

**STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF HEARINGS**

In the matter of

Docket No. 2000-712

Bureau of Commercial Services,
Petitioner

Agency No. 21-99-0840-00

v

Agency: Bureau of Commercial
Services

Sherr Development Corporation
Roger Sherr, Q.O.,
Respondent

Case Type: Sanction

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**Issued and entered
this 18th day of September 2001
by Stephen B. Goldstein
Administrative Law Judge**

HEARING REPORT

PROCEDURAL HISTORY:

Hearings were held in this case on May 25, 2000 and March 19, 2001.

Stephen B. Goldstein presided as Administrative Law Judge.

Kimbal Smith, III, Attorney at Law, represented the Bureau of Commercial Services (Petitioner) at all hearings.

John Ruemenapp, Attorney at Law, represented Sherr Development Corporation (Respondent) at all hearings.

This matter commenced with the filing by the Petitioner of a Formal Complaint dated February 8, 2000 (Complaint) alleging violations by Respondent of Michigan's Occupational Code, 1980 PA 299, as amended (Code).

An original Notice of Hearing dated March 16, 2000 scheduled this matter for a contested case hearing to commence on May 25, 2000 at 9:00 A.M. The May 25, 2000 hearing commenced as scheduled, however, proofs were not completed on that day. Accordingly, an Order for Continuance was issued on June 13, 2000, continuing the hearing to August 15, 2000.

On August 10, 2000, it became necessary to adjourn the August 15, 2000 hearing due to a conflict in this Judge's schedule. Thereafter, an Order for Adjournment was issued on August 15, 2000, rescheduling the hearing to commence at 9:30 A.M. on October 13, 2000.

On September 29, 2000, Petitioner requested an adjournment of the October 13, 2000 hearing due to the unavailability of a material witness. On October 6, 2000, Respondent, by and through counsel, responded by telephone. Thereafter, an Order Granting Adjournment was issued on November 2, 2000, rescheduling the hearing to continue at 9:30 A.M. on December 20, 2000.

On December 14, 2000, it became necessary to adjourn the December 20, 2000 hearing due to a conflict in this Judge's schedule. Thereafter, an Order for Adjournment was issued on January 16, 2001 rescheduling the hearing to continue at 9:30 A.M. on February 8, 2001.

On January 23, 2001, Respondent requested an adjournment of the February 8, 2001 hearing due to the unavailability of a material witness. On January 31, 2001, Petitioner responded to this request by telephone. Thereafter, an Order Granting Adjournment was issued on February 5, 2001, rescheduling the hearing to continue at 9:30 A.M. on March 19, 2001.

The March 19, 2001 hearing commenced as scheduled. All proofs were completed on that day, however, it was agreed that the parties would submit written closing arguments. Therefore, the record was left open until June 19, 2001.

On May 17, 2001, Respondent requested that the record be kept open past the June 19, 2001 hearing date for an additional 30 days. On May 18, 2001, an Order Granting Extension was issued, extending the record closing date to June 30, 2001.

Respondent's written closing brief was filed on July 2, 2001. The record reflects that Petitioner filed no written closing brief.

All transcripts were received in the hearing file on July 2, 2001.

ISSUES AND APPLICABLE LAW:

The general issue in this matter is whether Respondent violated the Code.

The specific issues are whether Respondent violated MCL 339.2411(2)(m); MSA 18.425(2411)(2)(m); and 1979 AC R 338.1551(5), and MCL 339.604(c); MSA 18.425(604)(c). Those Sections of the Code and Rule provides as follows:

“Sec. 2411. (1) * * *”

“(2) A licensee or applicant who commits 1 or more of the following shall be subject to the penalties set forth in article 6:

(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official.”

Rule 51. (1) “ * * *”

“ * * *”

“(5) Standards of construction shall be in accordance with the local building code, or in the absence of a code in accordance with the building code of the nearest political subdivision having a building code.”

“Sec. 604. A person who violates 1 or more of the provisions of an article

which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602.”

“ * * * ”

“(c) Violates a rule of conduct of an occupation.”

SUMMARY OF EXHIBITS:

Petitioner Exhibit 1 - Sherwood Hills Subdivision Building and Purchase Agreement dated February 23, 1997, between Respondent and Tony and Luane Bastianelli. (COMPLAINANTS)

Petitioner Exhibit 2 - NEITHER OFFERED NOR ADMITTED.

Petitioner Exhibit 3 - Statement of Complaint filed by Complainants against Respondent.

Petitioner Exhibit 4 - February 12, 1998 letter from Respondent to Complainants.

Petitioner Exhibit 5 - phone notes compiled by Complainants to document the conversations they had with Respondent and/or Respondent’s representatives.

Respondent Exhibit A - Sherwood Hills Subdivision Limited Warranty Agreement dated August 29, 1997.

Respondent Exhibit B - February 27, 1998 letter from Michael J. Sharkey, Attorney at Law, to Respondent.

Respondent Exhibit C - March 3, 1998 letter from Respondent to Michael J. Sharkey, Attorney at Law.

Respondent Exhibit D - Sherr Development Corporation warranty work description worksheet.

Respondent Exhibit E - Walk-Through List dated August 29, 1997.

Respondent Exhibit F - Charter Township of Grand Blanc blanket letter to “Contractors” highlighting changes in that townships building codes to comply with changes in Michigan’s General Building Code.

