. *Id.* at 564–67, 886 N.W.2d at 124–25.
177. *Id.* at 565, 886 N.W.2d 124.
178. *Id.*
179. *Id.* at 568, 886 N.W.2d at 126 (Young, J., dissenting).
180. *Id.* at 566, 886 N.W.2d at 125.
181. *See id.*
182. Brunt Assocs., Inc. v. Dep't of Treasury, 318 Mich. App. 449, 898 N.W.2d 256 (2017).
183. *See id.* at 452–56, 898 N.W.2d at 257–60 (discussing the characterization and distinction between sales and use tax).
184. *Id.* at 452, 898 N.W.2d at 257.
185. *Id.* at 452–53, 898 N.W.2d at 257.
186. *Id.* at 453, 898 N.W.2d at 257.
187. *Id.* at 454, 898 N.W.2d at 258.

and did not service the function of the real property.[188] Brunt's accountant testified that based on this knowledge, Brunt was a "manufacturer/retailer, not a manufacturer/contractor."[189] The items "could be moved and put into a different room;" therefore, Brunt was not engaged in "constructing, altering, or repairing real estate."[190] The tax auditor concluded that Brunt did not make retail sales and that the products did not retain their separate character after installation at the real property of its customers.[191] Brunt also claimed that it was entitled to an industrial processor exemption.[192]

The Michigan Court of Appeals reviewed the tax tribunal's holding under a deferential substantial evidence standard.[193] Michigan law provides that "every person . . . who purchases tangible personal property is subject to a use tax for the privilege of using, storing, or consuming tangible personal property in this state."[194] Sales and use tax liability is generally intended such that a taxpayer either pays the sales or use tax, but not both, on the same property.[195]

"It is undisputed that Brunt is a manufacturer."[196] The question was whether Brunt "is a retailer liable only for sales tax or a contractor liable for use tax."[197] Neither the General Sales Tax Act, nor the Use Tax Act define "contractor," but the Michigan Administrative Code does.[198] "Contractor includes only prime, general, and subcontractors directly engaged in the business of construction, altering, repairing, or improving real estate for others."[199] The dispositive issue with regard to Brunt is whether it "affixes [its] product to real estate for others."[200]

After a review of the methods Brunt uses to install its products, the court of appeals determined that Brunt's "products were physically attached to customers' realty . . . or constructively attached by means of the products' size or weight."[201] Moreover, Brunt "manufactures products to fit the specific needs and space of its customers."[202] The

188. *Id.* at 454–55, 898 N.W.2d at 258.
189. *Id.* at 455, 898 N.W.2d at 258.
190. *Id.*
191. *Id.* at 455, 898 N.W.2d at 259.
192. *Id.* at 456, 898 N.W.2d at 259.
193. *Id.* at 457, 898 N.W.2d at 259.
194. *Id.* at 457, 898 N.W.2d at 260.
195. *Id.*
196. *Id.* at 458, 898 N.W.2d at 260.
197. *Id.*
198. *Id.*
199. *Id.* (quoting MICH. ADMIN. CODE r. 205.71(1) (2018)).
200. *Id.* (quoting MICH. ADMIN. CODE r. 205.71(6) (2018)).
201. *Id.* at 460, 898 N.W.2d at 261.
202. *Id.*

court concluded that Brunt's products fill essential functions in the customers' businesses, and as such, the removal of these items would decrease the value of the realty.[203] After installation, Brunt's products were rarely removed.[204] If removed for repairs, the products are reinstalled.[205] Thus, the court of appeals held that Brunt is a "manufacturer and contractor that affixes [its] product to real estate for others and is directly engaged in the business of constructing, altering, repairing, or improving real estate for others."[206]

The court next considered the question of whether Brunt was entitled to the industrial processor exemption.[207]

> Industrial processing means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state.[208]

