CONSTRUCTION LAW

SUZANNE P. SUTHERLAND[†]

† Associate, Hilger Hammond, P.C., B.B.A., 2005, Grand Valley State University; J.D., 2014, *cum laude*, Wayne State University.

I. INTRODUCTION

Construction law connects many areas of substantive law, especially contracts, labor and employment, finance, tort, and others. The majority of construction law cases are resolved through alternative dispute resolution (ADR) such as arbitration and mediation.[1] ADR is so prevalent in construction law that the American Arbitration Association has a specialized set of guidelines for arbitration and mediation of construction-related matters.[2] Consequently, many construction-related cases are resolved outside of the court system. With a resurgence of the construction industry and more resources available, including less bankrupt developers,[3] more construction firms are seeking to collect on lien rights and unpaid contract balances through legal action. Favorable statutes that allow recovery of attorney fees can lead to cases pursued in traditional litigation, even if those cases are more likely to settle than make their way to a state's higher courts. With these considerations, this *Survey* Article examines significant developments in construction law through a selection of published and unpublished cases.

II. SIGNIFICANT STATE CASES INVOLVING MICHIGAN CONSTRUCTION LAW

A. Epps v. 4 Quarters Restoration LLC

In a significant construction law case during the *Survey* period, the Michigan Supreme Court held that a contract between a homeowner and an unlicensed builder is voidable at the homeowner's option, rather than void *ab initio*.[4] The court considered three other issues in its holding, including: (1) whether the statutory bar that prohibits an unlicensed builder from bringing an action to collect compensation also "prevents an unlicensed builder from defending on the merits against claims asserted

1. *See* Hon. Nancy Holtz, *Reflections from the ADR Sumit*, JAMS (2015), https://www.jamsadr.com/files/uploads/documents/gec-newsletter/jams-gec-news-2015-fall.pdf.

2. AM. ARB. ASS'N, CONSTRUCTION INDUSTRY RULES FOR ARBITRATION AND MEDIATION PROCEDURES (2011), https://www.adr.org/aaa/ShowPDF;jsessionid=Ul7sDW0-MozH42epO88vKsn_q9H8Gd1gvNFBZ-IckuHSOuQaUsaU!1672384811?doc=ADRSTAGE2025285.

3. Paul Davidson, *Construction Hiring is Surging*, USA TODAY (Jan. 11, 2015, 2:08 PM), http://www.usatoday.com/story/money/business/2015/01/11/construction-hiring-picking-up/21521769/.

4. Epps v. 4 Quarters Restoration LLC, 498 Mich. 518, 522–23, 872 N.W.2d 412, 414 (2015).

against him by a homeowner;"[5] (2) "whether MCL 339.2412(1) provides a homeowner with an independent cause of action for damages arising from the statute's violation;" and (4) "whether the trial court abused its discretion in refusing to set aside the default of Denaglen corp., the check-cashing service."[6]

In July 2006, Danny and Joyce Epps' Detroit home was flooded.[7] The Eppses contacted their insurance company, Auto Owners.[8] Ultimately, the insurance providers referred the Eppses to Troy Willis of 4 Quarters Restoration and Emergency Insurance Services.[9] Willis showed the Eppses a book of prior work that included a copy of his residential builder's license.[10] But Willis did not tell the Eppses that his license was revoked six months earlier.[11] The Eppses hired Willis, authorizing him to sign insurance checks on their behalf and collect the claim proceeds directly from Auto Owners.[12]

Willis received $128,047 in total proceeds from Auto Owners.[13] Willis would then bring the checks to Denaglen Corporation's (hereinafter referred to as "Denaglen") check-cashing business, which would cash the checks in exchange for a 3% fee. Denaglen, in turn deposited the funds into its account at Comerica Bank.[14] Willis appeared to have ceased work on the Epps home late in 2006.[15] The parties disputed whether the restoration was completed and whether the work was performed satisfactorily.[16]

On July 24, 2009, the Eppses filed an action in the Wayne County Circuit Court against all individuals and businesses involved in either the restoration of their home or with the flow of monies associated with the project, including Willis and his business, Denaglen Corp., Comerica, and Auto-Owners.[17] Comerica Bank filed an interpleader action and deposited the insurance proceeds totaling $128,047 from Denaglen's account into escrow and the claims against Comerica were dismissed.[18]

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5. MICH. COMP. LAWS ANN. § 339.2412(1) (West 2008).
6. *Epps*, 498 Mich. at 522, 872 N.W.2d at 414.
7. *Id.* at 523, 872 N.W.2d at 414.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 523–24, 872 N.W.2d at 414–15.
13. *Id.* at 525.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 525–26, N.W.2d at 415–16.
18. *Id.* at 526, 872 N.W.2d at 415–16.

Auto Owners assigned its claims against the other named defendants to the Eppses and the claims against Auto Owners were also dismissed.[19]

As to Willis and 4 Quarters Restoration, the Eppses alleged that restoration services were performed on the Eppses' home without the requisite license.[20] Consequently, neither Willis nor 4 Quarters Restoration was entitled to receive compensation.[21] The Eppses sought to have their agreement with Willis declared "illegal, void and unenforceable," and thereby rescinded.[22] The Eppses further "alleged that Willis defrauded them, carried out the restoration in an unworkmanlike manner, and converted the proceeds of the insurance checks."[23] For these allegations, the Eppses sought damages equal to the face value of the insurance checks.[24]

As to Denaglen, the Eppses alleged that it wrongfully cashed the insurance checks, acted in bad faith and without employing reasonable commercial standards, and converted the funds paid by Auto Owners to the Eppses.[25] The Eppses sought the $128,047 placed into escrow by Comerica as damages.[26] Denaglen failed to file a timely answer to the complaint and a default judgment against it was entered.[27] Denaglen subsequently moved to have the default set aside, but the trial court denied the motion.[28]

1. Unlicensed Builder May Defend Against a Claim on the Merits

The Michigan Supreme Court first analyzed whether an unlicensed builder may defend against a claim on the merits.[29] The court held that MCLA § 339.2412(1) does not bar an unlicensed builder from defending against a claim on the merits, reasoning that the statute does not prohibit receipt of the compensation itself, but rather the action to collect it.[30] Applying the definition of "action" from Black's Law Dictionary, the court stated that an "action is defined as a law suit brought in court; a

19. *Id.* at 526, 872 N.W.2d at 416. Claims were also dismissed against AM Adjusting, which was employed by Auto Owners to provide referrals to professionals capable of providing the necessary work.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 526, 872 N.W.2d at 416.
25. *Id.*
26. *Id.*
27. *Id.* at 527, 872 N.W.2d at 416.
28. *Id.*
29. *Id.* at 528, 872 N.W.2d at 417.
30. *Id.* at 530, 872 N.W.2d at 418 (citing BLACK'S LAW DICTIONARY (6th Ed.)).

formal complaint within the jurisdiction of a court of law."[31] The court further stated that a cause of action may be asserted "by filing a complaint, cross-claim, counterclaim, or third-party claim."[32]

Citing Black's Law Dictionary, the court distinguished a defense as "[t]hat which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks; [t]hat which is put forward to diminish plaintiff's cause of action or to defeat recovery."[33] The assertion of an action triggers a response.[34] "A party bringing an action seeks to recover from the opposing party, which a party asserting a defense seeks to diminish or defeat that action."[35] Therefore, if the homeowner seeks compensation or performance from the builder, it is the homeowner who has brought the action.[36] The builder's reasons why the homeowner should not recover are defenses.[37] MCLA § 339.2412(1) does not bar an unlicensed builder from asserting defenses.[38]

2. *Private Cause of Action Under MCLA § 339.2412(1)*

Next, the Michigan Supreme Court addressed whether MCLA § 339.2412(1) gave rise to a private cause of action that a homeowner may bring against an unlicensed builder.[39] The Eppses argued that MCLA § 339.2412(1) entitled them to a right of action for disgorgement of the funds paid to Willis and 4 Quarters Restoration.[40] The court held that MCLA § 339.2412(1) only prevents action by an unlicensed builder, but does not expressly create a private right of action for disgorgement.[41]

Moreover, the statute does not bar an unlicensed builder from receiving compensation.[42] Nor is an unlicensed builder barred from retaining compensation it already received.[43] MCLA § 339.2412(1) prohibits only actions in Michigan courts for the collection of payment.[44] "Any collection of payment that occurred before the litigation was not

31. *Id.*
32. *Id.* at 530, 872 N.W.2d at 418.
33. *Id.* (citing BLACK'S LAW DICTIONARY (6th Ed.)).
34. *Id.*
35. *Id.*
36. *Id.* at 531, 872 N.W.2d at 418.
37. *Id.*
38. *Id.*
39. *Id.* at 533, 872 N.W.2d at 420.
40. *Id.*
41. *Id.* at 534, 872 N.W.2d at 420.
42. *Id.* at 531, 872 N.W.2d at 418–19.
43. *Id.*
44. *Id.*

accomplished by an action in a court and therefore is beyond the scope of MCL 339.2412(1)."[45]

The court then analyzed whether a private cause of action could be inferred from the statute.[46] An inferred private cause of action is appropriate in limited circumstances where the statute provides no express remedy for its breach.[47] Additionally, that statute must be deemed:

> [E]xclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded; (b) to protect the particular interest which is invaded; (c) to protect that interest against the kind of harm which has resulted; and (d) to protect that interest against the particular hazard from this the harm results[.][48]

Reasoning that the statute was written to protect homeowners, a homeowner is protected from unsatisfactory or unsafe building services through existing and traditional common law causes of action in contract and tort.[49] In addition, the statute confers enforcement authority exclusively upon prosecutors and the Attorney General.[50] By implication, a similar authority is not conferred upon a private party.[51] Therefore, the court concluded that a homeowner does not have a private cause of action for disgorgement.[52]

3. Legal Status of a Contract Between a Homeowner and an Unlicensed Builder

The Michigan Supreme Court next considered the status of the contract between the Eppses and Willis.[53] The Eppses argued that the contract was void *ab initio* because it is illegal for an unlicensed builder to provide construction services.[54] Defendants contended that the contract was voidable at plaintiffs' option, rather than void.[55]

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45. *Id.*
46. *Id.* at 534, 872 N.W.2d at 420.
47. *Id.*
48. *Id.* at 534, 872 N.W.2d at 420.
49. *Id.*
50. *Id.* at 535, 872 N.W.2d at 420.
51. *Id.*
52. *Id.* at 535, 872 N.W.2d at 421.
53. *Id.* at 536, 872 N.W.2d at 421.
54. *Id.* at 534, 872 N.W.2d at 421.
55. *Id.* at 537, 872 N.W.2d at 421.

