STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

(Kathleen Jansen, P.J., Joel P. Hoekstra and Jane Markey, JJ.)

MILLER DAVIS COMPANY,
Plaintiff-Appellant,
v

Docket No. 145052

AHRENS CONSTRUCTION, INC.,
Defendant-Appellee,

Court of Appeals No. 284037

Kalamazoo Circuit A05-0199-CK

and

MERCHANT BONDING COMPANY,
Defendant.

Brief on Appeal - Appellee

ORAL ARGUMENT REQUESTED

DATED: August 29, 2013

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STATEMENT OF BASIS OF JURISDICTION

Jurisdiction for the above-captioned appeal was granted by the Supreme Court on June 5, 2013 (Apx 70a). Jurisdiction was limited to the following 3 issues:

1. Whether the indemnification clause in the plaintiff's contract with defendant Ahrens applies to this case.
2. If so, whether the plaintiff's action for breach of that provision was barred by the statute of limitations, MCL 600.5807(8).
3. Whether the plaintiff adequately proved that any breach of the indemnification clause caused its damages, including the issue whether the trial court clearly erred in concluding that defendant Ahrens' performance of nonconforming work caused the natatorium moisture problem.

Review of the Brief on Appeal filed by Appellant demonstrates that it has chosen to deliberately and flagrantly violate that jurisdictional grant. It does not even pretend that it is following the order. Footnote #1 on Page 1 admits its disobedience:

> If this Court's Opinion addresses only the three (3) briefed issues without addressing the other issues raised in Plaintiffs Application for Leave to Appeal and the Court of Appeals' Second Decision is allowed to stand without correction or reversal, the result will be confusion and uncertainty in the law with the contradiction on indemnity. Miller-Davis respectfully submits it will be most unfortunate if the opportunity is lost for clarification and direction by this Court on issues of importance to this crucial segment of the State's economy.

Not only does Appellant violate the grant of jurisdiction by failing to limit discussion to the issues defined by this Court, it attempts to inject into this case indemnification issues that were not plead in the original complaint and that were not litigated in the trial court. In particular on Pages 13 and 14 of its Appellant Brief, Appellant quotes 4 clauses. Review of these demonstrate that "Clause 2" and "Clause 3" are the contractual language quoted in Paragraph 21 of the Complaint filed by Appellant on May 12, 2005 (except that Clause 3 is missing the final 5 words, presumably due to clerical error.) (Apx 75a-76a). These are also the specific contractual provisions discussed by the Court of Appeals (Apx 66a).

Clause 1 and Clause 4 have never before been plead or proved or argued by Appellant. Yet again, Appellant violates the Order of this Court specifying the issues that will be considered in this appeal.

Notwithstanding the flagrant disobedience of this Court's decision by Appellant, Appellee intends to follow this Court's order and limit this Brief to the facts and law relevant to the 3 issues delineated by this Court. In particular:

1. What, if any, facts exist demonstrating that a claim was made by anyone other than Appellant relevant to the indemnification provisions of Clause 2 and Clause 3.
2. Is MCL 600.5807(8) relevant?
3. Did Appellant meet its burden of proving that Ahrens caused the NMP?

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

WAS THE FINDING OF FACT BY THE TRIAL COURT THAT NO CLAIMS, SUITS, ACTIONS, RECOVERIES, OR DEMANDS WERE EVER MADE OR RECOVERED AGAINST MILLER-DAVIS CLEARLY ERRONEOUS?

The Court of Appeals said: ..... "NO"

Plaintiff-Appellant says: ..... "YES"

Defendant-Appellee says: ..... "NO"

QUESTION 2

EVEN IF A CLAIM HAD BEEN MADE AGAINST MILLER-DAVIS, IS THIS LAWSUIT AGAINST AHRENS CONSTRUCTION BARRED BY MCL 600.5807(8)?

The Court of Appeals said: ..... "YES"

Plaintiff-Appellant says: ..... "NO"

Defendant-Appellee says: ..... "YES"

QUESTION 3

DID MILLER-DAVIS ADEQUATELY PROVE THAT ANY ALLEGED BREACH OF THE INDEMNIFICATION CLAUSE CAUSED ITS DAMAGES?

