



STATE OF MICHIGAN CONSTRUCTION LAW COMPENDIUM

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The following is an overview of Michigan construction law. Most construction disputes are governed by contract law, as Michigan follows the economic loss rule. With a few variations, the law applicable to construction disputes in Michigan is similar to that found in other states.

I. BREACH OF CONTRACT

A. Possible Recovery Available to Plaintiffs

Breach of contract is the cornerstone for most construction claims. In Michigan, the statute of limitations for breach of contract is six years from the date of the breach. MCL 600.5807(8). An action for breach of an express contract precludes a claim for breach of an implied contract, i.e., unjust enrichment, covering the same subject matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993); *but see Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 199-200; 729 NW2d 898 (2006) (permitting unjust enrichment claim against one defendant, in limited circumstances, notwithstanding existence of express contract with another defendant, covering same subject). In the absence of an express contract, a plaintiff may freely seek recovery for breach of an implied contract, i.e., unjust enrichment. *Cascade Elec Co v Rice*, 70 Mich App 420, 428-29; 245 NW2d 774 (1976). Such claims are sometimes subjected to a three-year limitation period. MCL 600.5805(10). *See e.g. Huhtala v Travelers Ins Co*, 401 Mich 118, 127-28; 257 NW2d 640 (1977) (the three-year period of limitations applies to all actions to recover for an injury to the person arising because of negligence whether based upon implied contract or tort). See Section VII below for further discussion of the periods of limitations and repose applicable to construction law.

In Michigan, private parties are allowed to contractually shorten the applicable limitations period; unambiguous contractual provisions serving that purpose will be enforced “unless the provision[s] would violate law or public policy.” *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005) (overruling *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118; 301 NW2d 275 (1981) (permitting courts to refuse enforcement of “unreasonable” limitation-period shortening provisions)).

B. Abandonment

Under Michigan law, contract abandonment is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. *Dault v Schulte*, 31 Mich App 698, 187 NW2d 914, 915 (1971). A party displays an intent to abandon if it “positively and absolutely refuses to perform the conditions of the contract, such as a failure to make payments due, accompanied by other circumstances, or where by [its] conduct [it] clearly shows an intention to abandon the contract.” *Collins v Collins*, 348 Mich 320; 83 NW2d 213 (1957). Abandonment must be mutual, however. If one party continues to perform under the contract after the other party exhibits an intent to abandon, there has been no abandonment. At least one court has held that a claim of abandonment is not viable where the contract contains a “changes” clause. *RM Taylor, Inc v General Motors Corp*, 187 F3d 809 (8th Cir 1999) (applying Michigan law).

Where abandonment has been proven, Michigan courts allow contractors to recover in *quantum meruit*. *Interior/Exterior Specialist Co v Devon Ind Group*, unpublished decision of the Michigan Court of Appeals, Docket No. 276620 (January 8, 2009); *Dault v Schulte*, 31 Mich App 698, 187 NW2d 914, 915 (1971).

C. Plans and Specifications

A contractor is generally entitled to rely on the accuracy of the plans and specifications provided by the owner. Indeed, such documents carry an implied warranty of suitability; if they are defective, the contractor may recover damages for delays proximately related to the breach of the implied warranty. *Hersey Gravel Co v State Highway Dept*, 305 Mich 333; 9 NW2d 567 (1943) (finding that there is a clear legal duty to furnish all the available information in a form and in a manner that would apprise the prospective bidders of the nature of the difficulties to be encountered). Nevertheless, a contractor cannot recover for defects in plans and specifications that it prepares. Nor can a contractor ignore defects in plans and specifications that it should have reasonably discovered when bidding the project.

II. NEGLIGENCE

Under Michigan's "economic loss rule," to state a tort claim, a plaintiff must allege the breach of a "separate and distinct" tort duty, i.e., something more than a mere breach of contract. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). In Michigan, "economic losses," see *Neibarger v Universal Cooperatives*, 439 Mich 512, 520; 486 NW2d 612 (1991) ("goods" contracts), and damages not due to breaches of "separate and distinct" tort duties, *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997) ("services" contracts), cannot be recovered in tort. *Accord Corl v Huron Castings, Inc*, 450 Mich 620, 628-29; 544 NW2d 278 (1996); *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 418-19; 295 NW2d 50 (1979). The idea here is that commercially anticipated damages, i.e., "economic losses" or those arising from no more than a breach of contract, must be recovered in contract. See e.g. *Detroit Bd of Educ v Celotex Corp*, 196 Mich App 694; 493 NW2d 513 (1992) (permitting suit in tort where parties not likely to have anticipated and negotiated over relevant risk); see also *Kisiel v Holz*, 272 Mich App 168, 172-73; 725 NW2d 67 (2006) (barring owner's suit in tort for contractor's deficient construction).

Generally, actions to recover damages for injuries to persons or property are governed by MCL 600.5805(10), which provides for a default three-year period of limitations. See also Section VI below.

In *McCann v Brody-Built Construction Co, Inc*, 197 Mich App 512; 496 NW2d 349 (1992), a subsequent purchaser of a residence sought to recover damages for alleged negligent construction. The court held that the three-year statute of limitations for negligence actions applied, running from when property damage, a basic element of the cause of action, was discovered, or should have been discovered, by plaintiff owner or the plaintiff's predecessor under MCL 600.5827.

