

WINTER 2020

# CROSS SECTION



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WINTER 2020

**Cover photo:**  
Photo courtesy of  
Z Contractors, Inc.  
The company worked  
on the Brush Street and I-94  
project located in Detroit that  
was demolished in April 2019.



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Mike Nystrom

## Executive Vice President

By the time you read this article, 2019 will have wrapped up and a new decade will be underway. The last decade brought with it many new challenges and MITA has been your partner throughout this “rebuilding” decade that followed the recession. Those issues included: healthcare reform, challenges related to prevailing wage and Buy America, infrastructure funding, new rules related to silica exposure and prompt pay, and a continuing focus on workzone safety and workforce development. The list goes on and on, and so it will be

as the new decade commences. MITA will continue to advocate on your behalf in all areas related to the heavy construction industry: safety, engineering, legislative, and workforce development.

The most important thing that I can say to you is this: MITA is only a phone call away (517-347-8336) if you ever have an issue or concern; however, our well-trained and dedicated staff are not mind readers. Call us as soon as an issue arises. We are here for you!

Best wishes to you, your staff and families for a safe, prosperous and happy new year!

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The team at Z Contractors Inc., specializes in bridge construction/rehabilitation and much more.

## Z Contractors, Inc.

Z Contractors, Inc., was established in 2010 and is an MDOT pre-qualified, Shelby Township-based contractor that specializes in heavy civil construction. Their focus in the heavy civil market includes both new construction and rehabilitation of Michigan's Bridge infrastructure which ranges in diversity, magnitude and complexity.

Examples of current and past projects include removal and replacement of two structures and approach work above I-94 at Second Avenue and Brush Street in Detroit; two bridges and a tunnel at the American Center for Mobility Highway Speed Loop in Ypsilanti; 2 M1 Rail Project bridges at Woodward over I-75 and Woodward over I-94 in addition to a retaining wall in Detroit; and deep overlay, bridge joint replacement and repair, and brush block rehabilitation on the Michigan

half of the Blue Water Bridge Overlay.

Being a member of MITA has benefited the company in many ways, according to Mike Phelps, Vice President of Z Contractors, Inc.

"Besides the obvious way Mike Nystrom and his team at MITA work to better the industry by lobbying and working the state and local government to increase road funding," Phelps said, "MITA really brings the industry together. We may battle on bid letting day, but MITA unites the contractors and suppliers. MITA also facilitates meetings with MDOT to ensure any changes to specifications are agreeable with MITA members and allows contractors the opportunity to comment before industry standards are changed."

MITA is an asset when it comes to safety as well, Phelps

said. From training to appealing MIOSHA violations, they provide recommendations and solutions to situations that arise for members.

"MITA is also reaching out to help establish training for younger generations from the scholarship program to the future leader program," he added. "They educate students on ways they can become part of this great industry."

As for the joys and challenges, Phelps said it is the vision of Z Contractors, Inc., to grow as a team, improve their expertise and invest in their future while assuring integrity, respect, and quality work in a safe work environment.

"This passion is enabling us to show future generations how our work today affects the landscape of tomorrow," he said. "It is very rewarding to bring our families to a job site and show them the level





ACM Test Track project in Ypsilanti that was completed in 2017.

of work that goes into making it all happen and come to fruition.”

As for the challenges, that varies from day to day.

“This industry always keeps you on your toes,” he said. “Schedules always change, issues always arise and that is what makes the industry what it is. The rush you feel when you finish a project and it is open to traffic makes it all worth it.” 🚧

## Specialites

- Bridge Construction & Rehabilitation
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- Structural Concrete
- Underground utilities
- Earthwork
- Pumping Stations

## Z Contractors, Inc.

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## ABOUT KOTZ SANGSTER WYSOCKI P.C.

Kotz Sangster Wysocki P.C., is a business law firm concentrating on the representation of middle market companies throughout Michigan and beyond. The firm represents a broad cross-section of businesses, and provides a full range of legal services to their clients, both locally and nationally. For clients doing business internationally, one of the firm's most powerful resources is their membership in Lawyers Associated Worldwide (LAW), a global association of over 100 independent law firms located in more than 150 commercial centers throughout the world.

Established in 1978, the firm started with three lawyers and focused its practice primarily on companies engaged in the automotive supply, aerospace, manufacturing, and construction industries. From its beginning, the firm has been located in the Renaissance Center in Detroit and was one of the original tenants.

During the 1980s and 1990s, the firm focused on developing relationships with commercial banks, accounting firms, financial and business consultants, insurance agencies and construction-related entities to achieve an established profile in the business community. In addition, during this period, the firm solidified its expertise as a business law firm and developed specialized practice areas in Construction Law, Financial Services, Mergers and Acquisitions, and Health Care Law.

In the 2000s, Kotz Sangster expanded its platform and established a Bloomfield Hills office, as well as four offices covering Grand Rapids and Southwest Michigan.

## MITA Connection

Founded in 1978, Kotz Sangster Wysocki P.C. is located in downtown Detroit in the Renaissance Center, with additional offices in Bloomfield Hills, Grand Rapids, Niles, St. Joseph and South Haven, Mich. Their clients include many MITA members, and Attorneys Jeff Sangster and Ed Boucher are familiar faces at the MITA Annual Conference, Golf Outings, Summer Conference, Wild Game Dinner, Holiday Parties and the Management Conference.

Their total immersion in MITA has helped them understand their clients' businesses as they provide legal counsel in all areas of construction law, including contract review/

negotiation, development work, risk mitigation, and claims matters, including litigation and arbitration.

## Services

"Our firm manages damages and risks for contractors and provides a full set of other legal services," said **Founding Partner Jeff Sangster**, who for more than 30 years has focused on all aspects of construction law.

In addition to construction law, Sangster provides counsel on high-profile development projects. Most notably at this time he is providing legal counsel for The Mid, which will be the largest development in Detroit north of Mack Avenue

since the 1920s. The \$377 million project was announced this March and is scheduled to be completed by the end of next year. In addition, Sangster is providing counsel on the historic Leland Hotel renovation, Broderick Towers Apartments, the Downtown Development Authority, Brownfield Authority, and the Wayne and Oakland County Drain Commissioners. He also finds time for community service work, with a large commitment to the Salvation Army in southeast Michigan. In fact, The Salvation Army Outdoors annual sporting clay outing, which he organizes, is an event attended by many MITA members, as are events for Pure Oakland Water, a water

## Kotz Sangster Wysocki P.C.

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## Specialites

- Construction law
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- Employment and labor law
- Estate planning
- Family law
- Finance and banking law
- Environmental law
- Healthcare law
- Insurance law
- Mergers and acquisitions
- Real estate law
- Tax law

resources charity for which he serves as a board member. The firm's western Michigan offices do a significant amount of charity work for YMCAs, as well.

