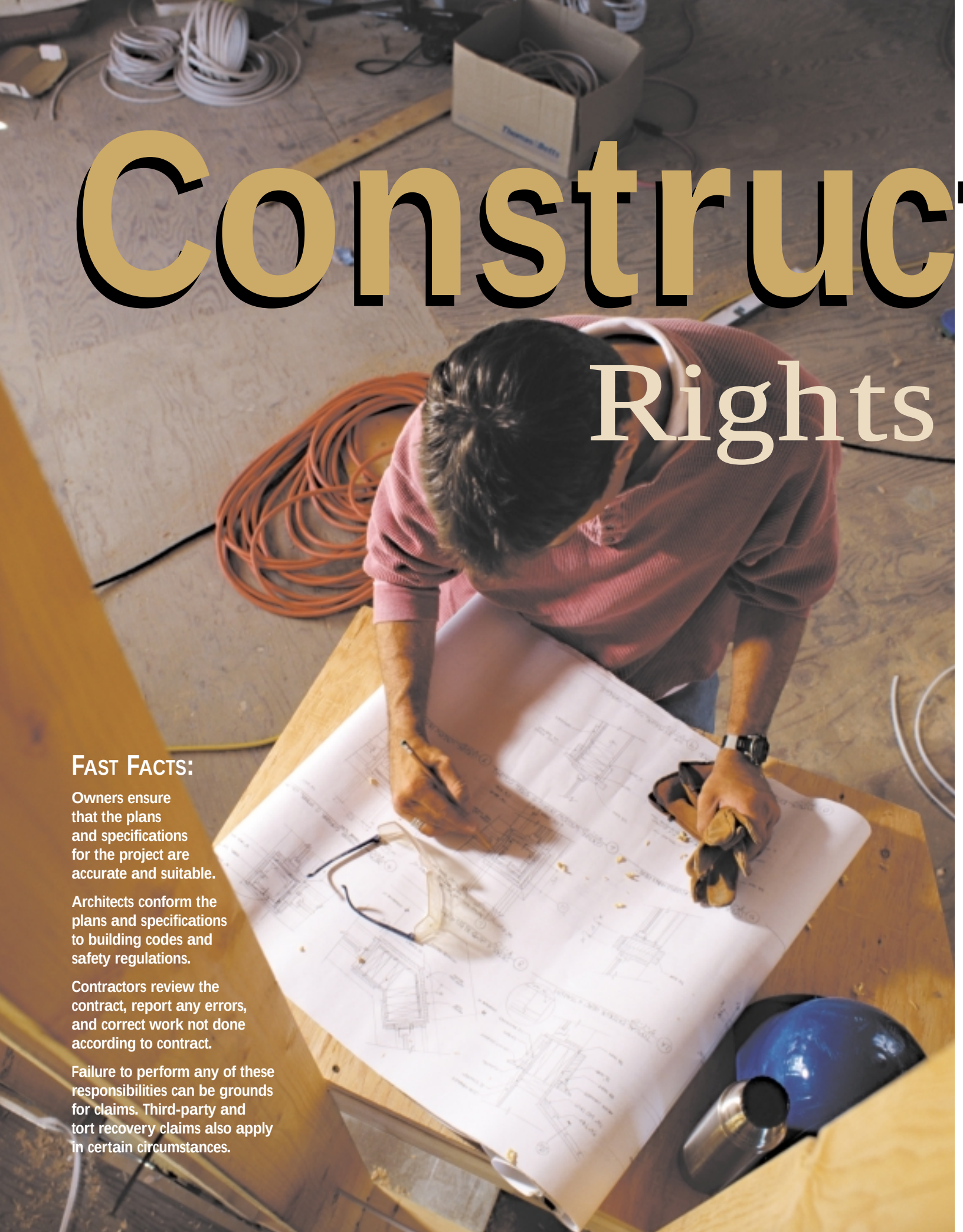

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Fast Facts:

Owners ensure that the plans and specifications for the project are accurate and suitable.

Architects conform the plans and specifications to building codes and safety regulations.

Contractors review the contract, report any errors, and correct work not done according to contract.

Failure to perform any of these responsibilities can be grounds for claims. Third-party and tort recovery claims also apply in certain circumstances.

tion and Remedies

By Lawrence M. Dudek

An overview of the responsibilities of owners, contractors, and architects in construction projects

An extended, more detailed version of this article is available on the Bar Journal *website at www.michbar.org/journal/home.cfm.*

The construction process involves many parties, including the owner, architect, engineers, general contractor, subcontractors, and suppliers. The relationships between the various parties and their respective rights and liabilities will, in many instances, be governed by the terms of their respective contracts. In other instances, however, the rights and liabilities of the parties will be controlled by other legal principles, such as tort recovery and the economic loss doctrine.

