

STATE OF MICHIGAN
COURT OF APPEALS

CEDAR RIVER INVESTMENT COMPANY,
L.L.C.,

UNPUBLISHED
June 18, 2009

Plaintiff-Appellant,

v

BENCHMARK ENGINEERING, INC., and
JOSEPH B. O'NEILL,

No. 282982
Antrim Circuit Court
LC No. 06-008251-CZ

Defendants-Appellees.

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Plaintiff Cedar River Investment Company, L.L.C. (Cedar River) appeals as of right from the trial court's order granting defendants Benchmark Engineering, Inc. (Benchmark) and Joseph O'Neill summary disposition pursuant to MCR 2.116(C)(7) and (10) on the ground that MCL 600.5839(2) barred Cedar River's action. We affirm.

I. Basic Facts And Procedural History

This action arises from the preparation of a condominium subdivision plan that inaccurately represented the square footage of condominium unit 86, on which Cedar River allegedly relied in purchasing the unit. The condominium subdivision plan included "floor plans" for unit 86 that Dean Morford, a technician that Benchmark employed, prepared. In August 1998, O'Neill, a licensed surveyor and the owner of Benchmark, signed and delivered the floor plans for inclusion in the condominium subdivision plan, which was thereafter recorded on September 22, 1998. It is undisputed that the floor plans inaccurately represented the square footage of unit 86 as 26,085 square feet. In fact, in April 2006, the actual square footage was determined to be 18,130 square feet. On September 11, 2006, Cedar River filed this action against Benchmark and O'Neill, alleging claims for negligent misrepresentation in connection with the preparation of the floor plans. The trial court granted the motion for summary disposition of Benchmark and O'Neill, concluding that MCL 600.5839(2) barred Cedar River's action. Cedar River now appeals.

II. Standards of Review

Benchmark and O’Neill moved for summary disposition under MCR 2.116(C)(7) and (10). In *Tenneco Inc v Amerisure Mut Ins Co*,¹ this Court explained:

This Court reviews de novo the trial court’s grant or denial of summary disposition. When considering a motion under subrule C (10), the court must view the proffered evidence in the light most favorable to the party opposing the motion. A trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.”

When addressing a motion under subrule C (7), the trial court must accept as true the allegations of the complaint unless contradicted by the parties’ documentary submissions. If the material facts are not disputed, this Court reviews de novo as a question of law whether a claim is barred by the statute of limitations.

This case also involves the interpretation and constitutionality of a statute, both of which involve questions of law that we review de novo.²

III. MCL 600.5839(2)

A. Provisions Of The Statute

Cedar River argues that the trial court erred in concluding that MCL 600.5839(2) governs this action. MCL 600.5839(2) provides:

No person may maintain any action to recover damages based on error or negligence of a state licensed land surveyor in the preparation of a survey or report more than 6 years after the delivery of the survey or report to the person for whom it was made or the person’s agent.

“The goal of statutory interpretation is to discern and give effect to the intent of the Legislature from the statute’s plain language.”³ “If the meaning of a statute is clear and unambiguous, then judicial construction to vary the statute’s plain meaning is not permitted.”⁴ “The Legislature is

¹ *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008) (internal citations omitted).

² *In re Complaint of Rovas*, 482 Mich 90, 97; 754 NW2d 259 (2008) (statutory interpretation); *Dep’t of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008) (constitutionality of statute).

³ *Houdek v Centerville Twp*, 276 Mich App 568, 581; 741 NW2d 587 (2007).

⁴ *Id.*

presumed to have intended the meaning it plainly expressed.”⁵ Also, “statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law[.]”⁶ “The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes.”⁷

B. The Relationship Between MCL 600.5805 And MCL 600.5839(2)

Cedar River argues that MCL 600.5839(2) is not applicable to this case when considered in conjunction with MCL 600.5805. The latter statute provides, in pertinent part:

(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 someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

(14) The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.

Cedar River asserts that because MCL 600.5839(1) provides that it applies to actions to recover damages for injuries to persons or property, and because MCL 600.5805(14) refers to MCL 600.5839, it necessarily follows that MCL 600.5839(2) is only applicable to actions for injuries to persons or property based on an improvement to real property. The trial court, however, found that MCL 600.5805 was not implicated in this case. We agree.

MCL 600.5839 stands independent of other statutes. It is only implicated through MCL 600.5805(14) if the action is for an injury to a person or property and it is based on an improvement to real property.⁸ Here, Cedar River’s negligent misrepresentation claims seek recovery of damages for lost rents. Therefore, there is no need to consult MCL 600.5805 for the applicable period of limitations.