**Attorney Ed Boucher**, who has practiced law for 22 years, said that although the firm's primary client base in construction is trade contractors who are MITA members, their team also provides services to heavy civil owners.

"As our expertise has grown over the years, we have gained a complete perspective of trade contractors, project managers, municipal owners and private owners," said Boucher, who joined the firm in 2001 and previously worked in the field of insurance law. "This has allowed us to improve the quality of the projects our clients are working on."

The problems that arise as their clients work on construction projects do not only happen between 9 and 5 Monday through Friday, and both Boucher and Sangster work right along with them 24-7, cell phones in hand. While working around the clock, the confidential nature of the information they receive is never taken lightly.

"We take what they say to the grave," Boucher emphasized. "And it doesn't matter if we are representing a large or a smaller shop, where the money is coming directly out of the company owner's pocket. The level of professional service and confidentiality is the same."

Boucher added that Kotz Sangster Wysocki P.C. understands the pressures that smaller shops are under, and yet they have the depth to also provide service to mega corporations, such as their client Skanska, one of the world's leading project development and construction contractors.

### The Strategy; The Fight

With 30 years under his belt practicing law, what still fascinates Sangster? *The Strategy*. Twenty years ago his practice was ½ contractors and ½ landlord tenant issues. That was not exciting enough for him, he said, and his

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## ASSOCIATE MEMBER PROFILE

Continued from page 11

focus became construction law.

For Boucher, the passion after 22 years is still in The Fight.

“The fight is fun,” said Boucher, who likened this to his love of playing and coaching hockey for his five sons, who are all active in swimming, lacrosse, and water polo. “We get tremendous satisfaction in solving our clients’ problems. We fish with them. We hunt with them. For us, fighting on their behalf is personal. It’s an honor to be their advocate.”

In the field of construction law, the potential is always there for a fight, as Boucher and Sangster work on complex infrastructure and vertical projects. However, Boucher noted they rarely litigate projects when they have been involved in the contract drafting or negotiating process because the unusual risks have been identified or ironed out.

“We also always encourage our clients to be on top of issues and to call us if they have even a hint of a problem so we can solve it before they have a claim,” Boucher emphasized. “That’s why we keep our cell phones on. We have learned to triage situations that arise, and we have a full team that gives us the ability to meet deadlines and provide the highest level of service.”

### Away From Work

When Sangster is taking a break from providing legal services to his clients, he can be found shooting or hunting, often with MITA members. Animal trophies are mounted on the wall of his office from his many big game hunting excursions, along with sport shooting trophies. In addition to hunting, he enjoys boating and lake life with his wife, Sherry, at their home in St. Clair Shores.

Boucher, lives in Ann Arbor and enjoys fishing and shooting—mainly sport clay shooting. He and his wife Laura, a talented wedding floral designer and former flight attendant and model, who sadly passed away this June, treasured many memorable years of love and happiness raising five boys, including two sets of twins: Nicky, 17; Noah, 17; Alex, 21; Lewis, 31; and Casey, 31.

He also finds time for community service, including participating in The Salvation Army’s annual clay shoot, which benefits an outdoor program for youth and their families.

### Challenges

Technology is definitely changing the way they do business, Boucher said. Sangster agreed, adding that simply dealing with digital information during a litigation, for example, can mean taking 250,000 documents and narrowing them down to 12,000-15,000 documents.

“250,000 documents is actually an understatement,” Boucher added. “Sometimes we are dealing with many more than that, considering all the plans, emails, texts, etc., but we have an attorney who focuses on e-discovery and 40 attorneys plus 20 professional staff who are up to the challenge.”

### The Future

“We are not done growing and deepening our practice groups where it makes sense, so we can continue to provide services to our clients,” Boucher said. “Clients may ask us for business help, but then they need family law work, which brings divorce cases—thus an expansion in Family Law services was an important move. Our labor and employment group has been a very helpful resource. And during the economic downturn, we expanded to augment our bankruptcy services. Then, as the economy improved, our corporate



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practice groups were able to assist contractors with their increased need for restructuring, finance, and banking work. We are excited about changes that the future has in store for us. But our clients' closely held family businesses are still a priority as we are not so big that we have outgrown them."

Boucher added: "The firm takes the trust clients have for our services seriously. We are honored by it, and we are as loyal as..."

"Junk yard dogs," Sangster affirmed.



**Jeffrey M. Sangster**

Jeffrey M. Sangster is a founding member of Kotz Sangster. For more than 30 years, his practice has focused on all aspects of construction law, from construction contract drafting and negotiations,

contract review and risk analysis, to claim resolution through litigation, arbitration, facilitation and mediation.

Jeff represents a diverse mixture of clients, including construction managers, general contractors, subcontractors, suppliers, bond companies, governmental and quasi-governmental entities, developers, non-profits and manufacturers. Jeff and his team specialize in a wide variety of commercial, industrial, and civil projects which encompass hospitals, stadiums, casinos, hotels, ethanol plants, churches, historic properties, sewer and infrastructure, bridges, automotive paint lines, correctional facilities and manufacturing plants, as well as most other types of construction, including commercial and residential developments.

Jeff has an intimate understanding of contractors and developers and their business objectives. He has specific knowledge and experience in design, site work,



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Together with the construction team, Jeff has developed risk mitigation programs which involve all aspects of the construction process, from the bid phase through contract negotiations and project administration, as well as project closeout. He has also obtained significant victories for clients through arbitration and litigation in courts throughout the country. His litigation experience includes significant involvement in delay claims, including complex Critical Path Method analysis, defect claims, design claims, construction liens, payment and performance bond claims, complex insurance coverage issues, and complex environmental issues. He sits as an arbitrator on the construction panel for the American Arbitration Association and, therefore, he is afforded the opportunity to view a construction dispute from both sides of the table, which is of significant benefit to his clients.

Continued on page 19



**Rob Coppersmith**

To contact Rob Coppersmith, email him at [roboppersmith@thinkmita.org](mailto:roboppersmith@thinkmita.org) or call the MITA office at 517-347-8336.

MITA staff and the bulk of the heavy construction industry will be at Soaring Eagle Casino and Resort for the 2020 Annual Conference! MITA's largest event of the year! Honestly, the phone calls for this event started coming in early August, which always bodes well for attendance. The theme of the event will hover around workforce development but encompass so much more. So pack your bags.

Wednesday's keynote speaker is the rags to riches story about Jeff Henderson. From the streets to the stove, from cocaine to foie gras is the tag line on his book. Jeff's story will inspire you, awe you and provide ideas for developing your workforce. Another highlight of the day will be our Honorary Member portion of the day. This year we will pay homage to two industry giants, Bruce Lowing of Hardman Construction and Tom Wagenmaker of Anlaan Corporation. Both have a rich history in the industry and have been instrumental leaders regarding the history of MITA.