The Court of Appeals said: ..... "NO"

Plaintiff-Appellant says: ..... "YES"

Defendant-Appellee says: ..... "NO"

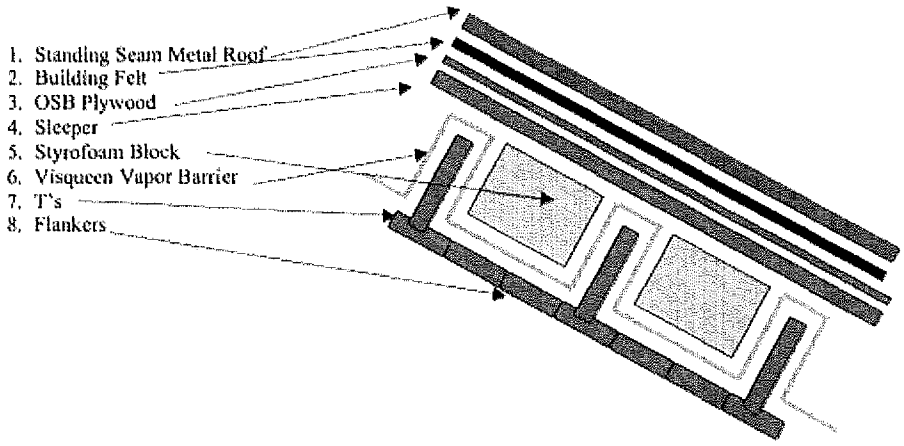
STATEMENT OF FACTS

Ahrens Construction was hired in 1998 to install the roofs on the Gymnasium, Dining Hall, and Pool (or Natatorium) at the Sherman Lake YMCA in Augusta, among other things. The roofs were a unique product with the trade name "TimberDeck". They consisted of a "honeycomb" structure filled with Styrofoam blocks(Apx 400a-404a).

The architects were Jim Derks and Jon Rambow (Apx 20a). Miller-Davis was the General Contractor for the entire project. Ahrens Construction completed the Natatorium roof before February 18, 1999(Apx 1b). Miller Davis paid Ahrens Construction for various work, including the Natatorium roof on April 27, 1999(Apx 18a). A 30-Day Temporary Certificate of Occupancy was issued June 11, 1999, and the final Certificate of Occupancy was issued August 2, 1999(Appendix 418a).

A dripping problem, otherwise referred to as the "Natatorium Moisture Problem" or "NMP", first appeared inside and outside the Pool when the weather became cold in the winter of 1999-2000. The roofs constructed by Ahrens over the Dining Hall and Gymnasium were identical to the Pool roof and in those locations they has performed perfectly. The following schematic

shows the component parts of the TimberDeck Roof that Ahrens Construction assembled.



The purpose for Element #4, the "Sleepers", was to allow circulation of outside air under the metal roof.

The air in the Pool is, naturally, very moist compared to the Gymnasium and Dining Hall due to evaporation from the pool surface. That moist air migrated through the joints in the "Flankers" (Element #8). The moist air continued to move under the Visqueen Vapor Barrier (Element #6) up the side of the T's (Element #7). When that moist air reached the top of the T's, the only thing separating the moist air from the outside winter air circulating through the Sleeper area (Element #4) was the Visqueen. As a result, the moisture condensed into water droplets on the frigid Visqueen and fell back through the gaps between the Flankers into the Pool. The same did not happen in

