STATE OF MICHIGAN

COURT OF APPEALS

CITY OF LITCHFIELD,

Plaintiff-Appellant,

v

UNION CONSTRUCTION COMPANY and ALAN E. RINGENBERG d/b/a RINGENBERG ENGINEERING,

Defendants-Appellees.

UNPUBLISHED
October 17, 1997

No. 189823
Hillsdale Circuit Court
LC No. 92-022554-CK

Before: O'Connell, P.J., and Smolenski and T. G. Power*, JJ.

PER CURIAM.

Plaintiff City of Litchfield appeals as of right the trial court's grant of summary disposition in favor of defendants Union Construction Company and Alan E. Ringenberg, d/b/a Ringenberg Engineering. We reverse and remand.

In 1983, plaintiff contracted with defendant Ringenberg, a licensed professional engineer, for engineering, architectural, oversight and inspection services for the Simpson Drive project. In 1984, plaintiff contracted with defendant Union for the construction of Simpson Drive. On November 13, 1984, plaintiff accepted Simpson Drive as completed according to specifications. Plaintiff has maintained throughout these proceedings that it did not learn until November 28, 1990, that Simpson Drive was not constructed according to specifications.

In September, 1992, plaintiff filed suit against defendants. Plaintiff's subsequent amended complaint contained one count alleging that defendants had breached their contracts with plaintiff by failing to construct both the subsurface and bituminous surface of Simpson Drive in accordance with contract specifications, and that, as a result, it had become necessary to rebuild a major portion of the roadbed. The complaint also alleged that defendants had fraudulently concealed the existence of the contract breaches from plaintiff by (1) failing to disclose the breaches to plaintiff; (2) falsely representing that Simpson Drive was constructed to specification, and; (3) covering the roadbed, which did not meet specifications, with what appeared to be a proper bituminous surface.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (8). Defendants contended, in relevant part, that plaintiff failed to state a claim for fraudulent concealment and that plaintiff's breach of contract claim was barred by the six-year statute of limitations applicable to actions to recover damages for breach of contract. This statute provides, in relevant part, as follows:

> No person may bring or maintain any action to recover damages or sums due for breach of 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 600.5807(8); MSA 27A.5807(8).]

Plaintiff answered defendants' motions, contending, in part, that its allegations concerning fraudulent concealment were not intended as a separate cause of action but were designed solely to permit it to bring its breach of contract claim within the two-year period provided by the fraudulent concealment statute. This statute states as follows:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations. [MCL 600.5855; MSA 27A.5855.]

In January, 1993, the court entered separate orders denying defendants' motions for summary disposition. Defendants then answered plaintiff's complaint and discovery commenced.

Defendant Union subsequently moved for summary disposition on two grounds. First, defendant Union contended that it was entitled to summary disposition pursuant to MCR 2.116(C)(7) on the ground that because plaintiff had not brought its claim within six years after the time plaintiff accepted Simpson Drive, it therefore had no cause of action under the statute of repose[1] applicable to engineers and contractors. This statute provides, in relevant part, as follows:

> No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property . . . against any state licensed architect or professional engineer performing or furnishing the

> design or supervision of construction of the improvement, or against any contractor making the improvement, more than 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 or licensed architect or professional engineer.[2] However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement. [MCL 600.5839(1); MSA 27A.5839(1).][3]

Defendant Union further contended that because plaintiff had no cause of action, the fraudulent concealment statute was inapplicable to this case.

Defendant Union alternatively contended that it was entitled to summary disposition pursuant to MCR 2.116(C)(10) because, even if applicable, the fraudulent concealment statute barred plaintiff's claim because no issue of material fact existed that plaintiff discovered or should have discovered the existence of the "alleged defect" more than two years before plaintiff filed its complaint in September, 1992, where at least by June, 1990, plaintiff had contracted to have Simpson Drive repaired or resurfaced due to settling in the road. Finally, defendant Union contended that even if plaintiff filed suit within two years of discovering the existence of its claim, no issue of material fact existed that defendant Union knew that Simpson Drive was not constructed according to specification or that defendant Union engaged in any conduct constituting fraudulent concealment of the breaches of contract. Defendant Ringenberg joined in defendant Union's motion.

