

CONSTRUCTION LAW UPDATE

March 13, 2007

KRAUSE V LEMESSURIER MUDDIES STATUTE OF REPOSE WATERS

By Benjamin H. Hammond

In December, 2006, the Court of Appeals issued an unpublished opinion concerning the application of the Statute of Repose. In *Krause v Lemessurier*, plaintiff hired defendant Serum Construction, Inc., to build a garage. Serum agreed to determine the boundaries of the property and the garage was completed in November, 1997. In early 1998, the plaintiff observed water bubbling up through the cracks in the floor, which damaged personal property. The cement floor was replaced by Serum in 1999.

In late 2003 or early 2004, the plaintiff became aware that the garage stood partially on her neighbor's property. Plaintiff then filed suit against the construction company alleging it was negligent for failing to determine the proper boundaries before building the garage.

Defendant filed a Motion in the trial court seeking dismissal of the lawsuit. The defendant argued that the plaintiff's lawsuit was barred by the Statute of Repose because the complaint was filed more than six years after defendant completed construction of the garage.

The Statute of Repose, states as follows:

No person may maintain any action to recovery damages for any injury to property, real or personal . . . arising out of the defective and unsafe condition of an improvement to real property . . . against any contractor making the improvement, more than 6 years *after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered*, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor . . .

Although the trial court dismissed the case, the Court of Appeals reversed because the plaintiff did not use

the garage until the floor was replaced in 1999. Interestingly, the opinion ignores the rest of the Statute of Repose that indicates that the six years begins to run at any one of three different triggers: **occupancy, use, or acceptance** of the improvement. (emphasis added)

However, it is unclear from the opinion whether defendant raised the argument that the plaintiff accepted the garage prior to 1999.

The Court next addressed the gross negligence one-year discovery rule under the Statute of Repose. The exception provides that a plaintiff has "one year after a defect is discovered or should have been discovered" to file suit if "the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor". The Court of Appeals held that the plaintiff did not learn of the encroachment until 2003 or 2004 when approached by her neighbor, in spite of the fact that in 1997 the contractor wrote a letter to plaintiff informing her that the garage might be misplaced.

Notably, the opinion does not address whether the defect was "the" proximate cause of the damage, or whether the contractor's action constituted "gross negligence". Nevertheless, the Court of Appeals reversed the trial court's dismissal of the action and allowed the plaintiff to proceed against the contractor.

As this recent case shows, there is much confusion concerning the Statute of Repose resulting from a variety of interpretations of the statute by the Court of Appeals. Even though the statute makes it clear that a contractor is not liable six years after the occupancy, use, or acceptance of an improvement to real property, more cases are being filed seeking to circumvent the narrow strictures of the statute and, as this case represents, some are succeeding.

SUPPLIER RECOVERS FROM GENERAL CONTRACTOR FOR MATERIALS SOLD TO SUBCONTRACTOR

By Benjamin H. Hammond

In the recent case of *Morris Pump v Centerline, et al*, the Court of Appeals held that material suppliers could recover directly from a general contractor for materials delivered to the job site despite the fact that there was no contract between the supplier and the general contractor.

The project concerned the construction of a \$28 million wastewater treatment facility in St. Clair County for the City of Detroit. The general contractor, defendant EBI-Detroit, subcontracted with Centerline Pipeline for a portion of the project, who, in turn, contracted with a supplier, plaintiff Morris Pump. Plaintiff Morris Pump timely delivered equipment and supplies to the job site pursuant to its contract with Centerline, but was never paid because Centerline went out of business and abandoned the project. Defendant EBI-Detroit then hired a contractor to replace Centerline. The replacement contractor used the equipment and supplies that had been delivered by Morris Pump to the job site.

Ultimately, the court held that EBI-Detroit must pay Morris Pump for the material it delivered to the job

site, even though (1) EBI-Detroit paid the replacement contractor the full purchase price of the original subcontract with Centerline for those materials, (2) a remedy was available under a payment bond, and (3) there was no contract between the general contractor and the supplier. The court reasoned that the general contractor should pay for the materials in this case because it “inequitably retained the materials and supplies delivered by plaintiffs without ensuring that plaintiffs were compensated”.

