# STATE OF MICHIGAN

# COURT OF APPEALS

KRISTA KRAUSE,

Plaintiff-Appellant,

v

CHRIS LEMESSURIER,

Defendant,

and

SERUM CONSTRUCTION, INC. and JAMES SERUM,

Defendants-Appellees.

UNPUBLISHED
December 28, 2006

No. 271326
Roscommon Circuit Court
LC No. 04-724640-CZ

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted summary disposition to defendants James Serum ("Serum") and Serum Construction, Inc.'s ("Serum Inc.") under MCR 2.116(C)(7). We reverse and remand for further proceedings.

## I. Facts

This case involves a garage that defendants constructed partially on land owned by plaintiff's neighbor, defendant Chris LeMessurier.[1] Plaintiff claims that defendants agreed to determine the boundaries of her property before they built the garage. Defendants completed construction of the garage in November 1997 and a Gerrish Township building inspector inspected it in December of the same year. In early 1998, plaintiff and her husband observed that the cement floor of the garage had begun to crack and crumble. Water had bubbled up through the floor and ruined the personal items plaintiff had placed in the garage. Plaintiff's

[1] LeMessurier settled his case with plaintiff at the trial court level and is not involved in the present appeal.

husband contacted defendant Serum, who eventually inspected the floor. Serum concluded that the floor needed to be replaced because it was poured when the weather was too cold for it to cure properly. Defendant poured the replacement floor in 1999.

In late 2003 or early 2004, LeMessurier contacted plaintiff to inform her that a land survey showed that her garage stood partially on his property, and he requested that she remove it. Plaintiff filed suit against defendants Serum and Serum, Inc., and alleged that they were negligent and breached their contract with plaintiff by failing to correctly determine the boundaries of her property before they built the garage. Defendants filed a motion for summary disposition and argued that plaintiff's suit is barred because she filed her complaint more than six years after defendants completed construction of the garage. The trial court agreed and dismissed plaintiff's case.

## II. Analysis

MCL 600.5805(14) provides that "[t]he period of limitations for an action against a state licensed . . . contractor based on an improvement to real property shall be as provided in section 5839." See also *Citizens Ins Co v Scholz*, 268 Mich App 659, 671; 709 NW2d 164 (2005). MCL 600.5839(1) states in pertinent part as follows:

> No person may maintain any action to recover damages for any injury to property, real or personal, . . . arising out of the defective and unsafe condition of an improvement to real property, . . . 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 . . . . [Emphasis added.]

The parties dispute when the six-year period of limitations began to run. Underlying this dispute is a disagreement about when the garage was actually used and fit for use by plaintiff and her husband. It is axiomatic that the garage at issue was built for the purpose of storing plaintiff's vehicles. Viewing the evidence in a light most favorable to plaintiff, the proofs established that she could not park vehicles in the garage because of the defective, crumbling floor. Thus, the trial court erred when it concluded that plaintiff had a complete and usable structure when the garage was first built or allegedly completed in 1997. Plaintiff also presented evidence that her husband repeatedly attempted to contact defendants about the defective structure until Serum finally admitted to the defect and replaced the floor in 1999. Clearly, plaintiff presented sufficient evidence to survive defendants' motion for summary disposition by showing that she did not and could not use the garage until the floor was replaced. Accordingly, her complaint was filed within the limitations period and summary disposition was improper.

We also hold that the trial court erred when it ruled that plaintiff knew or should have known that the garage was misplaced in 1997. MCL 600.5839(1) provides that a plaintiff has "1 year after the defect is discovered or should have been discovered" to file suit, "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." The record evidence shows

that plaintiff learned about the encroachment from her neighbor in November 2003 or January 2004. Plaintiff maintains that the trial court improperly acted as a fact-finder when it interpreted an October 17, 1997, letter from Serum to plaintiff. The trial court concluded that the letter established that the company could not locate the property lines and put plaintiff on notice that the garage might be misplaced.

When a court reviews a motion for summary disposition under MCR 2.116(C)(7), it "must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Farm Bureau Mut v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003). Here, the trial court failed to construe the evidence in plaintiff's favor. Serum stated in the letter that he hoped to locate the boundary lines within the week. Construing the letter in a light most favorable to plaintiff as the nonmoving party, it can easily be read to suggest that Serum accepted responsibility for locating the boundary markers and that he took steps to do so. Though defendants assert that plaintiff told them where to place the garage, plaintiff presented evidence that she actually knew or should have known about the location error as late as 2003 or 2004. Thus, plaintiff presented evidence to establish that factual development could provide a basis for recovery and summary disposition was inappropriate. *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993), mod by *Patterson v Kleiman*, 447 Mich 429, 433-435 (1994).[2]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

[2] Because of our resolution of the above issue, we need not address plaintiff's other arguments on appeal.