

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals
Markey, Murphy and Kelly, JJ.

SHERITA WHITE and DERRICK WHITE,
Plaintiffs-Appellees,

vs.

TAYLOR DISTRIBUTING COMPANY, INC.
PENSKE TRUCK LEASING COMPANY, L.P.,
and JAMES J. BIRKENHEUER,
Defendants-Appellants,

No. 134751

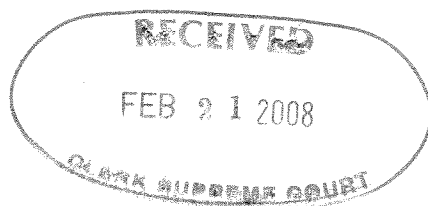
Court of Appeals
No. 272114

Oakland Circuit
No. 2005-064307-NI

BRIEF ON APPEAL

**AMICUS CURIAE
MICHIGAN DEFENSE TRIAL COUNSEL, INC.**

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BASIS OF APPELLATE JURISDICTION

This Court granted leave to appeal on November 30, 2007. Therefore, the Court has jurisdiction pursuant to MCR 7.301(A)(2).

QUESTION INVOLVED

DID THE COURT OF APPEALS ERR IN REVERSING SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS UNDER MCR 2.116(C)(10) ON THE GROUND THAT JUDGMENT WAS NOT APPROPRIATE UNDER MCR 2.116(G)(4), WHERE THE OPPOSING PARTY DID NOT PRESENT COUNTERVAILING EVIDENCE?

Plaintiff-Appellee says:	NO
Defendants-Appellants say:	YES
The Trial Court said:	YES
The Court of Appeals said:	NO
Amicus Curiae says:	YES

STATEMENT OF FACTS

Michigan Defense Trial Counsel, Inc. relies upon the statement of facts set forth in Defendants-Appellants' brief on appeal.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS UNDER MCR 2.116(C)(10) ON THE GROUND THAT JUDGMENT WAS NOT APPROPRIATE UNDER MCR 2.116(G)(4), WHERE THE OPPOSING PARTY DID NOT PRESENT COUNTERVAILING EVIDENCE.

A. Standard of Review.

“[I]nterpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo.” *CAM Construction v Lake Edgewood Condominium*, 465 Mich 549, 553; 640 NW2d 256 (2002) (citations deleted).

B. The Phrase “Judgment Shall Be Entered” Is Mandatory and the Qualifying Phrase “If Applicable” Refers Only to the Nature of the Judgment That Is Required To Be Entered.

1. The Rules of Statutory Interpretation Govern Interpretation of a Court Rule.

The fundamental rule of statutory construction is to discern and give effect to the intent of the Legislature.” *People v Venticinque*, 459 Mich 90, 99; 586 NW2d 732 (1998). If the statute’s language is clear and unambiguous, this Court must enforce the language as written. *Id.* at 99-100. *See also, Grievance Administrator v Underwood*, 462 Mich 188, 194; 612 NW2d 116 (2000). When the language of the statute is clear, it is assumed that the Legislature intended the plainly expressed meaning, and the statute must be enforced as written. *Hiltz v Phil’s Quality Market*, 417 Mich 335; 337 NW2d 237 (1983). Second, when statutes are in pari materia, meaning when two statutory provisions have a common purpose, the terms of the provisions should be read together so as to give the fullest effect to each provision. *Glover v Parole Board*, 460 Mich 511; 596 NW2d 598 (1999). Third, the Court is to avoid any interpretation that would

render part or all of a statute nugatory and meaningless. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1990).

The same rules of statutory interpretation also govern the interpretation of a court rule. *Haliw v City of Sterling Heights*, 471 Mich 700; 691 NW2d 753 (2005); *Grievance Administrator v Underwood, supra*, at 193.

2. Applying These Rules to MCR 2.116(G)(4) Supports Defendants-Appellants' Conclusion that Summary Disposition Must Be Entered If the Moving Party Has Satisfied the Requirements of MCR 2.116(C)(10).

The Court has asked the parties and the amici to address whether a trial court may deny a motion summary disposition filed under MCR 2.116(C)(10), even though the motion is supported by evidence and the opposing party did not present countervailing evidence, on the ground that judgment is not appropriate under MCR 2.116(G)(4).”

MCR 2.116(G)(4) states:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue of material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is genuine issue for trial. If the adverse party does not so respond, **judgment, if appropriate, shall be entered** against him or her.