Thursday's keynote, Wally Adamchik, is a name I'm guessing you won't recognize, but won't forget. He got my attention with his 2019 People in Construction Report. Wally took a good hard look at what's working and not working with regards to employees in the heavy construction industry and the results of his work will be a gut punch to many of you. A quote from the report was enough to make me call: "A deeper look suggest employees might not be looking for a new job at all

## Where Will You Be On January 22–24, 2020?

if they were more engaged in their present one, and if leadership was simply doing a better job of truly caring about employees". The results of his study should get the wheels in your head-turning.

As always we will have a wide array of break out sessions that provide an opportunity to collect continuing education credits. The Michigan Workzone Safety Task Force will also be presenting their survey results and asking for input regarding best practices for safer construction zones.

With some of our traditional industry parties and large vendor area, there should be something for everybody! We at MITA look forward to seeing you at the event. 🏠

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## Power Unit Only Construction Equipment Annual Permit

The Michigan Department of Transportation (MDOT) has recently released a new Power Unit Only Construction Equipment annual permit. This new annual permit has been implemented to fulfill compliance with amendments to Section 725 of the Michigan Vehicle Code, effective May 18, 2018. The law now allows an applicant to obtain an annual (single multiple-trip) permit for the movement of construction equipment to exceed the size, load, or size and load maximums specified in the Code for a power (or pulling) unit, without requiring a separate permit for each individual piece of equipment carried by that unit.

The Power Unit Only Construction Equipment annual permit fee is \$264. Under this permit, any individual piece(s) of equipment (including the trailer)

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Ken Bertolini

To contact Ken Bertolini, email him at [kenbertolini@thinkmita.org](mailto:kenbertolini@thinkmita.org) or call the MITA office at 517-347-8336.

# Federal Funds Available for Skills Improvement

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Continued on page 44

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## COMMENT—Vice President of Industry Relations

Continued from page 15

carried by a power unit are covered by the power unit's permit and do not themselves require a separate permit. These annual permits are limited to the hauling of construction equipment, but a definition for construction equipment is not included in the Code.

Although this change is expected to reduce the number of permits issued by MDOT, and thus reduce the State Trunkline Fund (STF) revenue (by an estimated \$491,000), it is also expected to save a lot of paperwork and time. The department's previous practice had required industry operators to obtain a permit for each trailer and each piece of equipment transported, in addition to the power unit.

Other provisions to the Code that have been implemented for construction equipment include:

- The permit may be stored and presented by the holder of the permit using a mobile device.
- The permit shall not contain any restrictions on daily operating hours and shall only include Memorial Day weekend, the Fourth of July holiday, and Labor Day weekend as restricted holidays. (The permit may contain restrictions on travel when the permit holder is traveling within a county that has a population greater than 150,000.)
- The permit shall not require travel of more than 10 miles per hour below the posted speed.

The Power Unit Only Construction Equipment annual permit can be obtained through MDOT's Michigan Transport Routing and Internet Permitting (MiTRIP) system through the MDOT Permit Gateway ([www.michigan.gov/mdotmpg](http://www.michigan.gov/mdotmpg)). Single trip permits through MDOT are still an option. Please note that the amendments to the Code do not have an impact on local road agency transport permitting or related permit fees assessed by local road agencies. 🚧

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# MITA PAC Donations— Every Little Bit Helps

By Lance Binoniemi, Vice President of Government Affairs

The MITA Political Action Committee (PAC) is one of the strongest business PACs in the state and has been for over a decade. It is a successful PAC because some of our dedicated members donate their own personal money year after year. Unfortunately, only a small percentage of MITA members actually contribute, and there are a variety of reasons why some members just don't. The requirement that the PAC can only accept personal contributions, differing philosophies on political giving, not believing in giving politicians money, and many more reasons are provided when someone says they choose not to contribute. But the staff has heard from members that one reason is that they don't think their donation is large enough to make a difference in the grand scheme of things. And that couldn't be further from the truth.

Various MITA staff members have often said, "If we had every

member, and every one of their top employees just give \$50–\$100 each year to the MITA PAC, we would be the largest PAC in the state." Increased participation in the PAC obviously brings in more dollars to be utilized towards our collective goal, but it also strengthens our association and our industry. Getting more politically active is beneficial to yourself, your business and our industry. And, if you are contributing to a PAC, you are already more politically active and have more incentive to go even beyond just giving.

Your MITA PAC dollars are utilized to help out those candidates who support our industry. Unfortunately, campaigns have become more expensive with every election cycle, which means it is even more essential for the MITA PAC to be stronger than ever. There are plenty of groups who are supporting candidates that don't support our issues and won't raise

the necessary dollars to fund our transportation network if elected. We have to band together and support those candidates who understand that we've underinvested in our infrastructure, that our industry faces difficult regulatory burdens, and that your companies are important to the economic growth of our state.

If you have been a PAC contributor in the past, we sincerely thank you. We have maintained a strong influence in Michigan politics because of our ability to support candidates who support our industry. If you have not contributed in the past, I hope you will take some time to consider it. And, if you have any questions about how the PAC operates or where the money goes, please feel free to contact me at the office or at my email, and we can certainly discuss. We are extremely careful and diligent with your personal donations and having an understanding of that may encourage you to donate. 🙏



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## ASSOCIATE MEMBER PROFILE

Continued from page 13

### Jeffrey M. Sangster

#### Practice Areas

- Administrative Proceedings
- Claim Litigation/Arbitration
- Construction
- Construction Project Development
- Contract Drafting and Negotiation
- Environmental Law for Construction
- Insurance and Bonding
- Lien, Bond, Trust Fund Act Compliance and Enforcement
- Post-Bid
- Risk Analysis and Mitigation Plan
- Strategic Assistance with Project Execution

#### Education

- J.D., Wayne State University Law School, 1979
- B.A., cum laude, Michigan State University, 1975

#### Bar & Court Admissions

- State of Michigan, 1979
- U.S. District Court, Eastern District of Michigan, 1979
- U.S. Court of Appeals, Sixth Circuit, 1993
- U.S. Supreme Court, 2005

#### Honors

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R. Edward Boucher

R. Edward Boucher is a construction lawyer who helps his clients' projects become successful. He works with them in the project planning and negotiation phase to identify and reduce risk and, in many cases, to help them structure their overall approach to the project. He also works with them during the project to help manage difficult events and brewing claims, and he works with them after the project to resolve claims, ideally through negotiation or mediation but

also through arbitration or litigation when necessary.