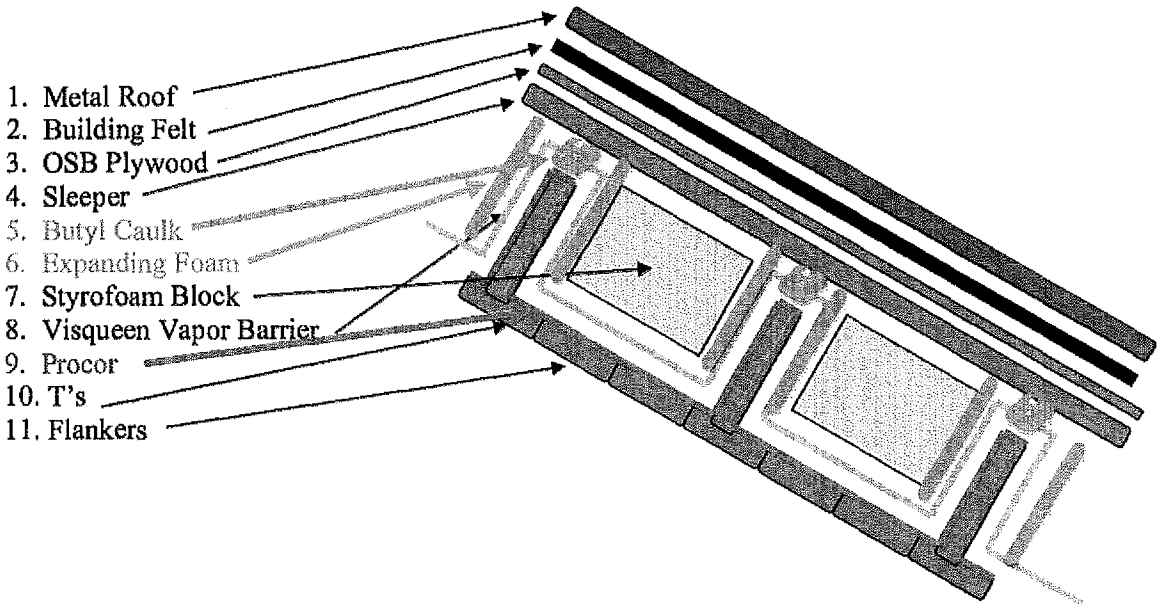
the Gym and Dining Hall, presumably, because the air in those rooms was not moist in winter.

In February of 2000, Miller Davis and the Architects asked Ahrens to install joint sealer between the masonry wall and the TimberDeck that had not been in the original design. Also in February 2000, Miller Davis and the Architects asked Ahrens and the steel roof contractor to install roof vents that had not been in the original design. Ahrens and the steel roof contractor did so even though these items were not in their contracts.

The NMP improved, but was not solved. In 2002 Miller Davis and the Architects asked Ahrens to install additional roof vents at the skylights and clerestory windows. The NMP was further improved but not completely solved.

In 2003 Jim Derks and Jon Rambow redesigned the roof for the Pool. They added 3 new elements into the design: (1) a waterproofing agent known as Procor, (2) expanding foam insulation between the Styrofoam blocks and the TimberDeck, and (3) butyl caulk sealant at the top of all T's. (Apx 67a) "Procor" is a spray-on flexible waterproofing substance that absolutely sealed the joints and cracks between the Flankers. (Apx 441a, ¶1) That way the moist air from the Pool could not migrate through the Flankers and get to the top of the T's. The redesign solved the NMP. The undesirable aspect of this cure

was that it required that the roof be completely disassembled to apply the Procor and then put back together. The following schematic shows the location of the Procor, the expanding foam, and the butyl caulk.



Once the Architects and Miller-Davis decided on this redesign, Miller-Davis demanded that Ahrens Construction, at its own expense, perform the reconstruction. Recognizing that the Corrective Work was a redesign, not a repair, Ahrens Construction refused to do the work at its own expense.

A Contract between Miller Davis and the YMCA Camp was drafted, presumably by counsel for Miller-Davis. It is unknown if it was ever executed since no signatures appear on the document. (Apx 439a) In any event the document states:

> The Contractor [Miller Davis] does not acknowledge that its or any of subcontractor's non-conforming work or materials were or are a contributing or the sole cause of the NMP.
> (Apx 431a)
>
> The Architect [Jim Derks and Jon Rambow] has represented and warranted to the Owner [Sherman Lake YMCA] and Contractor that the NMP will be solved and corrected by the Corrective Action and further that no additional insulation and no other work or materials are necessary to correct the NMP **except for the addition of certain supplemental waterproofing, the cost and expense of which supplemental waterproofing will be the responsibility that of the Architect and not the responsibility of the Contractor.**
> (Apx 441a)
>
> **The Architect shall bear the full cost of any Waterproofing.** Neither the Owner nor the Contractor shall be responsible for the payment, reimbursement or sharing, directly or indirectly, of the cost of the Waterproofing.
> (Apx 432a-433a)
>
> The Contractor denies responsibility for the NMP.
> (Apx 435a)