Owner Responsibilities

The owner warrants that the plans and specifications are accurate and suitable for the construction project. The *Spearin* doctrine holds that "[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *United States v Spearin,* 248 US 132, 63 L Ed 166, 39 S Ct 59 (1918).

As a general rule, the contractor will not be liable to the owner for defective construction if the work is performed according to the plans and specifications provided by the owner. For example, in *L W Kinnear, Inc v Lincoln Park,* 260 Mich 250; 244 NW 463 (1932), a contractor was not held responsible for the collapse of a sewer where the contractor installed the type of sewer required by the specifications, but the sewer was found to be unsuitable for use under the existing conditions. The city was held to have warranted the type and design of the sewer as being adequate and suitable for the proposed use.

According to the *Spearin* doctrine, the owner is further required to provide accurate information in the plans and specifications and to provide accurate information to the contractor about the conditions at the building site. The failure of the owner to provide accurate information regarding site conditions, such as soils data, may give rise to a breach of contract claim. *Hersey Gravel Co v State Highway Department,* 305 Mich 333; 9 NW2d 567 (1943).

In W H Knapp Co v State Highway Dept, 311 Mich 186; 18 NW2d 421 (1945), the owner was found liable for the extra expenses incurred by the contractor when the actual soil conditions were different from those represented in the plans and specifications, even though the blueprints contained a warning for the bidders to examine the site and not to rely on soils notations on the plans. In *Holloway Construction Co v Michigan*, 44 Mich App 508; 205 NW2d 575 (1973), the owner was found liable for extra costs incurred by the contractor because the owner failed to disclose that it didn't own a pit the contractor intended to excavate material from to use in constructing a road. If errors in the plans and specifications increase the cost of construction, the owner may be liable to the contractor for the amount of the increase.

Architect Responsibilities

As a general rule, the architect does not warrant the suitability of the plans and specifications, and the law does not imply such a warranty or guaranty. *Chapel v Clark*, 117 Mich 638; 76 NW 62 (1898). The architect is required to exercise reasonable care in preparing the plans and specifications: "A registered design professional is duty bound to furnish design specifications prepared with a reasonable degree of technical skill, such as would produce, if followed and adhered to, a building of the kind called for, without marked defects in character, strength, or appearance."[1]

The responsibility of an architect is similar to that of a lawyer or physician. The architect is required to possess and use the ordinary skills and knowledge of the profession and to exercise reasonable care.[2] The parties by contract may seek to impose a higher standard of care on the architect. Proof that the architect failed to exercise reasonable care in preparing the plans and specifications usually will require expert testimony.[3] Expert testimony may not be required if the negligent act or omission is obvious.

As a general rule, the architect is required to prepare the plans and specifications according to applicable building codes and safety regulations. Violations of building codes and regulations may be evidence of negligence and a failure of the architect to exercise reasonable care, but not necessarily. For example, in *Nurmi v Beardsley*, 284 Mich 165; 278 NW 805 (1938), the city building code required outside walls to be covered by 3/4" thick sheathing. A building inspector testified that 1/2" thick fiber board sheathing would be sufficient because it would have the same strength as regular sheathing. The contractor's use of the different material was not a breach of the contract.

A third party injured by the failure of the architect to exercise reasonable care may have a claim against the architect, even without privity of contract.[4] It is foreseeable that errors or miscalculations in the plans and specifications resulting from the negligence of an architect or engineer could create a risk of injury to third parties, such as the contractor and the subcontractors, and thereby increase their costs in performing the work. Such increased costs may be recoverable from the architect or engineer responsible for a negligent error or miscalculation, despite the lack of contractual privity.[5]

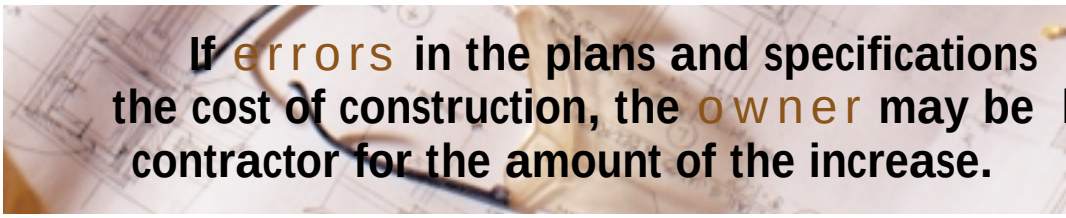
Similarly, a contractor or subcontractor may have a claim against an engineer or architect for negligence in the failure to administer the contract, for example, by failing to process submittals, such as shop drawings, in a timely manner.