Clients seek out Ed for his depth of industry knowledge, for his talent in developing effective and practical solutions to problems that arise during projects, and for the excellent results he obtains for them in litigation. His construction industry clients run the gamut from developers and institutional owners to general contractors and construction managers to trade contractors and suppliers.

#### Practice Areas

- Claim Litigation/Arbitration
- Construction
- Construction Project Development
- Contract Drafting and Negotiation
- Insurance and Bonding
- Lien, Bond, Trust Fund Act Compliance and Enforcement
- Post-Bid
- Real Estate Land Use and Zoning
- Risk Analysis and Mitigation Plan
- Strategic Assistance with Project Execution

#### Education

- J.D., Wayne State University Law School, 1997
- B.A., Albion College, 1987

#### Bar & Court Admissions

- State of Michigan, 1997
- U.S. District Court, Eastern District of Michigan
- U.S. District Court, Western District of Michigan
- United States Supreme Court, 2005

#### Honors

Best Lawyers in America, based on peer review, most recently in 2019 and 2018. 🏆



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# MITA Scholarship Fund Update: Wild Game Dinner Wildly Successful Four Years Running



The 4th Annual Wild Game Dinner & Scholarship Fundraiser was a smashing success on September 18 at the Palazzo Grande in Shelby Township. Nearly 600 members attended the event and \$25,000 was generated for the MITA Scholarship Fund, breaking last year's record of \$20,000. A great time was had by all as attendees noshed on authentic wild game fare (camel meatballs, anyone?), entered multiple 50/50 raffles and enjoyed dropping tickets in buckets to win entire tables featuring fun themes. The high dollar Bote Rover was a particularly neat item to spend a \$50 ticket on for numerous individuals.

Fundraisers like this are not possible without generous member support in terms of sponsorship, attendance and participation at the event. We are so glad that members not only enjoyed themselves, but that everyone got behind the purpose of it, which was to support the continued growth and development of the MITA Scholarship Fund for the benefit of future generations in the industry. Thank you to everyone for your contributions!

The MITA Scholarship Fund Committee of the Board of Directors has also been working to update the application process for individuals looking to receive a scholarship in the future. Stay tuned for more information regarding application requirements and deadlines in late 2019/early 2020. 🏠



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## WINTER 2020: MITA PAC UPDATE

Thank you to everyone who has contributed to the MITA PAC this year. Your generosity is greatly appreciated.

If you haven't donated to the MITA PAC yet this year, please consider making a contribution today. 🙏

First Name	Last Name	Company	Donation
Toni	VandenBos	Pete's Contracting, Inc.	\$500.00
Pete	VandenBos	Pete's Contracting, Inc.	\$500.00
David	Marsh	Peninsula Prestress Company	\$300.00
Alan	Sandell	Cadillac Asphalt, LLC	\$200.00
Deb	Edgecomb	Sanches Construction Company	\$500.00
Remi	Coolsaet	R. L. Coolsaet Construction Company	\$500.00
Lincoln	Noel	Payne & Dolan, Inc.	\$250.00
Mike	DeFinis	Angelo lafrate Construction Company	\$250.00
Dan	Eriksson	Hoffman Bros., Inc.	\$7,500.00
Tom	Peake	Action Traffic Maintenance	\$1,500.00
Mike	Peake	Action Traffic Maintenance	\$1,500.00
Dale	Chambers	Jensen Bridge & Supply Company	\$250.00
Andrew	O'Connor	C. A. Hull Co., Inc.	\$150.00
Kurk	Schweitzer	GM & Sons, Inc.	\$250.00
Ricky	Gallegos	GM & Sons, Inc.	\$150.00
Karl	Schweitzer	GM & Sons, Inc.	\$500.00
Paul	Marsh	Peninsula Prestress Company	\$300.00
Aden	Shea	P.K. Contracting, Inc.	\$500.00
John	Kloet	U.P. Concrete Pipe Co., Inc.	\$1,000.00
Craig	Fons	GBM Companies	\$1,000.00
Peter	Scodeller	Scodeller Construction, Inc.	\$1,000.00
Bob	Adcock	Angelo lafrate Construction Company	\$4,000.00
Ron	Lammy	Modern Companies	\$1,000.00
Mark	Campbell	GM & Sons, Inc.	\$200.00
Ken	Nowicki	M&M Excavating Co., Inc.	\$500.00
John	Landrie	M&M Excavating Co., Inc.	\$500.00
Brandie	Meisner	M&M Excavating Co., Inc.	\$1,000.00
Ron	Measel	Ace Cutting Equipment	\$1,000.00
Tom	Larabel	Ferris State University	\$500.00
Jack	Dykstra	Jack Dykstra Excavating, Inc.	\$1,000.00
Derrick	Arens	Anlaan Corporation	\$200.00
Nick	Baker	Anlaan Corporation	\$2,000.00
Dave	TerBeek	AIS Construction Equipment	\$1,690.00
J.W.	Fisher	Fisher Companies	\$2,000.00
Tom	DiPonio	Jay Dee Contractors, Inc.	\$10,000.00
Mike	Malloure	C. A. Hull Co., Inc.	\$5,000.00
Bob	Nobbs	Edw. C. Levy Co.	\$500.00

First Name	Last Name	Company	Donation
Kurt	Shea	P.K. Contracting, Inc.	\$500.00
Lee	Johnston	Johnston Contracting, Inc.	\$1,000.00
Brent	Gerken	Gerken Paving, Inc.	\$1,000.00
Brian	Dodds	D & R Earthmoving, LLC	\$500.00
Dennis	Scully	Mapes Insurance Agency	\$200.00
Keith	Rose	Rieth-Riley Construction Co., Inc.	\$5,000.00
Jim	Urban	Butzel Long	\$100.00
Terry	Pieprzak	T.R. Pieprzak Company	\$500.00
Ryan	O'Donnell	Anlaan Corporation	\$2,000.00
John	Zito	Zito Construction Co.	\$500.00
John	Fortier	Bacco Construction Co.	\$1,000.00
Jamie	Lemke	Give 'Em A Brake Safety	\$2,500.00
Ron	Acciavatti	Pamar Enterprises, Inc.	\$1,000.00
John	MacInnis	JRM Consulting, LLC	\$50.00
Jacque	Katterman	Katterman Trucking, Inc.	\$200.00
Lincoln	Noel	Payne & Dolan, Inc.	\$250.00
Amy	Hall	Ebony Construction Co., Inc.	\$500.00
Dave	Sturuss	Grand Valley Concrete Products	\$750.00
Andrew	Ross	Utility Contracting, Co.	\$200.00
Dan	Cortis	Cortis Brothers	\$250.00
Donn	Ellis	CSI Geoturf, Inc.	\$500.00
Remi	Coolsaet	R. L. Coolsaet Construction Company	\$500.00
Dave	Maas	Diversco Construction Co., Inc.	\$1,500.00
Ed	Boucher	Kotz Sangster Wysocki P.C.	\$500.00
Troy	Broad	Team Elmer's	\$5,000.00
Dale	Chambers	Jensen Bridge & Supply	\$250.00
Paul	Muscat	Cortis Brothers Trucking & Excavating	\$250.00
Marc	Van Til	Give 'Em A Brake Safety	\$1,000.00
Pete	Vandenbos	Pete's Contracting, Inc.	\$500.00
Toni	Vandenbos	Pete's Contracting, Inc.	\$500.00
Andy	Rose	Rehmann Robson	\$500.00
Mike	Buck	The Salus Group	\$500.00
Amy	Trahey	Great Lakes Engineering Group	\$1,000.00
Doug	Kaltz	M.U.E. Incorporated	\$1,000.00
Todd	Schrader	Hardman Construction, Inc.	\$500.00
Scott	Bazinet	Lowe Construction Company	\$4,000.00