Brunt asserted that it was entitled to this exemption because its products are ultimately offered for sale at retail.[209] The court of appeals, however, held that Brunt does not manufacture its products for sale at retail.[210] Nor was there any evidence that Brunt satisfied the other criteria needed to qualify for the industrial-processor exemption.[211] Consequently, Brunt failed to meet the statutory criteria for an industrial processor and therefore was not eligible for the exemption.[212]

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203. *See id.*
204. *Id.*
205. *Id.*
206. *Id.* at 461, 898 N.W.2d at 261.
207. *Id.*
208. *Id.* at 461, 898 N.W.2d at 262 (quoting MICH. COMP. LAWS ANN. § 205.94o[7] (West 2015)).
209. *Id.* at 462, 898 N.W.2d at 262.
210. *Id.*
211. *Id.* Other criteria include "manufactur[ing] products for 'use in the manufacturing of a product to be ultimately sold at retail or affixed to and made a structural part of real estate located in another state.'" *Id.* (quoting MICH. COMP. LAWS ANN. 205.94o(7)(b) (West 2017)).
212. *Id.*

H. Great American Insurance Co. v. E.L. Bailey & Co., Inc.

In *Great American Insurance Co. v. E.L. Bailey & Co., Inc.*[213] the Sixth Circuit considered the relationship between a general contractor and its surety under Michigan law.[214] E.L. Bailey & Company, Inc. (Bailey) contracted with the State of Michigan to construct a prison kitchen.[215] The construction project experienced delays and "Bailey and the State sued each other for breach of contract."[216] Bailey had obtained the statutorily required "surety bonds guaranteeing its performance from Great American Insurance Company" (GAIC).[217] As part of the surety agreement, Bailey assigned to "GAIC the right to settle claims related to the . . . project if Bailey allegedly breached the construction contract."[218] Pursuant to this assignment of rights, "GAIC negotiated with the State to settle Bailey's claims without Bailey's knowledge."[219] Bailey disagreed with the settlement amount.[220] Bailey argued that GAIC had settled in bad faith, in violation of Michigan's implied duty of good faith.[221]

The background facts of the case are undisputed.[222] The project experienced numerous delays and Baily never finalized completion.[223] GAIC reached an agreement with the state to have another contractor finish the project.[224] The procedural history of the case involved litigation in three courts, including the Michigan Court of Claims, the Washtenaw Circuit Court, and the United States District Court for the Eastern District of Michigan.[225] Bailey first raised its bad faith defense in the federal case, which arose out of GAIC's action for a declaratory judgment recognizing GAIC's authority to settle Bailey's claims, and whereby GAIC sought indemnification for Bailey's alleged breach of the agreement by failing to provide collateral for subcontract claims.[226]

"Michigan law infers a duty of good faith in every contract, [including surety contracts,] which a party may breach by performing in

213. Great Am. Ins. Co. v. E.L. Bailey & Co., Inc., 841 F.3d 439 (6th Cir. 2016).
214. *Id.* at 440–41.
215. *Id.* at 440.
216. *Id.*
217. *Id.*
218. *Id.* at 441.
219. *Id.*
220. *Id.* at 443.
221. *Id.* at 441, 445.
222. *See id.* at 440–43.
223. *Id.* at 441–42.
224. *Id.* at 441.
225. *Id.* at 442.
226. *Id.* at 442–43.

bad faith."[227] The standard for establishing a surety's bad faith, unless otherwise defined in the agreement, is "a measure of honest belief and intention."[228] Michigan has recognized a heightened good faith standard in the insurance context.[229] There, bad faith is "more than negligence but less than fraud . . . [it is] arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty."[230] Honest errors of judgment will not establish bad faith.[231]

"Bailey provided neither evidence about GAIC's state of mind, nor any reason why GAIC's interest[s] in settling would differ from Bailey's."[232] Both "GAIC and Bailey share[d] an interest in securing the highest settlement possible from the State."[233] Evidence showed that GAIC took a genuinely adversarial position in its negotiations with the State.[234] Such a position weighs in favor of GAIC's good faith.[235] Further, evidence revealed that GAIC pushed for multiple terms that were met with strenuous disagreement.[236] Ultimately, the settlement amount exceeded the mediator's recommendation by over $100,000.[237]