The time line for the corrective action is as follows. Miller Davis sent a carbon copy of its letter dated May 5, 2003, stating that Ahrens was in default of its obligations under the construction contract (Apx 421a). The specifications for the Corrective Work were finalized on August 1, 2003(Apx 440a). The Agreement for Corrective Work is dated August 27, 2003, though it is not signed (Apx 429a). The performance of the Corrective Work was monitored by an independent engineer. That Verification shows that performance of the Corrective Work

started August 29, 2003, and ended on October 22, 2003. (Apx 456a-457a).

This lawsuit was filed May 12, 2005, almost 19 months after completion of the Corrective Work. The date of filing was also 6 years and 83 days after Ahrens Construction completed the roof. (Apx 1b) That filing date was also 6 years and 15 days after Miller-Davis paid Ahrens Construction for the roof. (Apx 18a)

The case was tried in 2006. There are two particularly important points about that trial.

1. Rex Bell, the CEO of Miller Davis, testifying on behalf of the Plaintiff, swore under oath as follows:

   "Q. You did not – Miller-Davis did not know what was causing the natatorium moisture problem?

   A. That's correct.

   Q. Don't know now?

   A. No."
   (Apx 5b)

2. The trial court made the following finding of fact:

   "…no claims, suits actions, recoveries, or demand were ever made or recovered against Miller-Davis." (Apx 25a)

LAW AND ARGUMENT

I. NO CLAIMS, SUITS ACTIONS, RECOVERIES, OR DEMANDS WERE EVER MADE OR RECOVERED AGAINST MILLER DAVIS.

Miller-Davis brought 2 claims against Ahrens Construction. Count I was for breach of contract. Count II sought indemnification for claims allegedly made against Miller-Davis arising out of the work performed by Ahrens Construction. The question whether Ahrens Construction breached the contract is moot. The issue of this appeal is the alleged indemnification.

The indemnification issues presented by Miller-Davis in the Complaint were in Paragraphs 21

> You [Ahrens] as Subcontractor/Supplier agree to defend, hold harmless and indemnify Miller-Davis Company, its officers, employees, representatives, and agents from and against all claims, damages, losses, demands, liens, payments, suits, actions, recoveries, judgments and expenses including attorney fees, interest, sanctions, and court costs, which are made, brought, or recovered against Miller-Davis Company, by reasons of or resulting from, but not limited to, any injury, damage, loss or occurrence arising out of or resulting from the performance or execution of this Purchase Order by the Subcontractor/Supplier, its agents, employees, and subcontractors regardless of whether or not caused in whole or in part by any act, omission, fault, breach of contract, or negligence of Miller-Davis Company. The Subcontractor/Supplier shall not, however, be obligated to indemnify Miller-Davis Company for any damage or injuries caused by or resulting from the sole negligence of Miller-Davis Company. (Apx. 75a).

> You [Ahrens] as Subcontractor/Supplier agree to defend, hold harmless and indemnify Miller-Davis Company, the Owner, the Architect and other parties for all liabilities, either in tort or in contract, in the same manner and to the same extent that Miller-Davis Company is required to defend, hold harmless and indemnify the Owner, Architect, or other parties pursuant to Miller-Davis Company's Contract with the Owner, unless the liability arises solely as a result of the negligence of Miller-Davis Company or its employees or agents. (Apx.76a).

The second provision is, of course, not at issue. It is a derivative indemnification clause. In other words, it is only relevant to the, "extent that Miller-Davis Company is required to defend, hold harmless or indemnify …" someone else. Miller-Davis is not claiming now, nor has it ever claimed, that some third party sought indemnity from it.

Whether events took place that made the first paragraph applicable is a question of fact; it is not a question of law. At the conclusion of all the evidence presented by Miller-Davis, the trial court stated:

> "… no claims, suits actions, recoveries, or demand were ever made or recovered against Miller Davis." (Apx 25a)

That is a factual determination.

