STATE OF MICHIGAN
IN THE SUPREME COURT
****

ON APPEAL FROM THE COURT OF APPEALS
KATHLEEN JANSEN, JOEL P. HOEKSTRA AND JANE E. MARKEY

KALAMAZOO COUNTY CIRCUIT COURT
GARY C. GIGUERE, JR.

MILLER-DAVIS COMPANY,

Plaintiff/Appellant,

v

AHRENS CONSTRUCTION, INC.,

Defendant/Appellee,

and

MERCHANT BONDING COMPANY,

Defendant.

145052

Supreme Court Case No. ~~145053~~

Court of Appeals Case No. 284037

Kalamazoo County Circuit Court
Case No. A05-000199-CK

REPLY BRIEF – APPELLANT

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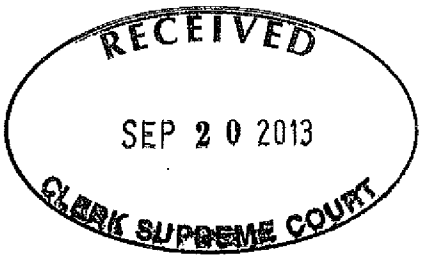

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I. AHRENS' "STATEMENT OF FACTS" SHOULD BE STRICKEN BECAUSE IT CONSISTS OF ARGUMENT WHICH IS ERRONEOUS, MISLEADING, AND UNSUPPORTED BY REFERENCES TO THE RECORD.

Ahrens' Brief contains a section labeled "Statement of Facts" (Appellee's Brief at 1-6) consisting primarily of argument that is not supported by record citations, as required by MCR 7.212(C)(6). For example:

1. "A dripping problem, otherwise referred to as the 'Natatorium Moisture Problem' or "NMP" first appeared inside and outside the Pool...." Appellee's Brief, p. 1 (Emphasis supplied). This statement is incorrect and is not supported by a record citation. There is no allegation, evidence or finding that any moisture problem was observed or occurred outside the pool room or outside the Natatorium building.

2. "The following schematic shows the component parts of the Timber Deck Roof that Ahrens Construction assembled." Appellee's Brief, pp. 1-2. The statement is inaccurate and misleading. It is not supported by a single record reference. The "schematic" could not be supported by the record because it was not admitted into evidence at trial. Ahrens' work did not include and Ahrens did not provide, "assemble" or install the "Building Felt" or the "Standing Seam Metal Roof." The "schematic" fails to show a crucial fact: the ceiling was of "tongue and groove construction." Most significantly the "schematic" fails to mention or show the 1,000 to 1,200 wooden Sub T's that were nailed in place as a structural part of the Timber Deck Roof System. (See Apx. 310a regarding the requirement and installation of Sub T's).

3. The conjectural and speculative explanation of the "cause of the NMP" appearing on pages 2 and 3 of Appellee's Brief is contrary to the express findings of the Circuit Court regarding the cause of the NMP which state:

> This Court finds that this deficiency, [improper installation of the block insulation], 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.

4. References to a "design error" or "redesign" and that the use of "Procor" constituted a "redesign," as stated at pages 3 and 4 of Appellee's Brief, is contrary to the following express findings of the Circuit Court, which stated:

> ...this Court finds that the introduction of Procor and spray urethane into the system as part of the corrective action was necessary to avoid costly removal of the wooden components of the Timber Deck System, and by so doing it lowered the overall costs of the repair. In short, introduction of these components was a mitigation of damages." (Apx. 24a).

Ahrens' claims at various times that the corrective work was a "redesign." This claim is unsupported by citations to the record because such citations do not exist. The trial court rejected this claim. (Apx. 24a).

In fact, application of the Procor allowed the reinstallation of the vapor barrier and foam block insulation without removal of the 1,000 to 1,200 wooden Sub T's that were nailed in place at right angles to the T's and which comprised an important structural component of the Timber Deck Roof System. Removal of the Sub T's would have compromised the structural integrity of the pool ceiling and Roof Deck System. Leaving the Sub T's in place substantially reduced the cost of the corrective work and thereby was important in mitigating damages.