Respondent Exhibit G - Grand Blanc Township record of framing approval for 8483 Sherwood Drive, Grand Blanc, Michigan. (Complainants’ home).

Respondent Exhibit H - Grand Blanc Residential Structural Framing Inspection dated June 12, 1997, for Complainants’ home.

Respondent Exhibit I - Temporary Certificate of Occupancy dated September 2,

1997.

Respondent Exhibit J - Grand Blanc Final Occupancy Inspection report.

Respondent Exhibit K - Motion transcript dated September 13, 1999, in the matter of *Anthony and Luane Bastianelli v Sherr Development Corporation*, Genesee County Circuit Court Case No. 98-62588-CK.

Respondent Exhibit L - Nelson Bradford Roofing Proposal Agreement & Work Order dated January 29, 1998, in the amount of \$3,295.00.

Respondent Exhibit M and N - NEITHER OFFERED NOR ADMITTED.

Respondent Exhibit O - January 14, 1998 letter from Kirk F. Richardson, Building Official, Charter Township of Grand Blanc, to Respondent.

Respondent Exhibit P - September 16, 1998 letter from John A. Ruemenapp, Attorney for Respondent, to various individuals involved in the matter of *Anthony and Luane Bastianelli v Sherr Development Corporation*, Genesee County Circuit Court Case No. 98-62588-CK.

Respondent Exhibit Q - September 24, 1998 letter from John A. Ruemenapp, Attorney for Respondent, to various individuals involved in the matter of *Anthony and Luane Bastianelli v Sherr Development Corporation*, Genesee County Circuit Court Case No. 98-62588-CK.

Respondent Exhibit R - October 14, 1998 letter from John A. Ruemenapp, Attorney for Respondent, to Michael J. Sharkey, Attorney for Complainants.

Respondent Exhibit S - November 9, 1998 letter from John A. Ruemenapp, Attorney for Respondent, to Michael J. Sharkey, Attorney for Complainants.

Respondent Exhibit T - December 17, 1998 letter from Dennis A. Rhodes to Michael W. Sharkey.

Respondent Exhibit U - January 7, 1999 letter from Eric T. McCormick to Michael J. Sharkey and John A. Ruemenapp, Attorneys at Law.

Respondent Exhibit V - April 23, 1999 "*Notice to Respondent*".

Respondent Exhibit W - May 3, 1999 letter from Respondent to Michael VanDertuuk, Office of Commercial Services, Department of Consumer and Industry Services.

Respondent Exhibit X - May 20, 1999 "*Repair/Correction Notice to Respondent*".

Respondent Exhibit Y - June 16, 1999 letter from Respondent to Michael VanDertuuk, Office of Commercial Services, Department of Consumer and Industry Services.

Respondent Exhibit Z - August 18, 1999 letter from Respondent to Anthony Bastianelli.

Respondent Exhibit AA - September 15, 1999 letter from Respondent to Anthony Bastianelli.

Respondent Exhibit BB - September 20, 1999 letter from Luane Bastianelli to Roger Sherr.

Respondent Exhibit CC - September 23, 1999 letter from John A. Ruemenapp, Attorney at Law, to Michael J. Sharkey, Attorney at Law.

Respondent Exhibit DD - September 23, 1999 letter from John A. Ruemenapp, Attorney at Law, to Michael J. Sharkey, Attorney at Law.

Respondent Exhibit EE - October 19, 1999 "*Notice to Respondent*", with attachments.

Respondent Exhibit FF - November 1, 1999 letter from Respondent to Paul Costello, Office of Commercial Services, Department of Consumer and Industry Services.

Respondent Exhibit GG - photographs of the entrance to the Sherwood Hills Subdivision, and of Complainant's home.

FINDINGS OF FACT:

It is undisputed that, on or about February 26, 1997, Respondent entered into a purchase agreement to construct and then sell a residential structure to Tony and Luane Bastianelli.

Luane Bastianelli testified at the May 25, 2000 hearing that she and her husband, Tony, entered into a contract with Respondent in early 1997 for the construction of their home located in Grand Blanc, Michigan. She further indicated they received a certificate of occupancy and closed the deal with Respondent in August, 1997. She indicated they moved

into the home on September 5, 1997.

Ms. Bastianelli testified that, before they moved into the home, they noticed that the roof was leaking, a problem she says they reported to Respondent's construction crew in July, 1997. Ms. Bastianelli testified that she and her husband were assured by Respondent's crew that the roof problem would be taken care of. She further testified that, on the day of closing, they went over to the house at which time it appeared the roof problem had been address, because it no longer looked warped and/or wavy in appearance.

Ms. Bastianelli testified that, on January 7, 1998, she awoke to water dripping on her face as she slept in the master bedroom. She indicated this is the location where she noticed the leaking back in July, before they closed on the home. She testified that, upon a closer inspection, she noticed that the entire ceiling of the master bedroom was bubbled, and the drywall was heaving and soaked with water.

Ms. Bastianelli testified that she and her husband panicked and immediately called Respondent's office at which time they were told that someone would come right out to the home and take a look at the problem. She further testified that, after Respondent's staff came out, they were assured the problem would be remedied that day, however, that night, the leaking continued. Ms. Bastianelli also indicated she noticed leaking around the upstairs front bedroom, the front of house window, the dining room, the downstairs living room and dining room window. She indicated it was raining heavily at the time she discovered these problems.