The Court of Appeals stated:

> We conclude that the trial court correctly ruled that no one brought a claim or demand against plaintiff within the meaning of the indemnification clause. (Apx 66a)

Counsel for Miller-Davis correctly states on page 9 of their Brief on Appeal that a trial judge's findings of fact are reviewed for clear error, with the reviewing court giving particular deference to the trial judge's resolution of factual issues which involve the credibility of witnesses whose testimony is in conflict People v Farrow, 461 Mich 202, 208-209; 600 NW2d 634 (1999). This standard for determining clear error is higher than the standard for reviewing questions of law

because the finder of fact often must choose between conflicting and contradictory testimony and is in a better position than the Court of Appeals to determine credibility. People v Szymanski, 321 Mich 248, 253-254; 32 NW2d 451 (1948). A factual finding is "clearly erroneous" if there is no substantial evidence to sustain it, Beason v Beason, 435 Mich 791,803; 460 NW2d 207 (1990), or if, although there is some evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. Department of Human Servs v Mason (In re Mason), 486 Mich 142, 152; 782 NW2d 747 (2010).

The Order granting leave to appeal gave Miller-Davis yet another, but a final, chance to identify the facts that contradicts the finding of the trial court and demonstrates that the trial court was clearly erroneous. Miller-Davis is the plaintiff in this case. To invoke the indemnification clauses in the contract, it had the burden of proof.

Analysis of the applicability of the indemnification language of Paragraph 22 of the Complaint brings to mind several obvious questions:

1. Who made the claim?
2. When was the claim made?
3 How was the claim made?
4. What was the nature of the claim?

5. What witness testified that a claim had been made?

6. What documents exist demonstrating such a claim was made?

The Brief filed by Miller-Davis makes abundantly clear that there is no such evidence in the record, and indeed, it never happened. Miller Davis devotes 20 pages of its Brief to the topic (Pages 10-30). The lengthy argument contained on those 20 pages boil down to this statement:

> Miller-Davis did not undertake removal and reinstallation of Ahrens defective Roof System and incur a $348,000 expense out of a sense of charity. Appellant's Brief p. 23

This statement does not tell who made the claim, when they made it, how they made it, what the nature was. It is not a summary of any direct evidence in the case. It is not circumstantial evidence. It is not based upon any kind of evidence. No witness so testified and there are no documents admitted into evidence to support such a claim.

In fact, the Sherman Lake YMCA is a non-profit and, for all we know, Miller Davis did perform the corrective work out of a sense of charity. It is more likely, however, that Miller-Davis did the work without claim because Rex Bell and the other principals at Miller-Davis decided that future business expectancies between Miller-Davis and the architects were more valuable that the money spent to perform the corrective work. In other words, it was obvious that the architects had

improperly designed the roof, but Miller-Davis decided the goodwill generated by solving the architects problem was worth the cost, especially if Ahrens Construction could be forced into performing the work at its expense.

This is all speculative, of course. Ahrens does not know precisely what Miller-Davis' motivation was. What matters is that the following is **not** a valid syllogism.

Major premise:	Miller-Davis did not undertake removal and reinstallation of the Roof System and incur a $348,000 expense out of a sense of charity.
Minor premise:	Miller Davis did remove and reinstall the roof.
Conclusion:	Someone made a claim against Miller-Davis.

The trial court weighed the evidence and made a factual determination that there was no evidence of a claim. Based upon that factual finding, the trial court denied the indemnification claim. The Court of Appeals affirmed, finding that Miller-Davis had identified no evidence to suggest that the factual finding of the trial court was clearly erroneous. Ahrens Construction respectfully submits that this Honorable Court should do likewise.

II. THE CLAIM OF MILLER-DAVIS IS BARRED BY MCL 600.5807(8) BECAUSE THE LAWSUIT WAS FILED MORE THAN 6 YEARS AFTER ITS CLAIM FIRST ACCRUED.

The text of MCL 600.5807(8) states:

> No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.
>
> * * *
>
> (8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.

MCL 600.5827 states:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

In order to apply these two statutes, it is first necessary to identify "the wrong upon which the claim is based." In that regard, this Honorable Court stated:

> In May 2005, plaintiff sued defendant, alleging that it had breached its contract by installing a roof that did not conform to the plan's specifications. (Apx 46a)

Thus, the wrong upon which the claim is based is, therefore the installation of the nonconforming roof.