Additionally, just prior to its oral argument on appeal, Cedar River submitted a supplemental authority, asserting that *Poly-Flex Construction, Inc v Neyer, Tiseo & Hindo, Ltd*, supported that MCL 600.5839 is confined to actions based on improvements to real property.⁹

⁵ *Watson v Mich Bureau of State Lottery*, 224 Mich App 639, 645; 569 NW2d 878 (1997).

⁶ *McNeil v Charlevoix Co*, 275 Mich App 686, 701; 741 NW2d 27 (2007).

⁷ *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008).

⁸ See *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 45-46; 709 NW2d 589 (2006) (construing MCL 600.5839[1]).

⁹ *Poly-Flex Construction, Inc v Neyer, Tiseo & Hindo, Ltd*, 582 F Supp 2d 892 (WD Mich 2008).

However, that non-binding federal decision¹⁰ is inapposite to our decision in this case. In *Poly-Flex Construction, Inc*, the court was interpreting MCL 600.5839(1) and, indeed, it specifically clarified that MCL 600.5839(2) (the provision at issue herein) was “not relevant” to its decision because that subsection “governs claims ‘based on error or negligence of a state licensed land surveyor in the preparation of a survey or report.’”¹¹

C. Statutes Of Limitations And Statutes Of Repose

The parties dispute whether MCL 600.5839(2) is both a statute of limitations and a statute of repose, or only a statute of repose. A telltale sign that a statute is one of repose is the inclusion of language to the effect that a party may not file an action after a specific date or period of time. MCL 600.5839(2) prohibits a cause of action from being brought more than six years after delivery of a survey or report. There is no dispute that the drawings at issue in this case were both delivered to the client of Benchmark and O’Neill and recorded as part of the condominium subdivision plan more than six years before Cedar River filed this action. Thus, if MCL 600.5839(2) is applicable, the repose aspect of the statute bars Cedar River’s action.

D. Applicability of MCL 600.5839(2)

Cedar River argues that MCL 600.5839(2) is not applicable because the drawings that are the subject of this action, which are labeled “floor plans,” are not a survey within the meaning of MCL 600.5839(2). Cedar River observes that floor plans and surveys are separate documents that are required to be included in a condominium subdivision plan.¹² However, we conclude that this delineation is not dispositive. While the drawings are titled “floor plans,” they depict “[t]he size, location, area, and horizontal boundaries of each condominium unit,” which is also a separate requirement of a condominium subdivision plan.¹³

MCL 600.5839(2) applies, by its terms, to the preparation of a “survey” or a “report.” The statute does not define “survey” or “report.” “[U]nless explicitly defined in a statute, ‘every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used.’”¹⁴ Because undefined terms must be given

¹⁰ Although this Court may choose to agree with the analysis of a federal court decision, “federal court decisions are not precedentially binding on questions of Michigan law.” *American Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000).

¹¹ *Poly-Flex Construction, Inc, supra* at 904 n 6.

¹² See MCL 559.166(2).

¹³ MCL 559.166(2)(g).

¹⁴ *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001), quoting *Michigan State Bldg & Construction Trades Council, AFL-CIO v Director, Dept of Labor*, 241 Mich App 406, 411; 616 NW2d 697 (2000).

their plain and ordinary meanings, it is proper to consult a dictionary to ascertain the ordinary meaning of a term.¹⁵

Black's Law Dictionary defines "survey" as "[a] general consideration of something; appraisal" and "[t]he measuring of a tract of land and its boundaries and contents; a map indicating the results of such measurements."¹⁶ *Random House Webster's College Dictionary* defines "survey" as "[a] general or comprehensive view, description, course of study" and "a plan or description resulting from [the act of surveying land.]"¹⁷ The *Random House* dictionary defines "report" as a "detailed account of an event, situation, etc., usu[ally] based on observation or inquiry."¹⁸ Under these definitions, the recorded condominium subdivision plan, of which the drawings are part, qualifies as a survey or report. The subdivision plan maps the land for the development and its proposed contents. The drawings in turn map unit 86, both the location of the physical structures within it and its dimensions. Because the drawings were created "in preparation of a survey or report [the Plan]," we conclude that they are within the scope of MCL 600.5839(2).

We disagree with Cedar River's argument that MCL 600.5839(2) is not applicable because an unlicensed technician, not a state licensed land surveyor, prepared the drawings. The statute requires that Cedar River's claims be based on "error or negligence of a state licensed land surveyor in the preparation of a survey or report" Here, it is undisputed that Dean Morford, Benchmark's employee, calculated the inaccurate square footage for unit 86 that was represented on the drawings. However, it is also undisputed that O'Neill, a licensed surveyor and Morford's supervisor, was responsible for checking Morford's work and failed to do so adequately. In addition, Cedar River does not dispute that Morford created the drawings at O'Neill's direction, or that O'Neill was ultimately responsible for the preparation of the drawings and the subdivision plan, all of which O'Neill signed, statutorily designating that he prepared it.¹⁹ Thus, because Cedar River bases its action on an error or negligence of O'Neill in the preparation of the subdivision plan, MCL 600.5839(2) is applicable.

