STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

EUGENE KOWIESKI and WANDA KOWIESKI,
husband and wife,

Plaintiffs,

v

File No. 07-25721-CK
HON. PHILIP E. RODGERS, JR.

LUECK CONSTRUCTION AND REMODELING,
INC., a Michigan corporation,

Defendant.
/

William G. Burdette (P49174)
Attorney for Plaintiffs

R. Carl Lanfear (P43967)
Alex Karpinski (P58770)
Attorneys for Defendant

DECISION AND ORDER GRANTING
DEFENDANT LUECK CONSTRUCTION'S MOTION FOR SUMMARY DISPOSITION

This action is one for breach of contract, negligent construction and violation of the Michigan Consumer Protection Act arising out of the Defendant's alleged defective construction of the Plaintiffs' private residence.

Defendant Lueck Construction filed a first motion for partial summary disposition pursuant to MCR 2.116(C)(7) and (8). It argued that (1) residential builders are exempt from liability under the Michigan Consumer Protection Act ("MCPA"), MCL § 445.904(1)(a) and therefore, the Plaintiffs' Complaint fails to state a claim upon which relief can be granted; and (2) that the Plaintiff's claims are time-barred by the six-year statute of limitations applicable to breach of contract claims, MCL § 600.5807, and, if the MPCA applies, the six-year statute of limitations applicable to MCPA claims, MCL § 445.911(7). The Court reviewed the parties' briefs and entertained their oral arguments of counsel on May 7, 2007. The Court entered an Order on May 18, 2007, denying the Defendant's motion as it related to the applicability of the MCPA, and in lieu of ruling on the remaining issues advanced in the Defendant's motion, permitted the Plaintiffs to amend their Complaint. The Court also requested that the parties brief

the issue of whether MCL § 600.5839 applied in this case and invited the Defendant to file a second motion for summary disposition, if appropriate, after the Complaint had been amended.

The Plaintiffs filed an Amended Complaint, dropping their breach of contract claim which they admit is time-barred and adding counts for breach of express warranty and gross negligence. On June 6, 2007, the Defendant filed a second motion for summary disposition, this time pursuant to MCR 2.116(C)(8) and (10). The Court heard the oral arguments of counsel on August 20, 2007 and took the matter under advisement. For the following reasons, the Defendant's motion is granted and the case is dismissed with prejudice and without costs.

I.

The Plaintiffs' Amended Complaint again contains a Count for Violation of the MCPA. The Defendant again contends that it is exempt from liability under the MCPA. The MCPA, specifically MCL § 445.904, provides, in pertinent part, as follows:

> (1) This act does not apply to either of the following:
>
> (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

The Defendant relies upon the fact that, as a residential builder, the Defendant is regulated, under the Residential Builders Maintenance and Alteration Contractors Licensing Act contained in the Michigan Occupational Code, MCL 339.2401, et seq., by a board of residential builders and maintenance and alteration contractors. MCL § 339.307; MCL § 339.317.

This question was recently answered by our Supreme Court. On June 6, 2007, the Michigan Supreme Court released for publication its opinion in *Liss v Lewiston-Richards, Inc*, Docket No. 130064. The issue in that case was the proper scope of the exemption for regulated conduct and transactions under the MCPA. After reviewing the MCPA and judicial interpretations of it, the Court held "under MCL 445.904(1)(a), residential home builders are exempt from the MCPA because the general transaction of residential home building, including contracting to perform such transaction, is "specifically authorized by the Michigan Occupational Code (MOC), MCL 339.101, *et seq*, overruling *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000) and *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545; 701 NW2d 749 (2005).

Therefore, the Court reverses its May 18, 2007 Order and grants the Defendant's motion for summary disposition on the MCPA claim because it is exempt from liability under the MCPA. The Plaintiffs' MCPA claim is hereby dismissed with prejudice and without costs.

II.

MCL § 600.5839 is both a statute of limitation and a statute of repose for actions against architects, engineers and contractors who make improvements to real property. The statute of repose for actions arising out of the defective and unsafe condition of an improvement to real property applies to all actions against a contractor based on an improvement to real property, including actions based on contract, and, therefore, applies to claims for breach of contract, breach of warranty, fraud, and misrepresentation. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473; 586 NW2d 760 (1998).