Ascertaining the status of the contract was critical in resolving the dispute between the Eppses and 4 Quarters Restoration because of the court of appeals holding below. The court of appeals held that the contract between the Eppses and Willis was void, and that defendants converted the insurance checks.[56] A void contract could not give Willis a right to receive, endorse, and cash the insurance checks.[57]

Difficulty has arisen from the imprecise use of the term "void."[58] Until the *Epps* decision, courts in Michigan and throughout the country have been inconsistent and vague as to the status of contracts involving an unlicensed builder.[59] Compounding the difficulty, courts have declared such contracts to be void, yet still have given those contracts some legal status.[60] Because a builder is forbidden from initiating or maintaining an action for collection, courts often refer to the contract as void.[61] Even then, "it is far from clear that the court actually intended to imply that the contract is a complete nullity devoid of any legal existence at any point in time."[62]

According to the Michigan Supreme Court, the purpose of the builder licensing requirement was to "protect the public from incompetent, inexperienced, and fly-by-night contractors and that contracts made in violation of a police statute enacted for public protection are void and there can be no recovery thereon."[63] The law is well-settled that a contract is void as against public policy when it is in violation of a statute meant to protect the public health or morals.[64]

In determining the legal status of a contract between a homeowner and an unlicensed builder, the Michigan Supreme Court noted the one-sided mechanism to protect the public from the dangers posed by unlicensed builders.[65] Only the unlicensed builder is barred from bringing an action seeking compensation.[66] "The statute therefore establishes that contracts between a homeowner and an unlicensed

56. *Id.*
57. *Id.* at 537, 872 N.W.2d at 422.
58. *Id.* at 539, 872 N.W.2d at 423.
59. *Id.* (citing 5 BRUNER & O'CONNOR CONSTRUCTION LAW §§ 16:19–16:22 (2016)).
60. *Id.* at 540, 872 N.W.2d at 423.
61. *Id.* at 541, 872 N.W.2d at 424; *see also* MICH. COMP. LAWS ANN. § 339.2412(1) (West 2008).
62. *Epps*, 498 Mich. at 541, 872 N.W.2d at 424 (internal quotations and alterations omitted).
63. *Id.* at 542, 872 N.W.2d at 424 (citing Alexander v. Neal, 364 Mich. 485, 487, 110 N.W.2d 797 (Mich. 1961)).
64. *Id.* at 542–43, 872 N.W.2d at 425.
65. *Id.* at 545, 872 N.W.2d at 426.
66. *Id.* at 547, 872 N.W.2d at 427.

builder are characterized by an asymmetrical enforceability."[67] Where the power to enforce a contract is exclusively in the hands of one party, a contract appears within the framework of voidability.[68] The court concluded that an innocent homeowner would be better protected if the contract were voidable at her option.[69]

In reaching this conclusion, the court stated that a void contract would leave the homeowner just one option: rescission.[70] Rescission would undo the transaction, which might deprive the homeowner from the full benefit of her bargain.[71] This single remedy would preclude the homeowner from seeking damages for a builder's breach of contract.[72] Breach of contract remedies are limited to situations where there is a contract.[73] A void contract, however, cannot be enforced by either party.[74]

4. Motion to Set Aside Default

The Michigan Supreme Court also reviewed Denaglen's default for abuse of discretion by the trial court.[75] The Michigan Court Rules permit a default to be set aside "only if good cause is shown and an affidavit of facts showing a meritorious defense is filed."[76] The jurisprudence in Michigan disfavors setting aside properly entered defaults and default judgments.[77] A default is an admission of liability and is not necessarily dispositive of damages.[78]

The court found that the trial court did not abuse its discretion in refusing to set aside Denaglen's default, reasoning that "Denaglen inexplicably waited seven weeks before moving to have the default set aside" even after it had received a notice of default.[79] However, because the Michigan Supreme Court reversed the court of appeals holding that Denaglen converted the insurance checks, Denaglen's default nonetheless must be set aside.[80] The conversion claim necessarily was

67. *Id.*
68. *Id.* at 548, 872 N.W.2d at 427.
69. *Id.* at 546, 872 N.W.2d at 426.
70. *Id.* at 546, 872 N.W.2d at 426.
71. *Id.* at 546, 872 N.W.2d at 427.
72. *Id.*
73. *Id.*
74. *Id.* at 547, 872 N.W.2d at 427.
75. *Id.* at 554, 872 N.W.2d at 431.
76. *Id.* at 554, 872 N.W.2d at 431 (citing MICH. CT. R. 2.603(D)).
77. *Id.*
78. *Id.*
79. *Id.* at 555, 872 N.W.2d at 431.
80. *Id.*

unenforceable because the contract with the homeowners was voidable at their option.[81]

B. Wyandotte Electric Supply Company v. Electrical Technology Systems, Inc.

In *Wyandotte Electric Supply Company v. Electrical Technology Systems, Inc*,[82] the Michigan Supreme Court interpreted several provisions of the Public Works Bond Act (PWBA).[83] First, the court held that actual notice is not required of a sub-subcontractor when that sub-subcontractor has complied with the notice requirements in the PWBA.[84] Second, a PWBA claimant may recover additional sums, such as a "time-price differential"[85] and attorney fees based on the claimant's contract, even if those sums were unknown to the principal contractor holding the bond or to the surety.[86] Thirdly, the court held that post-judgment interest under the PWBA should be calculated based on the general statute for calculating post-judgment interest.[87]

Defendant KEO & Associates, Inc. (hereafter referred to as "KEO") was the principal contractor on a renovation project of the south wing of the Detroit Public Library.[88] The PWBA required that Defendant Westfield Insurance Company (hereafter referred to as "Westfield") was the surety on the $1.3 million bond that it furnished to KEO.[89] KEO subcontracted with Defendant Electrical Technology Systems, Inc. (hereafter referred to as "ETS") to provide labor and materials.[90] ETS in turn obtained materials and supplies from Wyandotte Electric Supply Company (Wyandotte).[91]

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81. *Id.*

82. Wyandotte Elec. Supply Co. v. Elec. Tech. Sys., Inc., 499 Mich. 127, 881 N.W.2d 95 (2016).

83. *Id.* at 132, 881 N.W.2d at 97 (citing MICH. COMP. LAWS ANN. § 129.201 *et seq.* (West 1982)).

84. *Id.* at 133, 881 N.W.2d at 97.

85. *Id.* (Common in construction industry supplier contracts, the contract between Wyandotte and ETS described a "time-price differential" that allowed Wyandotte to separately invoice ETS for 1.5% per month on all invoices that remained unpaid beyond thirty days).

86. *Id.*

87. *Id.*; *see also* MICH. COMP. LAWS ANN. § 600.6013(7) (West 2013).

88. *Wyandotte Elec.*, 499 Mich. at 133, 881 N.W.2d at 97.

89. *Id.* at 133, 881 N.W.2d at 98.

90. *Id.*

91. *Id.* at 134, 881 N.W.2d at 98.

ETS and Wyandotte's business relationship was governed by a series of written instruments.[92] These documents included an "open account" agreement, a quote, and purchase orders.[93] Both the open account agreement and the quote, which ETS accepted by purchase order, included a "time price differential" provision.[94] The open account agreement also included an attorney fee provision.[95] Wyandotte initially delivered materials to the project on March 3, 2010.[96] ETS had payment problems from the start of the project and ultimately could only receive materials and supplies from Wyandotte on a cash-on-delivery basis.[97] Wyandotte last delivered materials to the project on September 30, 2010.[98]

Via certified mail, Wyandotte sent a thirty-day Notice of Furnishing[99] to KEO, Westfield, the library, and ETS.[100] Due to unknown

92. *Id.*
93. *Id.*
94. *Id.* at 134, 881 N.W.2d at 98.
95. *Id.* at 144, 881 N.W.2d at 103.
96. *Id.* at 134, 881 N.W.2d at 98.
97. *Id.*
98. *Id.*
99. Certain notices are required pursuant to claims under the PWBA:

> A claimant who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which payment bond is furnished under the provisions of section 3, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which claim is made, may sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of the civil action, prosecute such action to final judgment for the sum justly due him and have execution thereon. A claimant not having a direct contractual relationship with the principal contractor shall not have a right of action upon the payment bond unless (a) he has within 30 days after furnishing the first of such material or performing the first of such labor, served on the principal contractor a written notice, which shall inform the principal of the nature of the materials being furnished or to be furnished, or labor being performed or to be performed and identifying the party contracting for such labor or materials and the site for the performance of such labor or the delivery of such materials, and (b) he has given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Each notice shall be served by mailing the same by certified mail, postage prepaid, in an envelope addressed to the principal contractor, the governmental unit involved, at any place at which said parties maintain a business or residence. The principal contractor shall not be required to make payment to a subcontractor of sums due from the subcontractor to parties performing labor

delivery complications, KEO never received its letter.[101] On November 1, 2010, Wyandotte provided a ninety-day notice stating that its last day providing materials to the project was September 30, 2010.[102]

KEO eventually terminated its contract with ETS, citing ETS's abandonment of the project.[103] Wyandotte filed a claim with Westfield to recover on the payment bond on January 28, 2011.[104] After Westfield denied the claim for lack of liability, Wyandotte filed suit on March 14, 2011 against ETS, KEO, and Westfield.[105]

The Wayne County Circuit Court granted Wyandotte's motion for summary disposition and held that Wyandotte was owed an unpaid balance, a time-price differential and attorney's fees.[106] The court of appeals affirmed the trial court's judgment for $272,927.70 in Wyandotte's favor.[107] On appeal to the Michigan Supreme Court, defendants argued that the PWBA required actual notice.[108] Because KEO never received its thirty-day notice, it contended that Wyandotte failed to perfect its claim.[109] Noting that the Legislature did not specify that actual receipt of notice was required by the PWBA, the court rejected defendants' "actual notice" argument.[110]

Concluding that actual notice was not required under the PWBA, the Michigan Supreme Court reasoned that the purpose of the PWBA was to protect contractors and suppliers working on public projects where lien rights are typically unavailable.[111] Without the PWBA, contractors and suppliers on public projects would lack the lien rights their private project counterparts have when owners or upstream contractors default.[112] The court noted that imposing an actual notice requirement would render the service provisions of the PWBA nugatory because those provisions would be meaningless if actual notice was not given.[113]

> or furnishing materials or supplies, except upon the receipt of the written orders of such parties to pay to the subcontractor the sums due such parties.

MICH. COMP. LAWS ANN. § 129.207 (West 2017).

100. *Wyandotte Elec.*, 499 Mich. at 135, 881 N.W.2d at 98.

101. *Id.*

102. *Id.* at 144, 881 N.W.2d at 103.

103. *Id.* at 136, 881 N.W.2d at 99.

104. *Id.*

105. *Id.* (KEO filed a cross-claim against ETS, but ETS failed to appear because it had gone out of business and its president had declared personal bankruptcy).

106. *Id.* at 136–37, 881 N.W.2d at 99.

107. *Id.* at 137, 881 N.W.2d at 99.

108. *Id.* at 139, 881 N.W.2d at 100–01.

109. *Id.*

110. *Id.* at 139, 881 N.W.2d at 101.

111. *Id.* at 137–38, 881 N.W.2d at 100–01.

112. *Id.* at 138, 881 N.W.2d at 100.

113. *Id.* at 141, 881 N.W.2d at 101.