The court relied on an “unjust enrichment” theory in finding for the supplier and noted that “the law will imply a contract to prevent unjust enrichment only if the defendant has been ‘unjustly’ or ‘inequitably’ enriched at plaintiff’s expense”. The court concluded that an inequity resulted from defendant’s “wrongful retention” of the materials. The retention, along with the fact that plaintiff was not paid for the materials, resulted in an unjust enrichment at plaintiff’s expense.

Ben can be reached directly at bhammond@shrr.com or 616.458.4256.

PLANS, SPECIFICATIONS, AND LAWSUITS: RECENT TRENDS IN DESIGN PROFESSIONAL AND CONTRACTOR LIABILITY

By Steven K. Stawski

Can contractors use project plans and specifications in their defense to personal injury actions? A national trend suggests so.

The Old Winterbottom “Acceptance” Rule

In the past, contractors could avoid liability to an injured third person if construction was completed and the alleged personal injuries arose after the Owner accepted the project. Contractors used completion and the Owner’s acceptance as their primary defense. The “Acceptance” Rule was

established in England and was the general rule in America until around 1916, when the law began to change in favor of injured plaintiffs. Since then, most states have jettisoned the “Acceptance” Rule in favor of the new “Modern” Rule, where contractors remain liable after the date of completion and acceptance by the Owner.

The “Modern” Rule of Contractor Liability

The majority of states, including Michigan, subscribe to the “Modern” Rule. Under this rule, the

contractor is liable to all those who may foreseeably be injured by the structure. This liability occurs when the contractor fails to disclose known dangerous conditions and when the work is negligently done. For example, a contractor was liable to plaintiffs who suffered burn injuries when leaking gas at a gas station was ignited by the flame from a negligently installed water heater. In 1984, the Michigan Court of Appeals reiterated: "It is the general rule in Michigan that a contractor is not insulated from liability for foreseeable harm to third persons resulting from the contractor's negligent performance of a completed contract. A third party who is injured after the contractee or Owner accepts the negligently done work may maintain an action against the contractor even though a length of time has elapsed between the contractor's work and the injury."

The Ryan Exception to the "Modern" Rule

While the majority of states subscribe to the "Modern" Rule, a number of jurisdictions now allow contractors to point to the plans and specifications as a defense. The Ryan exception comes from a 1924 New York case where a contractor erected a building and canopy in accordance with plans and specifications furnished by the United States government and its architects. The canopy subsequently collapsed, causing injury to a third person. The Court ruled in favor of the contractor ruling that "[a] builder or contractor is justified in relying upon the plans and specifications that he has contracted to follow, unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury." To be actionable, the defects must be "so glaring and out of the ordinary as to bring home to the contractor that it was doing something which would be likely to cause injury."

While Michigan has not formally adopted the Ryan Exception to the Modern Rule, a recent Michigan Supreme Court decision may produce a similar result.

Recent Change in Michigan Law

In 2004, the Michigan Supreme Court changed the way courts must address cases filed by injured third parties. The ruling requires an assessment of contractual obligations as a preliminary step:

[C]ourts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a 'separate and distinct' mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on contract will lie.

This recent holding opens the door for contractors to argue that compliance with their contract, which usually requires construction in accordance with the Owner's plans and specifications, should preclude a "separate and distinct" duty to injured third parties.

In Michigan, contractors remain liable to people who are injured after a project is completed and turned over to the Owner. While Michigan has not formally adopted the Ryan Exception to the Modern Rule of contractor liability, a recent decision by the Michigan Supreme Court allows contractors to introduce new arguments involving compliance with the plans and specifications for a project. Design professionals should be aware that the plans and specifications will increasingly become the focus of lawsuits. As a result, design professionals may be named as potential non-parties at fault and also experience an increase in litigation. While the law is not settled in this area, the best mechanism for contractors and design professionals to reduce risk is to develop communication mechanisms for reporting, managing, and correcting potential trouble spots during the construction process itself.