Ms. Bastianelli testified that, because they had been told by Respondent the problems were fixed, but then the roof kept leaking, she and her husband decided to get second opinions on what exactly were the problems. She stated they also considered filing a formal complaint against Respondent at this point.

Ms. Bastianelli testified she and her husband also noticed the stair risers were improperly installed and that the carpeting installed over them was loose. At some point after they noticed this problem, she indicated a building inspector came to their home and informed them that they were never issued an occupancy permit. Ms. Bastianelli indicated that the fire alarms also were not working.

Ms. Bastianelli testified that the roof on their home was eventually repaired by someone other than Respondent, because attempts to have it done by Respondent were unsuccessful. She indicated they gave Respondent at least four or five opportunities to repair the roof, and, after the fourth attempt, no further attempts were made. Ms. Bastianelli indicated that, in early February, 1998, they hired someone else to repair the roof and have never had another problem with it since then. She indicated that, after they had given Respondent four different opportunities to repair the roof, and after four different attempts had been unsuccessful, they had lost faith in Respondent's ability to remedy the problem. Ms. Bastianelli further indicated that the leaking problems surround the windows have never been repaired.

Ms. Bastianelli testified that she and her husband considered filing a complaint with Petitioner at the time this was all occurring, however, because Respondent was attempting

to settle the matter, they held off doing so. She said that it wasn't until February, 1999 that they finally filed the statement of complaint with the State.

On cross examination, Ms. Bastianelli acknowledged they were excited about moving into their new home, but did not move into the home with actual knowledge that no occupancy permit had been issued. She indicated that, when she was informed by her mortgage company had disbursed to Respondent the last draw on the construction loan, she assumed the permit had been issued.

On further cross examination, Ms. Bastianelli further indicated neither she nor her husband ever prevented Respondent from accessing their home to address the problems. She acknowledged becoming distrustful that Respondent could ever fix the problems correctly because they had been given numerous opportunities to do so and had failed. She elaborated on this issue as follows:

“We---- at one point, Mr. Benson came to the house. He approached my husband, and he said — he came with absolutely no tools, and he said, I’ve come to fix item four on your list, which is the stair riser. And we had — and the building inspector told us that if we had already contracted someone to fix that, that we did not have to allow them to come in and fix that particular item, and we refused an entry on that item.

Q Okay. So Mr. -----

A And on that item only.

Q -----Benson came in to fix the stair item that you’re complaining about this morning?

A No, he arrived to inquire about fixing it, but we had already contracted someone to do so.

Q And you said to him that you would not permit him to make that repair; right?

A We told him that we had already contracted someone, and we were instructed by Grand Blanc Township that we were in our rights to do that.

Q Okay. But the effect of it is, you prevented him from attempting to make a repair of that item; correct?

A On that one item.”

(May 25, 2000 TR at p. 28)

On further cross examination, Ms. Bastianelli acknowledged that, once she hired an attorney to represent her interests, she did not want Respondent entering her home to make repairs. She also acknowledged that, during the civil lawsuit, she and her husband objected to Respondent's request for an order allowing him access. She insisted, however, that it was not necessarily Respondent who she didn't want on the property, but Greg Benson, one of Respondent's crew, who she didn't want on the property, because Mr. Benson had been to her property in the past and had not done a good job.

Kirk F. Richardson testified at the March 19, 2001 hearing that he is presently employed by Grand Blanc Charter Township as a building inspector. Prior to his present position, he was a Grand Blanc Charter Township Public Works Inspector. Mr. Richardson testified he conducted an inspection on the home of Tony and Luane Bastianelli, and thereafter issued a report dated January 9, 1998. (*Petitioner Exhibit 6*)

With regard to what he observed on the roof of complainants' home, Mr. Richardson testified as follows:

“A From the east slope, and I believe there was some slight sagging between the trusses of the plywood, to where it was evident, when you were standing in the front yard, you could see the sags between the trusses, which were probably 24 inches on center.

Q And, as a result, result of what you observed that day, and looking at your report, you had put an X in the column listed workmanship. Is that correct?

A That is correct.

Q And sir, what led to you, as far as what you observed, is what you’ve testified to you observed, as to the roof on the east side. What made you come to the conclusion that this was a workmanship problem?

A There really is no Code section for the failure of the plywood itself. It tells you what type of plywood to put on the roof, and what the spans can be, but it really, the Code really doesn’t address a sagging problem like that. So, it was listed under workmanship. There are, there’s several possible, several possible causes to the problem.

Q And, would that, when you, when you sight something as a workmanship item, what does that mean to you, when you indicate that there is a workmanship deficiency, so to speak?

A Usually, when we cite workmanship, #1, it was the opinion of the person doing the report, or the opinion of myself, that there is a problem with the structure. It’s really not covered by the Code, but the esthetics of it, or the condition of the roof at that time, warrants a workmanship complaint. As an example, for this roof, in my mind there is a couple of different causes. The plywood could be improperly nailed. The plywood could have been exposed to the weather too long, prior to having the roofing put on. Or, it could have been bad plywood from the manufacturer, which has happened on several occasions.

Q Would what you observed, as far as the condition of the east

side of the garage roof that day, meet the, you know, standard of practice of good workmanship in the, in your mind, in the Grand Blanc area?