The next step of the analysis is to determine when that alleged wrong was done. There can be no dispute about when that event occurred. Trial Exhibit #9 is a document created by Miller Davis on February 18, 1999, and which was introduced into evidence at trial by Miller-Davis. (Apx 1b) It clearly shows that Ahrens Construction had already finished the natatorium roof by February 18, 1999. There can be no dispute, therefore, that "wrong upon which the claim is based" had occurred as of February 18, 1999. MCL 600.5807(8) made the deadline for litigation February 18, 2005.

Notwithstanding the clarity of the foregoing analysis, Miller Davis alleges 3 alternate dates for accrual of it claim:

February 26, 2003: The day a partial tear-off of the roof took place.

August 27, 2003: The day that the Agreement for Corrective Work was allegedly executed. (As previously noted, there are no signatures on Page 439a.)

December 8, 2003: The day an independent engineering firm allegedly certified that Miller Davis had satisfactorily completed the corrective work. (The signed document is dated October 27, 2003 on Page 457a.)

It would appear that the Legislature contemplated such an argument when it crafted the language of MCL 600.5807. The statute includes a very important word:

> No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract

> unless, after the claim **first** accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.
> (Emphasis supplied)

Thus, even if it may be said that other events occurred during the transaction that could be argued to constitute accrual, such events do not delay commencement of the statutory period of limitation.

Any possible controversy regarding the foregoing is resolved by Mitan v Campbell, 474 Mich 21; 706 NW2d 420 (2005). That plaintiff sought damages for a defamatory statement made on February 22, 2000, and broadcast by WXYZ on February 25, 2000. February 25, 2001, was a Sunday. The lawsuit was brought Monday, February 26, 2001. The plaintiff in Mitan claimed that the lawsuit was timely filed alleging that the action accrued on February 25, 2000.

The statute of limitations for defamation cases is contained in MCL 600.5805(9). The introductory language of that statute is virtually identical to MCL 600.5807:

> A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim **first** accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

The Court of Appeals ruled in Mitan that the case was not barred by the statute of limitations. The Supreme Court reversed and ruled in favor of that defendant stating:

> Rather than a rule of first accrual, the reasoning of the Court of Appeals changes the statute to a rule of last accrual. Such reasoning undermines the principles of finality and certainty behind a statute of limitations.
> 706 NW2d at 422

The holding in Mitan is controlling in the case at bar. Were this Court to accept the claim of Miller-Davis that the date of accrual is February 26, 2003, August 27, 2003, or December 8, 2003, would be to change, the statute to a rule of "last accrual" that would undermine the principles of finality and certainty that the statute of limitations was designed to create. The rule of "first accrual" requires a result in the case at bar in favor of Ahrens Construction.

The last gasp argument presented by Miller-Davis is that it can extend the statute of limitations by claiming that its indemnity claim in entitled to separate consideration from its breach of contract claim. The Court of Appeals considered that question in the Tenneco Inc v Amerisure Mut Ins Co, 281 Mich App 429; 761 NW2d 846 (2008).

> The true nature of a plaintiff's claim must be examined to determine the applicable statute of limitations. Adams v Adams (On Reconsideration), 276 Mich App 704, 710; 742 NW2d 399 (2007). "[T]he gravamen of an action is determined by reading the

> complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." Id. at 710-711
> Opinion Page 14

"Reading the complaint as a whole" and "looking beyond mere procedural labels" shows that Paragraph 20 of the Complaint quotes the charge back provision of the contract (Apx 75a). This is the contract language that is the source of Count I (Apx 77a-78a). Paragraph 21 of the Complaint quotes the 2 indemnification clauses (Apx 75a) in the same contract and is the source of Count II (Apx 78a-79a). These facts make it abundantly clear that the "true nature" of the "gravamen" of the claim of Miller-Davis is breach of contract.