The three-year statute of limitations was also applied to a property owner's claim of flooding and damage, as a result of alleged improper maintenance of a lake improvement system, even though the complaint also alleged breach of contract. *Lear v Brighton Township*, 184 Mich App 605; 459 NW2d 26 (1990).

A claim of professional negligence must establish all the necessary elements of ordinary negligence: duty, breach of duty, proximate cause, and damages. *Bacco Constr Co v American Colloid Co*, 148 Mich App 397; 384 NW2d 427 (1986). Design professionals are liable for foreseeable injuries to foreseeable victims that proximately result from negligent performance of their professional duties.

Like other professionals, an architect owes a duty of care, which, in this instance, extends to any person lawfully on the premises designed by the architect, and constructed according to the architect's plans and specifications; privity of contract is not required. *Francisco v Manson, Jackson & Kane, Inc*, 145 Mich App 255, 261; 377 NW2d 313 (1985).

Architects, engineers and contractors are under a duty to exercise ordinary, reasonable care, technical skill, and ability and diligence, as are ordinarily required of such professionals, in the course of preparing their plans, making inspections, and performing supervision during construction. An architect's efficiency in preparing plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one in that profession. The duty of an architect depends upon the particular agreement he has entered with the person who employs him and in the absence of a special agreement, he does not imply or guarantee a perfect plan or satisfactory result, rather he is only liable if he fails to exercise reasonable skill and care.

III. BREACH OF WARRANTY

A. Breach of Implied Warranty

Michigan implies certain duties into all services contracts. In *Nash v Sears, Roebuck & Co*, 383 Mich 136, 142-43; 174 NW2d 818 (1970) (quoting 17 AM JUR 2D, CONTRACTS, § 371, p 814-15), for example, the court stated:

As a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner . . .

With respect to the skill required of a person who is to render services, it is a well-settled rule that the standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which he is employed . . .

Accordingly, under *Nash*, “[a]n independent contractor ... is bound to proceed with skill, diligence and in a workmanlike manner, as is any employee under the common law rule ... above.” *Nash*, 383 Mich at 143 (citing *Chapel v Clark*, 117 Mich 638; 76 NW 62 (1898)). Since *Nash*, however, the Michigan Court of Appeals has clarified that breach of the above duty gives rise to a breach of contract, but not a breach of warranty claim. See e.g. *Co-Jo, Inc v Strand*, 226 Mich App 108, 114-15; 572 NW2d 251 (1997).

As discussed in Section VII below, claims for breach of an implied warranty are governed by the three-year period of limitations under MCL 600.5805(10) and the six year period of repose found in MCL 600.5839. See *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977); *River Invs v Watson Bros Co*, unpublished opinion per curiam of the Court of Appeals (Aug. 30, 2011, Docket No. 298253).

B. Breach of Express Warranty

Michigan recognizes claims for breach of express warranty. These claims sound in contract and are governed by MCL 600.5807(8), the six-year limitation period applicable to breach of contract claims, unless the warranty arises from a contract for the sale of goods, in which case the

Michigan Commercial Code's four-year limitation period, i.e., MCL 440.2725, applies. Where the warranty provides that the goods will be free from defects for a period of time the warranty is deemed to extend to future performance. *Executone Business Systems Corp v IPC Comm, Inc*, 177 Mich App 660; 442 NW2d 755 (1989).

IV. MISREPRESENTATION AND FRAUD

Michigan recognizes three different theories upon which a plaintiff can establish fraud: (1) traditional common-law fraud; (2) innocent misrepresentation; and (3) silent fraud. *Diponio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 51; 631 NW2d 59 (2001) (citing *M & D, Inc v McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998)).

The elements of traditional common-law fraud are: (1) the defendant made a representation of a material fact; (2) the representation was false when made; (3) when the defendant made the representation, the defendant knew it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered damage. *See e.g. Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253, n 8; 701 NW2d 144 (2005) (citing *Scott v Harper Recreation*, 444 Mich 441, 446, n 3; 506 NW2d 857 (1993)).

A claim of innocent misrepresentation requires proof of all of the same elements as traditional common-law fraud and requires that the representation was made in connection with the making of a contract between the parties, and the injury suffered by the plaintiff inures to the benefit of the defendant. However, under innocent misrepresentation, it is unnecessary to establish the elements of knowledge of or recklessness concerning the representations falsity and the intent to induce reliance. *See e.g. United States Fid & Guar Co v Black*, 412 Mich 99, 115; 313 NW2d 77 (1981); *Temborius v Slatkin*, 157 Mich App 587; 403 NW2d 821 (1986). In other words, a claim for innocent misrepresentation requires showing that defendants: (1) made a false statement in a transaction with plaintiff, (2) without knowledge of that statement's falsity, (3) which statement actually deceived plaintiffs, and (4) on which plaintiffs detrimentally relied, with the benefit inuring to defendants. *Roberts v Saffell*, 483 Mich 1089, 1090; 766 NW2d 288 (2009).