A That particular area of the roof did not.”

(March 19, 2001 TR at pp. 14-15)

With regard to item #2 of his report, Mr. Richardson testified he performed a manual push test on one of the fire alarms in the house, and realized that all of the fire alarms were not sounding. He stated that, when one of the fire alarm buttons are pushed, all of the alarms throughout the structure should be sounding. Mr. Richardson indicated that, because this did not occur, he cited Respondent for a violation of Section 920.1 of the Building Code.

With regard to item #3 of his report, Mr. Richardson testified that he could not really tell from the outside if the window was properly installed. He indicated, however, that, from the inside of the home, he observed evidence that water was penetrating inside and around the window areas. He therefore concluded that the flashing around the window areas was improperly installed, and accordingly cited a violation of 1405.3.10 of the Code.

With regard to item #4 of his report, Mr. Richardson testified that the bottom riser on the stairwell was too tall, because it was supposed to be 7 3/4 inches maximum height from the bottom riser to the floor. He indicated he measured a distance of 8 inches on the stairwell in this home.

With regard to item #5 of the report, Mr. Richardson indicated he observed a damaged drywall area in the master bedroom above the bed, and he could see discoloration of the drywall in that area. He therefore concluded the roof was leaking for one reason or another.

On cross examination, Mr. Richardson acknowledged that, with regard to item #4 of his report, the stairwell riser issue, the Building Code has changed to reflect that the maximum height is no longer 7 3/4 inches, but rather, 8 3/4 inches. He therefore acknowledged that the stairwell riser in the Bastianelli home now meets code requirements.

On further cross examination, Mr. Richardson acknowledged that both the framing inspection and final occupancy inspection revealed no code violations with either the rough roof framing or the stairs or the fire alarms. (*Respondent Exhibits H and J*) Thus, at the time Complainants moved into their home, the stair riser height was not in violation of the Code.

Mr. Richardson, who was the inspector involved in inspecting numerous homes in the same subdivision where Complainants' home is located, acknowledged that there were several incidents involving what he termed "bad plywood" being used in these homes. He elaborated as follows:

"A Every once in awhile, not only in that subdivision, but in several construction areas, when a bad order, or a bad batch of plywood hits the area, some plywood tends to delaminate, after it has been subject to heat, or it wasn't properly fused, or glued at the factory.

Q Okay, did Sherr address any of those problems, as far as you know, on the homes other than the Bastianelli home?

A I believe Sherr addressed every one that was brought to our attention."

(March 19, 2001 TR at pp. 29-30)

Mr. Richardson testified that Respondent has been reasonable to deal with during the pendency of these proceedings.

David Paul Stevens testified on behalf of Respondent at the March 19, 2001 hearing that he is a roofer for Tri County Roofing, the company which installed the roof on Complainants' home. Mr. Stevens testified he has responsibility for not only estimating costs for installing roofs on homes, but, in addition, has supervisory responsibilities over crews he sends to work sites. Mr. Stevens indicated that, during installation of the roof on Complainants' home, he noticed no problems or difficulties. He claims that the subject matter roof was installed according to Code.

Mr. Stevens testified that, at or around the time Complainants moved into their home, his company received a call that there was a leak over the master bedroom. He claims that, at that time, he sent a crew out to the site, tore off a section of the roof and resheathed it. Mr. Stevens testified that, in around October of that same year, his company received another call that there was a leak in Complainants' home. He indicated that, within a couple of hours of receiving the call, he personally visited the home and investigated the problem. Mr. Stevens indicated he reset a vent, thinking that the vent may potentially be leaking, and that, furthermore, he conducted a thorough inspection of the roofing system of the home.

Mr. Stevens testified he thought he had the roof problems solved, however, he received a call a few days later from Respondent claiming the roof was still leaking. He indicated that, in response to this call, he went back to Complainants' home within an hour and, upon inspection, found that a pipe boot was cracked. Mr. Stevens testified he caulked the crack, left the premises, and thereafter never heard anything else about this roof.

Mr. Stevens testified the next he knew about Complainants' roof was when he received a call from Respondent about 3 months after he attempted to make repairs. Mr. Stevens indicated Respondent told him there was someone else, not associated with Respondent, at Complainants' home tearing off the roof.

Roger Marc Sherr (Respondent) testified at the March 19, 2001 hearing that he is a graduate of the University of Pennsylvania Business School, and also has a law degree from the University of Michigan Law School. Mr. Sherr indicated that, after graduation from law school, he initially went to work as an investment banker, but eventually came back to Michigan and joined the family real estate/land development company (Sherr Development Company).

Mr. Sherr testified that the Complainants closed on their home on August 29, 1997. He indicated the home is located in a subdivision known as Sherwood Hills. He acknowledged that, out of the 102 homes his company has constructed in this subdivision, some homes will not be perfectly constructed at the time of closing due to imperfect materials and trades. He indicated this is what the new homeowner warranty is designed for, and elaborated as follows:

“A I would say that, in the building process, the materials you use aren't perfect. Lumber is cut from the forest, experiencing all kinds of weather. The Trades you are using, are not perfect. The supervision that the home receives is not perfect. The inspections from the city, and in Sherwood Hills case, the State is not perfect. So, it's hard to argue that the home, at the date of closing, is perfect. The home you live in John, is not perfect either, I can tell you that without even inspecting it.

