STATE OF MICHIGAN

COURT OF APPEALS

FRANKLIN WOLFE and ANNA WOLFE,

Plaintiffs-Appellants,

v

FERRANTI SCIAKY, INC., a Delaware corporation,

Defendant-Appellee,

and

FORD MOTOR COMPANY, a Delaware corporation,

Defendant.

UNPUBLISHED
September 12, 1997

No. 183678
Monroe Circuit Court
LC No. 93-101942 NP

Before: Young, P.J., and White and P. D. Schaefer*, JJ.

PER CURIAM.

Plaintiffs appeal the circuit court's order granting defendant Ferranti Sciaky (defendant) summary disposition on statute of limitations/repose grounds. MCR 2.116(C)(7). Plaintiffs challenge the circuit court's application of the period of limitations/repose governing actions against architects, professional engineers or contractors arising from improvements to real property, MCL 600.5839; MSA 27A.5839,[1] rather than the period of limitations governing product liability claims, MCL 600.5805(9); MSA 27A.5805(9). We remand.

I

The facts viewed in a light most favorable to plaintiff are that plaintiff suffered severe hand injuries on March 27, 1990, while performing job duties as an automatic welder repairman at Ford's Monroe plant. The Sciaky line 8 (line 8) is an automatic welding machine system located in the plant.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Line 8 welds automobile wheels together and performs various other functions. After the wheels are welded, they travel down the line to a paint station. It was at line 8's paint station that plaintiff was injured. Plaintiff Franklin Wolfe (plaintiff) alleged that defendant manufactured, sold, installed and maintained the line 8 system.[2] The line 8 system was installed in the 1970s.[3]

On the date in question, plaintiff was called to line 8 because a malfunction occurred at the line's paint station. An electric eye under and behind the paint station directs a light beam at the wheel and, if operating properly, the light beam makes contact with the receiver after passing through the valve stem hole. If the light does not pass through the valve stem hole, the line shuts down. Plaintiff testified at deposition that he had had experience with malfunctioning electric eyes in this area before he was injured. He testified that he went to the paint station and as he was inspecting the machine, rested his hand on the wheel, at which time, without warning, line 8 reactivated and immediately dragged his left hand into an unguarded pinch point. Plaintiff acknowledged that he did not lock out power to the line before inspecting it, and explained that he did not do so because had he done so, the electric eye could not have been tested because the power would be off, and because he expected the machine to have a cycle interrupt—a safety device that prevents accidental reactivation of a machine after a malfunction occurs. Plaintiff testified at deposition that such a cycle interrupt circuit was installed soon after his injury.

Plaintiffs filed the instant complaint on March 26, 1993, alleging negligence and breach of warranty against defendant.[4] Plaintiffs alleged that the conveyor line's sudden movement and exposed pinch point were due at least in part to defendant's design, manufacture, sale, supply, installation and maintenance of line 8, and that defendant breached the following duties to plaintiff: to reasonably design, test, manufacture, market and maintain said equipment; to reasonably protect against foreseeable dangers and prevent harm to intended users, including plaintiff, when the equipment is used for its intended purpose, including adequate control of movement of the conveyor line and adequate guarding of pinch points; to provide adequate safety guards and other protection devices and mechanisms so as to protect operators against the foreseeable dangers and injuries of said equipment, including unexpected start-ups and exposed pinch points; to adequately instruct as to the installation, maintenance and operation of the machinery, including the provision of hazard warnings, maintenance, and repair; to provide adequate controls and operating systems; and to adequately warn operators.

Plaintiffs' breach of warranty count alleged that in placing its product into the stream of commerce, defendant made certain implied and express warranties regarding its product, which it breached, including, but not limited to, warranties that its product was fit for its intended and foreseeable uses; was reasonably safe and free from all hazards, risks, dangers and defects; and was of merchantable quality.