Silent fraud exists where a defendant breaches a legal or equitable affirmative duty to disclose, or not suppress, material facts, causing a plaintiff to have a false impression. *Black*, 412 Mich at 125. For example, parties to business deals are obliged to use reasonable care in disclosing to the other party, before the deal is agreed to, any subsequently acquired information that renders previous representations untrue or misleading. *See Hord v Environmental Research Inst*, 463 Mich 399, 412-13; 617 NW2d 543 (2000).

As a general rule, fraud claims must be proved by clear and convincing evidence. *Flynn v Korneffel*, 451 Mich 186, 199; 547 NW2d 249 (1996). Moreover, generally, a promise to do something in the future does not form the basis for a fraud claim unless the defendant did not intend to keep the promise when made, the facts of the case compel the inference that the promise was made to perpetrate a fraud or there was a relationship of trust or confidence between the parties. *See Derderian v Genesys Health Care Sys*, 263 Mich App 364, 378-79; 689 NW2d 145 (2004).

Subject to the applicability of the periods of limitation and repose discussed in Section VII, there is a six-year statute of limitations for fraud claims that runs from the date the fraud occurred, rather than from when it was discovered, or should have been discovered. *Boyle v*

General Motors Corp, 468 Mich 226; 661 NW2d 557 (2003) (citing MCL 600.5813 and 600.5827).

V. STRICT LIABILITY CLAIMS

Michigan does not recognize strict products liability. *Beaver v Howard Miller Clock Co*, 852 F Supp 631, 639 (WD Mich 1994) (holding that Michigan does not recognize strict products liability) (citing *Prentis v Yale Mfg Co*, 421 Mich 670; 365 NW2d 176, 181, n 9 (1984), and *Hickey v Zezulka*, 439 Mich 408; 487 NW2d 106, 122, n 11 (1992)). Moreover, the last time it addressed the issue, the Michigan Supreme Court declined to expressly adopt the general common law strict liability rule. See *Scott v Longwell*, 139 Mich 12, 15; 102 NW 230 (1905). However, Michigan does appear to at least recognize and possibly “follow[] the Restatement of Torts on the issue of strict liability,” *Doe v Johnson*, 817 F Supp 1382 (WD Mich 1993) (citing *Locke v Mach*, 115 Mich App 191, 195; 320 NW2d 70 (1982)); see also *Williams v Detroit Edison Co*, 63 Mich App 559, 570; 234 NW2d 702 (1975). *Locke* appears to endorse the view in RESTATEMENT (SECOND) OF TORTS §520 (“[o]ne who carries on an abnormally dangerous activity is subject to liability for harm ... resulting from the activity, although he has exercised the utmost care to prevent the harm” where the harm is of the kind “the possibility of which makes the activity abnormally dangerous”). But see *Vannoy v City of Warren*, 15 Mich App 158, 163, n 5; 166 NW2d 486 (1968) (noting that technically, “inherently dangerous work” doctrine is a rule of negligence).

In light of all of this uncertainty, any strict liability to which Michigan contractors are exposed appears to be limited to situations in which they are engaged in abnormally dangerous activities. Additionally, one can recover on the similar doctrine of breach of implied warranty, where it need only show that the product was not fit for its ordinary use, as opposed to showing that the product was defectively manufactured. *Sundberg v Keller Ladder, Inc*, 189 F Supp 2d 671 (ED Mich 2002).

VI. INDEMNITY CLAIMS

Michigan recognizes three theories of indemnity: (1) implied contractual indemnity, (2) common law indemnity; and (3) express contractual indemnity. *Oberle v Hawthorne Metal Products*, 192 Mich App 265, 269-70; 480 NW2d 330 (1991). Implied contractual indemnity is based on notions of restitution, and requires a special relationship between the indemnitor and indemnitee, or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification. *Feaster v Hous*, 137 Mich App 783, 791; 359 NW2d 219 (1984). Common law indemnity is based on principles of vicarious liability, and shifts liability from a passive wrongdoer to an active wrongdoer. *Hardy v Monsanto Envirochem Systems*, 414 Mich 29, 86-87; 323 NW2d 270 (1982). Both implied contract and common law indemnity require proof that the indemnitee was free from active fault. *Skinner v D-M-E Corp*, 124 Mich App 580, 585; 335 NW2d 90 (1983).

The most common form of indemnity on construction projects, however, is express contract indemnity. General contract documents and subcontracts typically contain indemnification clauses flowing up the contractual chain; i.e., the general contractor indemnifies the owner and is indemnified by its subcontractors, and so on. While a provision of indemnification for the indemnitee’s sole negligence is unenforceable as against public policy in Michigan under MCL 691.991, Michigan courts otherwise liberally construe indemnity provisions. For example, in *Harbensi v Upper Peninsula Power Co*, 118 Mich App 440; 325

NW2d 785 (1982), a subcontractor was held liable for indemnifying against its indemnitee's own negligence in a situation of concurrent negligence by multiple tortfeasors.