Contractor Responsibilities

Most contracts for construction will include a provision for an express warranty. For example, AIA Document A201 (1997 Ed.), Section 3.5.1 sets forth an express warranty by the contractor that the materials furnished under the contract will be of good quality and that the work will be free from defects and conform to the requirements of the contract documents. Under AIA Document A201 (1997 Ed.), Section 12.2.2.1, the contractor is required to promptly return and correct work that is not in accordance with the contract documents discovered within one year after substantial completion. The owner is required to give prompt written notice to the contractor of any needed corrections within the one-year period.

Where the construction contract expressly requires the contractor to make repairs within the one-year period, a claim based upon the contractor's failure to repair the defective work appearing after completion of the work may be covered by any performance bond posted by the contractor.[6]

The contractor is obligated to review the contract documents and to report any errors, inconsistencies, or omissions under AIA Document A201, Section 3.2.2 (1997 Ed.). The contractor will only be liable for knowingly failing to report any errors, inconsistencies, or omissions in the contract documents. The owner remains liable for defects in the plans and specifications, even if the owner instructs the contractor to compare the plans and specifications with the actual site conditions.[7]



As a general rule, where an express warranty for the condition of the construction work to be performed is given, there is no implied warranty on the part of the contractor regarding the quality of the construction.[8] However, where an element of defective construction consists of goods, there may exist implied warranties arising under the Uniform Commercial Code. UCC 2-314 provides for an implied warranty of merchantability that the goods are fit for the ordinary purposes for which they are used. MCL 440.2314. UCC 2-315 provides for an implied warranty of fitness where the seller knows the purpose for which the goods are being purchased and the buyer is relying on the seller's skill to select appropriate materials. MCL 440.2315.

In *Insurance Co of North America v Radiant Electric Co*, 55 Mich App 410; 222 NW2d 323 (1974), the court held that a contractor who supplied and installed electrical wiring gave an implied warranty under UCC 2-314. The court further held that the goods being installed were to be used for handling electricity, a dangerous force, and that "under such circumstances there is an implied warranty of fitness and merchantability with respect to the manner in which the goods were installed."

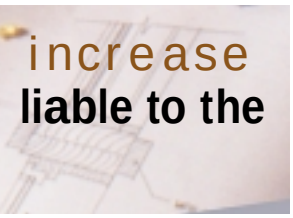
Third-Party Beneficiary Claims

The construction process will typically involve a number of different contractual relationships, including the owner-contractor, owner-architect, architect-engineer, contractor-subcontractor, subcontractor-supplier. An issue exists regarding whether a third party may enforce rights under a contract between other parties to the construction process. For example, may the owner bring suit directly against a subcontractor for damages suffered as a result of the subcontractor's failure to perform the contractor-subcontractor contract? May the contractor bring an action against the architect for damages suffered as a result of the architect's failure to comply with its obligations under the owner-architect contract? Under some circumstances such a claim may be asserted as a third-party beneficiary.

The ability of third-party beneficiary to enforce a contract entered into for its benefit is provided for by statute. MCL 600.1405 provides that

> *Any person for whose benefit a promise is made by way of contract...has the same right to enforce said promise that he would have had is the said promise had been made directly to him as the promisee.*

At common law, a contract could only be enforced by those who were parties to the contract and in privity of contract with one another. In the absence of statute, there would be no right for a third-party beneficiary to bring an action for enforcement of the contract.



The ability to enforce rights as a third-party beneficiary under the statute is limited, by the express language of the statute, to a "person for whose benefit a promise is made by way of contract." MCL 600.1405. Such a person will be deemed a third-party beneficiary under the statute only in those instances where the promisor "has undertaken to give or to do or refrain from doing something directly to or for said person." MCL 600.1405(1).

The fact that the plaintiff would have received an incidental benefit as a result of the performance of the contract does not confer the right to enforce the contract or to seek damages for breach as a third-party beneficiary: "A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof."[9]

The determination of third-party beneficiary status is to be made on a review of the contract on an objective basis; the motives and subjective intentions of the parties are not relevant.[10] In some instances the determination of third-party beneficiary status will be a question of fact.[11]

In *Reith-Riley Construction Co, Inc v Department of Transportation*, 136 Mich App 425; 357 NW2d 62 (1984), the court held that a subcontractor was not a third-party beneficiary of the contract between the Michigan Department of Transportation and the contractor, where the subcontractor sought to recover price increases for materials supplied to the contractor.

In *Dynamic Constr Co v Barton Malow Co*, 214 Mich App 425, 543 NW2d 31 (1996), the court held that a general contractor was only an incidental beneficiary and was not entitled to assert a third-party beneficiary claim against the owner's construction manager on the project. The court held, at 427, that "Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of contract." The contract between the owner and the construction manager specifically disclaimed any responsibility to third parties. Furthermore, the supervisory responsibilities of the construction manager were intended for the benefit of the owner and not the general contractor. The court also recognized that, as a general rule, the subcontractors are not third-party beneficiaries of the contract between the owner and the general contractor.