Cedar River also asserts that MCL 600.5839(2) is inapplicable because the drawings are not of land. However, the word "land" does not modify "survey or report." Cedar River argues that the term is implicit because the statute clearly applies to duties of a land surveyor, indicating that only professional negligence or errors are covered. We agree, as did the trial court, that the

¹⁵ *Robinson v Ford Motor Co*, 277 Mich App 146, 152; 744 NW2d 363 (2007).

¹⁶ Black's Law Dictionary, p 1486 (8th ed, 2004).

¹⁷ *Random House Webster's College Dictionary*, p 1298 (1997).

¹⁸ *Id.* at 1102.

¹⁹ MCL 559.166(1) requires that "[t]he condominium subdivision plan for each condominium project shall be prepared by an architect, land surveyor, or engineer licensed to practice and shall bear the signature and seal of such architect, land surveyor, or engineer."

statute governs professional negligence versus ordinary negligence.²⁰ However, that does not mean that “preparation of a survey or report” is limited to a duty that only a land surveyor could perform. We will read nothing into a clear statute that is not within the manifest intention of the Legislature, which we derive from the language of the statute itself.²¹ The plain language of the statute indicates that it applies when there is an error or negligence of a land surveyor in the preparation of a survey or report, which was the case here.

For these reasons, we agree that MCL 600.5839(2) applies to Cedar River’s cause of action. Because Cedar River did not file the action until more than six years after delivery of the survey or report, defendants were entitled to summary disposition because Cedar River filed its action was untimely filed under MCL 600.5839(2).

IV. Constitutionality Of MCL 600.5839(2)

A. The Rational Basis Test

Cedar River argues that to the extent that MCL 600.5839(2) bars its cause of action, it violates equal protection principles and its due process rights. Where there is a challenge to the constitutionality of social or economic legislation on equal protection or due process grounds, courts examine the statute under the rational basis test.²² Under this test, courts examine the legislation to determine whether it creates a classification scheme rationally related to a legitimate governmental purpose. Courts presume legislation to be constitutional.²³ The burden of proof is on the person attacking the legislation to show that the classification is arbitrary.²⁴ A rational basis for legislation exists when any set of facts is known or can be reasonably assumed to justify the discrimination.²⁵ Courts must analyze a claim that application of a statute renders it unconstitutional as applied to the facts of the particular case.²⁶

B. Equal Protection

Cedar River argues that to construe the statute as barring its cause of action violates equal protection principles because a land surveyor receives greater protections than another professional who may perform the same work. However, this disparity in liability protection is

²⁰ See *O’Brien v Hazelet & Erdal*, 410 Mich 1, 16; 299 NW2d 336 (1980) (MCL 600.5839(1) applies to causes of actions that arise from architects and engineers’ “lapses in their professional endeavors”).

²¹ *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

²² *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004) (equal protection); *Downriver Plaza Group v City of Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994) (due process).

²³ *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003).

²⁴ *Id.*

²⁵ *Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000).

²⁶ *Id.* at 269.

not fatal to the statute's constitutionality. In *O'Brien*, the Michigan Supreme Court considered this issue in the context of MCL 600.5839(1), which at the time only applied to architects and engineers, and not contractors.²⁷ While the Court's decision is not directly applicable here, its analysis is instructive.²⁸ In holding that the provision did not violate equal protection principles, the Court stated:

The Legislature could rationally determine that state-licensed architects and engineers possess characteristics which reasonably distinguish them with respect to the object of the legislation. The design of improvements to real estate is primarily the province of architects and engineers, while the construction of improvements and the realization of designs is primarily the function of contractors. Architects and engineers are required by law to be licensed, while non-residential contractors are not. The Legislature might have concluded that the different education, training, experience, licensing and professional stature of architects and engineers made it more likely that a limitation on their tort liability would not reduce the care with which they performed their tasks than would be the case with contractors.

The Legislature may also have thought it necessary to reduce the potential liability of architects and engineers in order to encourage experimentation with new designs and materials. Innovations are usually accompanied by some unavoidable risk. Design creativity might be stifled if architects and engineers labored under the fear that every untried configuration might have unsuspected flaws that could lead to liability decades later.

The statute is not invalid because contractors, as well as architects and engineers, may supervise construction. While this overlap of function may mean that a contractor's potential liability will endure longer than an architect's or engineer's potential liability for a similar breach, a statutory classification is not constitutionally invalid merely because its application results in hardship or injustice in some cases. The Legislature may have believed that the supervision provided by architects and engineers and that provided by contractors is

²⁷ *O'Brien, supra* at 9.