This Court expects mitigation of damages where contracts are breached and Miller-Davis did just that. *Morris v Clawson Tank Co*, 459 Mich 256, 587 NW2d 253 (1988).

II. THE CONTRACT DOCUMENTS INCLUDE ALL FOUR (4) INDEMNIFICATION CLAUSES IDENTIFIED IN MILLER-DAVIS' OPENING BRIEF.

Miller-Davis relies on four (4) contractual indemnification clauses which come from contract documents. The parties stipulated and agreed that specific documents comprised the

subcontract in this case. Ahrens ignores its trial stipulations and claims that only one clause should be considered by the Court; the one identified by Miller-Davis as Clause 1. The record resolves any dispute. The subcontract used in this case was called a "Purchase Order" ("PO"). During trial, Plaintiff referred to the PO. The Court and the parties agreed that the complete PO should be admitted into evidence. Plaintiff moved for the admission of its Exhibit 51, proffering that it was a complete set of the original PO and changes. Ahrens' counsel responded, "I have no objection, your Honor." (Supplemental Apx. 682a). The case was completed with the parties acknowledging that Exhibit 51 was the full Purchase Order. (Supplemental Apx. 687a). Exhibit 51 contains indemnification clauses 1, 2 and 3. (Miller-Davis Opening Brief at 13-14; Apx. 347a, 350a and 351a).

The parties also stipulated that AIA Document 201, the General Conditions, were "incorporated by reference and made part of the subcontract." (Supplemental Apx. 685a, Exs. 3 and 4, Apx. 322a and 371a). Indemnity clause 4 is contained in the General Conditions at Apx. 331a and 380a. The record unequivocally shows that all four (4) clauses are properly before the Court as part of the case presented by Miller-Davis. Ahrens cannot now contradict the uncontested admission of and stipulation.

III. THE OWNER MADE A DEMAND AND CLAIM THAT THE ROOF SYSTEM WAS IMPROPERLY INSTALLED SUFFICIENT TO TRIGGER THE INDEMNIFICATION CLAUSES.

The record supports Miller-Davis' claim that the Owner made a claim or demand sufficient to trigger Ahrens' indemnification obligation. The Agreement for Corrective Work (Apx. 429a) establishes these facts and provides, in part:

1. Miller-Davis, as the "At-Risk" Construction Manager, was responsible for the construction of the Project in compliance with all contract documents.

2. Miller-Davis was responsible to the Owner for work performed by its subcontractor and Ahrens was Miller-Davis' subcontractor.

3. Following installation of the Roof Deck System by Ahrens, the Owner experienced a serious condensation problem in the Natatorium ("NMP").

4. The architect, acting as the Owner's agent, investigated the cause of the NMP and determined that Ahrens failed to install the Roof Deck System in compliance with the contract specifications.

5. The architect determined what corrective action was necessary in order to solve and correct the NMP and concluded that the corrective action would solve and correct the NMP.

6. The Owner relied on the architect's investigation, conclusions and recommendations regarding the Roof Deck System.

7. The architect, as the Owner's agent, instructed Miller-Davis to perform the corrective work in order to solve and correct the NMP pursuant to specific plans and specifications. (Apx. 440a – 448a).

8. The Owner and Miller-Davis agreed that they wished to reach an "amicable resolution of any and all differences" and proceeded with the Corrective Action.

9. The Owner and Miller-Davis stated, "[t]his Agreement is the result of a compromise, settlement and accord reached in good faith after arm's length negotiations to avoid expense and delay and to effect a settlement of contested claims." (Emphasis supplied) (Apx. 431a).

10. Miller-Davis performed the corrective work which was inspected and approved by a third party.

11. Miller-Davis incurred costs in performing this work, which were proven to the trial court and are not the subject of this appeal.

These facts demonstrate the following: (1) the claim or demand was made by the Owner, through its agent, the architect, after the architect investigated the cause of the NMP; (2) the Owner, again through its agent, determined that the Roof Deck System was improperly installed and proposed corrective action that would cure the NMP; (3) the Owner demanded that Miller-Davis, as the at-risk CM, perform the corrective work; and (4) Miller-Davis did perform the work.