VII. STATUTE OF REPOSE/STATUTE OF LIMITATIONS

While limitations periods generally vary by the theory of the claim, see e.g. MCL 600.5805(10) (providing default three-year period for tort claims); but see MCL 600.5805(6) (providing two-year period for malpractice actions), rather than the identity of the defendant, the situation for state-licensed architects, professional engineers, land surveyors (collectively referred to as "design professionals") and contractors is a bit unusual. In 2011, the deadlines by which cases against contractors and design professionals must be filed were significantly altered by the Michigan Supreme Court's decision in *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355 (2011), and the State Legislature's passages of Public Act 162 of 2011 ("PA 162"). Prior to the *Miller-Davis* opinion, Michigan Courts interpreted MCL 600.5839 as both a six-year statute of repose and statute of limitations, barring all claims against contractors and design professionals arising out of an improvement to property, commenced more than six years after the occupancy, use, or acceptance of the improvement. *Ostroth v Warren Regency, GC, LLP*, 474 Mich 36, 46; 709 NW2d 589 (2006). In *Miller-Davis*, the Supreme Court held that MCL 600.5839 applies only to tort actions, while breach of contract actions against contractors and design professionals are governed by the general breach of contract six-year period of limitations under MCL 600.5807(8) running from the date of breach. The Court analyzed the statutory language, nature of tort and contract actions, and reasoned that because MCL 600.5839 describes tort-like actions, and is only referenced in the tort statute of limitations, it only applies to tort actions.

Determining the applicable period of limitations became even more complex when PA 162 was signed into law, which abrogated the *Ostroth* decision, restored the traditional periods of limitation for claims against contractors and design professionals, and relegated MCL 600.5839 to a statute of repose only. For tort claims that accrue on or after January 1, 2012, actions against architects, engineers, and surveyors are designated malpractice actions and must be brought within 2 years of the last date of professional service or within six months of the discovery of the claim. MCL 600.5805(14); MCL 600.5838. Tort actions against contractors must be commenced within 3 years of the injury. MCL 600.5805(10). The six-year period of repose in MCL 600.5839, arising out of a defective or unsafe condition of an improvement to real property, is in addition to the tort periods of limitations. Therefore, tort actions against licensed architects, professional engineers, and contractors must also be brought within six years of the use, acceptance, or occupancy of the improvement. However, plaintiffs seeking damages for injuries resulting from gross negligence against licensed architects, professional engineers, and contractors, have 1 year from claim discovery to commence an action, but not more than 10 years after occupancy, use or acceptance of the improvement. MCL 600.5839. The period of repose differs for actions based on error or negligence against a license professional, running 6 years after the survey or report is recorded or delivered. MCL 600.5839. It is important to note that PA 162 applies to tort causes of action that accrue on or after the effective date of the act. Therefore, tort claims that accrue before January 1, 2012 are only governed by the six year limitations period under MCL 600.5839, and not the separate 2 and 3 year periods under MCL 600.5805.

How *Miller-Davis* and the amendments to MCL 600.5805 and MCL 600.5839 will be interpreted by the courts is far from settled. For example, MCL 600.5805(14) appears to broadly designate all claims against architects, engineers and surveyors as malpractice actions. Because MCL 600.5805(14) is included in the general tort statute of limitations, and similar language was not included in the contract statute of limitations, the malpractice designation and 2 year period of limitations should only apply to tort actions, leaving contract actions against design professionals governed by the 6 year period of limitations for contracts in MCL 600.5807. Further, although the Supreme Court in *Miller-Davis* concluded that MCL 600.5839 does not apply to contract actions, in *McGee v City of Warren*, 490 Mich 1000 (2012), the Court indicated that MCL 600.5839 does apply to contract actions seeking indemnity for damages resulting from an injury arising out of a defective and unsafe condition of an improvement to real property. Therefore, while non-indemnity breach of contract actions are unaffected by MCL 600.5839, actions seeking contractual indemnification for tort injuries arising out of an improvement to property must also be filed within the six-year period of repose. Lastly, within just two months of *Miller-Davis* opinion, the Court of Appeals in *River Invs v Watson Bros Co*, unpublished opinion per curiam of the Court of Appeals (Aug. 30, 2011, Docket No. 298253), held that because a breach of an implied warranty is based on a “duty imposed by law”, the tort statute of limitations and repose periods should apply. However, breach of an implied warranty is a contract law concept, and does not fall within the tort “injury to person or property” parameters of MCL 600.5805.

Why does it matter whether contract statute of limitations, tort statute of limitations, or statute of repose applies to a particular matter? Because tort and breach of contract claims in the construction industry are now covered by separate statutes of limitations, running from differing triggering dates, a gap may exist between the expiration of the differing limitations periods based on the type of action and against whom the claim is asserted, potentially exposing parties to liability without recourse against others. Because of the discrepancies and apparent conflicts between *Miller-Davis*, MCL 600.5805 and MCL 600.5839, these issues will likely be before the Michigan courts and legislature again. However, until either the courts or the legislature resolve the discrepancies and provide more clarity, it will be important to closely watch how *Miller-Davis* and PA 162 are applied, to determine the applicable statute of limitations.