Q And how do you deal with imperfections?

A That's, what warranty is designed to do. Items are addressed in a sequential manner, methodically, systematically, over the course of a year, we tend to think that's enough time for the house to settle, to absolve, resolve, most of the issues in the house. We've gone back 2 and 3 years after, we meant, in some cases.

(March 19, 2001 TR at pp. 67-68)

Mr. Sherr could not recall specifics of the problems his company experienced with the Complainants. He acknowledges the relationship between his company and the Complainants went downhill after closing on the home. He was aware of the leaking roof problem, however, he could not state with any degree of certainty how it was handled.

With regard to the roof problems, Mr. Sherr testified that, as far he knows, his residential construction manager, Stewart Rosenberg, addressed this problem, and that Tri County Roofing also became involved.

Mr. Sherr testified that, when he received the first letter from Complainants' attorney, he was puzzled, because he was under the impression that his company was addressing Complainants' concerns. He further indicated that, in response to the attorney's letter, his company wrote the attorney, sympathizing with Complainants' problems and requesting that the company be allowed to continue trying to solve them. He elaborated on his company's efforts to address Complainants' concerns as follows:

“Q Fine, so to back track for just a minute, you received, you received Mr. Sharkey’s letter at the end of February, and you responded with your letter saying if you have warranty concerns, please let me know. And, what happened after you sent that letter.

A We assumed it would be a cordial correspondence with Mr. Sharkey. We’d schedule trades, we’d get things in, and correct these issues, and the issues that existed. That’s not what happened, we got sued.

Q Okay. How long after you sent the March 3rd letter, offering to address whatever items, was the lawsuit filed?

A I think it was a week, if that, March 10th.

Q What did you do after you got the lawsuit?

A We jumped, we jumped to try and get these issues addressed. We tried to get a meeting with all the trades, get them all together, itemize the list, itemize the, the, the issues, get them scheduled, and get the subs to address each issue.”

(March 19, 2001 TR at p. 81)

Mr. Sherr testified that, after the civil lawsuit was filed, his company attempted to work with the Complainants, by and through their attorney, Michael Sharkey. He indicated that their attempts to work things out were frustrated by the fact that they had no access to the Complainants’ home, and that Mr. Sharkey would not return phone calls or respond to correspondence. Respondent introduced a series of exhibits to demonstrate the frustrations that not only they experienced with both Complainants and Mr. Sharkey, their attorney, but that other subcontractors named in the civil lawsuit experienced as well. (*Respondent Exhibits P through U*)

Mr. Sherr testified that the Circuit Court in the civil lawsuit initially dismissed Complainants' lawsuit and awarded Respondent \$50,000.00 on their counterclaim against the Complainants, however, the Court later reversed itself and re-instituted the proceedings. This all occurred sometime between January and April, 1999. Thus, according to Mr. Sherr, the civil lawsuit and their attempts to work with the Complainants had dragged on for over 1 year by that point.

Mr. Sherr testified that, once the lawsuit had been reinstated, they ultimately had to obtain a court order allowing them access to the house to make repairs. Mr. Sherr indicated that, after they obtained the court order, they sent to the Complainants an August 18, 1999 letter informing them that they would be scheduling subcontractors to make repairs. *(Respondent Exhibit Z)* He indicated the Complainants never responded to this letter.

Mr. Sherr testified that, because the Complainants never responded to his August 18, 1999 letter, he sent them another one, dated September 15, 1999. *(Respondent Exhibit AA)* He added that, prior to sending the September 15, 1999 letter, he learned from subcontractors who were being sent to the Complainants' home that they were knocking on the door and receiving no responses.

Mr. Sherr stated that he received from the Complainants a response to his September 15, 1999 letter. *(Respondent Exhibit BB)* In response to Complainants' letter to Respondent, Respondent responded with a letter to Complainants' attorney, dated September 23, 1999. *(Respondent Exhibit CC)* Mr. Sherr elaborated on these letters as follows:

“Q The Judge can read it later, but can you tell me, what point do you think Mrs. Bastianelli is trying to make with Exhibit [BB] there?

A I don’t know, it was, this again, was as puzzling as Sharkey’s letter was to us earlier in February of ‘98. Here we are, trying to gain access to a house, to make repairs, and we get a letter from the homeowner, the person whose interest is high, greatest in seeing that repairs get made, saying don’t contact me, contact my attorney. Well, again, we were frustrated.

Q Did she ----

A Perplexed.

Q Did she address your prior letters where you had requested the opportunity to access the home?

A She said she did receive our prior letter.

Q All right, and did she welcome you into the home to-----

A No ----

Q Make the repairs?

A No, no, just the opposite. She asked us not to come in.

Q Do you know what the hold up was between the meeting with the Judge, where he said we could go in, and all these letters going back and forth?

A We were drafting a formal order. Judge Hayman requested that his informal order get formalized by the Attorneys’ formalizing how that order should be. I think we had, again, a lot of difficulty corresponding with Mr. Sharkey to draft that formal order.”