Defendant moved for summary disposition on several grounds, including that plaintiffs' claims were barred by the statute of limitations/respose governing actions against architects, engineers and contractors arising out of an improvement to real property. MCL 600.5839; MSA 27A.5839. Defendant argued that line 8 was an "improvement to real property," defendant was a "contractor,"[5] and more than six years had elapsed between the date of the occupancy, use, or acceptance of the

improvement to real property, and the date this action was filed. Defendant submitted no affidavits in support of its motion.[6]

Plaintiffs' response to defendant's motion for summary disposition argued that defendant had produced no evidence to establish that the injury-causing machine was an "improvement to real property," that defendant had admitted to being the manufacturer and supplier of the injury-producing machine, and had admitted that plaintiffs' action was brought under the product liability statute, MCL 600.2945 *et seq.;* MSA 27A.2945 *et seq*. Plaintiffs further asserted that line 8 was "not integral nor incorporated into the design of the Monroe Ford plant. It was put in long after the plant was built and it appears that it has been moved and reconfigured since its original installation." Plaintiffs argued that their claims "relate to a very specific part of what Defendant identifies as Sciaky line #8, i.e., a station on an automatic welding machine where paint is sprayed onto wheels which have been welded together earlier on the line."

The circuit court's opinion granting defendant's motion addressed only the statute of limitations argument, stating in pertinent part:

> The most instructive case on point seems to be Adair v Koppers, 741 F.2d 111 (CA 6, 1984). This is a Sixth Circuit case arising out of Ohio. It involves a dispute over whether a piece of industrial equipment (specifically a coal transportation device) is to be considered an "improvement", i.e., a part of the property in question. The court held that it was. If this decision is followed, then plaintiff's claim would be barred, and Defendant's motion should be granted.
>
> It is the opinion of this Court that the item known as "Sciaky Line #8" more properly is classified as an improvement to property and thus as part of the real property. Therefore, in light of the controlling statutes, Defendant's motion to dismiss is hereby granted. Prevailing party shall prepare the appropriate order.

II

In reviewing a motion for summary disposition filed under MCR 2.116(C)(7), we accept as true all well-pleaded allegations and construe them most favorably to the nonmoving party. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). We also consider all documentary evidence submitted by the parties. *Harrison v Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992). The motion should not be granted unless no factual development can provide a basis for recovery.

A

In support of its motion for summary disposition, defendant relied on *Fennell v Nesbitt, Inc*, 154 Mich App 644; 398 NW2d 481 (1986), and *Adair, supra*, which was found persuasive therein. *Adair* was a diversity action involving Ohio law. In *Adair*, the plaintiff sought damages for injuries to his arm, which had been caught between a pulley and belt on a conveyor in the coal-handling system at a

Republic Steel by-product coke plant. The defendant, Koppers, had designed and built the conveyor and the entire plant in 1923. Koppers constructed eighty ovens to replace sixty-four existing ovens and modified the coal handling system in 1949, but had not performed any services with regard to the conveyor since. 741 F2d at 112. The plaintiff brought suit in 1981, alleging negligence, strict liability, and breach of express and implied warranties. Koppers filed a motion for summary judgment, arguing that the plaintiff's suit was barred by Ohio's statute of repose for designers and builders. The plaintiff argued in response that the conveyor was not an improvement to real property.

The *Adair* court, noting that the Ohio Supreme Court had not interpreted the term "improvement to real property" as used in Ohio Rev. Code § 2305.131, adopted what it referred to as a common-sense interpretation, looking to the following definition of "improvement:"

> '[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 *Adair* court added:

> In applying the definition of "improvement," courts consider whether a modification adds to the value of the property for the purposes of its intended use, as well as 'the nature of the improvement, its relationship to the land and its occupants, and its permanence" . . . [741 F2d 114. Citations omitted.]
>
> * * *
>
> In considering the nature of the conveyor, we note that experts for both parties characterized it as an essential component in a larger system. The conveyor on which Adair was injured, Conveyor A, is the first in a line of conveyors used to transport coal from railroad tracks through various processing facilities to the coke ovens. Adair's expert stated that Conveyor A "is an integral part of the related processing equipment;" Koppers expert called it "a permanent and integral part of the coal conveying system of the coke plant." Adair has attempted to limit the focus of this inquiry to Conveyor A, or even to the pulley and belt involved in Adair's accident. Such components are arguably in the nature of equipment, rather than improvements. Adair's proposed limitation is too narrow, however. While Koppers' suggestion that the entire factory complex be considered as a single unit sweeps too broadly, the nature of the conveyor can best be understood in light of its "integral" role in the coal handling system. . . .
>
> The coal handling system, which transports raw material to processing facilities, is essential to the operation of the factory as designed and enhances the utility of the property.
>
> * * *