VIII. ECONOMIC LOSS DOCTRINE

Under what is commonly referred to as Michigan’s “economic loss rule,” to state a tort claim, a plaintiff must allege the breach of a “separate and distinct” tort duty, i.e., something more than a mere breach of contract. *Henry*, 473 Mich at 71-72. Indeed, in Michigan, “economic losses,” see *Neibarger*, 439 Mich at 520 (“goods” contracts), and damages not due to breaches of “separate and distinct” tort duties, *Rinaldo’s*, 454 Mich at 84 (“services” contracts), cannot be recovered in tort. *Accord Corl*, 450 Mich at 628-29 (1996); *Kewin*, 409 Mich at 418-19. The idea here is that commercially anticipated damages, i.e., “economic losses” or those arising from no more than a breach of contract, must be recovered in contract. See e.g. *Celotex*, 196 Mich App 694 (permitting suit in tort where parties not likely to have anticipated and negotiated over relevant risk); see also *Kisiel*, 272 Mich App at 172-73 (barring owner’s suit in tort for contractor’s deficient construction).

IX. RECOVERY FOR INVESTIGATIVE COSTS

Michigan law has not explicitly recognized or barred a right to recover for investigative costs.

X. EMOTIONAL DISTRESS CLAIMS

While exceptions exist for contracts involving very personal services, *see e.g. Stewart v Rudner*, 349 Mich 459; 84 NW2d 816 (1957) (involving contract to provide obstetric services), as a general rule, mental anguish damages are not allowed for breaches of contract. *Jankowski v Mazzotta*, 7 Mich App 483, 486; 152 NW2d 49 (1967) (citing 22 AM JUR 2D, DAMAGES, § 195, at p 276). Because construction contracts typically lack this intimate nature, plaintiffs suing for their breach typically cannot recover emotional distress damages. *Caradonna v Thorious*, 17 Mich App 41; 169 NW2d 179 (1969). Accordingly, in light of the economic loss doctrine, to recover for emotional distress in a construction contract setting, a plaintiff must allege that the defendant's breach of a separate tort duty caused their emotional distress in order to recover damages the resulting damages. *Groh v Broadland Builders, Inc*, 120 Mich App 214; 327 NW2d 443 (1982).

XI. STIGMA DAMAGES

Michigan has not recognized "stigma damages" as a separate component of damages.

XII. ECONOMIC WASTE

Michigan follows the general rule that, if a contractor's substantially completed construction is defective, but correcting the failure would require a substantial tearing down or rebuilding and would be unreasonably expensive, then the measure of damage is the diminution in the value of the structure attributable to the defect. *Schultz v Sapiro*, 23 Mich App 324, 327; 178 NW2d 521 (1970) (citing *Gutov v Clark*, 190 Mich 381; 157 NW 49 (1916)).

XIII. DELAY DAMAGES

Damages may also be recoverable for delay in a project. Causes of contractor delay may include, for example:

- Inadequate project staffing;
- Delayed selection of subcontractors for the owner's approval;
- Inadequate supervision and inspection;
- Time spent correcting defective work;
- Inadequate scheduling or coordination;
- Work start delays;
- Failure to provide sufficient equipment; and
- Delay in submission of required shop drawings.

Generally, when claims are made for delay damages, the plaintiff must show that defendant was responsible for the delay and that the plaintiff suffered damages as a result of the delay; the plaintiff must also furnish a rational basis – if not a precise measure - for the court to estimate those damages. *Walter Toebe & Co v Dep't of State Highways*, 144 Mich App 21, 37-38; 373 NW2d 233 (1985) (“[d]elay damage claims that are supported only by total time theory and are grounded upon a number of alleged incidents without a satisfactory showing of the extent of the actual delay caused by any of the incidents have been rejected”). In *Toebe*, the contractor recovered damages based on a year delay that was attributable to the owner's failure to include in its specifications the need for a certain material which had to be specially ordered.

Nevertheless, *Toebe* noted that a responsible contractor in a complex, multiparty project can and should consider possible reasonable delays when preparing its bid.

Michigan courts will not permit recovery for “concurrent delay,” i.e., attributable to multiple causes, absent apportionment. In *Giffels & Vallet, Inc v Edward C Levy Co*, 337 Mich 177; 58 NW2d 899 (1953), an owner sought delay damages from an engineering company because of the engineering company’s failure to meet a deadline for completion of project drawings. The engineering company claimed its failure to timely perform resulted in part from the owner’s failure to provide adequate information. *Giffels* held that “[w]here both contracting parties contribute to a delay, neither can recover damages unless there is a clear proof as to the apportionment of the delay and the expenses attributable to each party” *Giffels*, 337 Mich at 186.

A. Liquidated Damages for Delay

Liquidated damages are generally enforceable if they meet three requirements: (1) they are specified in the contract; (2) actual damages are difficult to ascertain and uncertain in amount; and (3) they constitute a reasonable estimate of actual damages. *UAW-GM Human Res Center v KSL Recreation Corp*, 228 Mich App 486; 579 NW2d 411 (1998); *Moore v St Clair County*, 120 Mich App 335, 328 NW2d 47 (1982). Liquidated damage provisions may also limit the amount of actual damages recoverable. *St Paul Fire & Marine Ins Co v Guardian Alarm Co*, 115 Mich App 278; 320 NW2d 244 (1982) (affirming that it is not contrary to public policy for a party to contractually liquidate and cap their liability for damage caused by their ordinary negligence). Liquidated damages clauses will not be enforced if the party seeking the damages has caused or contributed to the delay. *Grand Rapids Asphalt Paving Co v City of Wyoming*, 29 Mich App 474, 482; 185 NW2d 491 (1971).