"Bailey [also] argued that GAIC acted in bad faith by concealing its negotiations with the State" until the agreement was reached on the eve of facilitation.[238] The court expressed concern that another party's claim was settled, even if that claim had been assigned away.[239] "Depending on the facts, concealment might combine with other factors to establish a surety's bad faith."[240] However, the facts of this case do not lead to bad faith because "Bailey . . . had both the notice and the opportunity to prevent an undesirable settlement."[241]

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227. *Id.* at 445 (quoting Travelers Cas. & Sur. Co. of Am. v. J.O.A. Constr. Co., 479 F. App'x 684, 689–90 (6th Cir. 2012)).

228. *See id.* at 445–46 (quoting People v. Downes, 394 Mich. 17, 228 N.W.2d 212, 217 (1975)).

229. *See* Commercial Union Ins. Co. v. Liberty Mutual Ins. Co., 426 Mich. 127, 136–37, 393 N.W.2d 161, 164 (1968) (stating that in the insurance context, bad faith can occur "without actual dishonesty or fraud.").

230. *Great Am. Ins. Co.*, 841 F.3d at 446 (quoting Commercial Union Co. v. Liberty Mut. Ins. Co., 426 Mich. 127, 166, 393 N.W.2d 161, 164 (1986)).

231. *Id.*

232. *Id.*

233. *Id.* at 447.

234. *Id.*

235. *See id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 448.

The "amount reached by settlement is generally insufficient to establish bad faith on its own" because "[b]ad faith primarily concerns a party's state of mind during the settlement process, not the results."[242] In considering the evidence as to GAIC's state of mind, the court held that GAIC had not acted in bad faith when it settled Bailey's claim.[243]

III. CONCLUSION

During the *Survey* period, the most common disputes involved arbitration awards, the Construction Lien Act, and limitations periods.[244] Cases involving contract disputes remained present, but these matters focused on beneficiaries and limitations periods, rather than interpretation of contract terms.[245] As the construction industry economy has improved, contract-industry stakeholders will become more proactive with their legal needs.[246] The consequence is that owners, contractors, and subcontractors spend resources up front in negotiating contract terms.[247] More funds available in the construction industry leads to more arbitration proceedings and more out-of-court settlements.[248] This *Survey* period highlighted cases applying limitations periods.[249] This suggests that parties may have filed claims after seeing the improved financial health of their opponent. In the coming months, safety will likely emerge as the most developing area of law. The shortage of skilled labor and demand for construction projects has tightened timelines, possibly leading to more accidents. Further, the financial health of construction-related companies could lead to more lawsuits by workers who are injured on jobsites.[250] At least one Michigan Supreme Court justice has offered guidance for the future of the common work area doctrine.[251] This will be an area of law to watch in the months and years to come. Construction law is diverse and impacts many substantive areas of law.[252] Its development is largely accomplished through the few

242. *Id.* at 449.
243. *Id.*
244. See *supra* Parts II.B., II.C.1., II.E., and II.F.
245. See *supra* Parts II.C. and II.D.
246. *See* Kendal Jones, *2018 Construction Industry Economic Outlook*, CONSTRUCTIONCONNECT.COM (Feb. 8, 2018) https://www.constructconnect.com /blog/construction-news/2018-construction-industry-economic-outlook/.
247. *Id.*
248. *See* Hilger, *supra* note 4.
249. See *supra* Section II.C.1.
250. *See* Jones, *supra* note 246.
251. See *supra* Section II.A.
252. DeWolf & Albrecht, *supra* note 1.

published and unpublished cases decided outside of alternative dispute resolution.[253]

253. *See* Hilger, supra note 4; *supra* Section I.