STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

AUBURNMOST PROPERTY, LLC, et al.,

Plaintiffs,

v

Case No. 2020-184889-CB
Hon. Michael Warren

PHILADELPHIA INDEMNITY INSURANCE CO., et al.,

Defendants.

OPINION AND ORDER GRANTING DEFENDANTS ACRISURE, LLC, HUTTENLOCHER GROUP, LLC, HUTTENLOCHER GROUP, II, LLC AND HUTTENLOCHER HOLDINGS, LLC'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the County of Oakland, State of Michigan
June 2, 2021

PRESENT: HON. MICHAEL WARREN

OPINION

The instant action is before the Court on Defendants Acrisure, LLC, Huttenlocher Group, LLC, Huttenlocher Group II, LLC, and Huttenlocher Holdings, LLC's (the "Defendants") Motion for Summary Disposition filed on December 10, 2021; the Court having entered a Scheduling Order on December 15, 2021, requiring a responsive brief by May 27, 2022 which further states *inter alia,* that, "**[if] briefs are not timely filed, the Court SHALL assume that the party, whether or not represented by counsel, does not have any authority for his/her/its position(s). Failure to timely file briefs also will**

result in that party's waiver of oral argument" (emphasis in original); no responsive brief having been timely filed; the Court recognizing its authority to issue orders establishing times for events pursuant to MCR 2.116(G), MCR 2.119 and MCR 2.401; *Kemerko Clawson LLC v RXIV Inc,* 269 Mich App 347 (2005), and additional authorities *infra*; the Court finding that oral argument would not aid it in rendering a decision (the Court's Scheduling Order also providing that the failure of a party to respond results, *inter alia,* in that party's waiver of oral argument); and the Court being otherwise advised in the premises:

THE COURT HEREBY GRANTS the Motion for each of the following independent reasons:

I
The Court is entitled to enforce its Scheduling Orders

As stated in this Court's Scheduling Order "**[if] briefs are not timely filed, the Court SHALL assume that the party, whether or not represented by counsel, does not have any authority for his/her/its position(s).**" The Court has authority to issue orders establishing times for events pursuant to MCR 2.116(G), MCR 2.119 and MCR 2.401. See *People v Grove,* 455 Mich 439, 465 (1997) ("[t]he court rules provide for and encourage the use of scheduling orders to promote the efficient processing of civil and criminal cases); SCAO 2013-12; LAO 2015-03. In fact, the Michigan Supreme Court has affirmed summary disposition granted on the basis of a trial court enforcing its summary disposition scheduling order. *EDI Holdings LLC v Lear Corp,* 469 Mich 1021 (2004) (summarily

reversing the Court of Appeals' determination that the trial court abused its discretion by refusing to accept a brief filed after the deadline established by the trial court's summary disposition scheduling order: "The Court of Appeals clearly erred in finding that the Oakland Circuit Court abused its discretion when it enforced the summary disposition scheduling order").

Applying this precedent, our Court of Appeals has reaffirmed a court's power to enforce its scheduling orders, and in so doing, upheld this Court in enforcing its summary disposition scheduling order in both *Moore v Whiting,* unpublished per curiam opinion of the Court of Appeals, issued November 10, 2015 (Docket No. 323697) and *Thigpen v Besam Entrance Solutions,* unpublished per curiam opinion of the Court of Appeals, issued September 16, 2014 (Docket No. 316696). See also *Kemerko*, 269 Mich App at 351-353 (trial courts have authority to establish and enforce scheduling order deadlines in connection with summary disposition motions); *Bergin Financial, Inc v Delsean Littlejohn,* unpublished per curiam opinion of the Court of Appeals, issued September 16, 2008 (Docket No. 278088) ("A trial court has no obligation to consider whether enforcing a scheduling order is just under the circumstances).

In the present matter, the Plaintiffs failed to timely submit a responsive brief to this Court despite ample opportunity to do so, and there has been no timely attempt to show good cause to extend the deadline for responsive briefing set forth in the Court's Scheduling Order – a deadline which provided time well-beyond the time otherwise provided by the Rules of Court. The Plaintiffs had 24 weeks to prepare and file their

Response. Under Michigan jurisprudence, the Court need not await or accept an untimely filing.[1] See e.g., *EDI Holdings,* 469 Mich at 1021; *Alken-Ziegler,* 461 Mich at 224 (1990). See also *Henning v Verizon Wireless,* unpublished per curiam opinion of the Court of Appeals, issued January 25, 2005 (Docket No. 251241) (affirming this Court's reliance on MCR 2.401(B), and MCR 2.116(G)(1)(a)(ii) in striking an untimely reply submitted in support of a motion for summary disposition). To hold otherwise in the instant circumstances effectively renders meaningless the power afforded by MCR 2.401 to enforce scheduling orders in an effort to promote the efficient management of court dockets.