B. Actual Damages for Delay

Depending on the cause of the delay, one or more of the parties in the contracting chain may be entitled to, or liable for, delay damages. For contractor-caused delays, for example, an owner may be entitled to delay damages for loss of use of the property. *Januska v Mullins*, 329 Mich 606; 46 NW2d 398 (1951); *Tel-Ex Plaza, Inc v Hardees Restaurants, Inc*, 76 Mich App 131; 255 NW2d 794 (1977). Generally, a general contractor is responsible to the owner for the delays caused by its subcontractors. *Solomon v Department of State Highways & Trans*, 131 Mich App 479; 345 NW2d 717 (1984). Similarly, delays caused by an owner or third party may make the owner liable for cost overruns, which may include increased costs of supervision, field overhead, equipment rental, unabsorbed home office overhead, and wage escalation.

C. “No Damage for Delay” Clauses

With notable exceptions, Michigan courts enforce “no damage for delay” clauses, which protect owners from damages claims arising from project delays, typically, by providing that a contractor’s exclusive remedy is an extension of time. Such clauses can be harsh on contractors that faultlessly incur cost overruns due to idle resources. The exceptions, which arise from the narrow construction Michigan’s courts give to exculpatory clauses, include where the delay: was caused by the active interference of the owner, was not of a kind contemplated by the parties, amounted to an abandonment of the contract, or was caused by the owner in bad faith. *Phoenix Contractors, Inc v General Motors Corp*, 135 Mich App 787, 792; 35 NW2d 673 (1984). Any one of these exceptions is sufficient to render a “no damages for delay” clause unenforceable.

Phoenix Contractors, 135 Mich App at 796-797 (“it was only necessary for the jury to find the presence of one of these exceptions in order to support a plaintiff’s verdict”).

XIV. RECOVERABLE DAMAGES

A. Direct Damages

Typically, where a construction contract has been substantially complied with, and it is possible to remedy the claimed deficiencies at a reasonable cost, courts measure damages by the cost of correction. But, where the defects are such that they cannot be remedied without the entire demolition of the building, and the building is worth less than it would have been if constructed according to the contract, the measure of damages is the difference between the value of the building actually tendered, and the reasonable value of that which was to be built. *Kokkonen v Wausau Homes*, 94 Mich App 603, 615; 289 NW2d 382 (1980).

B. Loss of Use

Michigan law does not expressly address what remedies are available for loss of use damages in construction projects.

C. Punitive Damages

“Punitive” damages do not exist in Michigan. Rather, Michigan courts award “exemplary damages” to compensate a plaintiff for humiliation, outrage, or indignity caused by injuries maliciously, wilfully and wantonly inflicted by a defendant; exemplary damages must be awarded to compensate the plaintiff, not to penalize the defendant. *Kewin*, 409 Mich at 419. Generally, in cases involving only a breach of contract, exemplary damages are not available. *Id.*

D. Emotional Distress

While exceptions exist for contracts involving very personal services, *see e.g. Stewart*, 349 Mich 459 (involving contract to provide obstetric services), as a general rule, mental anguish damages are not allowed for breaches of contract. *Jankowski*, 7 Mich App at 486 (citing 22 AM JUR 2D, DAMAGES, § 195, at p 276). Because construction contracts typically lack this intimate nature, plaintiffs suing for their breach typically cannot recover emotional distress damages. *Caradonna*, 17 Mich App 41. Accordingly, in light of the economic loss doctrine, to recover for emotional distress, in a construction contract setting, a plaintiff must allege that the defendant’s breach of a separate tort duty caused their emotional distress in order to recover damages the resulting damages. *Groh*, 120 Mich App 214.

E. Attorney Fees

In Michigan, attorney fees are not generally recoverable, absent an agreement between the parties, statute, or other law, to the contrary. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16; 576 NW2d 641 (1998).

F. Expert Fees and Costs

Expert fees and costs can be awarded to a victorious litigant in Michigan. *See e.g. Gilliland v Baldwin-Lima-Hamilton Corp*, 52 Mich App 489; 218 NW2d 63 (1974).

G. Damages for Defective Work

In construction contracts, the general rule of damages is that the non-breaching party should be placed in as good a position as if the contract had fully been performed. *Tel-Ex Plaza*, 76 Mich App at 134. Therefore, aside from the costs of correcting, or the diminution in property value attributable to, the defective work, otherwise recoverable consequential damages are also available, including damages for increased construction costs, lost profits, and loss of rents. *Dierickx v Vulcan Indus, Inc*, 10 Mich App 67; 158 NW2d 778 (1968).

H. Damages for Abandoned Work

If a builder abandons a construction project after beginning it, damages are measured by the cost of completing construction, plus any additional expenses the owner incurs because of the abandonment. *Sheldon v Leahy*, 111 Mich 29; 69 NW 76 (1896) (capping the contractor's setoff recovery in *quantum meruit* to "a sum not exceeding the contract price, less the cost of completing the work, and less any damages and added expenses caused by his breach of the contract"). If the building is left unfinished, it is irrelevant that the building's value is lessened by remaining unfinished, and the owner does not have to actually complete the building to recover damages. *Newton v Consolidated Constr Co*, 184 Mich 63; 150 NW 348 (1915). The owner must, however, prove the cost of completing the building with a reasonable degree of certainty. *In re American Cas Co*, 851 F2d 794, 801 (6th Cir 1988).