In response, plaintiff acknowledged that it had not brought its claim within the six-year period specified in § 5839(1), but contended that the fraudulent concealment statute nevertheless applied to give it two years after it discovered the contract breaches in November, 1990, to bring suit. Plaintiff also contended that, at the very least, questions of fact existed concerning whether defendants fraudulently concealed the contract breaches.

Following oral argument, the trial court issued an opinion granting defendants' motions for summary disposition. Noting simply that § 5839(1) and the fraudulent concealment statute were the "two statutes which the parties allege are applicable," the trial court found that plaintiff's claim commenced on November 13, 1984, and expired six years later, before plaintiff learned that Simpson Drive was not constructed according to specification on November 28, 1990. Relying on *Smith v Quality Construction Co,* 200 Mich App 283; 504 NW2d 24 (1993),[4] the court concluded that plaintiff therefore had no cause of action because it had not filed suit within the six-year period provided by § 5839(1). The court further concluded that the fraudulent concealment statute "does not apply."

On appeal, the parties again dispute the issue whether § 5839(1) precludes application of the fraudulent concealment statute to this case. However, before addressing this issue, we believe that we must first address the threshold question whether § 5839(1) applies at all to this

case. MCR 7.216(A)(7); *People ex rel Attorney General v Kosot Interplanetary, Inc*, 37 Mich App 447, 478; 195 NW2d 43 (1972).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 408; 557 NW2d 127 (1996). Although the trial court did not specify the ground on which it based its grants of summary disposition, we assume that the court granted the motions pursuant to MCR 2.116(C)(7) where it found that plaintiff had no cause of action under § 5839(1) and that the fraudulent concealment statute was, therefore, inapplicable. When this Court reviews a motion for summary disposition under MCR 2.116(C)(7), it accepts the allegations in a well-pleaded complaint as true and construes them in the plaintiff's favor. *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996). The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). If there are no facts in dispute, the question whether the claim is barred by the statute of limitations is one of law for the court. *Pendzsu, supra* at 408. This Court reviews questions of law de novo. *Kuebler, supra*. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Guerra, supra*. The burden of establishing the bar imposed by a statute of limitations is normally on the party asserting the defense. *Kuebler, supra*.

It is well established that in ruling on a statute of limitations defense the court may look behind the technical label that a plaintiff attaches to a cause of action to the substance of the claim asserted. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327, n 10; 535 NW2d 187 (1995). In determining whether an action is of a type subject to a particular statute of limitations, we look at the basis of the plaintiff's allegations. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). The type of interest harmed, rather than the label given the claim, is the focal point in determining which limitation period controls. *Brownell v Garber*, 199 Mich App 519, 526; 503 NW2d 81 (1993). The gravaman of an action is determined by reading the claim as a whole. *Aldred, supra* at 490.

In *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977), our Supreme Court established a distinction for determining whether a claim is subject to the six-year statute of limitations applicable to actions to recover damages for breach of contract or to the three-year statute of limitations applicable to actions to recover damages for injuries to person or property contained in MCL 600.5805(7); MSA 27A.5805(7), redesignated as MCL 600.5805(8); MSA 27A.5805(8) by 1978 PA 495. *Id*. at 125-126. Specifically, where the nature and origin of an action to recover damages for injury to property is a promise or duty imposed by law, the three-year period applies, even if the claim is premised on a contract theory. *Id*. at 126-130; see also *Lear v Brighton Twp*, 184 Mich App 605, 607-608; 459 NW2d 26 (1990). Conversely, where the nature and origin of a claim is the breach of an express promise and dependent on the existence of a contract or contract principles, then the breach of that promise is not a damage to property within the meaning of the three-year statute and the six-year statute applicable to actions to recover damages for breach of contract applies. *Huhtala, supra*; *Lear, supra*. In *Huhtala*, the Court held that the six-year statute applied to the plaintiff's promissory estoppel claim because it

was dependent on the existence of a contract or contract principles and its nature and origin was not a duty implied by law but rather an express promise. *Id*. at 126, 130.