Next, the Michigan Supreme Court evaluated whether Wyandotte was entitled to recover its claim for the time-price differential and attorney fees.[114] Wyandotte relied on its contract with ETS, which contained provisions allowing Wyandotte to recover 1–1/2% per month for unpaid balances over thirty days and to recover 33% of any unpaid balance referred to an attorney for collection to cover attorneys' fees.[115]

Defendants argued that Wyandotte's lack of privity with KEO precluded the claims based on specific provisions of Wyandotte's contract with ETS.[116] The court immediately dismissed this argument, stating that the PWBA exists to preserve claims between parties that are out of privity.[117] Instead, the court considered the meaning of the statutory phrase "sums justly due."[118]

The PWBA does not specifically define what is included in "sums justly due."[119] Adopting Wyandotte's argument that "sums justly due" meant the total balance owed pursuant to the contract, the court expressly rejected the notion that a claimant's recovery is limited to the terms of the primary contract[120] because "additional contracts also govern the parties' relationship with regard to that project."[121] The court held that the PWBA permits a sub-subcontractor to rely on the terms of the agreement(s) which "govern its relationship with a subcontractor."[122]

Two partial dissenting opinions expressed concern with the majority's holding that a remote subcontractor or supplier could rely on its own contract provisions in a PWBA claim.[123] Justice Zahra noted the

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114. *Id.* at 143, 881 N.W.2d at 103.

115. *Id.* at 144, 881 N.W.2d at 103.

116. *Id.* at 145, 881 N.W.2d at 103.

117. *Id.* at 145, 881 N.W.2d at 104.

118. *Id.* at. 145, 881 N.W.2d at 104.

119. *Id.* (citing MICH. COMP. LAWS ANN. § 129.207 (West 2017)).

120. The PWBA requires that a payment bond must be in an amount "not less than 25% of the contract amount . . . " MICH. COMP. LAWS ANN. § 129.202 (West 2017). This contract amount refers to the "primary contract," which in construction terminology refers to the contract between the general contractor and a governmental unit. *Wyandotte Elec.*, 499 Mich. at 149, 881 N.W.2d at 106.

121. *Wyandotte Elec.*, 499 Mich. at 149, 881 N.W.2d at 106 (discussing the PWBA requirements that a payment bond must be in an amount "not less than 25% of the contract amount" pursuant to MCLA § 129.202 and defining "primary contract" as the contract between the general contractor and a governmental unit pursuant to MCLA § 129.203).

122. *Id.* at 150, 881 N.W.2d at 106.

123. *Id.* at 158, 881 N.W.2d at 110 (Young, C.J., dissenting) ("Thus, the statute limits a claimant's recovery to the contractual terms that are related to the price of labor or materials furnished."); *id.* at 169, 881 N.W.2d at 116 (Zahra, J., dissenting) ("Wyandotte can only illustrate the intent and expectations of ETS and Wyandotte. . . . [T]here is no

difficulty of the majority's position.[124] Because liability is limited to the amount of the payment bond, which must only total 25% of the contract amount, "the PWBA does not provide for remote subcontractors to seek to enforce any and all collateral terms in the underlying contract."[125] Thus, allowing one claimant to recover remote or incidental damages could have a prejudicial effect on a future claimant who might be unable to recover for labor and materials because the bond sum was exhausted by the earlier claim.[126]

Finally, the court assessed the method and amount for computing post judgment interest.[127] Reversing the court of appeals, the Michigan Supreme Court held that interest should be calculated using the general rule for calculating interest in a civil case, MCLA § 600.6013(8).[128] The court reasoned that the statutory provisions for calculating post-judgment interest based on a written instrument only apply in limited circumstances.[129] The statute, MCLA § 600.6103(7), provides that it applies when a written instrument evidencing indebtedness forms the basis for the judgment.[130] For varying reasons, the justices unanimously agreed that the general post-judgment interest statute was the more appropriate one to use.[131]

C. Dubuc v. Copeland Paving Inc.

The Michigan Court of Appeals issued an unpublished opinion interpreting the Construction Lien Act (CLA)[132] in a dispute between a property owner, a contractor, and a supplier.[133] On May 30, 2013, Carol and Dennis Dubuc (hereafter referred to as "the Dubucs") contracted with Copeland Paving, Inc. (hereafter referred to as "Copeland") to repave the parking lot of their office.[134] Copeland in turn subcontracted with Ajax Materials Corporation (hereafter referred to as "Ajax") to

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basis from which to conclude that KEO would have agreed to pay a time-price differential or attorney fees to a party with whom it had no contractual relationship.").

124. *Id.* at 173, 881 N.W.2d at 118.

125. *Id.*

126. *Id.*

127. *Id.* at 152, 881 N.W.2d at 107.

128. *Id.* at 153, 881 N.W.2d at 108.

129. *Id.*

130. *Id.*

131. *Id.* at 153, 881 N.W.2d at 108.

132. MICH. COMP. LAWS ANN. § 570.1101 *et seq* (West 1982).

133. Dubuc v. Copeland Paving Inc., No. 325228, 2016 WL 1230860, at *1 (Mich. Ct. App. Mar. 29, 2016).

134. *Id.* at *1.

supply asphalt for the project.[135] Ajax supplied the Dubucs with a notice of furnishing[136] when it supplied the materials to the Essex Park office site.[137] The Dubucs paid Copeland approximately half the contract price: $25,963.[138] Problems arose between the Dubucs and Copeland, so the Dubucs withheld the remaining balance of $24,504.[139] Copeland failed to pay Ajax $32,574, including a time-price differential for supplies.[140] Copeland and Ajax recorded liens against Essex Park as permitted by the CLA.[141]

The Dubucs responded by filing breach of contract and fraud claims against Copeland and Ajax, alleging defective work and insufficient amounts of asphalt.[142] Ajax and Copeland filed countercomplaints for foreclosure on the Essex Park lien.[143] In addition, Copeland filed a breach of contract claim against the Dubucs for their failure to pay the remaining contract balance.[144]

The circuit court granted summary disposition in favor of Ajax and awarded attorney fees under the CLA.[145] The court of appeals reasoned that the CLA "is intended to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs."[146] The notice requirements of the CLA facilitate a critical exchange of information between the property owner, the general contractor, subcontractors, and suppliers of labor and materials.[147] This communication underpins the protections afforded by the CLA.[148]

The Dubucs contested the validity of Ajax's lien because it was invalid when filed when Ajax's lien exceeded the total remaining contract balance.[149] The court of appeals held that the liens were valid,

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135. *Id.* at *1.

136. *See, e.g.*, MICH. COMP. LAWS ANN. § 570.1109 (West 1982) (a notice of furnishing is required of subcontractors and suppliers who may lack privity with the property owner. The purpose of the notice of furnishing is to inform the property owner of potential lien claims).

137. *Dubuc*, 2016 WL 1230860, at *1.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at *2.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* (citing MICH. COMP. LAWS ANN. § 570.1107(6) (West 2007)).

reasoning that a contractor and material supplier may record concurrent liens that together total more than the remaining contract balance.[150]

Further, the court of appeals held that the Dubucs were not entitled to count the down payment of $25,963 to reduce the contract balance or lien amounts because the Dubucs failed to demand sworn statements.[151] The court of appeals reasoned that the CLA provides the property owner with a right to demand sworn statements as part of the communication exchange.[152] In failing to demand sworn statements, the court of appeals determined that the Dubucs had not complied with the CLA and "could not establish that the contract price had been reduced."[153] The court of appeals stated that only a lien waiver from Ajax, or a sworn statement, would suffice to reduce the contract balance and limit Ajax's recovery.[154] Copeland was not permitted under the CLA to unilaterally reduce, waive, or limit Ajax's potential lien by recording Copeland's own lien in a lesser amount.[155]

The Dubucs also challenged the circuit court's acceptance of a time-price differential in Ajax's lien amount.[156] The Dubucs argued that the time-price differential was effectively a late fee and Copeland was responsible for paying Ajax on time.[157] The court of appeals instead found that a time-price differential is properly included in a lien amount as long as it was part of the original supply contract.[158] In construction

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150. *Id.* at *3.

151. *Id.*

152. *Id.* Owners should beware of making payments to contractors without an accompanying sworn statement.

> (1) A contractor shall provide a sworn statement to the owner or lessee in each of the following circumstances:
> (a) When payment is due to the contractor from the owner or lessee or when the contractor requests payment from the owner or lessee.
> (b) When a demand for the sworn statement has been made by or on behalf of the owner or lessee.
> (2) A subcontractor shall provide a sworn statement to the owner or lessee when a demand for the sworn statement has been made by or on behalf of the owner or lessee and, if applicable, the owner or lessee has complied with the requirements of subsection (6).
> (3) A subcontractor shall provide a sworn statement to the contractor when payment is due to the subcontractor from the contractor or when the subcontractor requests payment from the contractor.

MICH. COMP. LAWS ANN. § 570.1110 (West 2007).

153. *Dubuc*, 2016 WL 1230860, at *3.

154. *Id.* at *4.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (citing Mich. Pipe & Valve-Lansing, Inc. v. Hebeler Enters., Inc., 292 Mich. App. 479, 488, 808 N.W.2d 323 (Mich. Ct. App. 2011)).

usage, a "time-price differential is not a late fee. It is a two-tiered pricing system based on whether the customer pays with cash or credit."[159]

Relatedly, the Dubucs asserted that the pay when paid[160] contract between Ajax and Copeland precluded Ajax's recovery for the amount the Dubucs held back due to deficient work.[161] The court of appeals dismissed this argument and held that the particulars of the contract between Ajax and Copeland did not limit lien rights.[162]

The court of appeals next addressed the attorney fees award.[163] The circuit court awarded attorney fees pursuant to both the CLA[164] and other court rules permitting attorney fee awards.[165] The court of appeals reviewed the circuit court's decision for abuse of discretion.[166] Ajax was clearly a prevailing party under the CLA.[167] As such, Ajax was entitled to receive "reasonable attorney fees."[168] The court of appeals noted that the circuit court reviewed extensive invoices from Ajax's counsel and conducted the required evidentiary hearing to determine the

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159. *Id.*

160. Copeland's contract with Ajax stated that Ajax would be paid when Copeland was paid. In addition, Ajax filed a cross-claim against Copeland for breach of contract that admitted Copeland, not the Dubucs, owed Ajax money. *Id.* The court of appeals remained silent on whether the contractual provision included an express condition precedent that Copeland must first be paid for Ajax to be paid at all (i.e., a "pay if paid" clause) or whether the contractual provision was merely an indication of the timing of payment (i.e., a "pay when paid" clause). *See generally* Berkel & Co. Contractors v. Christman Co., 210 Mich. App. 416, 419–20, 533 N.W.2d 838, 839–40 (1995).

161. *Dubuc*, 2016 WL 1230860, at *4.

162. *Id.* at *5.

163. *Id.* at *7.

164. The CLA specifically allows for the recovery of attorney fees:

> In an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance and their respective priorities. The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious.

MICH. COMP. LAWS ANN. § 570.1118(2) (West 2010).

165. *Dubuc*, 2016 WL 1230860, at *8 (noting that the circuit court determined that the Dubuc's claims against Ajax were frivolous, and as such, a recovery of attorney fees was appropriate as sanctions under court rules). *See* MICH. CT. R. 2.114 (for bringing an action or defense that was frivolous); MICH. CT. R. 2.625 (for bringing and an action or defense that was frivolous); MICH. COMP. LAWS ANN. § 600.2591 (West 1986) (describing the motion and procedures, and definition of "frivolous" when attorney fees and costs are assessed).