> Smith's [plaintiff's expert] assertion that Conveyor A can be removed does not conflict with the District Court's finding that the coal handling system is permanent. The conveyors have remained in place since their construction in the 1920s. According to the specifications and drawings, Conveyor A is bolted in place and supported by steel angles on a concrete footing. A walkway and a handrailing are located on either side of the conveyor belt. Some elevated conveyors are housed in steel sheathing, while Conveyor A is placed below ground level, largely in a tunnel. This degree of physical annexation, combined with the length of time the system has remained intact, despite the sale of the property, supports Koppers' affidavit stating that "the coal conveyor system, including Conveyor 'A', was a permanent installation."
>
> Thus, there is no question of material fact concerning the nature of the conveyor as an integral component of an essential system, its usefulness to the purpose of the factory, and its permanence. We affirm the holdings of the District Court that Conveyor A is "an improvement to real property" under section 2305.131, and that the statute bars suit against Koppers for designing or building the material handling system. [741 F2d at 114-116.]

The plaintiffs in *Fennell, supra,* filed suit against the professional engineering firm that had designed the heating-ventilation-air conditioning (HVAC) system used in the school where they taught. The plaintiffs alleged that the faulty design and construction of the HVAC system created harmful atmospheric conditions, and that continuous exposure to these conditions caused them to suffer respiratory and other problems. The defendant performed its last services in connection with the HVAC system sometime before April 30, 1975. The plaintiffs filed their actions between April and September 1982.

The circuit court rejected the plaintiffs' arguments that the statute of limitations/repose applicable to engineers and architects was not applicable because the HVAC system was not an "improvement to real property," and that the HVAC system was a product the defendant placed in the marketplace and thus the three-year statute of limitations, MCL 600.5805(9); MSA 27A.5805(9), governed:

> This claim is also without merit. While no Michigan case law has specifically defined the term "improvement to real property" within the meaning of the engineers and architects' statute, we are persuaded by the rationale of the federal appellate decision in *Adair v The Koppers Co, Inc,* 741 F2d 111 (CA 6, 1984). Considering the Ohio architects' statute, the *Adair* court found that a conveyor system used to transport coal in a factory was an improvement to real property. The court ruled that there was "no question of material fact concerning the nature of the conveyor as an integral component of an essential system, its usefulness to the purpose of the factory, and its permanence." *Id.,* p 116.

A common-sense application of the term convinces us that the HVAC system in this case is integral to the use of the school. We reject the plaintiffs' product liability allegations for the same reasons that the *Adair* court did:

> This would be contrary to the intent behind section 2305.131, which protects designers and builders from all actions arising from defects in an improvement. (Citation omitted). Although Adair cites many cases to support his contention, none deals with the situation before us—an attempt to maintain a product liability action where the defective entity has been held an improvement and where a negligence action has been held barred by the statute of repose of designers and builders. We decline to undercut the protective purpose of section 2305.131 by excluding a "product liability" action for defects in an improvement from the coverage of the statute. [741 F2d 116.]

Accordingly, we conclude that the term "improvement to real property" should be construed to include the design of the HVAC system and to preclude maintaining a cause of action under MCL 600.5805(9); MSA 27A.5808(9). [154 Mich App at 650-651.]

Another case defendant relied on below is *Matthews v Beloit Corp*, 807 F Supp 1289 (WD Mich 1992). The plaintiff in *Matthews* was injured while on the job at a paper-manufacturing factory. The court held that the stack calendar machine at which plaintiff was injured, which was incorporated into and functioned exclusively as a component of the paper making machine, was an "improvement to real property." *Id*. at 1290-1292. The *Matthews* court applied the four factors set forth in *Adair* -- whether a modification adds to the value of the property for the purposes of its intended use, and "the nature of the improvement, its relationship to the land and its occupants, and its permanence," -- and denied the plaintiffs' motion for reconsideration, upholding its decision that Michigan's statute of repose barred the plaintiffs' claim. *Id*. at 1290, 1292-1293. The court rejected the plaintiffs' argument that the stack calendar be viewed as one component of the machine:

> . . .the stack calender [sic] which allegedly caused Mr. Matthews' injuries was an essential component in a larger system. Without it or some substitute, the S.D. Warren Company could not produce paper of the same quality. Therefore, the stack calender [sic] must not be viewed in isolation but as a component of the entire papermaking machine.
>
> The entire papermaking machine is approximately 350 feet long and between 24 and 25 feet wide. It occupies two stories of a building at S.D. Warren Company's plant. The machine is supported by base plates which are permanently affixed to the concrete floor. Mr. Matthews testified that **the papermaking machine is approximately a block long in length and that the machine is interconnected with the building. The basement below the machine houses a conveyor system which is also a**