(Emphasis added). The plain text of this subrule is explicit in its use of the mandatory word “shall.” The word “may” is used when the intent is to confer discretion, while “the use of the word ‘shall’ indicates a mandatory and imperative directive.” *Michigan Chiropractic Council v Comm’r of Office of Financial and Insurance Services*, 475 Mich 363, 397; 716 NW2d 561 (2006).

The plain language of MCR 2.116(G)(4) requires the nonmoving party to make the showing that there is genuine issue for trial,” unless the litigant takes advantage of MCR

2.116(H) and the court makes a finding that the necessary affidavits are unavailable. That rule provides:

(H) Affidavits Unavailable.

(1) A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must

(a) name these persons and state why their testimony cannot be procured, and

(b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

(2) When this kind of affidavit is filed, the court may enter an appropriate order, including an order

(a) denying the motion, or

(b) allowing additional time to permit the affidavit to be supported by further affidavits, or by depositions, answers to interrogatories, or other discovery.

MCR 2.116(H)

Defendant's position is also supported by the statutory scheme. Subrule (G)(4) is written so as to make a motion for summary disposition an effective remedy by making summary disposition mandatory if the opposing party does not "set forth specific facts showing that there is a genuine issue for trial" or satisfy MCR 2.116(H). Only specific contravening facts (or a proper affidavit under subrule (H) demonstrating the unavailability of specific contravening facts) are sufficient to avoid the mandate of the rule. The party opposing the motion cannot defeat the motion merely by denying the facts offered by the movant, or by attacking their credibility.

A trial court tests the factual support of a plaintiff's claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10). The court must consider the affidavits, pleadings, depositions, admissions and documentary evidence admitted or filed in the action. **The court is not**

permitted to assess credibility, or to determine facts on a motion for summary judgment. Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial.

Skinner v Square D Co, 445 Mich 153, 161; 516 NW2d 475 (1994) (citations deleted) (emphasis added).

The majority opinion in the Court of Appeals focused on the words "if appropriate" as supporting the conclusion that "there may be situations in which summary disposition is inappropriate even if the adverse party fails to submit documentary evidence sufficient to show a genuine issue of fact for trial when responding to a properly supported (C)(10) motion." Opinion, p 626. But far from being a broad grant of power that allows a court to look behind the evidence and evaluate its strength, the phrase merely confirms that the court has authority to tailor the specific form or content of the judgment that it is required to enter, so that the relief is appropriate to the specific facts of the case.

The context provides the answer. The phrase "judgment, if appropriate, shall be entered," by juxtaposing "judgment" and "appropriate," demonstrates that the word "appropriate" modifies the type of relief that is to be granted. It does not contemplate situations in which the moving party will be denied relief, but instead recognizes that the relief sought might be limited in some other way. For example, a party seeking injunctive relief of some kind, might establish that it is entitled to relief, but the court might decide that the injunctive relief should be structure in some particular way that may or may not be the precise form of relief requested.

Another example would be a plaintiff whose motion is sufficient to support a judgment of liability but insufficient to support the specific damages sought. Or a defendant might move for summary disposition as to each of four counts in a complaint and the court might find that the

support that the defendant provided for the motion justifies summary judgment as to three but not the fourth count.

The plain meaning of the phrase “judgment, if appropriate, shall be entered” indicates that the moving party that provides the necessary support is entitled (by the word “shall”) to a judgment, but not necessarily the specific form of relief that he or she asked for. The word “shall,” requires the court to grant relief, but only that relief that is appropriate to the nature of the case. The court is not permitted under this subrule, to deny a judgment, but retains the power to tailor the judgment to the facts court rule.

The *Skinner* case distinguishes sharply between inferences and credibility, when it says that “[t]he court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. Instead, the court’s task is to review the record evidence, and all reasonable inferences therefrom . . .” *Skinner, supra* at 161. The evaluation of possible inferences is qualitatively different from the assessment of credibility. In drawing inferences, the court takes the evidence as true and then evaluates the conclusions that are permissible based on the evidence. It is possible that a defendant moving for summary disposition might offer support which, although stating facts that are not controverted, would still not exclude an inference consistent with liability. If, for example in a case involving an intersection collision, the evidence offered by the defendant was that he did not see the plaintiff’s car as it entered the intersection, it might be inferred that he did not see her car either because something obstructed his vision or because he was inattentive.

Judgment would be denied in this situation, but not because of the phrase “if appropriate.” The reason that judgment would be denied is that the moving party has failed to show that “there is no genuine issue of material fact.” Because the evidence does not exclude a

permissible inference that is consistent with liability, the movant has failed to offer proper “support” and “there is genuine issue for trial.” MCR 2.116(G)(4). Summary judgment would be denied because the motion was not “made and supported as provided in this rule.”