166. *Dubuc*, 2016 WL 1230860, at *7.

167. *Id.*

168. *Id.*

reasonableness of the fees.[169] The court of appeals concluded that the circuit court did not abuse its discretion in awarding fees, and despite its reliance on multiple statutes and court rules to make the award, ensured that the total equaled the actual amount Ajax had expended in attorney fees.[170]

D. City of Pontiac v. Ottawa Tower II, L.L.C.

Defendants Ottawa Tower II, L.L.C. and Charles Stevens, as Trustee of the North Bay Drywall, Inc., Profit Sharing Plan and Trust (hereafter referred to as "Defendants") owned parcels of property that adjoined the Phoenix Center in Pontiac.[171] In 1980, plaintiff, the City of Pontiac (hereafter referred to as "Pontiac") gave the owners of those parcels easement rights to the Phoenix Center.[172] Pontiac filed this action under the Uniform Condemnation Procedures Act (UCPA) to demolish a parking deck at the Phoenix Center.[173] The UCPA requires a good-faith offer be made prior to initiating a lawsuit under the statute.[174]

In 1980, Pontiac executed a declaration of easements with various other affected property owners surrounding the Phoenix Center.[175] Subject to the declaration of easements, Defendants performed maintenance work, for which Pontiac was responsible, on the parking deck to protect their adjacent property.[176] When Pontiac failed to pay those maintenance costs, Defendants recorded a lien in the amount of $1,001,147.63.[177]

The initial issue in this case was whether the UCPA requires a good-faith offer as a condition precedent to filing a condemnation action.[178] Following Michigan jurisprudence, the court of appeals upheld the conclusion that a good-faith offer is a necessary condition to invoke the circuit court's subject matter jurisdiction in condemnation cases.[179] The court of appeals concluded that neither subsequent decisions nor

169. *Id.*
170. *Id.* at *8.
171. City of Pontiac v. Ottawa Tower II, L.L.C., No. 324548, 2016 WL 1038135, at *1 (Mich. Ct. App. Mar. 15, 2016).
172. *Id.* at *1.
173. *Id.* (citing MICH. COMP. LAWS ANN. § 213.51 *et seq.* (West 1996)).
174. *Id.*; *see also* MICH. COMP. LAWS ANN. § 213.55 (West 2006).
175. *Ottawa Tower II*, 2016 WL 1038135, at *1.
176. *Id.*
177. *Id.* at *2.
178. *Id.* at *3.
179. *Id.* at *3 (citing *In re* Acquisition of Land for the Cent. Indus. Park Project, 177 Mich. App. 11, 14, 441 N.W.2d 27, 28 (1989)).

amendments to the UCPA have modified that requirement.[180] Because Pontiac did not tender a good-faith offer, it was not entitled to commence condemnation litigation.[181]

The court of appeals next resolved the issue of whether Defendants' lien was valid against publicly owned property.[182] The trial court found that the lien was permitted by a provision in the declaration of easements.[183] Pontiac relied on a statute that bars construction liens on public works projects and instead requires contractors to secure a payment bond.[184] The court of appeals rejected this argument, distinguishing lien rights that arise out of contract as compared with

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180. *Id.* at *4.

181. *Id.* at *5.

182. *Id.*

183. The full provision granting Defendants' lien rights as excerpted from the case:

> 10. *Right to Cure Default; Lien.* If any Owner shall fail or omit to perform any of its obligations hereunder or shall fail to pay any tax, assessment or other charge imposed upon their respective Site or Improvements or perform any other act or discharge any other obligation in respect to such Site or Improvements which failure or omission may cause any provision of the easements, covenants and restrictions contained herein to be impaired, breached or nonperformed, the Owner of such Site or Improvements so in default shall perform the same within ten (10) days after receipt of written notice thereof given to such Owner by any other Owner and upon failure to so perform and remove such default within such ten (10) day period, then any other Owner shall have the right, but not the obligation, to cure such default, to pay any such default in the payment of money and/or to take such action (including, without limitation, reentry upon the property of the defaulting Owner or Owners) as any other Owner may deem necessary or expedient to cure such default. Such other Owner or Owners, upon so performing, shall have a lien for the full and complete cost and expense of curing such default (including reasonable attorneys' fees) against the real property of the defaulting Owner(s), which lien may be foreclosed by suit in equity in the manner provided for the foreclosure of mortgages on real estate generally, or as may then be allowed at law. . . .

Id.

184. The Public Works Bond Act provides for posting of a bond because contractors do not have statutory lien rights to public projects:

> Before any contract, exceeding $50,000.00 for the construction, alteration, or repair of any public building or public work or improvement of the state or a county, city, village, township, school district, public educational institution, other political subdivision, public authority, or public agency hereinafter referred to as the "governmental unit", is awarded, the proposed contractor, hereinafter referred to as the "principal contractor", shall furnish at his or her own cost to the governmental unit a performance bond and a payment bond which shall become binding upon the award of the contract to the principal contractor.

MICH. COMP. LAWS ANN.§ 129.201 (West 1982).

other types of lien rights.[185] The court of appeals reasoned that Pontiac, by executing the declaration of easements, effectively consented to Defendants' easement rights, which where specifically given to owners that performed work on the project that another owner failed to perform.[186]

E. Fremont Community Digester, L.L.C. v. Demaria Building Company, Inc.

In a case illustrating the importance of arbitration in construction cases, the court of appeals considered the scope of an arbitrator's ability to determine his jurisdiction over matters in addition to those included in the initial arbitration agreement.[187] In December 2010, plaintiff Fremont Community Digester, LLC (hereafter referred to as "Fremont") and defendant Demaria Building Company, Inc. (hereafter referred to as "Demaria") entered into a contract for a construction project located in Fremont, Michigan.[188] The contract included a clause stating that all disputes would be submitted to arbitration "in accordance with the Construction Industry Rules of Arbitration (CIRA) of the American Arbitration Association (AAA) and with the procedural law of the State of Michigan in matters as to which such Rules of Arbitration are Silent."[189] When disputes arose, the parties executed a separate agreement, referred to as the Letter Agreement, that addressed the manner in which their disputes would be arbitrated, notably including that a single arbitrator would resolve the disputes.[190]

Following arbitration proceedings conducted in accordance with the Letter Agreement, the arbitrator issued a decision resolving those disputes and the award was satisfied.[191] Later, Demaria made a demand for arbitration of new claims that were not previously decided.[192] Fremont argued that these new claims were beyond the scope of the Letter Agreement and that these claims should instead be arbitrated under the original arbitration rules.[193] Specifically, Fremont contended

185. *Ottawa Tower II*, 2016 WL 1038135, at *7.
186. *Id.*
187. Fremont Cmty. Digester, L.L.C. v. Demaria Bldg. Co., Inc., No. 320336, 2015 WL 3917635 (Mich. Ct. App. June 25, 2015).
188. *Id.* at *1.
189. *Id.* (internal quotations and alterations omitted).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*

that a three-member panel of arbitrators should be employed for arbitration of the new claims.[194]

In its de novo review of the trial court's grant of summary disposition to Demaria, the court of appeals affirmed.[195] The court of appeals noted that "[a]rbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority or in contravention of controlling law."[196] The court determined that the dispute in this case involved the procedure for arbitrating the claims, rather than a substantive question related to whether the claims were arbitrable or pertaining to the existence or validity of an award.[197]

The court of appeals upheld the parties' Letter Agreement as a valid contract, and found that it modified their original agreement so that the arbitrator had jurisdiction to determine any claims that fell within the scope of the agreement.[198] Interpretation of contracts, even the arbitrator's own enabling contract, is for the arbitrator to decide.[199] The court of appeals concluded that the arbitrator's determination that he had authority to decide the newly disputed claims, and that the newly disputed claims were within the scope contemplated by the Letter Agreement, was binding.[200]

F. Cebula v. M. Rhoades Construction Company

In an unpublished opinion, the Michigan Court of Appeals addressed the appropriateness of case evaluation sanctions in a case involving a construction lien as well as third party claims and counterclaims.[201] John Cebula (hereafter referred to as "Cebula") contracted with Rhoades Construction Company (hereafter referred to as "Rhoades") to construct the frame of a home for a total contract price of $135,413.63.[202] Cebula made payments to Rhoades in the amount of $116,500.[203] At some point during the construction, Cebula stopped making payments under the contract due to concerns about the quality of Rhoades' workmanship.[204]

194. *Id.*
195. *Id.* at *2.
196. *Id.* (quoting Miller v. Miller, 474 Mich. 27, 30, 707 N.W.2d 341, 344 (2005)).
197. *Id.* at *3.
198. *Id.*
199. *Id.* (citing City of Ann Arbor v. Am. Federation of State, Co., & Mun. Employees (AFSCME) Local 369, 284 Mich. App. 126, 771 N.W.2d 843 (Mich. Ct. App. 2009)).
200. *Id.* at *4.
201. Cebula v. M. Rhoades Constr. Co., No. 321791, 2015 WL 5707138, at *4 (Mich. Ct. App. Sept. 29, 2015).
202. *Id.* at *1.
203. *Id.*
204. *Id.*

Rhoades recorded a construction lien against the property in the amount of $18,913.63, the balance of the contract.[205]

At case evaluation, the panel made a one sentence award of "$25,000 to plaintiff[.]"[206] Neither Rhoades' counterclaim for foreclosure of the construction lien or the third-party claim were mentioned.[207] After all parties rejected the award, the case proceeded to a bench trial.[208]

The trial court held in favor of Cebula, awarding $31,829 in repair costs to correct Rhoades' work and offsetting the $18,913.63 that Cebula had already withheld for a net award to Cebula of $12,905.37.[209] The trial court ordered Rhoades to pay Cebula its damages and to remove the construction lien.[210] The trial court awarded case evaluation sanctions to Cebula.[211]

The court of appeals noted that the standard for a case evaluation sanctions award is that the plaintiff must achieve a result at trial that is at least 10% more favorable to him than the evaluation award.[212] The difficulty was determining whether the one-sentence case evaluation award of $25,000 was more favorable than the $12,950.37 the trial court had awarded.[213]

The court of appeals reasoned that based on the meaning of the term "verdict," Cebula's award at trial was less favorable than the case evaluation award.[214] Cebula argued that the verdict was the $31,829 awarded as damages for repairs while Rhoades contended that the verdict was instead the $12,905.37 net amount awarded.[215] The court accepted Rhoades' position, reasoning that Cebula had already received the benefit of the $18,913.63 that he withheld.[216]

Cebula's final argument was that removal of the construction lien was equitable, rather than monetary relief, and it should not be offset from his recovery.[217] The court of appeals found that an order to remove a lien was merely a ministerial order appropriate when the trial court found in favor of Cebula.[218] Because Rhoades' lien was, at that point,

205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at *2.
213. *Id.*
214. *Id.* at *3.
215. *Id.*
216. *Id.*
217. *Id.* at *6.
218. *Id.*

"worthless" and unenforceable, the court ordered it removed.[219] Thus, the lien value was not additional relief provided to Cebula.[220]

G. Longhorn Estates, L.L.C. v. Charter Township of Shelby

The court of appeals addressed the validity of a bond claim and whether a defect properly arose to prompt coverage under a maintenance and guarantee bond.[221] Charter Township of Shelby (hereafter referred to as "Shelby") contracted with Capital Contracting, Inc. (hereafter referred to as "Capital") to construct a sanitary sewer on the property of Longhorn Estates, L.L.C. (hereafter referred to as "Longhorn").[222] Based on the contract between Shelby and Capital, Ohio Casualty Insurance Company (hereafter referred to as "Ohio Casualty") issued a maintenance and guarantee bond for the project.[223] The bond covered repair of any defect that might arise during the two years following Shelby's payment of the Final Estimate amount to Capital.[224]

Construction commenced in August 2008. Consultant-issued reports at various points during construction indicated that tests were below the desired 90% compaction.[225] A member of Longhorn advised Shelby against making final payment to Capital until the compaction issues were resolved.[226] Shelby engaged a separate consultant to conduct a "Supplemental Geotechnical Evaluation" of the project.[227] A report dated in September 2009 showed problems with the backfill density, but stated

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219. *Id.*

220. *Id.*

221. Longhorn Estates, L.L.C. v. Charter Twp. of Shelby, No. 324769, 2016 WL 805575 (Mich. Ct. App. Mar. 1, 2016).

222. *Id.* at *1.