> **component of the machine. The machine manufactures paper in one continuous process from the wet, pulp beginning to the finished paper product. *The machine is*, in effect, *the factory*—albeit, protected by a roof and walls. In fact, the walls and roof were designed to accommodate the papermaking machine rather than vice-versa.** [807 F Supp at 1292. Emphasis added. Italicized emphasis in original.]

Defendant cited additional Michigan cases where the statute was applied, but the term "improvement to real property" was not at issue.[7]

B

During the pendency of this appeal, in *Pendzsu v Beazer East, Inc*, 219 Mich App 405; 557 NW2d 127 (1996), this Court adopted the reasoning of *Adair* and held that its analysis is consistent with the purpose of Michigan's statute of repose. One of the two plaintiffs in *Pendzsu* worked as a truck driver/cement mixer/warehouse worker for Standard Fuel Engineering and Zero Refractories, and alleged that in the course of his employment, he worked in areas, including buildings owned by Ford and National Steel, where asbestos-containing materials were used, exposing him to harmful asbestos fibers. The second plaintiff, McGhee, worked as a laborer-maintenance worker at Great Lakes Steel. His duties included working near furnaces where asbestos-covered steam lines were located. McGhee alleged that he was exposed to airborne asbestos fibers when the furnaces were rebuilt. Both filed product liability suits.

The defendant was the successor in interest to Koppers Company, which was the contractor for the installation of two coke ovens at the Ford Rouge plant in the 1930s and relined the ovens in the 1960s and 1979. Koppers also performed relining and enlargement to blast furnaces and coke ovens at Great Lakes Steel in 1973.

The circuit court granted defendant's motion for summary disposition on the basis that the plaintiffs' claims were barred by MCL 600.5839; MSA 27A.5839. The plaintiffs argued on appeal that the defendant's work was not an improvement, but rather constituted repair work. This Court applied *Adair* and affirmed the circuit court's grant of summary disposition:

> Here, the material facts are not in dispute. Defendant was retained to design, manufacture and install two coke ovens at the Ford Rouge plant in the 1930s. Defendant relined the ovens in the 1960s and in 1979. The relining process requires the rebuilding of brick contained within the oven that becomes worn out after continued use. Similarly, defendant was the engineering and procurement contractor for relining and enlarging the blast furnaces and coke ovens at Great Lakes Steel in the 1960s and in 1973. **Plaintiffs do not dispute the characterization of the installation of a coke oven or a blast furnace as an "improvement." Similarly, the integral role of the coke ovens and blast furnaces as entities in their respective plants is not in dispute.**

The fact that the brick which defendant installed in the relining process will eventually wear out is not dispositive. Rather than looking solely to the permanency of a component, that factor is merely one of the factors to consider in determining whether a modification adds to the value of the realty for the purposes for which it was intended to be used. *Adair, supra*, pp 114-115. Like the conveyor system at issue in *Adair, supra*, p 115, and the heating-ventilation-air conditioning (HVAC) system at issue in *Fennell, supra*, p 651, there is no genuine issue of material fact that the relining of the coke ovens and blast furnaces was "integral" to the usefulness of the respective plants. Accordingly, the trial court did not err in applying the statute of repose to plaintiffs' claims against defendant. *Adair, supra*, p 115, *Fennell, supra*, p 651.

Next, plaintiffs argue that the statute of repose does not apply to defendant in its role as a supplier. We disagree. First, plaintiffs never identified the exact building materials for which they claim defendant is liable as a supplier. In any case, it is not disputed that defendant was a contractor for purposes of the statute of repose. The statute of repose controls "any action" against a contractor for injury which arises "out of the defective and unsafe condition of an improvement to real property." MCL 600.5839(1); MSA 27A.5839(1). Although Michigan case law has not specifically addressed the problem of a hybrid situation under the statute of repose, this Court rejected the plaintiffs' attempt in *Fennell, supra*, pp 650-651, to characterize the HVAC system as a product placed into the marketplace. That is analogous to the claim here since, if this Court had accepted the *Fennell* plaintiffs' argument, the *Fennell* defendant would have been the supplier of the HVAC "product."