II
Summary disposition pursuant to MCR 2.116(C)(10) is warranted[2]

Simply put, the Defendants' uncontroverted legal authorities and analysis, hereby incorporated, dispositively establish that in absence of an expert witness, the Plaintiffs

[1] On May 27, 2022 at 11:56:54 p.m., less than three minutes before the filing deadline, the Plaintiffs filed a five-sentence motion for extension, with an incomplete fifth and final sentence. Notwithstanding the Plaintiffs' delay in requesting an extension and the cursory treatment with little citation of supporting authority, the motion is defective for failing to include a brief. MCR 2.119(A)(2) (any motion "that presents an issue of law must be accompanied by a brief citing the authority on which it is based"); *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) (a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority" (citations omitted)). Furthermore, neither a notice of hearing nor a praecipe was filed to properly schedule the motion for hearing before the Court. See Oakland County Circuit Court Guidelines for Filing a Motion. As a result, the defective and untimely motion floats in limbo and is not appropriately before the Court.

[2] A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim or defense. See e.g., *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *Skinner v Square D Co*, 445 Mich 153, 162 (1994).

cannot identify the applicable standard of care or demonstrate that the Defendants breached that standard.[3] The Plaintiffs must prove that the Defendants owed the Plaintiffs a legal duty and breached that duty. *Bialick v Megan Mary, Inc,* 286 Mich App 359, 362 (2009). To establish the applicable standard of care and that a professional breached it, the Plaintiffs must present expert testimony unless the lack of professional care is so obvious as to be within the common knowledge and experience of a layperson. *Eilher v Misra,* 499 Mich 11, 21-22 (2016). "Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community." *Decker v Rochwolak,* 287 Mich App 666, 686 (2010) (quotation marks and citation omitted). In the instant case, the Plaintiffs never filed an expert witness list, discovery is closed, and the Plaintiff Ronald Weiss admits he never discussed the standard of care with an expert witness. As such, the Plaintiffs cannot prove the standard of care or its breach.

Furthermore, the Defendants' submission reflects that the Plaintiffs' claim for negligence fails as a matter of law because (a) the Defendants did not owe the Plaintiffs a duty to advise regarding the adequacy of coverage and the Plaintiffs cannot establish a "special relationship" which can give rise to such a duty,[4] and (b) the Defendants

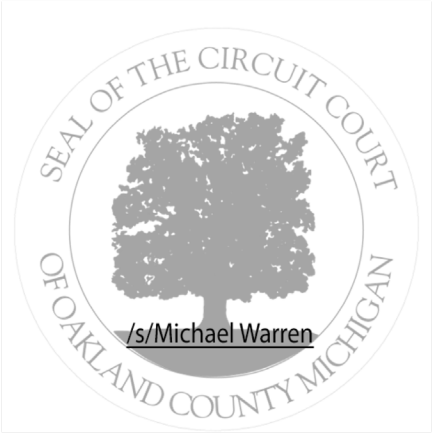
[3] *Nofar v Eikenberry*, unpublished per curiam opinion of the Court of Appeals, issued October 30, 1998 (Docket No. 197231) ("Generally, expert testimony is required in a professional negligence case to establish the applicable standard of care and to demonstrate that the professional breached that standard.")
[4] *Harts v Farmers Ins Exch*, 461 Mich 1, 7 and 10 (1999).

processed the Plaintiffs' application as requested. This is a separate and distinct basis for granting the Motion.

ORDER

In light of the foregoing, Defendants Acrisure, LLC, Huttenlocher Group, LLC, Huttenlocher Group II, LLC and Huttenlocher Holdings, LLC's Motion for Summary Disposition is **GRANTED**.

This Order resolves the last pending claim and closes the case.[5]



[5] In a September 7, 2021 Opinion and Order, Defendant Philadelphia Indemnity Insurance Company's motion to dismiss the complaint was granted.