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# MITA Joins Battle Over Whether CGL Policies Cover Property Damage Arising Out of Subcontractor's Defective Work

By Eric J. Flessland — Butzel Long

If you haven't noticed, there is a war going on in the construction industry. Contractors' insurers are financing a national war against property damage coverage—coverage that their underwriters have been promising (and providing in their insurance products) since 1973.<sup>vi</sup> The primary focus of this war is whether a subcontractor's defective work that damages a portion of a project is an occurrence and thus covered under the general contractor's Commercial General Liability ("CGL") policy.

Liability insurance provides coverage against accidents. If defective work is accidental, then generally, liability insurance should cover claims for property damage arising from defective work—depending on whose property was damaged. But should it cover damage caused by a subcontractor? This is one of the most debated issues in construction law, and one in which MITA has become involved to ensure its members receive the coverage to which all its members are entitled.

Supreme Courts in the majority of states around the country which have considered the issue have ruled accidental property damage arising out of a subcontractor's work is covered, even if the damage is to the policy holder's work. The courts that find coverage for property damage caused by defective construction reach this conclusion by applying the express language of the CGL policy. The Insurance Services Office ("ISO"), which writes the standard CGL policies, says that is precisely how the liability policy should be interpreted and enforced. Therefore, it follows that the courts refusing to find coverage do so by ignoring the express language of the policy.<sup>ii</sup> Unfortunately, the Michigan Court of Appeals is one court adopting a rule based on "public policy" rather than the policy language. This rule most often destroys coverage most general contractors believe they purchased. So far, the Michigan Supreme Court has not taken a position on the issue.

The Michigan Supreme Court has an opportunity, however, to join the majority of jurisdictions that enforce

the CGL policy as written, and to correct the misguided interpretation espoused by the Michigan Court of Appeals. In *Skanska USA Building Inc. v. M.A.P. Mechanical Contractors, Inc.*, and *Amerisure Insurance Company*, the general contractor received an adverse coverage ruling in the Court of Appeals, and has applied for Leave to Appeal to the Michigan Supreme Court. Skanska seeks to overturn the Court of Appeals' "public policy" interpretation of contract language. To protect its members, MITA has filed a "Friend of the Court" brief, urging the Supreme Court to

Continued on page 27

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# 2020 EVENTS CALENDAR

## January 22-24, 2020

MITA Annual Conference  
Soaring Eagle Casino & Resort

## January 22, 2020 @ 9:00 a.m.

Board Meeting  
Soaring Eagle Casino & Resort

## February 22-29, 2020

Management Conference  
Atlantis, Bahamas

## TBD

European Pheasant/DREW Foundation Hunt  
Crooked Foot Hunt Club

## April 14, 2020 @ 1:00 p.m.

MITA Board Meeting, MITA Office

## June 10, 2020 @ 9:00 a.m.

MITA Western Golf Outing  
Boulder Creek, Grand Rapids

## July 8, 2020 @ 9:00 a.m.

MITA Metro Golf Outing  
Twin Lakes Golf Course, Oakland

## July 23, 2020 @ 9:00 a.m.

MITA Board Meeting, Crystal Mountain

## August 26, 2020 @ 9:00 a.m.

MITA Central Golf Outing  
Eagle Eye Golf Club, East Lansing

## September 15, 2020 @ 8:30 a.m.

MITA Board Meeting, Country Club of Lansing

## September 24, 2020 @ 6:00 p.m.

Wild Game Dinner,  
Palazzo Grande, Shelby Township

## December 11, 2020 @ 9:00 a.m.

Board Meeting, Country Club of Lansing

## December 11, 2020 @ 11:30 a.m.

Central Holiday Party, Country Club of Lansing

## December 15, 2020 @ 11:30 a.m.

Western Holiday Party, Location TBD

## December 17, 2020 @ 11:30 a.m.

Metro Holiday Party, Location TBD

## Bid Letting Dates

January 10, 2020 / February 7, 2020

March 6, 2020 / April 3, 2020

May 1, 2020 / June 5, 2020

July 10, 2020 / August 7, 2020

September 4, 2020 / October 2, 2020

November 6, 2020 / December 4, 2020



Continued from page 24

grant leave to appeal, and to adopt the correct interpretation rule based on the express language of the CGL policy. Other trade associations then filed similar briefs, and the insurance industry association has filed counter briefs. The battle lines have been drawn, and the importance of this issue to the construction industry is obvious. Hopefully the Michigan Supreme Court takes up the challenge and issues a clear ruling based on the CGL language.

Liability insurance policies begin with a broad grant of coverage in the insuring agreement, and then list numerous exclusions that substantially narrow that coverage. Some of those exclusions are then tempered by exceptions which give back the coverage taken away by the exclusion. In this article, we will discuss the structure of liability policies, the current state of the coverage debate, and the fight MITA has joined to bring the Michigan insurance policies in line with the ISO's intent and contractor's expectations.

### The Structure of CGL Insurance

Contractors purchase Commercial General Liability insurance to protect themselves from claims for personal injury and property damage. Coverage for personal injury caused by defective work is rarely an issue. Property damage is another story. The standard ISO CGL policy begins with a broad statement granting coverage:

We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies.

This broad statement of coverage

is then immediately limited by:

This insurance applies to bodily injury and property damage only if:

1)The bodily injury or property damage is caused by an occurrence.

CGL policies define "property damage" as either physical injury to tangible property or loss of use of tangible property that is not physically injured. An "occurrence" is as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While "accident" is not defined in the standard CGL policy, the Michigan Supreme Court has repeatedly stated "accident" means not only "accidental events," but also injuries or damage neither expected nor intended from the standpoint of the insured.<sup>iii</sup> If some event or change occurs without the policy's holder's intent, but rather through carelessness, unawareness, ignorance, or a combination of causes and produces unfortunate property damage, the loss is covered by the CGL's initial grant of coverage.