223. *Id.*

224. The full text of the bond section as excerpted from the opinion is:

> [T]he above named principal has agreed with the said Owner that for a period of two years from the date of payment of Final Estimate, to keep in good order and repair any defect in all the work done under said contract either by the principal or his subcontractors, or his material suppliers, that may develop during said period due to improper materials, defective equipment, workmanship or arrangements, and any other work affected in making good such imperfections, shall also be made good all without expense to the Owner, excepting only such part or parts of said work as may have been disturbed without the consent or approval of the principal after the final acceptance of the work. . . .

Id.

225. *Id.*

226. *Id.*

227. *Id.*

that the sewer pipe "should function as intended."[228] Several months later, and after Shelby had made final payment to Capital, Shelby put Capital on notice that there were defects with the project and demanded correction or repair.[229] Capital responded shortly thereafter that there were no defects with its work.[230]

On December 20, 2010, Longhorn hired its own consultant who reported, "the condition of the soil backfill above the sewer line is abysmal."[231] On February 17, 2011, nearly a year after the initial notice of defect, Shelby demanded that Capital cure the compaction issues.[232] Longhorn then filed a complaint against Shelby and Capital in April 2011.[233] Shelby filed a third-party complaint against Ohio Casualty, alleging that Ohio Casualty had breached its contract with Shelby "by failing to compact the trench as required and refused to remediate the compaction defects."[234] Ohio Casualty filed a motion for summary disposition on October 23, 2013.[235]

In support of its motion, Ohio Casualty argued that Shelby's bond claim was invalid because the defect did not develop during the two year period following final payment.[236] Rather, the defect was known as early as September 2009, well before Shelby made final payment to Capital.[237] The trial court partially granted Shelby's motion for leave to file a second amended complaint.[238] In the second amended complaint, Shelby argued that a defect did in fact develop during the coverage period, which was December 13, 2010 to December 13, 2012 and that the "may develop" language in the bond was ambiguous.[239] Interpretation of ambiguous language in the bond was a fact question for the jury to decide.[240]

Notwithstanding Shelby's second amended complaint, the trial court granted summary disposition in favor of Ohio Casualty, concluding that Shelby had knowledge of the defect prior to making final payment.[241]

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228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at *2.
232. *Id.*
233. *Id.*
234. *Id.* (internal quotations omitted).
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at *3.

Shelby appealed the trial court's denial of Shelby's motion for relief from the order granting summary disposition to Ohio Casualty.[242]

On appeal, Shelby contended that the trial court should have granted its motion for relief because the sewer system developed defects during the bond coverage period.[243] The court of appeals reviewed the trial court's decision on a motion for relief from judgment based on an abuse of discretion standard.[244] That standard upholds a trial court decision so long as the decision is within "the range of reasonable and principled outcomes."[245]

Shelby argued that it was entitled to relief from the trial court's judgment because the court failed to address the allegations contained in Shelby's second amended complaint.[246] The court of appeals determined that the trial court did not address those allegations.[247] However, that did not warrant relief because Shelby's second amended complaint continued to rely on the defect alleged in the prior complaint.[248] At all times, Shelby continued to refer to this defect as "compaction."[249] The court of appeals reasoned that while the trial court's mistake in failing to address the allegations in the second amended complaint may have been sufficient to warrant relief from the order, the mistake was not sufficiently severe as to meet the standard for abuse of discretion.[250]

H. Rave's Construction and Demolition, Inc. v. Merrill

The Michigan Court of Appeals considered various disputes arising out of a series of employment agreements between a construction company and two key employees.[251] Pursuant to a bench trial, Rave's Construction and Demolition, Inc. (hereafter referred to as "Rave's") was awarded $84,356.53 plus statutory interest based on profits that Rave's claimed were improperly reported by Randy Merrill and James Merrill (hereafter referred to collectively as the "Merrills").[252] The trial court

242. *Id.*
243. *Id.* at *5.
244. *Id.*
245. *Id.* (quoting Bronson Methodist Hosp. v. Auto-Owners Ins. Co., 295 Mich. App. 431, 442, 814 N.W.2d 670, 677 (2012)).
246. *Id.* at *6.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. Rave's Constr. & Demolition, Inc. v. Merrill, No. 323908, 2016 WL 105451 (Mich. Ct. App. Jan. 7, 2016).
252. *Id.* at *1.

found no cause of action as to the Merrills' claims of conversion and unpaid commissions.[253]

Before Rave's employed the Merrills, they operated their own construction company.[254] The Merrills had completed several large-scale projects for Kroger, including store renovations.[255] Rave's had completed smaller projects for Kroger, but prior to hiring the Merrills, Kroger lacked confidence in Rave's ability to complete the bigger projects.[256]

On January 1, 2010, Rave's hired the Merrills to lead a new division, the General Contracting Division.[257] The purpose of the General Contracting Division was to complete large-scale Kroger projects, although it also bid and completed small-scale projects.[258] The Merrills began their employment pursuant to a written employment agreement that provided the Merrills would receive a base salary, and a commission of 1.5% of the gross revenue received by Rave's from Kroger if the Merrills were a "procuring cause" of the contract. The Merrills also received a monthly vehicle allowance and a health insurance allowance.[259]

The Merrills tracked the division's profits, and provided monthly profit and loss statements to Rave's.[260] The Merrills calculated a profit during 2010.[261] In early 2011, Rave's accepted the Merrills' profit calculations and the parties agreed to share the 2010 profits.[262] The Merrills' profit share was divided into equal, weekly payments throughout 2011 rather than a lump sum.[263]

Due to a breakdown in the relationship between Rave's and the Merrills, the parties executed a subsequent employment agreement dated April 6, 2012.[264] This agreement required the Merrills to complete "all general contracting work, through receipt of final payment for Kroger store #622."[265] The Merrills would continue to receive their base salaries through June 9, 2012 and health and vehicle allowances through June 2012.[266]

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253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*

The trial court found that the Merrills had failed to include certain expenses in their calculation of profits for the division in 2010.[267] Consequently, the trial court held that the Merrills were entitled to no additional compensation for commissions beyond what they had already received.[268] Further, the trial court determined that the Merrills had delayed in returning certain important documents to Rave's and had wrongfully retained two laptop computers.[269] The trial court awarded an additional $3,700 to Rave's for these combined damages.[270]

On appeal, the court of appeals found that the trial court clearly erred with regard to some of its conclusions.[271] The court of appeals held that the trial court erroneously included damages and expenses beyond the year 2010 in its conclusion that the Merrills were due no additional commission.[272] The trial court's findings incorrectly included expenses that were based on years before and after 2010.[273] The court of appeals remanded to the trial court to revisit its findings on what expenses should have properly been included for only the year 2010.[274]

In addition, the court of appeals held that the trial court clearly erred as to its calculations of items that were not expenses of the General Contracting Division.[275] The court of appeals concluded that what expenses should properly be included in the 2010 profit calculation is a question of fact to be resolved by the trial court.[276] The court of appeals remanded for additional findings on expenses properly chargeable to the General Contracting Division.[277]

The court of appeals addressed issues related to the Merrills' cross-claims.[278] The court of appeals noted that the trial court clearly erred in its failure to recognize the distinct methods for calculating commissions under each of the employment agreements in its decision that the Merrills were not entitled to additional commission compensation.[279] The trial court's analysis ignored the fact that the April 6 employment

267. *Id.* at *2.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at *3.
273. *Id.* at *4.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*

superseded the earlier employment agreement.[280] Consequently, the trial court may have improperly calculated the amount due to Rave's.[281]

I. Dancer v. Clark Construction Company, Inc.

The "common work area" doctrine continues to develop in Michigan courts.[282] Although an unpublished opinion, *Dancer* could serve as persuasive authority for future construction workplace injury cases.[283] Ronnie Dancer was injured when he fell from a scaffold over thirty feet above the floor.[284] When injured, Ronnie worked for Leidal & Hart Mason Contractors, Inc. (hereafter referred to as "Leidal & Hart").[285] Better Built Construction Services, Inc. (hereafter referred to as "Better Built") served as the general contractor for a project at the Fort Custer Training Center.[286] Better Built subcontracted with Leidal & Hart to build the masonry walls at the project.[287]

After sustaining injuries in the fall, Ronnie Dancer and his wife (hereafter referred to as "Dancer") filed a complaint against Better Built as the general contractor.[288] Dancer alleged "gaps in work surfaces traversed by overlapped but unsecured planks . . . [were] a makeshift arrangement where more sophisticated and safer equipment could have been used."[289] An apprentice electrician working for a separate subcontractor testified at deposition that the arrangement of overlapped planks was never secured before Dancer fell.[290] Dancer asserted the common-work-area doctrine in his negligence claims against

280. *Id.* at *7.

281. *Id.*

282. Dancer v. Clark Constr. Co., Inc., No. 324314, 2016 WL 1671287 (Mich. Ct. App. Apr. 26, 2016).

283. The precedential value of unpublished opinions in Michigan has been a topic of recent debate. During the *Survey* period, the Michigan Supreme Court proposed new rules that address when an opinion should be published. The expectation is that the new rules on both publication and citing to unpublished cases will produce clearer, more consistent jurisprudence in Michigan. Order amending MICH. CT. R. 2.119, 7.212, 7.215, *available at* http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2014-09_2016-03-23_formatted%20order.pdf.

284. *Dancer*, 2016 WL 1671287, at *1.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* (co-defendant Clark Construction Company was involved in supervising the project as part of a federal mentorship program, but its individual liability was not discussed).