Steve can be reached directly at sstawski@shrr.com or 616.458.4394.

Practice Pointers

The site on the west arm of the Grand Traverse Bay wasn't much to look at. It consisted of an abandoned boat repair and storage facility. The owner wanted to do something special with the site for the community and envisioned an educational facility stressing the importance of environmental stewardship. Soon, several non-profits joined the dream. Rotary Camps & Services, Inc. agreed to assume the lead role in making it a reality and hired SHRR for its legal team.

SHRR is pleased to begin a new section of our quarterly newsletter. "Practice Pointers" will consist of case studies of some of the projects we've worked on recently that we hope will offer valuable examples of problem solving. If you have a particular issue you'd like us to address, please contact Chip Behler at cbehler@shrr.com.

The legal challenges were many: secure the property, make sure that the new owner and users were protected from any claims for past environmental issues, design a governance structure for the entity that would ultimately hold title, secure tax exempt status for the entity that would hold title and the consortium of user groups, obtain tax exemption for the real property, negotiate and secure the transfer of the valuable bottom lands leases from the State of Michigan, and make sure that the new use was consistent with the municipality's zoning and land use plan. In order to pull it off, SHRR assembled a multi-disciplinary team of attorneys with experience in real estate, tax, environmental, non-profit, and zoning and land use law.

One of the first steps was the preparation and submission of four Base Line Environmental Audits (BEA's) and Due Care Plans to Michigan's Department of Environmental Quality. Four were necessary as the ultimate end uses of the property varied. While those were being reviewed:

- the entities needed to be created and tax exemption secured from the IRS;
- A master lease from the holding company to the consortium needed to be drafted and negotiated;
- Tax exemption for the real property needed to be obtained from the township and the county;
- Assignment of the bottomlands leases from the DNR needed to be secured;
- Assurances needed to be obtained from the township that this new use was consistent with the township's zoning and comprehensive land use plan;
- Title insurance ordered and reviewed, and;
- Restrictive covenants negotiated and reviewed.

In all, the process took nearly a year. By December 2006, Rotary Camps & Services Maritime Education Center LLC was prepared to take title to the property as a gift from the site owner, northern Michigan philanthropist, Michael Dow. Rotary turned around and leased the property to Grand Traverse Bay Alliance, which is a Michigan non-profit corporation formed by several, water-related non-profit corporations. The long-term goal to convert the site from its prior commercial/industrial use into a center that promotes historic preservation and stresses "the importance of environmental stewardship, the joy of discovery, and the pleasure of water-based recreation."

**SMITH HAUGHEY RICE & ROEGGE'S
CONSTRUCTION LAW INDUSTRY TEAM**



Aileen M. Leippandt,
Chair
616.458.5298
aleippandt@shrr.com



Charles F. Behler
616.458.6245
cbehler@shrr.com



Thomas M. Weibel
616.458.6244
tweibel@shrr.com



Michael J. Roberts
616.458.1212
mroberts@shrr.com



Craig R. Noland
616.458.9466
cnoland@shrr.com



T. J. Ackert
616.458.3638
tackert@shrr.com



Jeffrey R. Wonacott
231.486.4509
jwonacott@shrr.com



Robert W. Parker
231.929.4878
rparker@shrr.com



Todd W. Millar
231.486.4512
tmillar@shrr.com



Peter J. Boyles
231.486.4511
pboyles@shrr.com



Rachel Brochert Roe
231.486.4503
rroe@shrr.com



Benjamin H. Hammond
616.458.4256
bhammond@shrr.com



Cara L. Nieboer
616.458.0437
cnieboer@shrr.com



Steven K. Stawski
616.458.4394
sstawski@shrr.com



Scott D. Harvey
231.486.4545
sharvey@shrr.com



Jason Thompson
231.486.4543
jthompson@shrr.com