The prohibition against inquiries into credibility is not a harsh or arbitrary rule that interferes with the making of a sound decision, but a principle that is essential to preserve the integrity of the summary disposition procedure.

C. Federal Practice Does Not Support the Majority’s Analysis.

The majority opinion refers to federal practice for support, and it is true that the advisory committee notes to the federal rule that parallels MCR 2.116(G)(4) state that summary judgment is not appropriate “when an issue of material fact cannot be resolved without observation of the demeanor of witnesses,” but the federal courts take a strict view of the responsibilities of the parties in a motion under F R Civ P 56(e). The rule, as frequently stated, is:

The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, “the burden on the moving party may be discharged by ‘showing’-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case.” Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue.

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in *Anderson v Liberty Lobby, Inc*, 477 US 242, 249-50, 106 SCt 2505, 91 LEd2d 202 (1986),

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant’s] evidence is merely colorable, or is not significantly probative, summary judgment may be granted. (Citations omitted).

The standard for summary judgment mirrors the standard for a directed verdict under Fed R Civ P 50(a). **Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact.**

McDonald's v Burger King Corp, 107 F Supp 2d 787, 789 (ED Mich 2000) (citations omitted) (emphasis added).

The essence of attacking credibility, of course, is to “raise some doubt as to the existence of a fact,” and the cases in the federal courts, applying the federal rules, specifically reject it as a basis for the denial of summary judgment.

D. Inquiring into Credibility Will Severely Limit the Effectiveness of Motions for Summary Disposition.

The view of the majority in the Court of Appeals cannot be justified on the basis of the text of the rule or by reference to the practice in the federal courts, and it also fails as a practical matter.

Under the rule that the majority applies, any party opposing summary disposition will always assert that a particular affidavit or certain deposition testimony may not stand up under cross examination at trial, and that the demeanor of the affiant or deponent at trial will thus destroy or at least diminish his or her credibility.

There is no principled basis on which the application of the majority’s proposed rule can be restricted to the facts of this case. If the court’s inquiry into credibility is necessary in this case, then it is necessary in all cases. But this is specifically prohibited under this Court’s decision in *Skinner*:

The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. Instead, the court’s task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial.

Skinner v Square D Co, *supra*, 445 Mich 161 (citations deleted).

The *Skinner* opinion provides the template that gives effect to the full text of the subrule and results in a workable rule. The trial court takes the supporting evidence at face value and

determines what the “reasonable inferences” are. If each side offers contradictory assertions of material fact, then of course there is an issue of material fact and the motion is denied. If there is a fact that is material and for which no controverting fact is offered, the trial court is still required to determine the “reasonable inferences” that can be drawn from the fact. If any reasonable inference supports liability, the motion must be denied.

But what *Skinner* prohibits is precisely what the majority in this case did. It assessed the credibility of the evidence offered by the Defendant. First, it offered the argument from self-interest, looking to the “motive and intent” of a witness’s testimony (opinion p 625).

The opinion also found that the evidence offered by the defendant was somehow suspect because the medical opinions “did not pinpoint when Birkenheuer blacked out.” Opinion p 626. The medical opinions, of course, were concerned with medical matters, with whether a particular symptom (diarrhea and dehydration) could or could not be linked to a particular phenomenon (dizziness and loss of consciousness). It was not necessary to state the time of the event to support the medical basis for a linkage.

The majority also noted (page 625, note 4) that the notes of Birkenheuer’s treating physician make “no mention of waiting 20 minutes at the rest area, which could call into question Birkenheuer’s version of the events.” The silence in one person’s evidence is a thin basis for finding a conflict with a positive statement contained in another person’s evidence, but the point is that the majority was delving into the credibility of the support offered by the defendant.

Each of these three critiques in the majority opinion was an attempt to “assess credibility” – specifically proscribed by *Skinner* – as a basis for denying summary disposition. To “assess”

means “to determine the value, significance or extent of,” *American Heritage Dictionary*, 3rd Ed. p. 111, and the majority was doing precisely that.


The approach that was taken by the majority of the Court of Appeals was inconsistent with the language and the purpose of the rules providing for summary disposition.

RELIEF REQUESTED

Amicus Curiae Michigan Defense Trial Counsel, Inc. requests that this Court reverse the decision of the Court of Appeals and reinstate the decision of the trial court.

Respectfully submitted,

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February 20, 2008