I. Damages for Defective Design

Damages for defective design are essentially the same as damages for defective work. They may include the cost of correcting the defective design and otherwise recoverable consequential damages. However, where correcting the defective design is economically infeasible, a court may award the difference between the value of the property with the defective design and the value if it were properly designed. See *Fick v Long's Tri-County Homes, Inc*, unpublished opinion *per curiam* of the Michigan Court of Appeals, No. 216133 (July 21, 2000) (citing *Schultz v Sapiro*, 23 Mich App 324; 178 NW2d 521 (1970)).

J. Intentional Interference With Contract

In Michigan, the elements of the tort of intentional interference with a business relationship (contract) are: 1) the existence of a business relationship (contract), (2) knowledge of the relationship (contract) on the part of the defendant, (3) an intentional interference which induces or causes breach or termination of the relationship (contract) by the defendant, and (4) resulting damage. *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181(1991).

K. Liquidated Damages

Liquidated damages are generally enforceable if they meet three requirements: (1) they are specified in the contract; (2) actual damages are difficult to ascertain and uncertain in amount; and (3) they constitute a reasonable estimate of actual damages. *UAW-GM Human Res Center v KSL Recreation Corp*, 228 Mich App 486; 579 NW2d 411 (1998); *Moore v St Clair County*, 120 Mich App 335, 328 NW2d 47 (1982). Liquidated damage provisions may also limit the amount of actual damages recoverable. *St Paul Fire & Marine Ins Co v Guardian Alarm Co*, 115 Mich App 278; 320 NW2d 244 (1982) (affirming that it is not contrary to public policy for a party to contractually liquidate and cap their liability for damage caused by their ordinary negligence). Liquidated damages clauses will not be enforced if the party seeking the damages has caused or contributed to

the delay. *Grand Rapids Asphalt Paving Co v City of Wyoming*, 29 Mich App 474, 482; 185 NW2d 491 (1971).

XV. INSURANCE COVERAGE FOR CONSTRUCTION CLAIMS

The two most important construction-related insurance policy types in Michigan are commercial general liability (“CGL”) and Builder’s Risk. CGL policies insure commercial entities against liabilities they accidentally incur in the course of business, arising from injuries to others or their property. In contrast, Builder’s Risk policies provide coverage for damage to property under, or involved in, construction while construction is ongoing. Subject to their exclusions and other limitations, standard-form CGL policies will cover their named and additional insureds for, among other things, damages that the insureds become legally obligated to pay because of bodily or property damage caused by an occurrence, where an “occurrence” is “an accident, including continuous or repeated exposure to substantially the same harmful conditions.” See e.g., ISO CGL Form CG 00 01 01 96, Coverage A.1.a and Definitions ¶ 13. Michigan’s courts, unlike some others, *see e.g. Lamar Homes, Inc v Mid-Continent Casualty Co*, 242 SW3d 1 (Tex 2007) (construing “occurrence” in accordance with its plain meaning), have added a judicial gloss to the all important term “occurrence,” construing it to such that an insured contractor’s unintentional construction defect is an “occurrence,” i.e. “accident,” only when the defect causes property damage outside of the contractor’s own scope of work. *See e.g. Radenbaugh v Farm Bureau Gen Ins Co*, 240 Mich App 134; 610 NW2d 272 (2000). The typical exclusions, which serve to limit otherwise covered liability, *see e.g. Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369; 460 NW2d 329 (1990), that may be included in a CGL policy apply to, *inter alia*, certain indemnification liability and the named insured’s own work or products. The purposes of these exclusions is to eliminate coverage for specialized risks covered under other insurance policies, eliminate coverage for risk attributable to certain types of activities by the insured and to exclude coverage for risks too significant, or unpredictable to be underwritten. Finally, Builder’s Risk policies are essentially property insurance policies that are specially adapted to the construction setting, in which the insureds’ risks of loss are constantly increasing and the risks of loss are greater and more difficult to evaluate.

XVI. CONSTRUCTION LIENS

The Michigan Construction Lien Act, MCLA 570.1101 et. seq. (“CLA”) affords protection to those performing labor, or supplying material or equipment for the improvement of real property. The protection is in the form of a construction lien which attaches to the real estate on which the construction project is located or to which the improvements were made.

The Lien Act outlines requirements and procedures which must be followed by the parties who may be affected by the recording of a lien, including the project owner, the general contractor, subcontractors, materialmen, suppliers, and laborers. The requirements vary depending on whether the improvements were made to residential or non-residential structures. Further, public projects are not subject to the attachment of construction liens. If payment on the lien is not made within a certain period of time, then a lawsuit must be commenced to foreclose on the lien.