289. *Id.*

290. *Id.*

defendants.[291] The trial court granted Defendants' motion for summary disposition, stating that Dancer "failed to offer evidence sufficient to create a genuine issue of material fact" as to whether a common work area existed.[292]

Typically, general contractors are not liable for the negligence of independent subcontractors or employees.[293] The purpose of the common work area doctrine is to increase the general contractor's responsibility to maintain a safer workplace.[294] Practically, the general contractor may have greater control over workspaces that are shared by multiple subcontractors.[295]

To invoke the common work area doctrine, a plaintiff must show four elements:

> (1) [T]he defendant . . . failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.[296]

The court of appeals noted that a common work area exists where "the employees of two or more subcontractors eventually work in the same area."[297] Although the trial court recognized that other subcontractors used the scaffold from which Dancer fell, only Leidal & Hart employees used the scaffold at heights of thirty five to forty feet, from which Dancer fell and therefore the area was not a common work area beyond twenty feet.[298] The court of appeals dismissed the argument that the scaffold ceased to be a common work area above twenty feet.[299] In finding that the scaffold was a common work area at all heights, the court of appeals reasoned that other subcontractors used the scaffold at dangerous heights, even if those heights were lower than thirty five feet.[300]

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291. *Id.*
292. *Id.*
293. *Id.* at *2 (citing Ormsby v. Capital Welding, Inc., 471 Mich. 45, 53, 684 N.W.2d 320, 325 (2004)).
294. *Id.* (quoting *Ormsby*, 471 Mich. at 53, 684 N.W.2d at 325).
295. *Id.* (citing Ghaffari v. Turner Constr. Co., 473 Mich. 16, 21, 699 N.W.2d 687, 690 (2005)).
296. *Id.* (citing *Ormsby*, 471 Mich. at 54, 684 N.W.2d at 325–26).
297. *Id.* at *3 (quoting Candelaria v. B.C. Gen. Contractors, Inc., 236 Mich. App. 67, 75, 600 N.W.2d 348, 353 (1999)).
298. *Id.*
299. *Id.*
300. *Id.*

The court of appeals stated:

> [T]he common-work-area determination is not confined to a snapshot in time, that 'when the plaintiff is injured' refers to the time during the ongoing construction—not to a specific moment and thus that the length of the relevant time period is defined by the continued existence of the same risk of harm in the same area.[301]

The court of appeals determined the relevant issue in this case was "whether the evidence of all workers operating on the allegedly defective scaffolding during the ongoing construction project added up to a significant number."[302]

Although there is no minimum number that equals a "significant number," the court of appeals concluded that at least fifteen workers might have operated on the scaffold from which Dancer fell.[303] The court of appeals declined to address whether fifteen constituted a "significant number" but determined that this number at least created a genuine issue of material fact, thus making the trial court's grant of summary disposition inappropriate.[304]

On appeal, the court considered the "high degree of risk" element in two facets: the fall protection and the responsibility for faulty planking.[305] Better Built argued, and the trial court found, that Dancer's injury was caused by Dancer's own failure to use fall protection.[306] Dancer also contended that the question of whether he was required to use fall protection based on the job's safety requirements was, at a minimum, a genuine issue of material fact that precluded summary disposition in defendant's favor.[307] Recognizing that deposition testimony was not clear, the court of appeals reversed the trial court and held that whether or not fall protection was required in this circumstance, it presented "issues of duty, breach, and comparative negligence for resolution at trial."[308]

Writing in dissent, Judge Wilder expressed concern that the court of appeals majority opinion expanded the common work area doctrine to

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301. *Id.* at *4 (quoting Richter v. Am. Aggregates Corp., 522 F. App'x 253, 263 (6th Cir. 2013)).
302. *Id.*
303. *Id.* at *5.
304. *Id.*
305. *Id.* at *6.
306. *Id.*
307. *Id.*
308. *Id.* at *6.

the point that it would subsume the construction industry.[309] Instead, in his analysis, the trial court properly granted summary disposition because it was clear that no other subcontractors were working on the scaffold at heights above twenty feet, and therefore, the scaffold above twenty feet was not a common work area.[310]

J. Grand River Construction, Inc. v. Department of Transportation

The Michigan Court of Appeals clarified the circumstances under which the Department of Transportation (hereafter referred to as "MDOT") could charge bid guaranties against a contractor.[311] The case arose out of a bid solicitation process initiated by MDOT for the construction of two highway projects.[312] Grand River Construction (hereafter referred to as "Grand River") submitted bids to these projects pursuant to MDOT's Standard Specifications.[313] The specifications contained an agreement that a bid guaranty of $50,000 for one of the projects and $25,000 for the other project would be due to MDOT if the bidder "fail[ed] to provide the required materials and/or execute the contract."[314] The specifications required that each bid be "carefully prepared" and accurate, noting that the "Bidder's mistake in judgment in preparing the bid will not warrant nonpayment of the bid guaranty absent a compelling showing that enforcing payment of the guaranty would be unconscionable under all circumstances."[315]

In early August 2014, Grand River sent a letter to MDOT requesting permission to withdraw its bids because a new estimator had mistakenly underestimated Grand River's bids on the two projects.[316] MDOT responded stating that all bids for the two projects had been rejected and that the projects would likely be advertised again in the future.[317] The letter further stated that it understood Grand River's letter as a withdrawal of its bids and included two invoices, one for $25,000 and the other for $50,000.[318]

309. *Id.* at *8 (Wilder, J., dissenting).
310. *Id.* (Wilder, J., dissenting).
311. Grand River Constr., Inc., v Dep't of Transp., No. 325311, 2016 WL 902277 (Mich. Ct. App. Mar. 8, 2016).
312. *Id.* at *1.
313. *Id.*
314. *Id.*
315. *Id.* at *2.
316. *Id.*
317. *Id.*
318. *Id.*

Grand River then sent MDOT a second letter providing more detail about its underestimated bids and requesting relief from the bid guarantees.[319] On September 16, 2014, MDOT denied Grand River's request for relief by letter enclosing a final demand for payment and stated that "nonpayment would result in any of Grand River's other contract proceeds from MDOT being offset by the amount of the bid guaranties."[320] Grand River's attorney directed correspondence to MDOT, asserting that the bid guaranties were improperly charged because Grand River "never withdrew its bids, but rather only asked MDOT for permission to do so, and because MDOT rejected all bids on the projects, including Grand River's bid, without ever accepting Grand River's bid and awarded it the contracts."[321]

Grand River then filed a complaint seeking declaratory relief that MDOT could not withhold earned contract proceeds based on the improperly assessed bid guaranties.[322] The Court of Claims denied MDOT's motion for summary disposition, and in turn, granted summary disposition in favor of Grand River on the basis that MDOT failed to follow its own protocols.[323]

On appeal, MDOT argued that it was not required to send the contracts for signing and that Grand River repudiated the contracts by its early August letter, and therefore, the Court of Claims had erroneously granted summary disposition in favor of Grand River.[324] The court of appeals rejected this argument, reasoning that the doctrine of repudiation requires that a contract must first exist between the parties.[325] At the time of the early August letter, no contract existed because Grand River's bids were merely offers that MDOT could accept or reject.[326] In rejecting all bids, including Grand River's, a valid contract never existed.[327]

The court of appeals concluded that under MDOT's specifications, Grand River only became liable for the bid guaranties if it failed to sign the contract and perform other related tasks within the twenty-eight day period following notification that it was the successful bidder and had been awarded the contract.[328] Because Grand River was not so notified,

319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.* at *3.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.* at *4.

and in fact, all bids were rejected, Grand River was not liable for the bid guaranties.[329]

Next, MDOT argued that Grand River should be equitably estopped from changing its position because Grand River's early August letter forced MDOT to re-advertise the projects after MDOT relied on Grand River's request to withdraw its bids.[330] The court of appeals rejected this argument, stating that not only reliance, but also prejudice to the relying party must be shown.[331] The court of appeals held that MDOT must follow its own specifications before assessing bid guaranties.[332] Because MDOT failed to follow its own protocols, the court of appeals determined that there was no wrong to be prevented and thus invoking equitable estoppel was inappropriate.[333]

K. SPE Utility Contractors, LLC v. All Seasons Sun Rooms Plus, LLC

During the *Survey* period, the Michigan Court of Appeals considered a trial court's grant of a motion to set aside default in the context of a construction contract.[334] SPE Utility Contractors, LLC (hereafter referred to as "SPE") hired All Seasons Sun Rooms Plus, LLC (hereafter referred to as "All Seasons") to construct a three-level porch on the Postill residence.[335] David Postill (hereafter referred to as "Postill"), the sole member of SPE and his wife, Laura Postill, owned the residence upon which the enclosure was to be constructed.[336]

After some negotiations by email and in-person, All Seasons sent a proposal to Postill describing the plan to install windows around the three-level porch and noted that the contract balance was to be paid in three equal installments, one due at contract signing, one due at commencement of construction, and one upon completion.[337] SPE and All Seasons signed an agreement on December 16, 2011, at which time Postill wrote a deposit check on behalf of SPE to Mark Malloy of All Seasons in the amount of $12,565.[338] The trial court noted that multiple documents comprised the agreement: a December 12, 2011 email from

329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. SPE Util. Contractors, LLC v. All Seasons Sun Rooms Plus, LLC, No. 323363, 2015 WL 5952134 (Mich. Ct. App. Oct. 13, 2015).
335. *Id.* at *1.
336. *Id.*
337. *Id.*
338. *Id.*

Malloy to Postill, an email from Postill to Malloy, a copy of the December 12, 2011 email with Postill's handwritten amendments, a quotation from All Seasons for the project, and drawings of the proposed construction.[339] The total cost for the project was $37,695.[340]

All Seasons began work on the project after the parties signed the agreement and Postill wrote a check for $14,930 at that time.[341] The agreements specified that final approval had not yet been provided for the middle level, which would be completed after the top and bottom levels.[342] At some point, Postill became dissatisfied with the construction of the middle level.[343] Correspondence between Malloy and Postill was unclear whether approval had actually been given for the construction of the middle level, but suggested that Postill had, in fact, approved the plans.[344] In any event, All Seasons never completed the installation of the middle level windows.[345]

SPE filed a complaint in Macomb Circuit Court alleging that All Seasons breached its contract by delivering and installing windows that failed to conform to the contract plans and specifications, damaged columns surround the middle level sunroom by performing deficient work, and demanded final payment despite the fact that project was incomplete.[346] A copy of the complaint was served on Rebecca Malloy, a co-owner of All Seasons according to the proof of service.[347] On July 25, 2012, Rebecca emailed SPE's attorney stating that All Seasons planned to negotiate a resolution with the Postills.[348] SPE's attorney responded on July 31, 2012 extending All Seasons' time to answer the complaint until August 10, 2012.[349] On August 13, 2012, a default was entered after All Seasons had failed to answer or otherwise defend.[350]

All Seasons filed a motion to set aside the default and transfer venue to the St. Clair Circuit Court in October 2012.[351] "All Seasons contended that it filed a construction lien that would become the subject of a foreclosure action in the St. Clair Circuit Court and that the action should

339. *Id.*
340. *Id.*
341. *Id.* at *2.
342. *Id.* at *1.
343. *Id.* at *2.
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.* at *3.