The foregoing analysis begs the question: Is there anything unfair about this outcome? MCL 600.5807(8) gave Miller-Davis 6 years to sue Ahrens Construction. There made the deadline for filing this lawsuit February 18, 2005. Miller-Davis admits that it knew all about its claim against Ahrens 2 years earlier when the partial tear off occurred. (Page 5 of Appellant's Brief and Apx 23a) Two years is the entire limitation period for all kinds of claims including malicious prosecution, malpractice (MCL 600.5805) and charging surety for costs (MCL 600.5807). Claims for libel and slander only get 1 year (MCL 600.5807). After all work was complete on October 27, 2003, (Apx 457a) Miller Davis still had 480 days to file suit.

III. THE TRIAL COURT CLEARLY ERRED IN CONCLUDING THAT AHRENS' PERFORMANCE OF NONCONFORMING WORK CAUSED THE NATATORIUM MOISTURE PROBLEM.

One of the biggest controversies in the trial of this action was the issue of causation. At trial Appellant's counsel, Alfred Gemrich and Scott Graham called as a witness to testify Mr. Rex Bell. The following is the beginning of the cross examination of this witness.

Q. Mr. Bell, you're the president of Miller-Davis-
A. Yes, I am.
Q. -Corporation?
Do you have authority to speak on its behalf?
A. Yes.
Q. You were at all times with regard to this project, true?
A. Yes.
Q. Okay. You're the one who made the decision to sue Ahrens Construction?
A. Ultimately, that decision fell on me, yes.
Q. The buck stops here -
A. Yeah.
Q. You're the president -
A. - that's correct.
Q. - you made the decision, right?
All right. If my notes are correct you just said — quote- we did not know what was causing it — unquote. Is that correct?
A. Correct.
Q. You did not - Miller Davis did not know what was causing the natatorium moisture problem?
A. That's correct.
Q. Don't know now?
A. No.
(Apx 4b-5b)

This testimony was not some kind of misspeak by Rex Bell. Miller-Davis always took the position that the alleged construction defects were not the cause of the problem. In the Agreement for Corrective Work it states:

> The Contractor (Miller-Davis) acknowledges that subcontractor Ahrens did not install one or more of the components of the Roof System in accordance with the Owner-Contractor contract documents. The Contractor does not acknowledge that its or any subcontractor's non-conforming work or materials were or are a contributing factor or the sole cause of the NMP. (Apx 431a)
>
> The Contractor denies responsibility for the NMP. (Apx 435a)

Ahrens argued at trial that in light of the testimony Rex Bell and the fact that the Corrective Work amounted to a redesign, that Plaintiff could not meet its burden of proof.

The trial court directed that the parties submit Proposed Findings of Fact and Conclusions of Law after the close of the proofs. Miller-Davis did not ask the trial court to find that the alleged deficiencies of Ahrens' work caused the NMP. How could it in light of Rex Bell's testimony? Rather, Miller Davis argued that it did not have to prove causation.

Miller-Davis also filed a Memorandum of Authority in Support of Plaintiff's Proposed Findings of Fact and Conclusions of Law. That document contains the following:

> VII. LIMITED RELEVANCE OF CAUSATION
>
> Where evidence presented at trial demonstrates a failure to perform work in accordance with requirements and specifications, the Court need not determine what a subcontractor's liability might have

> been had it complied fully with the contract documents and the problems existed in the first instance. See City of Osceola v Gjellefald Const. Co, et al. 225 Iowa 215; 279 N.W. 590 (1938)
> (Apx 13b)

In other words, Miller-Davis took the position, based upon an Iowa case, that Ahrens had to pay to rebuild the pool roof whether or not anything it did caused the NMP. Miller-Davis persists in this position. Point III(B) asserts that the Court of Appeals erred in requiring proof that the alleged breach caused the damages sought. (Appellant's Brief pp. 38-39)

Notwithstanding that (1) Miller-Davis did not plead causation, (2) the President of Miller-Davis testified that the company did know the cause of the NMP, and (3) Miller-Davis at all times denied that anything Ahrens had done caused the NMP, and (4) Miller-Davis has persistently argued that it need not prove causation, the trial court stated in its decision:

> This Court finds that this deficiency [the lack of tightness of the Styrofoam blocks], along with the shoddy installation of the vapor barrier (specifically, the rips tears and lapping issues) was the cause of the NMP
> (Apx 23a-24a)

The Court of Appeals reversed the trial Court finding that its conclusion was clearly erroneous for the reasons set forth at Apx 67a-68a. Appellee incorporates that analysis by reference.