(March 19, 2001 TR at pp. 100-101)

Mr. Sherr testified that, after the September, 1999 letter from the Complainants, the next communication he received regarding this project was from the State of Michigan, more specifically, the Notice to Respondent, dated October 19, 1999. (*Respondent Exhibit EE*)

With regard to actions he took when receiving the State's notice, Mr. Sherr testified as follows:

“A Yea, each time we responded to the Department’s letter to us within the required time constraints that they gave us. Telling them, we had this civil litigation pending, we’re having difficulty dealing with these people. We can’t get access to their house. We will keep you informed. We followed our correspondence with phone calls. I have spoken with Paula Costello (phonetic), I’ve spoken with Michael Vandertook (phonetic), I’ve spoken with all of these individuals directly, in addition to corresponding them, with them, to them in writing, to ensure that we could deliver the message that, we can’t get access into the house. We are having difficulty, bear with us. The civil claim has placed restraints, constraints, on what we can do.”

(March 19, 2001 TR at p. 106)

Mr. Sherr testified that his staff attempted to address warranty items between the time of closing in August, 1997, and the first part of 1998. He claims, however, that, because he and his staff were continuously denied access to the Complainants' home, they were unable to address the problems in any reasonable fashion.

Gregory J. Benson testified on behalf of Respondent that he had been a licensed builder for the past 22 years, and that he is presently employed as a construction manager for Diversified Financial and Realty Services. Mr. Benson indicated that he was employed by Respondent prior to accepting his present position.

In his position with Respondent, Mr. Benson was the Construction Superintendent on the Sherwood Hills Subdivision project. With regard to item 3 of the building inspection report, Mr. Benson testified that, because the entire front of Complainants' home is brick, there is no truly effective way to flash the windows. He indicated that the flashing is provided primarily by the fin which comes with the window frame itself. He further indicated the only way to stop any potential leaking is to caulk the brick to the vinyl window. He was uncertain if this was done on Complainants' home. He was also uncertain if his crew installed house wrap on the home, but if they did, the windows were installed over the house wrap. Mr. Benson claims he never discussed with Complainants the issue of leaking windows either before or after they moved into the home. He further claims the first he knew about leaking windows was when he saw the notations on the building inspection report.

Mr. Benson testified the Complainants were "tough" to deal with. He elaborated as follows:

"A Difficult to satisfy, always, it was rough going to finish their house, and finish the way they liked it. It was a combination of many things. They were part of it. The Trades I dealt with were part of it, and many things that were asked to be done by the purchasers, that weren't always in writing, were asked of me in kind of, you know, went around the actual chain of command. In an effort to please people, you, you attempt to do things, But it makes it very difficult when someone asks you a question, and you go, no, you have to over here and do a, b, and c, and then when I get it, well I can act on it. It makes it very difficult."

(March 19, 2001 TR at p. 128)

Mr. Benson recalled a number of occasions where he showed up to make repairs on Complainants' home and was denied access for one reason or another.

Curtis E. Stone testified on behalf of Respondent that he has been employed by this company for about 2 years. He is a licensed builder, and eventually became Respondent's site supervisor.

Mr. Stone testified he first had contact with Complainants in mid-October, 1999, after the Circuit Court Judge issued his order allowing Respondent access to Complainants' property to make repairs. He indicated that, for the most part, he had a positive working relationship with the Complainants, and estimates he repaired approximately 30 items, some on a list ordered by the Court, and some not on the list, but which Respondent directed him to repair anyway.

Anthony J. Bastianelli (Complainant) testified on rebuttal at the March 19, 2001 hearing. With regard to whether he or his wife denied Respondent access to his property, Mr. Bastianelli testified as follows:

“Q Had there been occasions where you had from sometime in the fall of '97 up through, at least part of '98, had there been occasions where you in fact denied access to representatives of Sherr to your property?”

A There was one instance, yes.

Q One instance?

A Yes. One instance specific to one item.

Q And could you indicate to His Honor this morning, why, on that occasion, access was denied?

A Yes Your Honor, approximately December of the previous year, late in December, what, where my Christmas break ----

Q That would have been what year Sir?

A '98, it was '98.

Q Would it have been the first year you were in, or the second year you were in?

A The first year it was in, I'm sorry. It was '97, December of 1997. All right, what happened, Your Honor, was they had a key to our home for full access, any given time, any time, 24 hours a day, just call, let us know what is going on. You have access to the home to repair anything, per the list, providing, one stipulation that we know what's going on. I mean, it is our residence, we live there. Long story short, they hired another individual, Craig Johnson, and this individual was introduced, probably early December, that this was our new warranty clerk, okay. He was going to take care of all warranty items, and work with Greg, and he'd looked at a few things, and he had taken care of a few things. He had no problems entering the home, I may add, at any given time, with the key to my home. What had transpired right before the Christmas break of '97, we'd indicated that there was some problems with the tub surround, and Mr. Johnson came down, when we weren't home, because he had permission to do so, entered the home made some repairs, and when I got home from work, I looked at it, and I was in question of what, what was he thinking. So, I called him at the office, this is probably a Friday, late Friday, I would have to look at a calendar for days, and I began to explain. I said Greg, when you get time, I need you to come down, I says, evidently you misunderstood what I was talking about in regards to the tub surround. At this point, Mr. Johnson went off on a tangent, screaming, telling me to shut up, and to quit talking to the neighbors, and who are you, and we'll fix your home whenever we're, excuse me, damn good and ready. At that point, I got, I got nervous, got off the phone, and I told my wife I'm going to get our key before he goes home. This guy doesn't sound stable. So, I got in my vehicle, I drown down to the office, and he attacked me right on the driveway of the model.