be transferred" to that court.[352] The Macomb Circuit Court ruled that because All Seasons had established good cause and a meritorious defense, the default was set aside and the case transferred to the St. Clair Circuit Court.[353] The case ultimately proceeded to trial where a jury determined that SPE materially breached the contract, and All Seasons was entitled to $15,150 in damages.[354]

The court of appeals reviewed whether the motion to set aside default was properly granted based on the abuse of discretion standard.[355] The court of appeals held that the trial court did not abuse its discretion because All Seasons established good cause and a meritorious defense.[356] In reaching its conclusion, the court of appeals reasoned that service was improper because the registered agent of All Seasons did not receive service of the summons and complaint.[357] Instead, Rebecca Malloy, who was the registered agent's wife, received the summons and complaint.[358] The court of appeals rejected SPE's argument that All Seasons had actual notice of the lawsuit, which cured any defect in the service of process.[359] In rejecting this argument, the court of appeals reasoned that Rebecca Malloy's email to SPE's attorney requesting time to negotiate with the Postills was insufficient to establish that All Seasons had actual notice of the lawsuit.[360] The court of appeals also stated that All Seaons had a reasonable excuse for its failure to answer based on its ongoing negotiations with the Postills.[361]

The court of appeals concluded that Malloy's affidavit established a meritorious defense that would be absolute if proven.[362] The substance of All Seasons' defense was final payment was unpaid, and thus, All Seasons was in the process of initiating litigation to foreclose on its construction lien.[363] If All Seasons were able to prove that it complied with all respects of the construction contract, its defense would be absolute. Concluding that All Seasons satisfied both of the required elements to set aside a default, the court of appeals affirmed the trial court's decision to do so.[364]

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352. *Id.*
353. *Id.*
354. *Id.* at *4.
355. *Id.* at *6.
356. *Id.* at *7.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at *8.
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*

L. Auto-Owners Insurance Company v. Kelley

The Michigan Court of Appeals issued an unpublished opinion in an insurance coverage dispute arising from an underlying complaint that alleged construction deficiencies in a log home.[365] Steven and Jennafer Prain (hereafter referred to as "the Prains") contracted with North Arrow Log Homes, Inc. (hereafter referred to as "North Arrow") to construct a log cabin home.[366] North Arrow's contract was limited to the exterior shell of the home, while others were responsible for the interior construction.[367] North Arrow was not a subcontractor to the other parties.[368]

Following completion of construction, the Prains noticed structural problems with the home in December 2006.[369] North Arrow attempted to correct these problems, but nonetheless, the issues persisted.[370] The Prains subsequently filed a nine-count complaint against North Arrow.[371] When North Arrow sought coverage under its policy with plaintiff Auto-Owners Insurance Company (hereafter referred to as "Auto Owners"), Auto Owners filed an action seeking declaratory relief.[372] Auto Owners argued that it had no duty to defend or indemnify North Arrow because the alleged construction defects did not constitute an "accident" or "occurrence" under the policy, and moreover, that certain policy exclusions applied to the situation with North Arrow and the Prains.[373]

The trial court ruled that because the structural deficiencies caused by North Arrow damaged property other North Arrow's work, there was an occurrence under the policy and the cited exclusions were inapplicable, therefore, the Prains were entitled to summary disposition.[374]

Because this action presented an issue of interpretation of a contract for insurance, the issue was one of law and the court of appeals reviewed it de novo.[375] The court of appeals first addressed Auto Owners' duty to indemnify.[376] The policy provided that Auto Owners would pay North

365. Auto-Owners Ins. Co. v. Kelley, No. 319641, 2015 WL 4465048 (Mich. Ct. App. July 21, 2015).
366. *Id.* at *1.
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*

Arrow "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."[377]

Auto Owners contended that the policy did not apply because the Prains' underlying complaint alleged facts limited to North Arrow's own negligent construction.[378] Auto Owners acknowledged that an "accident" or "occurrence" arises if the insured's defective work damages the work or property of others.[379] Despite the allegations in the underlying complaint, the Prains submitted to the trial court affidavits and evidence that North Arrow's defective work allowed water and weather intrusion into the home thereby causing damage to the work of other contractors, including drywall, interior walls, and electrical work.[380] The damaged work was separate and distinct from the exterior shell that North Arrow constructed.[381] Because evidence that the work of others, not just North Arrow's own work, was damaged, the court of appeals held that an "accident" or "occurrence" had arisen within the policy terms.[382]

Auto Owners next argued that the Prains alleged "intentional conduct" on the part of North Arrow in the underlying complaint.[383] Such intentional conduct, including North Arrow's alleged abuse of the corporate form, intentional and willful breach of the contract, and fraud and misrepresentation was not covered under certain policy exclusions.[384]

The court of appeals concluded that Auto Owners read its exclusions too broadly.[385] The allegations cited did not necessarily indicate North Arrow's expectation or intent to damage the property.[386] Neither abuse of the corporate form or willful breach of its own contract are directly related to the property damage that occurred, particularly to the work of others.[387] Thus, the court of appeals concluded that the policy exclusion for intentional conduct did not absolve Auto Owners of its duties to defend and indemnify North Arrow.[388]

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377. *Id.* at *2.
378. *Id.* at *3.
379. *Id.* at *1 (citing Radenbaugh v. Farm Bureau Gen. Ins. Co. of Mich., 240 Mich. App. 134, 147, 610 N.W.3d 272, 279–80 (2000)).
380. *Id.* at *3.
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.* at *3–4.
385. *Id.* at *4.
386. *Id.*
387. *Id.*
388. *Id.*

Auto Owners raised a second exclusion commonly found in similar insurance policies that cover construction projects.[389] The "your work" exclusion precludes coverage as to property upon which a contractor or its subcontractors performed deficient work.[390] The court of appeals stated that this exclusion was limited to damage and defects found in North Arrow's own work.[391] The court of appeals held that Auto Owners' duty to indemnify was limited to the work of others that was damaged by North Arrow's defective work.[392]

The court of appeals held that an insurer's duty to defend is broad.[393] First, the duty to defend is not limited by the precise allegations of a suit.[394] The insurer has a duty to defend whenever any of theories of recovery would be covered by the policy.[395] The facts clearly showed that the underlying complaint covered occurrences, and therefore, the court of appeals held that Auto Owners had a duty to defend North Arrow.[396]

M. Jerry Zabel Electric Company v. Stonecrest Building Co.

Following the housing market crisis, many companies that engaged in construction related trades were unpaid for services due to losses and market value decline of many projects.[397] As a result, Michigan courts tested novel theories of recovery under statutes like the Michigan Builders Trust Fund Act (MBTFA) to make these trade contractors whole.[398] The Michigan Court of Appeals issued an unpublished opinion in one such case involving a group of building-trade contractors against defendants collectively referred to as "Stonecrest."[399]

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389. *Id.*

390. The full text of this exclusion, as excerpted in the opinion, is:

> (6) That particular part of real property on which any insured or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations; or
>
> (7) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly perfumed on it.

Id.

391. *Id.*

392. *Id.* at *5.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. Jerry Zabel Elec. Co. v. Stonecrest Bldg. Co., No. 320168, 2015 WL 4489225, at *1 (Mich. Ct. App. July 23, 2015).

398. *Id.*

399. *Id.*

Stonecrest served as project manager for a series of condominium development projects.[400] Stonecrest contracted with real estate developers for two main services: "(1) [I]nteraction with and management of the building-trade contractors who worked on the condominium developments; and (2) provision of other services to the real-estate developers, such as marketing, and negotiation and closing of sales."[401]

During the financial crisis, the real-estate developers suffered losses to the extent that they were unable to pay their lenders or the building-trade contractors that had performed work on the projects.[402] Consequently, many contractors attempted to collect payment by suing the developers, like Stonecrest, and other individuals involved in the projects.[403]

A single trade contractor, European, was able to obtain partial payment through construction liens for its work providing and installing countertop materials at several condominium projects.[404] In an effort to secure full payment, European filed suit against Stonecrest alleging that Stonecrest received payment from developers that was intended as payment to building-trade contractors, including European, and did not hold the payment in trust for the contractors as required under the MBTFA.[405]

After conducting an extensive evidentiary hearing, the trial court concluded that Stonecrest never received any money from the lenders or real-estate developers intended for dispersal to building-trade contractors.[406] On appeal, European argued that the trial court erred in finding that Stonecrest had not violated the MBTFA, and that the trial court abused its discretion in denying European leave to amend its complaint to add a count of common law fraud.[407]

The court of appeals analyzed the required elements that a plaintiff must satisfy to establish a civil cause of action for violation of the MBTFA.[408] In particular, the court of appeals noted that "[a] party must be paid money for labor and materials provided on a construction

400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.* at *2.
407. *Id.*
408. *Id.* at *3; *see also* BC Tile & Marble Co., Inc. v. Multi Bldg. Co., Inc., 288 Mich. App. 576, 584–85, 794 N.W.2d 76, 80–81 (2010); Livonia Bldg. Materials Co. v. Harrison Constr. Co., 276 Mich. App. 514, 519, 742 N.W.2d 140, 143–44 (2007).

project—i.e., the work of its laborers, subcontractors, and suppliers—and then retain those funds instead of disbursing them to these groups and individuals."[409]

The court of appeals reasoned that Stonecrest was paid money that it was expected to retain for the performance of its own services.[410] When Stonecrest paid European, the checks were drawn on accounts held by the real-estate developers, not by Stonecrest.[411] Therefore, because funds were not channeled through Stonecrest, the court of appeals held that no violation of the MBTFA could have occurred and affirmed the trial court's findings.[412]

As to the trial court's denial of leave to amend, the court of appeals held that an appeal would have been futile and therefore the trial court did not abuse its discretion.[413] European desired to amend its complaint to add a common law fraud count against Stonecrest on the basis that Stonecrest violated the MBTFA.[414] Because the alleged MBTFA violation, which the trial court had already determined did not exist, was European's sole support for the fraud claim, amendment would have been futile.[415]

N. Windrush Inc. v. VanPopering

The Michigan Court of Appeals reviewed another case involving an interpretation of the MBTFA that revealed persistent, strict enforcement of personal civil liability under the MBTFA, but possible reluctance to entertain potential alternate theories of recovery.[416] *Windrush Inc. v. VanPopering* returned to the court of appeals after the Michigan Supreme Court declined to review the case and ordered the court of appeals to reconsider it in light of *BC Tile & Marble Co, Inc.*[417] The court of appeals opinion specifically considered personal civil liability of a principal pursuant to the MBTFA and the viability of a statutory conversion claim in the context of MBTFA violations.[418]

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409. *Jerry Zabel Elec. Co.*, 2015 WL 4489225, at *3 (internal quotations omitted).
410. *Id.*
411. *Id.* at *1.
412. *Id.* at *3.
413. *Id.*
414. *Id.* at *4.
415. *Id.*
416. Windrush Inc. v. VanPopering, No. 315958, 2015 WL 5314831 (Mich. Ct. App. Sept. 10, 2015).
417. *Id.* at *1.
418. *Id.*