Section 5839(1) likewise applies to "any action" against an engineer or contractor "to recover damages for *any injury to property* . . ., arising out of the defective and unsafe condition of an improvement to real property" (emphasis supplied). Thus, in utilizing the distinction enunciated in *Huhtala*, it would appear that § 5839(1) applies to a claim against an engineer or contractor for a defect in an improvement to real property where, even if premised on a contract theory, the nature and origin of the claim is a promise or duty imposed by law. However, again utilizing *Huhtala*, it would further appear that § 5839(1) does not apply to a claim against an engineer or contractor where the nature and origin of the claim is the breach of an express promise and dependent on the existence of a contract. In *Garden City Osteopathic Hosp v HBE Corp*, 55 F3d 1126 (CA 6, 1995), a diversity action governed by Michigan law, the Sixth Circuit Court of Appeals expressly so held.

In *Garden City*, the plaintiff Michigan hospital contracted in 1970 with the defendant contractor and the defendant architect for the construction of a building addition. *Id*. at 1128. This contract included a specification that the defendant contractor

> shall examine all surfaces that are to be plastered and report to the Architect if these are found to be out of plumb, true or insecure, and shall be held strictly to a straight job throughout. [*Id*. at 1129.]

The addition was apparently completed some time in the early 1970's. See *id*.

In 1990, the plaintiff hospital contracted with a new contractor for the construction of another addition. *Id*. In 1991, the new contractor discovered that a basement wall constructed during the 1970 project had been built three inches out of plumb and that a coat of plaster had apparently been applied to the wall so that it appeared straight. *Id*. In February, 1992, the plaintiff hospital brought suit with respect to the 1970 contract against the defendant contractor and the defendant architect. *Id*. The plaintiff hospital's complaint contained five counts, the first of which was labeled breach of contract, and also claimed that the defendants had concealed the basement wall's out-of-plumb condition by plastering the wall so that it appeared straight. *Id*.

The district court subsequently granted the defendants' motion for summary disposition on the ground that the plaintiff hospital's claims were barred by § 5839(1). *Id*. The district court did not consider the plaintiff hospital's argument that it had two years after discovering its claim to bring suit pursuant to the fraudulent concealment statute. The district court's reasoning in this regard was that § 5839(1) provided a six-year *repose* period and therefore the fraudulent concealment statute was inapplicable because it authorizes commencing an action within two years after discovery only if the action "would otherwise be barred by the period of *limitations.*" *Id*. at 1129, 1134; see also MCL 600.5855; MSA 27A.5855

The Sixth Circuit Court of Appeals reversed and remanded. *Id*. at 1136. Although noting that the parties had focused their dispute on how § 5839(1) applied, the court stated that the threshold question was whether this statute applied at all to preclude the plaintiff hospital's

claims. *Id*. at 1130. The court surveyed Michigan case law and found that the distinction outlined in *Huhtala* supplied the analysis for determining whether § 5839(1) applied to the plaintiff hospital's claims. *Garden City, supra* at 1131-1133. The court noted that the approach taken in *Huhtala* was consistent with the language of various statutes of limitation, which apply uniformly to actions to "recover damages," but are distinguishable with respect to what the damages are sought for, i.e., "breach of contract,[5]" "injuries to persons or property,[6]" or, as in §5839(1) "injury to property, real or personal, or for bodily injury or wrongful death arising out of the defective or unsafe condition of an improvement to real property . . . ." *Garden City, supra* at 1133.

The court then applied the distinction outlined in *Huhtala* to the claim labeled breach of contract and concluded that this claim was subject to the six-year statute of limitations applicable to actions to recover damages for breach of contract. *Garden City, supra*. In arriving at this conclusion, the *Garden City* court noted that the nature and origin of the claim was "that the defendants failed to perform the express promise to construct the improvement in conformity with the governing contract documents." *Id*. The *Garden City* court also noted that the claim did not involve a duty implied by law but rather was dependent on the existence of a contract and contract principles. *Id*.

