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Michigan Supreme Court Clarifies That Certain Construction Negligence Claims Are Governed By Six-Year Statute of Limitations

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Thousands of negligence cases arising out of construction work are filed in the State of Michigan every year. In accordance with Michigan's three-year statute of limitations applicable to ordinary negligence actions, construction negligence cases were routinely filed within three years of the date of the occurrence giving rise to the lawsuit. Recently, the Michigan Supreme Court changed these once well-established principles of law by ruling that construction litigation, particularly those cases involving "improvement[s] to real property," is controlled by a six-year statute of limitations. In other words, potential litigants now have three more years to sue architects, engineers and contractors for damages arising out of an "unsafe or defective improvement of real property." This includes both personal injury and property damage claims.

In *Citizens Insurance Company v Scholz*, 268 Mich App 659, 709 NW2d 164 (2005), Plaintiff insurance company filed a subrogation action on behalf of its insured, Zinger Sheet Metal, to recover damages sustained when a building collapsed during a construction project. Zinger Sheet Metal hired Defendant F.C. Scholz as the general contractor and Defendant Hoornhoorst Concrete, Inc. as a sub-contractor. On July 31, 1997, the subcontractors dug below the foundation of a building, causing an adjoining wall of the building to collapse. Plaintiff paid out over sixty thousand dollars in insurance proceeds for the damages caused by the collapse. Nearly six years later, on April 23, 2003, Plaintiff filed a complaint seeking recovery from Defendants for the insurance payment.

In response, the Defendants sought to dismiss the case on the basis that Plaintiff's claim was time barred. They argued that the claim was governed by the three-year statute of limitations applicable to ordinary negligence actions under MCL 600.5805(10). Plaintiff argued that its claim was governed by the six-year statute of limitations for improvements to real property under MCL 600.5839(1), otherwise known as the statute of repose. (Please see *Secret Wardle Notes* section for full text of statute). The trial court agreed with Defendants that the applicable statute of limitations for Plaintiff's claim was three years and dismissed the case.

SECRET WARDLE NOTES:

Based on fact patterns in these decisions, it is believed that the courts will take an expansive view as to construction activity that constitutes an "improvement to real property." The *Citizens* Defendants argued that the "improvement to real property" did not cause the damage and that the act of excavating, which did cause the damage, was not a "defective and unsafe condition" and did not constitute an "improvement" to real property under MCL 600.5839(1). The court disagreed, noting the excavation was an integral part of the construction of the building addition and, therefore, the six year statute of limitations will apply to these claims. The far-reaching impact of the Supreme Court's ruling in extending the Statute of Limitations from 3 to 6 years in construction litigation will be felt for years to come.

The statute provides as follows:

§ 600.5839. **Actions for injury or death arising from unsafe or defective improvements to real property; time limits for actions;** conditions for action.

(1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property... against **any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than six years after the time of occupancy of the completed improvement,** use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer....(emphasis supplied).

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On appeal, the Michigan Court of Appeals agreed with the Plaintiff that the statute of repose for actions against architects, engineers and contractors under MCL 600.5839(1) provides the limitations period for this type of case.

The appeals court admitted that the above-referenced statute was originally enacted to protect architects and engineers from "latent defect" claims that arise many years after improvements to real property. Based on "evolving case law," however, the court felt that there was no distinction between "latent defect" cases and other actions seeking recovery for construction-related negligence. Furthermore, twenty years after the original enactment of the statute in 1985, the Legislature amended the statute to expressly state that all actions against contractors based on an improvement to real property were governed by MCL 600.5839 as well.

The Appeals Court largely relied on the 2002 decision of *Ostroth v Warren Regency, GP, LLP*, 263 Mich App 1, 687 NW2d 309 (2004). The *Ostroth* case had a similar procedural fact pattern as the *Citizens* matter. The *Ostroth* lawsuit alleged that an architect was liable for personal injuries arising out of the renovation of Plaintiff's work place. The Appeals Court in *Ostroth* reasoned that specific statute of limitations, such as MCL 600.5839, control over general statutes of limitation, such as MCL 600.5805. In other words, the *Ostroth* panel held that MCL 600.5839 provided the applicable six-year statute of limitations for "all negligence actions against architects, contractors, and engineers" on the basis of real property improvements.

The *Ostroth* decision was appealed to the Michigan Supreme Court. In a published decision, 472 Mich 898, 696 NW2d 708 (2006), the Supreme Court agreed with the Appeals Court that 600.5839 is both a statute of repose and a statute of limitations and thus the Plaintiff's cause of action was not time-barred. According to the Court, "[t]he time period of limitations for actions against a state licensed architect, professional engineer, land surveyors or contractor based on an improvement to real property shall be as provided in MCL 600.5839." This six-year period of limitations begins to run "after the time of occupancy of the completed improvement, use, or acceptance of the improvement..." The Court also indicated that the three year statute of limitations under MCL 600.5805 remains applicable to any general negligence claim that does not involve "a state licensed architect, professional engineer, land surveyor, or contractor" or is not "based on an improvement to real property."

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