A construction lien that arises under the CLA relates back to the day of the first actual physical improvement to the property, regardless of when the particular work or materials were provided to the project, and has priority over all interests recorded after the first actual physical improvement. A change in owners, general contractors, or developers, does not establish the existence of a new project. Similarly, a gap in construction progress between the date of first actual improvement and the time the lien claimant provided labor or materials does not affect the priority of lien recorded regarding the particular project. *Jeddo Drywall, Inc v Cambridge Inv. Group, Inc.*, No. 295726, slip op (Mich Ct App Aug. 2, 2011). However, the Michigan Court of Appeals expanded the availability of equitable subrogation in *CitiMortgage, Inc. v Mortgage Elec Registration Sys*, No. 298004, slip op. (Mich Ct App Dec. 15, 2011), holding that a new mortgage may retain the priority of a discharged mortgage if the lender was the holder of the original mortgage. Therefore, a lender may retain the priority of its mortgage over construction liens that are subsequently recorded, even if the mortgage is refinanced through the same lender after the liens are recorded.

XVII. RELEVANT STATUTES

MCL 125.1561-1565 - Applies to public agency construction contracts and establishes when progress payments are to be made, when interest can be claimed by the contractor when progress payments are made untimely, and provides that interest is to be paid on the amount retained.

MCL 129.201, et seq. - Commonly referred to as the “public works bonding statute,” this law requires a general contractor on public projects to provide performance and payment bonds for the benefit of the owner and its subcontractors.

MCL 691.991 - Provides that a provision in a contract whereby a contractor is to be indemnified for its sole negligence is void as against public policy.

MCL 125.1591-1596 - Provides that a contract for improvements between a contractor and a governmental entity exceeding \$75,000 must contain the following provisions: A contractor must promptly notify the government entity if it finds (1) that a subsurface or latent physical condition at the site differs materially from those indicated in the contract, and/or (2) that an unknown physical condition at the site of an unusual nature differing materially from that ordinarily encountered and generally recognized as occurring in the work of the character envisioned in the improvement contract. If a governmental entity receives such a notice, it must promptly investigate the physical condition, and if it determines that the physical condition is materially different and would cause an increase or decrease in cost or additional time to perform the contract, it must put its determination in writing and an equitable adjustment to the contract price and time must be made.

MCL 570.1101, et seq. - Michigan Construction Lien Act.

MCL 600.5839(1) - Statute of repose for tort claims against contractors, engineers, architects.

XVIII. PAY-IF-PAID CLAUSES

Michigan enforces “pay-if-paid” clauses. Indeed, where payment clauses unambiguously make the receipt of payment by an upstream contractor a condition precedent to its obligation to pay a downstream contractor, absent waiver or estoppel, and consistent with freedom of contract, Michigan’s courts will enforce, as a matter of law, the unambiguous condition precedent. *See e.g. Christman Company v Anthony S Brown Dev Co, Inc*, 210 Mich App 416, 420-21; 533

NW2d 838 (1995). In *Christman*, the Michigan Court of Appeals held that a general contractor was not obligated to pay its subcontractor, where the general contractor had not been paid by the owner, and where the contract between the two unambiguously provided that payments to the subcontractor would not be made until the general contractor was paid for the work by the owner.

No magic language is required to create a “pay-if-paid” clause; the words “condition” and “precedent” need not be used. In *Citadel Corp v Eastbank Assoc LP*, unpublished opinion *per curiam* of the Michigan Court of Appeals, No. 223308 (September 20, 2002), the court held that a payment clause providing that “such Progress Payments shall not become due Subcontractor unless and until Contractor receives payment for such Work from the Owner,” unambiguously created a condition precedent, i.e., a “pay-if-paid” clause, a-la *Christman*.

Where a purported “pay-if-paid” clause does not unambiguously state a condition precedent, whether the clause is “pay-if-paid” become issues of fact. In *Materials Software System, Inc v New World Technologies, Inc*, unpublished memorandum opinion of the Michigan Court of Appeals, No. 246526 (June 15, 2004), the Court of Appeals reversed a trial court’s “pay-when-paid” construction - as a matter of law and in reliance on the general judicial disfavor of conditions precedent - of what both courts held to be an ambiguous payment provision. Ambiguity does not necessarily rule out a “pay-if-paid” meaning. Instead, “the meaning of the agreement becomes a question of fact for the trier of fact, and it is the trier of fact who may utilize general principles of construction, if necessary, to determine the parties’ intent.” *Materials Software* (citing *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469-72; 663 NW2d 447 (2003)).

XIX. FLOW-DOWN/FLOW-THROUGH CLAUSES

Construction subcontracts typically incorporate by reference the obligations of the general contract documents. Under Michigan law, a subcontractor is presumed to know the contents of the documents incorporated by reference, whether or not they have been provided to or reviewed by the subcontractor. *Ginsberg v Meyer*, 215 Mich 148, 151; 183 NW 749 (1921). Nevertheless, incorporation by reference must be clear and unambiguous, *Omega Construction Co, Inc v Altman*, 147 Mich App 649; 382 NW2d 839 (1985), and, a reference to an extraneous writing for a particular purpose makes the extraneous writing part of the agreement only for the purposes specified. *Christman Co v Anthony S Brown Dev Co, Inc*, 210 Mich App 416, 419; 533 NW2d 838 (1995) (citing *Arrow Sheet Metal Works, Inc v Bryan & Detwiler Co*, 338 Mich 68, 78; 61 NW2d 125 (1953); accord *Omega Construction*, 147 Mich App at 656 (citing same)).

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