It is the rare instance that a contractor policy holder intentionally damages a project it is constructing. In the construction context, therefore, accidental property damage arising out of defective work normally is an occurrence under the express language of the CGL policy. That is not the end of the analysis. The CGL then requires an examination of the exclusions from the broad grant of coverage, and exceptions to the exclusions before a coverage determination may be made.

When deficient work damages a portion of a completed project, the battle will most often be over the "Your Work" exclusion:

### This insurance does not apply to: I. Damage to Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The last sentence in this exclusion is commonly known as the Subcontractor Exception to the "Damage to Your Work" exclusion.

To understand and properly apply the "Your Work" exclusion, you must appreciate the evolution of that provision. The ISO standard-form CGL policy has undergone several revisions since its initial drafting in 1940. The 1973 standard-form CGL policy precluded coverage for property damage to an insured's own completed work, regardless of whether the damages were caused by work completed by the contractor or "on [its] behalf" by a subcontractor.<sup>iv</sup> The 1973 version of the "Your Work" exclusion did not contain a subcontractor exception. Instead, subcontractor-caused damage was considered a risk inherent to the construction business and explicitly excluded from coverage in CGL policies.

Over time, general contractors became increasingly reliant on subcontractors' work and became dissatisfied with the lack of CGL policy coverage when the general contractor was not directly responsible for defective work.<sup>v</sup> In response, the 1976 standard-form CGL policy eliminated the phrase "or on behalf of" from the "Your Work" exclusion. The policy thus broadened coverage by no longer

Continued on page 28

Continued from page 27

excluding damages arising from faulty subcontractor work. Contractors could pay a higher premium to add additional coverage for property damage arising from completed work performed by subcontractors. This optional coverage provision was known as the “Broad Form Property Damage Endorsement” and provided that the policy only excluded “property damage to completed work performed by the named insured.”<sup>vi</sup>

### THE LOGICAL RATIONALE BEHIND THE “YOUR WORK” EXCLUSION

This dichotomy of coverage makes sense from a public policy standpoint. A CGL policy is a risk-shifting document. A contractor performing its own work controls the factors that could produce property damage to its completed operations. An insured can prevent damage to its own work simply by performing the work correctly. As a result, the CGL policy does not protect the policyholder from damage to its own product caused by the policyholder’s own negligence. That is the purpose of the “Your Work” exclusion. The Contractor retains the risk that its negligence may cause damage to its work, and the Contractor retains the financial responsibility to repair the damage. Otherwise, the central concept of insurance would be violated if an insured is allowed through intentional or reckless acts to control the risks covered by the policy.<sup>vii</sup> As one court noted, “the policy in question does not cover the accident of faulty workmanship but rather faulty workmanship which causes an accident.”<sup>viii</sup>

However, a contractor does not

control a subcontractor in the same manner. Through indemnification and other provisions, the subcontract documents shift the risk of loss down to the subcontractor, who is best situated to prevent damage to the project from the carelessness or negligence of its own crews. In the same way, the Subcontractor Exception to the “Your Work” exclusion shifts the risk of a covered loss to the subcontractor, and maintains coverage for the general contractor. The subcontractor retains the risk its crews may cause property damage to its work and to other portions of the project (i.e., the work of the general contractor.) The subcontractor’s CGL policy will insure the damage to other portions of the project (third-party property damage), but damage to the subcontractor’s work arising out of the subcontractor’s operations will be excluded by the “Your Work” exclusion in its CGL policy.

In 1986, the ISO attempted to clear up confusion by expressly stating in the standard-form CGL policy that the “Your Work” exclusion does not apply “if the damaged work ... was performed ... by a subcontractor.”<sup>ix</sup> Since then, the ISO standard-form CGL policy has contained materially identical language to the “Your Work” exclusion and Subcontractor Exception language that appears in the Policy.

The insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the

view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.<sup>x</sup>

For these compelling and obvious reasons, the highest court in the states that have addressed this issue have adopted this interpretation, and found coverage under the contractor’s CGL policy when a subcontractor’s defective work damages the contractor’s completed operations.

### THE MICHIGAN COURT OF APPEALS’ TWISTED RULE

The Michigan Court of Appeals has adopted a public policy rationale which expands the application of the “Your Work” exclusion by incorporating it into the definition of “occurrence.” When a policy holder unintentionally damages its own work, there is no coverage through operation of the “Your Work” exclusion. According to the Michigan Court of Appeals public policy rationale, an accident can arise from the policy holder’s negligence or breach of warranty, **but only if** the damage extends beyond the policy holder’s own work product. This judicially created definition of occurrence achieves the same result of the “Your Work” exclusion but in a summary fashion that artificially narrows the broad grant of coverage at the outset.

The CGL’s definition of “occurrence” says nothing about whose property is damaged—the focus of that portion of the policy is upon the policy holder’s intent. If accidental property damage occurs, the coverage analysis inquires (1) whose property was damaged, and (2) who caused the damage. Rather

Continued on page 33



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# 2019 MITA Wild Game Dinner

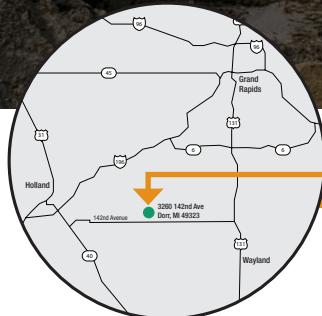
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## LEGAL ISSUES

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than relying upon the CGL policy's express language, the Michigan Court of Appeals in *Skanska* held that an "occurrence" cannot include damages to the insured work from its own faulty workmanship. Michigan courts have focused on the particular property damaged to determine whether an "occurrence" has happened. An unforeseen incident that damages third-party property is an occurrence,

and the coverage analysis proceeds to consider the exclusions. However, if precisely the same unforeseen incident damages the contractor's work product, the Michigan Court of Appeals has concluded that there is no "occurrence" regardless of whether the contractor directly performed the damaged work or whether a subcontractor's negligence caused the damage. This judicially imposed definition eliminates the

"Subcontractor Exception" to the "Your Work" exclusion, which ISO states ensures coverage for the prime contractor whose work product was damaged by a subcontractor's operations.


### MITA FIGHTS FOR ITS MEMBERS

Given the significance of this issue to the entire construction industry and its members, MITA has joined in the fight. It has filed a "Friend of the Court" brief urging the Michigan Supreme Court to accept *Skanska's* application for leave to appeal, and to adopt the interpretation the ISO states was intended by the "Subcontractor Exception" to the "Your Work" exclusions.


A fundamental tenet of Michigan jurisprudence, like that of every state, is that unambiguous contracts are not open to judicial construction and must be enforced as written. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals to contract. The general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. It is this tenet which guided the holdings in other jurisdictions.