Q You say attacked, what do you mean?

A He ran, he ran across the yard, a snow covered yard, as I was approaching the driveway, and met me in the street. I stood there in amazement as this guy came running after me. He took his hat, he beat me with his hat, spitting on me, bumping chests with me, carrying on, and I got my key, he went and I told him I wanted my key, and we stood there, and we shared some pretty violent words, and he went back in the office, got my key, and I went back home, and I was rather shaken. My wife says what's the problem. I says you're not going to believe what happened.

Q Okay. On the occasion that you denied access to a representative of Sherr, to the property, I believe you testified once, am I correct?

A Yes.

Q Was Mr. Johnson with the representative of Sherr when you denied the access?

A Yes he was. They approached me at the end of my driveway, Mr. Benson got out of the passenger side, left the door open, and Mr. Johnson sat in the vehicle, and they approached me, and they said Tony, we're here to fix item number 1, understand no tools in hand, nothing. I'm sorry, we're here to fix item number 4, so we're going to fix item number 4, and that item was the stairwell in question here. But -----

Q And ----

A I'm sorry.

Q Okay. As a result of the encounter that you had with Mr. Johnson, prior to that when you indicated that he came at you. You filed a, did you file a police report?

A Yes I did file a police report."

(March 19, 2001 TR at pp. 148-151)

On cross examination, Mr. Bastianelli acknowledged his participation in an incident at the courthouse between Respondent's attorney and himself. He elaborated as follows:

“Q There was an incident you might remember back in the Genesee County Court, about a year or so ago, when I tried to get on the elevator with you and Mr. Sharkey, to ride down to the first floor together after court. Do you remember?

A Mmhmm, very clear.

Q And, what did you do?

A It was not a good outcome, and I told you to catch another elevator. I didn't think it was prudent for you to be on that elevator.

Q And, you pushed me off.

A No, I did not, I did not touch you, John.

Q You didn't touch me?

A I did not touch you.

Q And, you recognize you're under oath, sir?

A Yes, sir. I pushed the door closed, I did not touch you John, and I know I'm under oath."

(March 19, 2001 TR at pp. 154-155)

On further cross examination, Mr. Bastianelli acknowledged that the roof on his home was torn off and replaced with dimensional shingles, which, according to Mr. Bastianelli, cover up any irregularities present on the roof. Mr. Bastianelli indicated he paid approximately \$4,200.00 for the new roof.

CONCLUSIONS OF LAW:

The principles that govern judicial proceedings apply to administrative hearings. 8 Callaghan's Michigan Pleading and Practice, 2nd Ed, Section 60.48, p. 280. The burden of proof is upon the Petitioner to prove, by a preponderance of the evidence, that Respondent violated the Code. **1990 AACS, R 339.1763.**

VIOLATION OF SECTION 2411(2)(m) OF THE CODE

By this charge, the Petitioner asserts that certain aspects of Respondent's construction of Complainants' home was not accomplished in a workmanlike manner.

With regard to Item #1 of Inspector Richardson's January 9, 1998 building inspection report, the evidence supports a conclusion that the plywood used over this area of the garage may have been part of a bad batch shipped to and used by Respondent in constructing the roof. Inspector Richardson acknowledged this could have been the case, and did not unequivocally conclude that poor installation techniques caused the sagging appearance in this area. Therefore, no violation of workmanship standards are supported on this record.

VIOLATION OF RULE 51(5)

By this charge, the Petitioner asserts that Respondent failed to construct the subject matter dwelling in accordance with §§ 920.1 (fire alarms), 1014.6 (bottom riser of stairs), 1405.3.10 (leaking front windows) and 1504.1 (master bedroom roof leak) of 1996 Building Officials and Code Administrators Code, which was adopted by the Township of Grand Blanc, via Ordinance #32-D, effective January 1, 1997.

With regard to item #2 of Inspector Richardson's report, the evidence presented fails to support a conclusion that this rule has been violated. Inspector Richardson performed his inspection of this structure in January, 1998, some five months after Complainants took occupancy of the home. At that time, his manual inspection revealed a problem. However, when the situation was brought to Respondent's attention by Complainants upon occupancy of the home, Respondent went to the home and, according to Mrs. Bastianelli, the problem was fixed. There may be other reasons why the fire alarms were not working at the time of

the building inspector's visit. For Inspector Richardson to conclude that Respondent is in violation of the code without knowing that the problem had already been addressed and apparently remedied is unjustified. Therefore, no violation of this rule is found.

With regard to item #3 of Inspector Richardson's report, the evidence supports a conclusion that this rule has been violated. Inspector Richardson testified he observed evidence that water had penetrated inside the home around the window areas. In this Judge's opinion, windows installed on a newly constructed home should not leak in the absence of some material installation flaw.

There are certain items of construction on a newly built home which can and should be done right the first time. In fact, Michigan case law appears to support the proposition that workmanship and code violation issues are not cured merely because a contracting party later corrects what he was under an initial duty to do right the first time. In ***Arndt v State of Michigan*, 147 Mich App 97 (1985)**, the Court of Appeals specifically held that a builder is under a duty to perform the terms of a contract in a workmanlike manner from the outset of the contract until its terms are satisfied. The ***Arndt*** court also held that a homeowner preventing a builder from correcting the problem is no defense to the workmanship violation itself.