In many instances the contract will specifically provide that it is intended solely for the benefit of the parties thereto. Under such circumstances it will be difficult to successfully assert a third-party beneficiary claim.

Tort Recovery and Economic Loss

Under certain circumstances, a claim for tort may arise out of a construction project performance. To assert a claim for tort, the claimant must demonstrate an actionable wrong that is independent of the contract between the parties, as set forth in *Hart v Ludwig*, 347 Mich 559, 563; 79 NW2d 895 (1956).

There is no tort of negligent performance of a contract unless the relationship between the parties imposes a legal duty without any need to enforce the contract promise. Such a duty for example, would include a legal duty to maintain a safe construction site that does not unreasonably endanger people. On the other hand, a negligence claim involving property damage caused by the failure of a contractor to comply with contractual obligations is simply a claim for breach of contract.[12]

An owner might assert a tort theory of recovery to avoid the effect of contractual provisions that would bar a suit as untimely or limit the amount of damages available for recovery by the owner. In cases involving defective goods, the Michigan courts have applied the economic loss doctrine to bar tort theories of recovery where the loss is economic.[13] The economic loss doctrine "hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual

consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts."

The economic loss doctrine bars tort remedies where a sale of goods is involved, the only injury is damage to the goods themselves, and the only losses alleged are economic. The doctrine applies even in the absence of contractual privity.[14] The doctrine will be applied where the damages suffered "are direct and consequential losses that were within the contemplation of the parties and that, therefore, could have been the subject of negotiations between the parties."[15]

The economic loss doctrine has also been applied to a claim for negligent misrepresentation.[16] The doctrine will not apply to a claim for fraudulent inducement to enter into the contract, or other intentional tort claims.[17]

If applied to a construction contract, the economic loss doctrine could be asserted as a way to bar any claims for economic loss between the various parties, except for those claims arising out of contract. In Michigan, however, the application of the economic loss doctrine has been limited to contracts for the sale of goods. The doctrine has not been applied to contracts for services or to contracts for mixed goods and services that predominately involve services.[18] Notwithstanding the economic loss doctrine, contractors and subcontractors should be able to continue to assert claims against design professionals. ✦

FOOTNOTES

1. R. Martell & M. Morin, "Owner as Plaintiff: Construction Failures; Suing the Design Professional," Practicing Law Institute No. 308 (1988).
2. *Bayne v Everham*, 197 Mich 181, 200; 163 NW 1002 (1917); *Ambassador Baptist Church v Seabreeze Heating and Cooling Co*, 28 Mich App 424; 184 NW2d 568 (1970).
3. A. Stover, "Construction & Design Contract," *Construction Law*, paragraph 3.02 (Stein. 1989).
4. *Swartout v Beard*, 33 Mich App 395; 190 NW2d 373 (1971); *Francisco v Manson, Jackson & Kane, Inc*, 145 Mich App 255; 377 NW2d 313 (1985).
5. *Bacco Co v American Celloid*, 148 Mich App 397; 384 NW2d 427 (1986); *National Sand, Inc v Nagel Construction, Inc*, 182 Mich App 327, 451 NW2d 618 (1990).
6. *Hunters Pointe Partners Limited Partnership v United States Fidelity & Guaranty Co*, 194 Mich App 294, 486 NW2d 136 (1992).
7. *Hersey Gravel Co v State Highway Dept*, 305 Mich 333; 9 NW2d 567 (1943).
8. *Detroit Conveyor & Steel Corp v Milbrand*, 354 Mich 222; 92 NW2d 317 (1958).
9. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 190, 504 NW2d 635 (1933) quoting *Greenlees v Owen Ames Kimball, Co*, 340 Mich 670, 676, 66 NW2d 227 (1954).
10. *Taggart v United States*, 880 F2d 867 (CA 6, 1989).
11. *Chatham, Inc v Ajax Paving, Inc*, 370 Mich 334; 121 NW2d 836 (1963).
12. *Garden City Osteopathic Hospital v HBE Corporation*, 55 F3d 1126, 1135.
13. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 486 NW2d 612 (1992).
14. *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 480 NW2d 623.
15. *Detroit Edison Company v NABCO, Inc*, 35 F3d 236, 241 (CA 6, 1994).
16. *Bailey Farms, Inc v NOR-AM Chemical Company*, 27 F3d 188 (CA 6, 1994).
17. *Huron Tool and Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 532 NW2d 541 (1995).
18. *Frommert v Bobson Constr Co*, 219 Mich App 735, 558 NW2d 239 (1997); *Higgins v Lauritzen*, 209 Mich App 266, 530 NW2d 171 (1995); *Home Insurance Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 538 NW2d 424 (1995).

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