Although noting that the plaintiff hospital's breach of contract claim was now barred by the six-year statute of limitations because it had accrued sometime in 1971 when the defendants constructed the wall,[7] the *Garden City* court further held that

> [b]ecause we have concluded that the "breach of contract" cause of action is governed by section 600.5807(8), which provides a limitations period rather than a repose period, summary judgment was inappropriate without considering the fraudulent concealment argument. [*Id*. at 1134.]

The court remanded the case for further proceedings consistent with its opinion. *Id*. at 1136.

However, before we apply the distinction enunciated in *Huhtala* to this case, we believe that we must first consider a previous opinion by this Court to determine whether a contrary rule of law by which we are bound[8] has been established. In *Michigan Millers Mut Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367; 494 NW2d 1 (1992), the defendant contractor built a restaurant for the plaintiff owner that opened for business on July 1, 1980. *Id*. at 369. On April 24, 1988, the restaurant's roof collapsed allegedly because of defective roof trusses. *Id*. The plaintiff owner and plaintiff insurance company filed suit against the defendant contractor for negligence and breach of contract. *Id*. The trial court subsequently granted the defendant contractor's motion for summary disposition pursuant to MCR 2.116(C)(7) on the ground that the plaintiffs failed to bring suit within the time prescribed by § 5839(1). *Id*. at 370.

The plaintiffs appealed. Relying on previous caselaw, they argued that § 5839(1) was inapplicable to claims seeking damages for deficiencies in an improvement to real property itself[9] and that, therefore, the three-year period for injuries to persons or property found in MCL 600.5805(8); MSA 27A.5805(8) applied to their negligence claim, not § 5839(1). However, the

plaintiffs acknowledged that their breach of contract claim was time-barred because it was filed more than six years after it accrued.[10] *Id*. at 372, n 1.

The defendant contended that the previous cases relied on by the plaintiffs had been effectively overruled by the Legislature's subsequent addition of subsection (10) to § 5805:

> (1) 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 some through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (10) The period of limitations for an action against a state licensed architect, professional engineer . . . or contractor based on an improvement to real property shall be as provided in 5839. [MCL 600.5805(1) and (10); MSA 27A.5805(1) and (10), as amended by 1988 PA 115.]

The defendants claimed that in adding § 5805(10) the Legislature intended to eliminate any difference between third-party claims and claims made by owners against an engineer or architect. *Michigan Millers, supra* at 372.

This Court affirmed the trial court's grant of summary disposition. The Court agreed with the defendant's argument, holding as follows:

> [W]e conclude that the Legislature's intent in amending § 5805(10) . . . was to apply the statute of limitation contained in § 5839(1) to all actions brought against contractors on the basis of an improvement to real property, including those brought by owners for damage to the improvement itself.

In arriving at its holding, this Court rejected the following argument by plaintiff:

> Finally, plaintiffs' argument that the Legislature's intent in amending § 5805 was to include contract actions within the "prospective ambit" of § 5839(1) is specious and inconsistent with their own arguments. According to plaintiffs, § 5839(1) is limited to tort actions and does not specifically include or exclude contract actions from its coverage. Because § 5839(1) refers to "*any* action to recover damages for any injury to property . . . or for bodily injury or wrongful death," it is clear that even before the addition of § 5805(10) it was not limited to tort actions, but rather, included contract actions. If plaintiffs' argument concerning the intent of the addition of § 5805(10) were correct, the amendatory language of that subsection would be rendered meaningless because the applicability of § 5839(1) to contract actions was never in question and needed no clarification. Moreover, plaintiffs' argument in this regard is inconsistent with their contention that § 5839 does not apply to actions brought by an owner against

> a contractor, because the only party who will have a breach of contract action against a contractor is the owner. [*Id.*]

Thus, the question is raised whether *Michigan Millers*, which is binding on this Court, precludes application of the distinction raised in *Huhtala* and applied persuasively in *Garden City* to this case. We conclude that *Michigan Millers* does not compel such a conclusion.