Lee VanPopering (hereafter referred to as "VanPopering") was the sole owner of Northland Construction (hereafter referred to as "Northland"), and the general contractor for a condominium development known as Shagbark Condominiums (hereafter referred to as "Shagbark").[419] Northland subcontracted with Windrush for certain painting and carpentry services.[420] Before the condominium project was fully complete, financial difficulties arose and the lender threatened foreclosure.[421] Windrush also faced financial difficulties and its sole owner, James Suschil, declared personal bankruptcy.[422] As part of the bankruptcy proceedings, the bankruptcy trustee identified that Northland may have owed funds to Windrush and Suschil.[423] Windrush then sued Northland, VanPopering, and other entities that were involved in the Shagbark project, alleging violations of the MBTFA, breach of contract, and statutory conversion.[424] Windrush also claimed it was entitled to $11,300 for work performed on an individual condominium unit.[425]

The trial court granted Windrush's motion for summary disposition as to breach of contract against the project owner for $29,300 but denied all other claims as to all other defendants.[426] Following a bench trial, the trial court ruled in favor of Windrush against Northland (ordering that Northland pay Windrush $9,000), but in favor of VanPopering against Windrush.[427] As to the claim of MBTFA violations, the trial court ruled in favor of Windrush against Northland (for $11,300), but also ruled in favor of VanPopering against Windrush.[428] As to the claim of statutory conversion, the trial court found for all of the defendants.[429]

On appeal, the court of appeals affirmed the trial court's ruling as to the breach of contract claims.[430] As to the MBTFA violations, the court of appeals affirmed the trial court's ruling that Northland violated the MBTFA when Northland received funds from the sale of Building, retained those funds for its own use, and never paid Windrush.[431]

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419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.*
427. *Id.* at *2.
428. *Id.*
429. *Id.*
430. *Id.* at *2–3.
431. *Id.* at *3. The five elements to establish violation of the MBTFA are:

> (1) [T]he defendant is a contractor or subcontractor engaged in the building construction industry, (2) a person paid the contractor or subcontractor for

Likewise, the court of appeals affirmed the trial court's ruling as to the $11,300 lien.[432]

However, the court of appeals reversed as to the personal liability of VanPopering after admonition from the Michigan Supreme Court.[433] The MBTFA is also a criminal statute with potential incarceration for persons who violate it.[434] The standard for personal civil liability under the MBTFA is less stringent than the standard for criminal liability.[435] The court of appeals articulated the standard for personal civil liability to be participation in the decision to act in violation of the MBTFA, rather than the existence of a subjective intent to defraud or obtain personal financial benefit.[436]

As the sole owner and president of Northland, VanPopering managed all financial decisions for the company.[437] Because VanPopering controlled all relevant transactions and participated in the decision not to pay Windrush the $9,000 builder's fee it was owed, VanPopering was personally civil liable, along with Northland, for violations of the MBTFA.[438]

The court of appeals then considered the viability of Windrush's statutory conversion theory.[439] Conversion is defined as "any distinct act of domain wrongfully exerted over another's property in denial of or inconsistent with the rights therein."[440] The court of appeals applied reasoning from *Appletree*,[441] and the court of appeals determined that

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> labor or materials provided on a construction project, (3) the defendant retained or used those funds or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project.

Id. (citing DiPonio Constr. Co., Inc. v. Rosati Masonry Co., Inc., 246 Mich. App. 43, 49, 631 N.W.2d 59, 62 (2001)).

432. *Id.* at *4.

433. *Id.*

434. *Id.*; *see also* People v. Brown, 239 Mich. App. 735, 610 N.W.2d 234 (Mich. Ct. App. 2000) (holding that a corporate officer could be convicted of wrongfully transferring funds from a business account to her personal account, while subcontractors remained unpaid).

435. *Windrush Inc.*, 2015 WL 5314831, at *5.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.* at *6 (internal citations omitted).

441. *Id.*; *see also* Dep't of Agriculture v. Appletree Marketing, LLC, 485 Mich. 1, 779 N.W.2d 237 (Mich. 2010) (*Windrush* cited an analogous case where a statutory trust was created and a claim for statutory conversion could be pursued cumulatively with the remedies provided by the underlying statute).

Windrush was permitted to maintain both claims cumulatively.[442] However, in applying the elements of statutory conversion to the case, the court of appeals concluded that Windrush had failed to establish this claim.[443]

In reaching this conclusion, the court of appeals reasoned that there was no evidence that Northland "stole" or "embezzled" the money Windrush was owed.[444] "To support an action for conversion of money, the defendant must have obtained the money without the owner's consent to the creation of a debtor-creditor relationship and must have had an obligation to return the specific money entrusted to his care."[445] By contrast, the record suggested that Northland obtained the funds with Windrush's consent to the trust relationship.[446]

O. Spring Harbor Club Condominium Association v. Wright

The Michigan Court of Appeals clarified the applicable statutes of limitations and repose that often arise in construction cases.[447] Spring Harbor Club Condominium Association (hereafter referred to as "Spring Harbor") owned condominiums that were built and designed from 1991 to 1994.[448] In 2013, Spring Harbor discovered structural problems that were due to defective construction or construction management.[449] Spring Harbor contended that these defects were completely undiscoverable and sued both the architect and the licensed residential builder engaged in the original construction.[450] The trial court granted summary disposition in favor of the defendants, the architect and builder, on the grounds that Spring Harbor's claims were time-barred.[451]

On appeal, Spring Harbor argued that its claims were not time-barred because the breach of contract arose out of an indemnity provision rather than the original construction contract.[452] Construction matters have a complex limitation period whereby contract claims are subject to the

442. *Windrush Inc.*, 2015 WL 3514831, at *7.
443. *Id.*
444. *Id.* at *8 (citing MICH. COMP. LAWS ANN. § 600.2919a(1)(a) (West 2005)).
445. *Id.* (quoting Lawsuit Fin., LLC v. Curry, 261 Mich. App. 579, 591, 683 N.W.2d 233, 240 (2004) (internal quotations omitted)).
446. *Id.*
447. Spring Harbor Club Condo. Ass'n v. Wright, No. 321507, 2015 WL 3874524 (Mich. Ct. App. June 23, 2015).
448. *Id.* at *1.
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*

standard period of limitations for contracts,[453] while construction-related tort claims are subject to the tort limitations and a statute of repose.[454] However, a claim for breach of an indemnity clause accrues separately from a standard construction contract, and not until a party refuses a demand to indemnify.[455] If Spring Harbor could prove that defendants breached an indemnity clause, the claim would not be time-barred.[456] However, the court of appeals held that the indemnity clause in the Spring Harbor contract was not sufficiently broad as to support Spring Harbor's claim.[457]

The court of appeals addressed Spring Harbor's malpractice claim against the architect Jack Begrow.[458] Malpractice claims against an architect are subject to a discovery rule, which operates in favor of Spring Harbor.[459] The court of appeals held that Spring Harbor's malpractice claim against Begrow was not time-barred, because the statute of repose did not apply when malpractice claims are neither strictly tort or contract claims.[460]

As to Spring Harbor's breach of warranty claim, the court of appeals held that the warranty contained in the original contract was one of quality or fitness and subject to a discovery rule, yet was not a tort claim barred by the statute of repose.[461] By contrast, the architect's contract contained an express waiver of any claims for construction defects and therefore Spring Harbor's claims for breach of warranty could not proceed against Begrow.[462]

P. Associated Builders and Contractors v. City of Lansing

In one of the most interesting cases during the *Survey* period, the Michigan Supreme Court held that local municipalities could enact ordinances to require that contractors working on city construction

453. *Id.* at *2; *see also* Miller-Davis Co. v. Ahrens Constr. Inc., 495 Mich. 161, 169–70, 848 N.W.2d 95, 99–100 (2014); MICH. COMP. LAWS ANN. § 600.5807(8) (West 2017).

454. *Spring Harbor*, 2015 WL 3874524, at *2; *see also* MICH. COMP. LAWS ANN. § 600.5839 (West 2012).

455. *Spring Harbor*, 2015 WL 3874524, at *2.

456. *Id.*

457. *Id.*

458. *Id.* at *3.

459. *Id.*

460. *Id.*

461. *Id.* at*4.

462. *Id.* at *5.

projects pay employees a prevailing wage.[463] Prevailing wage has been a hotly debated topic in Michigan in recent months, with legislation and ballot proposals attempting to eliminate prevailing wage laws at the state level.[464] Associated Builders and Contractors (hereafter referred to as "ABC") is a trade association which filed suit against the City of Lansing (hereafter referred to as "Lansing"), contending that the local prevailing wage ordinance was unconstitutional because municipalities lacked the authority to regulate wages paid by third parties, even on public projects.[465]

The case was complicated by an archaic precedential case that barred similar local ordinances.[466] The court of appeals held that Lansing's local ordinance was constitutional, despite the difficulty of the prior Michigan Supreme Court precedent.[467] Despite agreeing with the court of appeals' conclusion that Lansing's prevailing wage ordinance was constitutional, the Supreme Court vacated the decision but affirmed the result.[468] The Michigan Supreme Court reasoned that municipalities have more autonomy and power of their affairs under the 1963 Constitution than during the *Lennane* era.[469] Consequently the court expressly overruled *Lennane*.[470]

III. CONCLUSION

During the *Survey* period, the most prevalent disputes involved the Construction Lien Act and the Michigan Builder's Trust Fund Act. Cases involving contract disputes, particularly contract interpretation remained prominent. The importance of precise contract language should remain at the forefront of any practitioner's mind. Contract terminology continues

463. Associated Builders & Contractors v. City of Lansing, 499 Mich. 177, 880 N.W.2d 765 (2016).

464. Lindsay Vanhulle, *Group Trying to Repeal Michigan's Prevailing Wage Law Starts New Petition Drive*, CRAIN'S DET. BUS. (Oct. 30, 2015, 4:53 PM), http://www.crainsdetroit.com/article/20151030/NEWS/151039980/group-trying-to-repeal-michigan-prevailing-wage-law-starts-new; *see also* Kathleen Gray, *Senate Votes 22-15 to Repeal Prevailing Wage Laws*, DET. FREE PRESS (May 15, 2015, 6:33 PM), http://www.freep.com/story/news/local/michigan/2015/05/14/senate-votes-repeal-prevailing-wage-laws/27302317/ (just prior to the *Survey* period, a bill to repeal Michigan's prevailing wage law passed in the Senate but never became law).

465. *Associated Builders & Contractors*, 499 Mich. at 181, 880 N.W.2d at 767.

466. *Id.* at 182, 880 N.W.2d at 767.

467. *Id.* 182–83, 880 N.W.2d at 767; *see also* Attorney General ex rel. Lennane v. Detroit, 225 Mich. 631, 196 N.W. 391 (1923).

468. *Associated Builders & Contractors*, 499 Mich. at 192–93, 880 N.W.2d at 773.

469. *Id.* at 187, 880 N.W.2d at 770.

470. *Id.* at 189–90, 880 N.W.2d at 771–72.

to have a significant effect on the result of construction litigation. With improved economic conditions, construction industry actors and trade associations used their resources towards cultivating the regulatory landscape for the industry and testing novel theories of recovery under power statutes. Construction law is diverse and impacts many substantive areas of law. Its development is largely accomplished through the few published and unpublished cases decided outside of alternative dispute resolution.