STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

HARLEYSVILLE LAKE STATES INSURANCE COMPANY, as Subrogee of Lois Kay Contracting Co.,

Plaintiff,

v

Case No. 16-152603-CB
Hon. Wendy Potts

CONSUMERS ENERGY COMPANY, a Michigan corporation a/k/a CONSUMERS ENERGY and CMS ENERGY CORPORATION, a Michigan corporation, a/k/a CMS ENERGY,

Defendants.
_____/

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

At a session of Court
Held in Pontiac, Michigan
On
OCT 05 2016

This matter is before the Court on Defendants Consumers Energy Company and CMS Energy Corporation's motion for summary disposition of all counts in Plaintiff Harleysville Lake States Insurance Company's complaint. Defendants bring their motion pursuant to MCR 2.116(C)(7), which tests whether a claim is barred as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). For purposes of background, on June 18, 2015, Lois Kay was excavating using a pavement milling machine, when it dug through pavement and hit a Consumers Energy gas line serving a business on Stutz Drive in Troy, Michigan. The gas service line ruptured causing a fire that destroyed Plaintiff subrogor's milling machine resulting

in damages in excess of $200,000. Plaintiff filed the instant matter in an attempt to recover insurance proceeds paid to its insured, Lois Kay Contracting Company.

Under MCR 2.116(C)(7), a party may support the motion "by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. Moreover, the substance or content of the supporting proofs must be admissible in evidence. Further, 'unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich at 119 (internal citations omitted).

Defendants assert that the statute of repose, MCL 600.5839, bars Plaintiff's negligence claims because Defendants are a "contractor" under the applicable definition, the gas line is "an improvement to real property," and the installation and use of the gas line occurred more than ten years before Plaintiff filed its complaint in April 2016. In support of their position, Defendants cite to *Hoffman v Consumers Energy Company*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2012 (Docket Nos. 300577, 301977). Plaintiff correctly argues that unpublished opinions are not binding on this Court. However, unpublished opinions may be considered instructive or persuasive. See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145; 783 NW2d 133 (2010) and *In re Application of Indiana Michigan Power Co.*, 275 Mich App 369, 380; 738 NW2d 289 (2007). The issues in *Hoffman, supra* are similar to the instant issues and involved interpretation of the statute of repose. In the present circumstances, *Hoffman, supra* provides instructive and persuasive value.

The statute of repose, MCL 600.5839, provides:

> (1) A person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of

> the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within either of the following periods:
>
> (a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.
>
> (b) If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.
>
> (2) A person shall not maintain an action to recover damages based on error or negligence of a licensed professional surveyor in the preparation of a survey or report more than 6 years after the survey or report is recorded or is delivered to the person for whom it was made or the person's agent.

Defendants argue that this negligence action arising from the allegedly defective installation of a service gas pipeline is barred because Consumers was a "contractor" when it made this "improvement to real property" in 1986.

The Court must first determine whether Consumers was a "contractor" within the contemplation of the statute. The statute of repose defines the term "contractor" as "an individual, corporation, partnership, or other business entity that makes an improvement to real property." MCL 600.5839(3)(a). Where a term is specifically defined in a particular statute, that definition alone controls. *Haynes v Nashewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Plaintiff argues that Defendants owned the gas line and that they are not merely "contractors" under the facts of the case and the applicable statute. Plaintiff's argument is unpersuasive. As in *Hoffman, supra*, the theory of liability alleged by Plaintiff was that Defendants' conduct was negligent. Plaintiff does not allege a claim premised on Defendants' duty as an owner, possessor, or occupier of land. The claim is one for defective workmanship, and is not based on

a premises liability claim. Like in *Hoffman*, *supra*, the definition of "contractor" reflects the Legislature's intent that conduct, and not merely ownership, is the relevant consideration with regard to the application of the statute of repose. "Our Supreme Court has recognized this intention by holding that the focus of this definition is 'on whether a defendant *makes* an improvement to real property.' This interpretation also comports with the purpose of the statute of repose which is to protect contractors from stale claims and eliminate open-ended liability for defects in *workmanship*." *Hoffman*, unpub op at 3 (internal citations omitted). Accordingly, if the installation of the gas pipeline was an improvement to real property, then Consumers was a contractor within contemplation of the statute of repose.

The statute of repose does not define the phrase "improvement to real property." However, Michigan Courts have analyzed this phrase in other cases. "An improvement is a 'permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.' The test for an improvement is not whether the modification can be removed without damage to the land, but whether it adds to the value of the realty for the purposes for which it was intended to be used. In addition, the nature of the improvement and the permanence of the improvement should also be considered. Furthermore, if a component of an improvement is an integral part of the improvement to which it belongs, then the component constitutes an improvement to real property. More specifically, with regard to determining whether work constitutes an 'improvement' rather than a repair, the *Pendzsu* [*v Beazer East, Inc.*, 219 Mich App 405, 410; 557 NW2d 127 (1996)] Court further explained that the work must be considered in light of the system, not just as a component of the system because improvements to real property typically consist of a complex system of components.

'To artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property.'" *Id.* (internal citations omitted). As in *Hoffman, supra* the gas installation of the gas service pipeline constituted an improvement to real property.

The Court finds that Consumers was a contractor as defined in the statute of repose, and that the installation of the gas service pipeline constituted an improvement to real property. Since the installation of the gas service pipeline occurred in 1986, and since Complaint in the instant matter was not filed until April 2016—well after the expiration of the timelines in the statute of repose—Plaintiff's claims are barred by MCL 600.5839.

For all of the reasons stated above, the Court grants Defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and dismisses Plaintiff's claims. This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated: OCT 0 5 2016

Hon. Wendy Potts