In *Michigan Millers*, the issue facing this Court was whether "§ 5805(10) overrules this Court's interpretation of § 5839 in the cases mentioned above and requires an application of the limitation periods specified in § 5839(1) to all actions against a contractor based on an improvement to real property." *Id*. at 372. However, this Court was called upon to decide this issue in the context of the only theory advanced by the plaintiffs on appeal as not being barred by § 5839(1), i.e., their negligence claim, which is a claim the nature and origin of which is an obligation imposed by law. Because the plaintiffs acknowledged that their claim labeled breach of contract was time-barred, the *Michigan Millers* panel had no occasion to consider and decide the issues whether the nature and origin of that claim was a duty imposed by law or the breach of an express promise and, if the breach of an express promise, whether such a claim is subject to § 5839(1). Our conclusion in this regard is bolstered by the following statement by the panel in the *Michigan Millers*:

> Because § 5839(1) refers to "*any* action to recover damages for any injury to property . . . or for bodily injury or wrongful death," it is clear that even before the addition of § 5805(10) it was not limited to tort actions, but, rather, included contract actions. [*Id*. at 378 (emphasis in original).]

In other words, we agree with the *Michigan Millers* panel that § 5839(1) applies to "any action" against an engineer or contract, whether premised on a tort theory or contract theory. However, in addition, the "action" must be one seeking "to recover damages for any *injury to property* . . . ." MCL 600.5839(1); MSA 27A.5839(1) (emphasis supplied). The breach of an express promise is not a damage to property. *Huhtala*, *supra* at 128-129. Thus, we conclude that *Michigan Millers* does not decide a rule of law, i.e., that § 5839(1) governs a claim whose nature and origin is the breach of an express promise, that is binding on this panel by virtue of MCR 7.215(H). See also *Witherspoon v Guilford*, 203 Mich App 240, 246; 511 NW2d 720 (1994) (dicta). Accordingly, we will apply the distinction enunciated in *Huhtala* to analyze the nature and origin of plaintiff's breach of contract claim in this case.

Plaintiff's amended complaint alleges it entered into a contract with defendant Union in which defendant Union agreed to construct Simpson Drive according to certain specifications. The complaint further alleges that plaintiff entered into a contract with defendant Ringenberg pursuant to which defendant Ringenberg agreed to perform "resident construction inspection services" pertaining to the construction of Simpson Drive. Section five of the contract between plaintiff and defendant Ringenberg indicates that the "resident construction inspector" would perform, in part, the following duties:

(1) Physically oversee the various parts of the work of the construction in all phases to determine that the work performed is in accordance with the plans and specifications.

* * *

(8) Report to the A/E [defendant Ringenberg] and the Owner any problems which are delaying, or are anticipated to delay, the Work.

The complaint alleges that defendants breached their contracts because Simpson Drive was not constructed in accordance with the contract specifications. The complaint further alleges that defendant Ringenberg failed to advise plaintiff that Simpson Drive was not constructed according to specification.

Plaintiff's complaint does not allege any breaches of duties implied by law, such as the breach of an implied warranty of fitness, *Huhtala, supra* at 129, n 11, or the breach of a duty of reasonable care. Rather, plaintiff's complaint, taken as a whole, indicates that plaintiff's damages flowed from defendants' failure to construct or oversee the construction of Simpson Drive as agreed to in their contracts. In other words, the nature and origin of plaintiff's claim is the breach of express promises and dependent on the existence of a contract and contract principles. The breach of these promises is not a damage to property. Therefore, we conclude that § 5839(1) does not apply to this case, and that the six-year period applicable to actions to recover damages for breach of contract, § 5807(8), applies to this case.