This issue is also analogous to how the UCC deals with a contract that involves a mixture of goods and services. In that context, the court must determine whether the contract's predominant factor, its thrust, its purpose, is the rendition of service, with goods incidentally involved, or is a transaction of sale, with labor, incidentally involved. *Higgins v Lauritzen*, 209 Mich App 266, 269; 530 NW2d 171 (1995). Here, assuming arguendo that a supplier of building materials is not controlled by the statute of repose, the supplying of building materials was incidental to defendant's role as a contractor in this case. [219 Mich App at 411-413. Emphasis added.]

III

We conclude that defendant failed to provide sufficient facts to establish that the instant case involves an improvement to real property under MCL 600.5839; MSA 27A.5839.

Defendant described line 8 in its motion for summary disposition as

. . . a system on Ford's premises which moves wheel rims down a conveyor line where several operations are performed on them by machinery, not manpower.

* * *

> . . . the Sciaky line # 8 is an improvement to real property. It clearly adds to the value of the property. Ford is in the business of making automobiles, which includes the manufacture of wheel rims for those automobiles. The Sciaky line # 8 is an integral part of this manufacturing process. In addition, the Sciaky line # 8 is a large conveying system that is connected to wires and pipes and it is permanent.

Plaintiffs' response to defendant's motion for summary disposition argued that defendant had produced no evidence to establish that line was an improvement to real property.[8] Plaintiffs argued that line 8 was "not integral nor incorporated into the design of the Monroe Ford plant. It was put in long after the plant was built and it appears that it has been moved and reconfigured since its original installation."[9]

Defendant failed to set forth facts necessary to the circuit court's determination whether line 8 was an improvement to real property for purposes of MCL 600.5839(1); MSA 27A.5839(1) and, if so, whether the defect involved an integral component of the improvement. Defendant did not state when or for what purpose the Monroe plant was built; did not explain the circumstances of line 8's design, manufacture and installation; did not shed light on the placement or dimensions of line 8 or how it is affixed to the building;[10] and did not provide facts from which to deduce the extent and importance of line 8's role in the plant's operations, or the relationship between the plant's operations and the structure and design of the plant.[11]

In light of defendant's failure to present sufficient facts from which the circuit court could conclude that line 8 was an improvement to real property, we vacate the order granting summary disposition and remand for further proceedings.[12]

/s/ Robert P. Young, Jr.
/s/ Helene N. White
/s/ Philip D. Schaefer

[1] MCL 600.5805(10); MSA 27A.5805 provides:

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

[2] Ford's answer to plaintiffs' complaint admitted that defendant was the manufacturer, seller, installer and maintainer of the line 8 machinery.

Defendant's answer responded to this allegation with "defendant neither admits nor denies for lack of sufficient knowledge or information as to form a belief, but leaves the Plaintiffs to their proofs."

[3] We have gleaned some of this information from defendant's joinder of Ford's motion for change of venue, which is not at issue here. Defendant stated therein that the decision to purchase the line 8 machine was made by Ford employees, who issued the request to purchase line 8. Defendant further stated that it designed and manufactured line 8 in Chicago, Illinois, and that line 8 was assembled and inspected in Chicago. Further the line was accepted in Chicago by Ford employees before being transported to Monroe for installation. Defendant attached to its joinder an affidavit of defendant's president stating that when Ford contracted with defendant to manufacture a piece of machinery, the machinery was designed, manufactured and assembled in Chicago; that upon completion the piece of machinery was shipped to the Monroe Ford plant; and that in order to build a piece of machinery to Ford's specification and approval, the design is approved by Ford employees, but the primary design, manufacture and assembly occurs at defendant's facilities in Chicago.

Attached to Ford's supplemental memorandum in support of change of venue were the depositions of two Ford employees, Poupard and Briggs. The questioning at deposition was limited to the issue of venue, with agreement that they could be called back for more substantive questioning. In any case, Poupard testified he had been a control applications engineer at Ford's Monroe plant since 1972. He testified that he was involved with the purchase of line 8, and estimated that it was in the 70s, possibly the late 70s. Poupard sat in on the original line-up with potential vendors where the vendors presented proposals, and was involved in the selection of the successful bidder. Boupard also followed the machine through building and delivery to the plant and testified that the vendors are given specifications by Ford. Boupard testified that at the time the purchase of line 8 was initiated, there was other Sciaky equipment at the plant, perhaps six spot welder lines. Spot welders differ from automatic welders in the method of attachment. Boupard testified that Ford Monroe plant personnel installed the machine at the plant, and when asked "Anybody from Sciaky assist them?" answered "yes." Boupard also testified that he was involved in one repair or modification of line 8 since its purchase, that being the attempted installation of a vision system to detect the quality of the weld, but that the system would not do everything the vendor promised, and the vendor was not defendant.