MITA's brief asks the Supreme Court to consider the 2013 trendsetter case from the West Virginia Supreme Court involving a lawsuit arising out of defects at a newly constructed residential project.<sup>xi</sup> Only the project itself suffered damage, and the builder's insurer denied coverage because, among other reasons, allegations of defective construction do not constitute an "occurrence." That position followed several prior


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Continued on page 35

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Amy L. Trahey, P.E.

Amy L. Trahey, P.E., the founder and president of Great Lakes Engineering Group, LLC and a member of the MITA Board of Directors, was recently named to the Mackinac Bridge Authority by Governor Gretchen Whitmer.

Trahey was appointed to succeed Barbara J. Brown, for a term that will expire June 30, 2022.

“Kim Novak of the Mackinac Bridge Authority said I am officially the only board member who has been to the very top of the bridge and the very bottom of the bridge,

since we did the underwater inspection back in 2012,” Trahey said. “The Mackinac Bridge is acutally the bridge that inspired me to become a civil engineer, so it is really special and full circle.”

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## LEGAL ISSUES

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rulings of the West Virginia Supreme Court. Ignoring precedent, the Court held the term “occurrence” in a CGL policy includes defective construction. The court reasoned by defining “occurrence” to mean “an accident,” all damages or injuries unintentionally caused by an insured fall within the CGL policy’s insuring agreement. The court focused further on the express language of the policy to support its conclusion, noting the “Your Work” exclusion implied damage to the policy holder’s work must be within the insuring agreement. Otherwise, the exclusion would be meaningless.

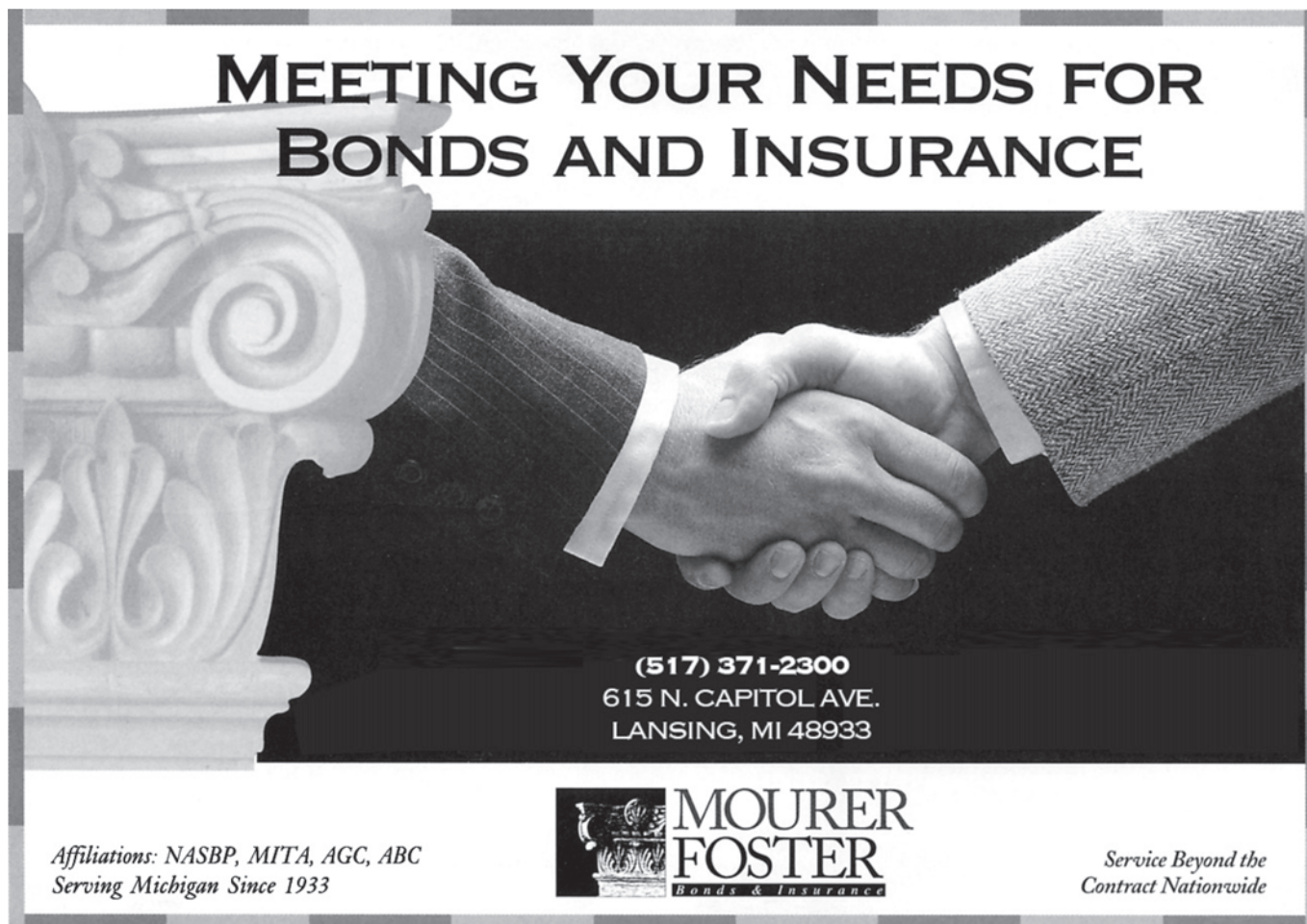
Also in 2013, the North Dakota Supreme Court similarly overturned precedence, and held defective construction may constitute an

“occurrence” provided the policy holder did not expect or intend the faulty work and resulting property damage.<sup>xii</sup> In that case, homeowners claimed their homes were damaged because of substantial shifting caused by improper footings and inadequately compacted soil under the home’s footings and foundations. After examining the standard CGL policy’s drafting history and surveying cases nationwide, the North Dakota Supreme Court concluded defective construction could qualify as an “occurrence” under the builder’s liability policy if the builder did not intend or expect the faulty work and the property damage was not anticipated or intentional. In explaining why it departed from its previous holdings, the North Dakota Supreme

Court explained that previous case law incorrectly distinguished between defective construction that damages only the insured’s work, and defective construction that damages a third-party’s work or property. The Court found there is nothing in the definition of “occurrence” which supports differentiating between the two types of damages.

MITA’s brief urges the Michigan Supreme Court to similarly review the CGL policy’s drafting history, the ISO explanation of how to interpret the changes, and to note the nationwide trend to find defective work not done intentionally to be accidental and, therefore, an occurrence under CGL insurance. Coverage will then depend upon operation of the “Your Work”

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Brett Laughlin, P.E.