The documents supporting the claim include the Agreement for Corrective Work (Apx. 429a), the Specifications issued by the architect (Apx. 450a), and the Verification of Compliance (Apx. 456a). The Agreement specifically recognizes that it includes a "settlement of contested claims."

IV. AHRENS' RELIANCE ON THIS COURT'S DECISION IN *MITAN* IS MISPLACED.

The statute of limitations issue before this Court is based on Miller-Davis' contractual indemnification claim, not its claim based on breach of the construction contract. Specifically, the question is, when did the claim for indemnification accrue? Ahrens addresses only the accrual date for a construction contract. Construction contract claims and contractual indemnification claims have different elements and require different proofs. *Greene v Sterling Woods Condominium Ass'n,* 2011 WL 1327877 (Mich App 2011) citing *Alan Custom Homes Inc v Krol,* 256 Mich App 505, 512; 667 NW2d 379 (2003). Ahrens argues that these should be treated as one in the same claim, citing *Tenneco Inc v Amerisure Mut Ins Co.,* 281 Mich App 429, 761 NW2d 846 (2008). However, in *Tenneco*, the Court examined equitable and legal

claims in the complaint to determine whether laches or which statute of limitations would apply. Here, there are two separate claims, each of which could stand on their own. Though the same contracts contain terms which govern the conduct of the parties, the relevant terms relate to different obligations.

Ahrens asks the Court to extend its decision in *Mitan v Campbell*, 474 Mich 21, 706 NW2d 420 (2005), a case involving a tort action for defamation, to contractual indemnification claims. In *Mitan* the Court held that an action for defamation accrued when a statement was first published, regardless of when it became known to a Plaintiff. *Id* at 22. This Court held that the statute was unambiguous, and clarified its position that republication of the statement did not toll the statute of limitations. The facts in *Mitan* do not apply to a contractual indemnification claim. In *Mitan*, plaintiff sued the person who had initially made the statement; the television station which subsequently reported the statement was not named as a defendant. As a result, the "wrong upon which the claim was based" was one discreet event. In this case, the act upon which the indemnification claim is based is the YMCA's claim or demand against Miller-Davis which resulted in work that corrected Ahrens' non-conforming work.

V. MILLER-DAVIS PROVED CAUSATION AND THE TRIAL COURT'S FINDING ON THAT ISSUE WAS NOT CLEARLY ERRONEOUS.

Ahrens, with no citation to relevant evidence, argues that the trial court's finding of causation was clearly erroneous. Ahrens ignores the first and most important step in the analysis; the correct measure of damages was the cost of making the building conform to the project plans and specification. In *Gutov v Clark*, 190 Mich 381, 387; 157 NW 49 (Mich 1916), this Court defined the appropriate measure of damages where demolition is not required as: "such a sum as is necessary to make the building conform to the plans and specifications."

(Emphasis supplied) (See also: *Schultz v Sapiro*, 23 Mich App 324, 178 NW2d 521 (1970), and *Bayley Products Inc v American Plastic Products Co*, 30 Mich App 590, 598; 186 NW2d 813 (1971)).

The damage element was based on the requirements of the contract documents: (1) Plans and specifications were provided for the entire project; (2) Miller-Davis agreed to comply with those specifications; (3) Ahrens agreed that it would comply with specifications relating to its work; (4) Timber Systems provided explicit specifications for the Roof Deck System; (5) Ahrens did not comply with the specifications; (6) the Owner demanded that Miller-Davis correct the work; and (7) Miller-Davis demanded that Ahrens and its surety correct it. Both refused and Miller-Davis paid to correct Ahrens' non-conforming work. The cost of correction was the damage component in this case. The trial court found non-conforming work (Apx. 23a – 24a) and went on to find causation. Ignoring the trial evidence and the trial court's findings, Ahrens takes a different approach.

Citing only a tort case in which a plaintiff is sought to contradict deposition testimony on a factual issue, Ahrens argues that Rex Bell's statement that he did not know the cause of the NMP should control the causation issue in this case. *Gamet v Jenks*, 38 Mich App 719, 197 NW2d 160 (Mich App 1972).