Briggs testified that he had been employed at the Monroe plant since 1984 and had been supervisor of safety and security for five years. He testified that his duties include coordinating all the safety activities in the plant and interfacing with MIOSHA. Briggs testified that he did not believe that there was another Sciaky line 8 machine in any other Ford plant, or anywhere in the continental United States, adding "We are the only ones in the Continental United States making wheels." Briggs testified that he had observed repairs or maintenance on machines such as the line 8, and that Monroe plant employees make the decision that a machine needs repair or maintenance.

[4] The complaint also alleged intentional tort against defendant Ford Motor Company. The parties later stipulated to Ford's dismissal. An order to that effect was entered on December 13, 1994.

[5] Defendant noted in its motion that the definition of contractor includes any corporation which makes an improvement to real property. MCL 600.5839(4); MSA 27A.5839 provides:

> As used in this section, "contractor" means an individual, corporation, partnership, or other business entity which makes an improvement to real property.

[6] Defendant's motion attached six exhibits: plaintiffs' complaint, excerpts from plaintiff's deposition, and four cases.

[7] These cases all assumed that improvements to real property were involved, and that assumption appears to have been sound in each case. *Cliff Forest Products Co v Al Disdero Lumber Co,* 144 Mich App 215; 375 NW2d 397 (1985), involved roof support components; *Smith v Quality Construction Co*, 200 Mich App 297; 503 NW2d 753 (1993), involved building repairs; *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994), involved a guardrail; and *Beauregard-Bejou v Pierce*, 194 Mich App 388; 487 NW2d 792 (1992), involved a staircase.

[8] We are aware, having thoroughly reviewed the lower court file, that plaintiff argued in response to defendant's motion that discovery had not been completed and that depositions remained to be taken including of Ford personnel "who can speak to the mobility of the line and its history."

At the December 21, 1994, hearing on defendant's motion, at which plaintiffs' lead counsel (Christopher Holliday) was present, plaintiff's counsel argued, among other things, that "nothing has been shown to establish that this is an improvement to real property, there has been no testimony introduced about that. I don't think there have been no [sic] photos introduced, there's been nothing introduced to show that it is. Defense counsel responded that

> this is an issue of law for the court and the cases that we cite also make it clear that plaintiff has admitted to enough facts to establish that this was clearly an improvement to real property, (one) we are a contractor, they admit it, (two) we're the ones that put it in, they admit that, (three) it was an intrical [sic] part to the plant system and components. We know that from the plainitff's testimony. He worked with this conveyor for some 20-plus years. It was what the whole plant, the Ford plant, was about down there. The Sciaky No. 8 line wasn't installed the week before his accident. He had actually been the troubleshooter, working on the line and repair of it if it was necessary, for a good share of his work life at Ford, so there's nothing new that's going to come from a new expert's dep or from some Ford employee who was not an eyewitness, that will be germane to the factual determinations you have to make.

The court then rescheduled the hearing to give plaintiffs' counsel opportunity to depose Ford employees. On January 19, 1995, at the second hearing defense counsel stated that plaintiffs' counsel had decided not to depose Ford personnel. Plaintiffs' lead counsel was not present, and attorney Haddad responded "I believe so" when the court asked him if there had been no further discovery.

[9] We note that while plaintiff failed to support its responses to defendant's motion for summary disposition with the requisite evidence, the initial burden is on defendants to produce facts sufficient to

support the assertion that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

[10] The mere statement that it is connected to wires and pipes does not aid our analysis.

[11] Neither defendant nor plaintiff set forth in their summary disposition briefs any of the facts gleaned from the motion to change venue. See note 3. We observe, however, that the testimony referred to in note 3 does not establish that line 8 is an improvement to real property.

[12] Defendant's remaining arguments were not addressed by the circuit court and may be renewed on remand.