# Know Your Owner

Brett Laughlin, P.E., Managing Director,  
Ottawa County Road Commission

## 1. What is your background?

I have had the privilege to work at the Ottawa County Road Commission (OCRC) for the past 22 years, serving as the managing director since 2010. I have over 28 years of experience in civil engineering with an emphasis in road and bridge design, construction engineering, and project management. Before joining the OCRC, I worked for a consultant as a project engineer on some notable projects, including: the St. Louis Arch Underground Theatre, the Franklin Virginia Union Camp Paper Mill De-Inking Facility and the Denver International Airport.

I hold a Bachelor of Science degree in civil engineering from Michigan Technological University and am a registered Professional Engineer within the State of Michigan.

## 2. How do you interact with MITA members?

Improvements toward the county road infrastructure has greatly increased since the implementation of the additional transportation funding from the State of Michigan. We have relied on a great partnership with our local contractors to provide reconstruction, resurfacing and preventative maintenance treatments along our county roads. This relationship has even provided the ability for these local partners to assist with winter maintenance and other routine maintenance activities.

## 3. Given the increased funding that public owners are seeing, what is your outlook for work in Kent County?

Through public involvement and asset management principals, the Ottawa County Road Commission has developed a Strategic Improvement Plan that serves as a 5-year blueprint to effectively plan the investment of resources to improve, maintain and preserve the OCRC transportation infrastructure. This is a systematic process of operating, maintaining, upgrading and expanding transportation

assets effectively through their life cycle. The plan focuses on asset management, engineering and economic analysis, and other tools to comprehensively evaluate the data and view the “big picture” before making decisions as to how specific resources should be utilized.

The latest Strategic Improvement Plan outlines a positive outlook for continued investment toward improvements to the county road infrastructure. This investment would not be possible if were not for the continued support received from township contributions, voter confidence with a countywide road millage and the state’s ongoing dedication to providing transportation revenue. These investments will not be accomplished without our friends from the private industry who can deliver and provide high-quality services. 🏗️

### OCOC Contact info:

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## LEGAL ISSUES

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exclusion and the Subcontractor Exception. This does not necessarily mean, however that CGL insurance will always pay for property damage caused by defective work. The trend to find defective work accidental is not a trend to convert CGL insurance into a surety bond, and make CGL insurance pay for defective work in all instances. It is instead a trend to allow the CGL policy, rather than judicial policy, determine whether property damage caused by defective work is covered. As written, accidental property damage arising out of a contractor's work constitutes an "occurrence," and when the subcontractor is the entity which negligently or carelessly performed the damage-causing work, the contractor's policy provides coverage

for the property damage.

The Supreme Court is expected to announce later this year whether it has granted leave to appeal. We shall advise MITA members of that determination in the next *Cross-Section*. 

<sup>i</sup>O'Connor, What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction, 21 Constr. Law. 15 (2001).

<sup>ii</sup>O'Connor, What Every Court Should Know About Insurance Coverage for Defective Construction, 5 Journal of the ACCL, No. 1 (Winter 2011).

<sup>iii</sup>South Macomb Disposal Auth v Am Ins Co, 225 Mich. App. 635 (1997).

<sup>iv</sup>CGL Coverage Guide, App. A: 1973 CGL Form (excluding coverage for "property damage to work performed by or on behalf of the named insured" (emphasis added); see Christopher C. French, Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies, 19 U. Pa. J. Bus. L. 101, 107 (2016) ("French").

<sup>v</sup>See Steven Plitt et al., 9A Couch on Ins. §

129:19 (3rd ed. 2017).

<sup>vi</sup>CGL Coverage Guide, App. A: Broad Form Endorsement, at 295; see also Plitt at § 129:19.

<sup>vii</sup>7A Appleman, Insurance Law and Practice, § 4492.01 at 21 (1979)

<sup>viii</sup>Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 249, 405 A. 2d 788, 796 (1979).

<sup>ix</sup>See CGL Coverage Guide, App. B: 1986 Occurrence Form, at 299; see also Bruner at § 11:259.

<sup>x</sup>Christopher C. French, Construction Defects: Are They "Occurrences"? 47 Gonz. L. Rev. 1, 8-9 (2011) (citing Jeffery W. Stempel, Stempel on Insurance Contracts § 14.13d at 14-224.8 (3d ed. supp.2007))

<sup>xi</sup>Cherrington v. Erie Ins Property & Casualty Co., 745 S.E. 2d 508 (W. Va. 2013)

<sup>xii</sup>K&L Homes, Inc. v. American Family Mutual Ins Co, 829 N. W. 2d 724 (N.D. 2013)

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Governor Gretchen Whitmer gave an update on funding solutions to the MITA Board of Directors at their September 2019 board meeting, held at the MITA office in Okemos. MITA's Executive Vice President Mike Nystrom is pictured to the left of the governor.

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## Letters to MITA

### Dear Nancy:

I really appreciate the article! Looked great and got a ton of positive feedback already!

### James Maioho

McCann Industries

### Dear Ken:

I am so proud of the decision you made to be a part of the Black Caucus Foundation of Michigan. Congratulations on becoming a board member. You are such an asset to the Foundation. I look forward to your contributions.

### Winetta Chyil

Black Caucus Foundation of Michigan

## COMMENT—Director of Workforce Development

Continued from page 16

the Department of Labor. The way the code reads, employers have available funds, not to exceed \$10,000 per fiscal year, for the administration of this subsection.

According to MDOT, there are very few employers that are taking advantage of this provision. One of the difficulties, according to MDOT, is that employers have to prove that their employee(s) are on state subsidies or other state assistance. This is often difficult information to garner from an employee. Also, as most things with the general government, the forms that need to be filled out are not simple. With this said, there is federal funding available to offset and help with the training of employees. These funds can be used to ensure that we are providing training to employees and help ensure that our workforce is better prepared to handle the difficulties associated with our industry.

For more information regarding this program, contact me at [kenbertolini@thinkmita.org](mailto:kenbertolini@thinkmita.org) or call the MITA office at 517-347-8336.

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Kirk Steudle

## Kirk Steudle Wins George S. Bartlett Award

Kirk Steudle, former MDOT director and now senior vice president of Intelligent Transportation Systems at Econolite, was recently honored with ARTBA's George S. Bartlett Award.

The Bartlett Award has been conferred annually since 1931 to an individual who has made an outstanding contribution to advancing highway construction, preservation, and modernization practices. The recipient is selected jointly by

ARTBA, the American Association of State Highway & Transportation Officials (AASHTO), and the Transportation Research Board (TRB).

Steudle spent 31 years at MDOT where from 2006 to 2018 he served as its director and oversaw a \$5 billion budget and 2,700 employees. His distinguished career also includes serving as AASHTO's 2011–2012 president and TRB's 2014 chairman.



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