²⁸ Cedar River's attempts to undermine reliance on *O'Brien* are unpersuasive. First, Cedar River is unlike the hypothetical plaintiff in *O'Brien* that gave the Court pause, *id.* at 15 n 18, because Cedar River's cause of action did not accrue shortly before the expiration of the repose period. Second, nothing of significance can be derived from the amendment of MCL 600.5839(1), 1985 PA 188, subsequent to the *O'Brien* decision. The addition of the one-year discovery window relates to the statute of limitations aspect of the provision, which is not at issue here. Also, the Legislature's decision to extend the repose period in subsection (1) from six years to ten years represents a policy decision. It is not the function of this Court to determine whether a longer repose period would also be appropriate for subsection (2), but only to analyze the statute as is and determine if it is constitutional. *Huron Ridge, LP v Ypsilanti Twp*, 275 Mich App 23, 45; 737 NW2d 187 (2007).

qualitatively different in a manner which would render it less appropriate to limit the duration of the contractor's tort liability. For example, a contractor may have better access to the details of ongoing construction and thus be in a superior position to assure that the improvement is built safely.^[29]

Architects, engineers, and surveyors have distinct skill sets.³⁰ Although architects and engineers may also prepare surveys and reports, the Legislature rationally may have chosen to provide surveyors with broader protection because they are more likely to perform this type of work and, therefore, have greater exposure to liability. This "overlap of function" does not in itself invalidate a statute.³¹ A classification that has a rational basis is not invalid because it results in some inequity or it appears to be undesirable, unfair, or unjust.³² Therefore, we are not persuaded that MCL 600.5839(2) violates equal protection principles.

C. Due Process

Cedar River further argues that MCL 600.5839(2) is unconstitutional as applied to its claims on due process grounds. The essence of Cedar River's due process challenge is that the statute bars its claims before they even existed. But this is the very nature of a statute of repose like MCL 600.5839(2). A statute of repose may bar a claim even before an injury or damage has occurred.³³ The Legislature was within its powers to abrogate causes of action such as Cedar River's and could reasonably have concluded that a six-year period "would allow sufficient time for most meritorious claims to accrue and would permit suit against those guilty of the most serious lapses in their professional endeavors."³⁴ Cedar River "is not deprived of a right to sue . . . because no such right can arise after the statutory period has elapsed."³⁵ Accordingly, application of MCL 600.5839(2) to Cedar River's action does not violate due process.

V. Respondeat Superior Liability

Cedar River argues that even if MCL 600.5839(2) bars its claims against O'Neill, it has no effect on its claim against Benchmark. We disagree

MCL 600.5839(3) provides:

²⁹ *O'Brien, supra* at 17-18.

³⁰ See MCL 399.2001 (The Occupational Code's definitions of these professions and their realm of expertise).

³¹ *O'Brien, supra* at 18.

³² *Crego, supra* at 260.

³³ *Ostroth, supra* at 42 n 7; *O'Brien, supra* at 15.

³⁴ *O'Brien, supra* at 15-16.

³⁵ *Id.* at 15.

As used in this section, “state licensed architect or professional engineer” or “state licensed land surveyor” means any individual so licensed, or any corporation, partnership, or other business entity on behalf of whom the state licensed architect, professional engineer, or land surveyor is performing or directing the performance of the architectural, professional engineering, or land surveying service.

Benchmark is a corporation on whose behalf O’Neill performed the land surveying service (completion of the subdivision plan) or directed the performance of the land surveying service (Morford’s completion of the drawings for inclusion in the subdivision plan). By expressly including business entities in the definition of a “state licensed land surveyor,” the Legislature expressly provided them protection under MCL 600.5839(2) from vicarious liability claims. Therefore, MCL 600.5839(2) also bars Cedar River’s claim against Benchmark Engineering.

VI. Estoppel

Cedar River argues that the trial court erred in failing to specifically address its estoppel argument. The trial court implicitly rejected this argument. We review de novo a trial court’s decision to apply equitable estoppel.³⁶ Generally, estoppel will not be applied to preclude assertion of the expiration of a repose period in the absence of conduct clearly designed to induce a plaintiff to refrain from bringing an action within the period fixed by statute.³⁷ Even if defendants were aware of the square footage error before 2006, as Cedar River claims, Cedar River presented no evidence that defendants did anything to induce it not to bring an action during the repose period. In fact, Cedar River admits that it did not look at the drawings until 2006. Accordingly, Cedar River’s estoppel argument has no merit.

Affirmed.

/s/ William C. Whitbeck

/s/ Alton T. Davis

/s/ Elizabeth L. Gleicher

³⁶ *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309; 583 NW2d 548 (1998).

³⁷ *City of Novi v Woodson*, 251 Mich App 614, 628; 651 NW2d 448 (2002).