Ahrens is wrong for a number of reasons. The issue of causation is legal, not factual. Rex Bell was not qualified to offer expert testimony about causation. His testimony would be, at best, hearsay. There is no basis to bind Miller-Davis by such testimony.

Mr. Bell was qualified to testify about Miller-Davis' obligation to build a structure in compliance with project plans and specifications and he was a fact witness regarding Ahrens' breach of its problem to participate in the correction of the defective work.

This is not a case like *Gamet* in which a party seeks to change a factual position in a negligence case in the face of "clear, intelligent [and] unequivocal testimony." *Id* at 726.

The specifications of the Timber Deck System were clear, as noted by the trial court (Apx. 21a) and called for a layer of block insulation placed between Sub T's using a "tight" fit. The installation here did not provide a tight fit. The trial court found that it was "not even a close call." (Apx. 24a). The record supports this finding. (Apx. 230a, 233a, 238a, 239a). The specifications called for the installation of a vapor barrier. The trial court found that Ahrens installed a barrier that was ripped, torn, improperly lapped and comprised of "shoddy installation." (Apx. 24a).

Jonathan Rambow, a licensed architect, testified as a fact witness and as an expert. He testified that the original plans of the roof deck specifications called for a "vapor barrier" to be on the "warm side" of the insulation in order to stop moisture from getting through and into the insulation. (Apx. 591a). He was aware of this requirement and stressed it in the original design. Eventually, in a cost saving measure, the Timber Deck System was proposed as a "voluntary alternate." Rambow immediately questioned whether the system had a vapor barrier. (Apx. 595a). However, Rambow learned that the system had a vapor barrier when the company owner explained the system and its installation. Tom Bergeron described the components of the system and provided documents showing how it should be installed. A vapor barrier was specified and it was to be lapped and stapled at the top of wooden "T's." (Apx. 596a).

When Rambow saw the condition of the Roof Deck System after the partial tear off, he recognized a "multitude of problems" with the installation. Most important were the gaps in block insulation and the condition of the vapor barrier, which was missing in spots, torn in other spots and generally installed with lapping and stapling where convenient – not at the top of

"T's." (Apx. 969a). Rambow clearly identified the non-conforming work, but he did more, which the Court of Appeals should have recognized. He offered the opinion that the "integrity of the vapor barrier was gone." He noted, "[w]e really didn't have a vapor barrier." (Apx. 621a). The design component that was crucial to Rambow from the beginning was gone. The insulation component, something of equal importance, was also compromised.

Rambow and others were left to solve the problem created by Ahrens. They needed all the components of the Timber Deck System, but they could not re-install the system unless they removed the structural T's and Sub T's. This would have resulted in removal of the inside ceiling of the Natatorium which served as the boards into which these structural components were nailed. It would have resulted in "starting from scratch in building the roof' with used materials. Many of the materials, such as the vapor barrier and many of the Styrofoam blocks, would be useless.

As a result, Rambow worked on a corrective plan to install both a vapor barrier and insulation "after the fact." It was a "retro-fit" installation. The installation could not occur as Timber Deck described in its Technical Data Manual (Apx. 404a) because the T's and Sub T's were already in place. Absent disassembly of the entire structural system and ceiling, the installation would have to be done without the process of sliding Sub T's snug to the block insulation, thereby creating the crucial "tight fit." (Apx. 404a).

The directive issued for the work was entitled: "SPECIFICATION: REPLACEMENT OF THE VAPOR BARRIER." (Apx. 440a). The vapor barrier could not be applied in the manner described in the Manual. Therefore, the corrective work sought to provide insulation and a vapor barrier, as originally specified. The Circuit Court specifically found that these steps constituted mitigation of damages by Miller-Davis. (Apx. 24a).

Ample evidence was introduced supporting the trial court's finding of causation. The Court of Appeals and Ahrens disagree, but have never cited a portion of the record supporting their position.

CONCLUSION

Miller-Davis respectfully requests that this Court reverse the decision of the Court of Appeals and remand the cause to the Circuit Court with instructions to determine the attorney fees and costs to be awarded to Miller-Davis.

Date: September 20, 2013

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