Although Inspector Richardson did not cite this problem under "workmanship", the failure to adhere to code requirements implies a correlative failure to adhere to normally acceptable standards of care for the industry, that is, a workmanship standard. It is this Judge's opinion that, had the windows been installed correctly at the outset, they would not have leaked.

Respondent's witness, Greg Benson, testified that, if house wrap was installed, the

windows would have been installed over the house wrap. He did not testify, with any degree of certainty, that house wrap was actually installed. For that matter, Roger Sherr did not seem to know precisely what his warranty staff had done to correct the problems with this project. All he indicated was, that, as far as he knew, the problems were being addressed. Accordingly, a violation of the rule is found on this record.

With regard to item #4 of the report, the evidence presented is insufficient to justify a conclusion that the bottom riser is too tall. Although Inspector Richardson claims he measured 8 inches from the bottom to the top of the bottom riser, he never specifically indicated from where he made this measurement, specifically whether the measurement was made from a carpeted or hardwood floor surface. Therefore, this Judge cannot conclude, one way or another, if the bottom riser was of a proper height. Therefore, no violation of the rule is found with regard to this item.

With regard to item #5 of the report, the evidence presented establishes a violation of this rule. Luane Bastianelli credibly testified that she gave Respondent four different opportunities to fix the leaks in this roof, yet the roof kept leaking. Respondent contends in its written closing brief that there were no further leaks after they were notified of the problem in January, 1998, and went to Complainants home to replace a vent boot. However, the transcript does not necessarily reflect that was the case. Mrs. Bastianelli did, in fact, testify that neither she nor her husband noticed any additional penetration of water while everything was frozen, but she also indicated that, whenever it rained, the roof leaked, and continued to do so until they had it replaced by someone else. Therefore, this Judge concludes that the roof continued to leak even after the vent boot had been replaced.

In this Judge's opinion, a roof should not leak on a newly constructed home in the absence of a material construction defect. A leaking roof is every homeowner's nightmare. Therefore, once Respondent had notice of the leak, time was of the essence. Immediate, aggressive action should have been taken. The evidence establishes such action was not taken. Rather, the evidence indicates the only action taken by Respondent was to replace a rubber vent boot. This apparently did not solve the problem, because the roof kept leaking. At this point, if solving the problem meant tearing the roof off and replacing it with new material, then this is exactly what should have been done. A roof is a necessary and vital part of any structure. It should be given the utmost attention when not functioning as it should. In this case, Respondent failed to give this problem the urgent and immediate attention it required.

It is unreasonable to expect a homeowner to deal with a leaking roof for more than a few days, especially in Michigan, where winter weather conditions can be harsh. It is this Judge's opinion that Complainants were justified in eventually hiring someone else to fix the problem, because after a certain point, their level of confidence in Respondent's ability to remedy the problem evaporated.

There was considerable evidence regarding Complainants' obstinance in allowing Respondent access to their home to make repairs. This apparently occurred after the civil lawsuit was filed, and/or after Mr. Bastianelli's confrontation with an agent of Respondent.

Such interference by a homeowner is certainly relevant to the issue of allowing a contracting party to cure defects or incidents of questionable workmanship. If all of the problems with this project were of a minor nature, Complainants' uncooperative attitude during the civil lawsuit would have been damaging to their claims against Respondent.

However, two of their claims against Respondent were, in this Judge's opinion, of major importance, that is, the leaks present around windows and in the roof. The evidence presented does not support a conclusion the Complainants immediately interfered with Respondent's ability to address these two problems. According to the testimony of Mrs. Bastianelli, it was not until March, 1998 that Respondent was denied access to her home. Respondent was informed of these problems in January, 1998. They were given two months to address these issues and failed. These problems should have been remedied immediately, not two months later. Perhaps Respondent was busy and the problems with Complainants' home were overlooked. Under any scenario, failing to address such serious problems in an immediate fashion is, in this Judge's opinion, simply unacceptable.

For all of the above reasons, this Judge concludes the rule has been violated with regard to this issue.

VIOLATION OF SECTION 604(c) OF THE CODE

Based upon this Judge's previous findings and conclusions, a violation of this Section of the Code is also found on this record. Accordingly, the Petitioner established, by a preponderance of the evidence, that Respondent has violated a rule of conduct in practicing its occupation and has therefore violated Section 604(c) of the Code.

SUMMARY:

The preponderance of the evidence presented in this case establishes that Respondent has violated Section 2411(2)(m) of the Code, and Rule 51(5). Therefore, it has also violated Section 604(c) of the Code.

RECOMMENDED SANCTIONS:

This Administrative Law Judge recommends the following sanctions be imposed:

1. ***That Respondent be assessed a Civil Fine in the amount of \$1,000.00 for its violation of Section 2411(2)(m) and therefore Section 604(c) of the Code, and for its violation of Rules 51(5).***
2. ***That any and all licenses presently held by Respondent in either an individual or corporate capacity be suspended if the fine and restitution are not paid within 60 days of the Final Order of the Board of Residential Builders and Maintenance and Alteration Contractors.***
3. ***That no new licenses issue to Respondent in either an individual or corporate capacity until such time as Respondent has complied in full with the Final Order of the Board.***

**STEPHEN B. GOLDSTEIN
ADMINISTRATIVE LAW JUDGE**