As amended in 1985, MCL 600.5839 provides, in pertinent part, as follows:

> Sec. 5839. (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any 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, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that 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. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

This statute contains a six-year statute of limitations, a one-year discovery period for cases where the damage is proximately caused by the contractor's gross negligence and a ten-year statute of repose. Thus, the Plaintiffs' claims are barred unless they were brought within six years of occupancy or, for claims of gross negligence, within one year of discovery, but in any event before the expiration of ten years from the date of occupancy. *Abbott v John E. Green Co* 233 Mich App194; 592 NW2d 96 (1998), appeal denied 461 Mich 868; 603 NW2d 779. A statute of repose prevents a cause of action from ever accruing when more than ten years elapses from the date of occupancy or use, or acceptance to the date of the injury. *Smith v Quality Construction Co*, 200 Mich App 297; 503 NW2d 753 (1993).

In *Citizens Ins Co v Scholz*, 268 Mich App 659, 671; 709 NW2d 164 (2006), the Court of Appeals recognized that "all actions against contractors based on an improvement to real property were governed by § 5839," citing *Ostroth v Warren Regency, GP, LLC*, 263 Mich App

1, 9; 687 NW2d 309 (2004), aff'd 474 Mich 36; 709 NW2d 589 (2006). Thus, MCL § 600.5839 applies in this case.

Admittedly, the Defendant was a contractor when it constructed the Plaintiffs' home in 1996. The certificate of occupancy is dated June 30, 1997. The Plaintiffs allege that they noticed leaking from the roof in 2005 and discovered the full nature and extent of the problem in the summer of 2006. In addition, in 2006, they discovered leaking from where the deck was improperly attached to the house. They filed their Complaint on January 30, 2007, within one year of these discoveries. The Defendant argues that the discovery of a leaking roof in 2005 precludes application of the one-year rule. Plaintiff states that the deck and roof must be viewed as independent defects. The Court agrees with the Plaintiff but the issue is moot.

The Plaintiffs rely upon the fact that they discovered the construction defects after the six-year period of limitation expired but before the running of the 10-year statute of repose. Pursuant to MCL § 600.5839, their claim is barred unless it was filed within "1 year after the defect is discovered or should have been discovered" and "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." In their Amended Complaint, the Plaintiffs added a count of gross negligence.

In Count III, entitled Gross Negligence, the Plaintiffs re-allege all of the same acts that they allege in Count II constitute Negligent Construction. In *Maiden v Rozwood*, 461 Mich 109, 122; 597 NW2d 817 (1999), our Supreme Court held that "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence. Rather, a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" See also *Jennings v Southwood*, 446 Mich. 125, 135-136; 521 NW2d 230 (1994). Reckless misconduct is not willful in the sense that there is actual intent to cause harm. *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994). Rather, it constitutes the functional equivalent of willfulness in that it shows an "'indifference to whether harm will result as to be the equivalent of a willingness that it does.'" *Id*, quoting *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982).

Jennings, *supra*, involved the applicability of gross negligence in the context of the emergency medical services act (EMSA), MCL § 333.20901, et seq. Instead of embarking on an analysis of the various standards used in different jurisdictions, the Court turned to the definition of gross negligence provided in the government tort liability act (GTLA), MCL § 691.1401, *et seq*. Because the EMSA and the GTLA shared the same purpose--insulating employees from

ordinary negligence liability, the Court adopted the GTLA definition as the standard for gross negligence under the EMSA. *Jennings, supra* at 136-137. Gross negligence is defined in the GTLA as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Id at* 136. See also MCL § 691.1407(2)(C).

This definition is used in many other Michigan statutes that provide limited immunity to certain groups, but allow liability for gross negligence. See MCL § 257.606a (Michigan Vehicle Code); MCL § 324.81131 and MCL § 324.81124 (Recreational Use Act); MCL § 500.214 (Insurance Code); MCL 600.2945 (Revised Judicature Act). Additionally, Michigan's standard jury instruction for gross negligence also incorporated the GTLA's definition. M. Civ. J.1 14.10.

Applying this definition of gross negligence, the question becomes whether reasonable minds could differ regarding whether the Defendant's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. *Jennings, supra*; *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). In the instant case, reasonable minds could not differ. The Plaintiffs have not alleged any facts which would support a finding of gross negligence. Simple construction defects or building code violations alone cannot support a finding of gross negligence. Water leaked through bolts attaching the deck to the home. There was no structural deficiency that showed indifference to personal injury or property damage.

The factual allegations in the Plaintiffs' Amended Complaint will not support a finding of gross negligence. The six-year period of limitations applies and the Plaintiffs' claim is time-barred. MCL § 600.5839. The Plaintiffs' Amended Complaint should be and hereby is dismissed, with prejudice and without costs.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/04/07