Plaintiff's breach of contract claim accrued no later than November 13, 1984, when plaintiff accepted Simpson Drive. Accordingly, plaintiff's breach of contract claim is time-barred by § 5807(8).[11] However, the fraudulent concealment statute provides that a fraudulently concealed claim may be commenced within two years after the plaintiff "discovers, or should have discovered, the existence of the claim . . . although," as in this case, "the action would otherwise be barred by the period of limitations." Finding the fraudulent concealment statute inapplicable, the trial court did not address defendants' motion pursuant to MCR 2.116(C)(10) with respect to plaintiff's fraudulent concealment argument. We conclude that summary disposition is inappropriate without a consideration of this argument. Accordingly, we reverse the trial court's grant of summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

Reversed and remanded.

/s/ Michael R. Smolenski
/s/ Thomas G. Power

[1] As explained in *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 219 Mich App 165; 555 NW2d 510 (1996):

> A statute of repose limits the liability of a party by setting a fixed time after the sale or first use of an item beyond which the party will not be held liable for defects in it or injury or damage arising from it. Unlike a statute of limitations, a statute of repose may bar a claim before an injury or damage occurs. [*Id*. at 167, n 1.]

[2] Plaintiff conceded below that the one-year discovery period is inapplicable to this case because its claim was not founded on gross negligence.

[3] This statute initially applied only to engineers and architects. *Frankenmuth, supra* at 171. However, it was amended by 1985 PA 188 to include contractors. *Id*. As explained in *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980), § 5839(1)

> was enacted in 1967 in response to then recent developments in the law of torts. The waning of the privity doctrine as a defense against suits by injured third parties and other changes in the law increased the likelihood that persons taking part in the design and construction of improvements to real property might be forced to defend against claims arising out of alleged defects in such improvements, perhaps many years after construction of the improvement was completed. The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement and thereby limit the impact of recent changes in the law upon the availability of cost of the services they provided. [*Id*. at 14.]

In *Smith v Quality Construction Co*, 200 Mich App 297, 300-301; 503 NW2d 753 (1993), this Court explained that the 5839(1) is

> both one of limitation and one of repose. For ordinary negligence actions that accrue within six years from the occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and, thus, acts as a period of limitation. When more than six years has elapsed from the date of occupancy, use, or acceptance before an injury is sustained, the statute is one of repose that prevents a cause of action from ever accruing. . . . Where the injury occurs after the passage of the applicable time period, the injured party "literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress." [*Id*. at 300-301 (citations omitted).]

[4] See note 3, *supra*.

[5] See, generally, MCL 600.5807; MSA 27A.5807.

[6] See, generally, MCL 600.5805; MSA 27A.5805.

[7] A breach of contract claim accrues on the date of the breach, not the date the breach is discovered. *Michigan Millers Mut Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367, 372; 494 NW2d 1 (1992).

[8] See MCR 7.215(H).

[9] Specifically, plaintiffs relied on *Burrows v Bidigare/Bublys, Inc*, 158 Mich App 175; 404 NW2d 650 (1987), *City of Midland v Helger Construction Co, Inc*, 157 Mich App 736; 403 NW2d 218 (1987), and *City of Marysville v Pate, Hirn & Bougue, Inc*, 154 Mich App 655; 397 NW2d 859 (1986). In *Marysville*, the plaintiff owner accepted in 1973 an improvement to real property, the construction of which was designed and supervised by the defendant engineers pursuant to their contract with the plaintiff owner. *Id*. at 657. A defect in the improvement was discovered in 1981 by the plaintiff owner, who brought a malpractice action against the defendant engineers in 1983. *Id*. This Court held that § 5839(1) did not apply to preclude the plaintiff owner's malpractice action. *Id*. at 660. In arriving at this holding, this Court reasoned that the Legislature intended that § 5839(1) apply to claims by injured third parties, but not to claims by owners for deficiencies in the improvement itself. *Id*. *Midland* and *Burrows*, the other cases relied on by the plaintiffs in *Michigan Millers*, contain facts similar to *Marysville* and rely on *Marysville* for a similar holding.

[10] What is not clear from this opinion is whether the plaintiffs acknowledged that their breach of contract claim was time-barred by § 5839(1) or § 5807(8).

[11] See note 7, *supra*.