Here we are in 2013, 14 years after Ahrens completed the roof, 7 years after the trial, and counsel for Miller-Davis, begin Point III of the Brief with the following statement:

> The cause of the NMP was not mystery.
> (Appellant's Brief, p. 37)

This statement is nothing short of bizarre. The CEO of the company they are representing testified unequivocally at trial that Miller Davis did not know the cause of the NMP. Said counsel signed a legal brief submitted to the trial court citing an Iowa case for the proposition that Miller Davis did not have to prove causation to win. (Apx 13b) Indeed, on the very next page of the Brief they repeat the argument that proof of causation is not required.

The Court of Appeals specifically ruled that causation was a necessary element of a breach of contract claim:

> Like all other civil actions, the plaintiff in a breach of contract case must establish a causal link between alleged improper conduct of defendant and the plaintiff's damages.
> Apx 67a

The analysis of the Court of Appeals hinges on another significant fact:

> The only evidence in the record that supports the finding that defendant's alleged defective workmanship caused the natatorium moisture problem is an inference drawn from the fact that after the corrective work the problem was not present.
> (Apx 68a)

The Court of Appeals held that Miller-Davis did not, and could not, prove causation because of the three design changes in the corrective work: (1) the waterproofing agent, Procor, was added, (2) expanding foam was added, and (3) butyl caulk sealant was added. These changes made the inference of the trial court impermissible speculation.

The testimony of Rex Bell was not something discussed by the trial court or the Court of Appeals, but the significance of that testimony is something Appellee submits should be considered and addressed by this Honorable Court. In Gamet v Jenks, 38 Mich App 719; 197 NW2d 160 (1972), the Court of Appeals made a statement about the law of evidence:

> However, when a party makes statements of fact in a "clear, intelligent, unequivocal" manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or a showing of mistake or improvidence.
> 197 NW2d at 164.

Applying this standard to the testimony of Rex Bell shows what the outcome of this case should have been in the first place. To claim damages, a plaintiff has the burden to prove that the alleged breach by the defendant was the cause of those damages. Rex Bell was the President of Miller-Davis. (Apx 2b). He has a Bachelor's degree in building construction and contracting from Purdue. (Apx 2b) He is a past President of the Associated General Contractors of Michigan. (Apx 2b) He is an adjunct assistant professor at Western Michigan University. (Apx

2b) He is an affiliate member of the American Institutes of Architects. (Apx 2b)

Rex Bell was called to testify in his capacity as the President of Miller-Davis. Under cross-examination, he testified, as a matter of fact, that Miller-Davis did not know the cause of the NMP. (Apx 5b) His testimony was clear. His statements were intelligent. His admission that Miller-Davis did not know the cause of the NMP was unequivocal. There was never any effort in the trial court to explain or modify Mr. Bell's testimony. There has never been a claim that his testimony was a mistake or improvident. Appellee submits that the testimony of Rex Bell should be considered conclusively binding against Miller-Davis and requires a finding that the conclusion of the trial court was "clearly erroneous".

The result of this all should be simple for this Honorable Court to resolve.

First To prevail in a construction case such as this a plaintiff must show that the alleged defective construction caused the damages sought.

Second Miller-Davis did not in fact plead, prove or argue that the NMP was caused by anything Ahrens did, and as a result, cannot prevail. This makes the conclusion of the trial court that the NMP was caused by Ahrens clearly erroneous.

Third The fact that to resolve the NMP Miller-Davis added Procor, expanding foam, and butyl caulk sealant to the roof system makes the conclusion of the trial court that the NMP was caused by Ahrens clearly erroneous for the reasons set for the in the opinion of the Court of Appeals.

Fourth The admission by Rex Bell that Miller-Davis did not know the cause of the NMP was a fatal flaw to its case and makes the conclusion of the trial court that the NMP was caused by Ahrens clearly erroneous.

RELIEF SOUGHT

Defendant-Appellee Ahrens Construction, Inc. submits that this Honorable Court should affirm the Decision of the Court of Appeals in its favor and against Plaintiff-Appellant Miller Davis.

DATED: August 29, 2013

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