

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

GREAT NORTHERN INSURANCE COMPANY,

Plaintiff,

v

**Case No. 24-205198-CB
Hon. Michael Warren**

HUGHES BUILDING, LLC, et al.,

Defendants.

****Consolidated with****

SAM R. SIMON and NADA SIMON,

Plaintiffs,

v

**Case No. 24-205192-CB
Hon. Michael Warren**

HUGHES BUILDING, LLC, et al.,

Defendants.

**DEFENDANT PROFESSIONAL HEATING & AIR CONDITIONING, INC.
d/b/a PROFESSIONAL HEATING & COOLING'S
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)
IN LIEU OF AN ANSWER TO PLAINTIFFS' COMPLAINT**

**At a session of said Court, held in the
County of Oakland, State of Michigan
September 23, 2024**

PRESENT: HON. MICHAEL WARREN

OPINION

I

The instant action is before the Court on Defendant Professional Heating & Air Conditioning, Inc. d/b/a Professional Heating & Cooling's ("PHAC") Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) in Lieu of an Answer to Plaintiffs' Complaint; PHAC's Motion seeking summary disposition of Plaintiffs Sam R. Simon and Nada Simon's (the "Simons") claims for Negligence (Count V) and Breach of Implied Warranty of Workmanship (Count VI) against it;¹ the Court having entered a Scheduling Order on July 12, 2024² requiring a responsive brief to be filed by August 14, 2024 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 by the Simons;³ 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*

¹ Paragraph 1 of the Motion states "Plaintiffs, SAM R. SIMON AND NADA SIMON filed this lawsuit on January 25, 2024 seeking damages in excess of \$25,000.00 following a fire on October 31, 2023 at 150 Lone Pine Road Bloomfield Hills, MI 48304. (Exhibit A)." Exhibit A to the Motion is the Simons' Complaint.

² On April 4, 2024, the Simons moved to consolidate Case No. 24-205192-CB (former "CZ") with Case No. 24-205192-CB. Case Nos. 24-205198-CB and 24-205912-CB were consolidated on April 23, 2024. The order reflects that all future filings are to be filed under Case No. 24-205198-CB. The instant Motion was filed in Case No. 24-205198-CB. A second order of consolidation was entered on June 21, 2024 and again reflects that all future filings are to be filed under Case No. 24-205198-CB. On June 27, 2024, Case No. 24-205192-CB was reassigned to Judge Michael Warren. The Scheduling Order was filed in both Case No. 24-205192-CB and Case No. 24-205198-CB.

³ On August 14, 2024, Great Northern Insurance Company ("Great Northern") filed a Response; however, the Motion does not seek summary disposition of Great Northern's claims. Indeed, on September 13, 2024, PHAC filed a separate motion seeking summary disposition of Great Northern's claims.

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:

II 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 Simons 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 as set forth in the Court’s Scheduling Order – a deadline beyond the time otherwise provided by the Rules of Court. Indeed, the Simons had fourteen (14) weeks to prepare and file a response. Under Michigan jurisprudence, the Court need not await or accept an untimely filing. 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). See also *Master Beat v Skill*, unpublished per curiam opinion of the Court of Appeals, issued February 29, 2024 (Docket No. 363340) (“in light of the lack of a properly and timely filed responsive brief, the trial court did not err by granting plaintiffs’ motion for summary disposition”); *INXS V LLC v Kathelene’s Compassionate Adult Day Care*, unpublished, per curiam opinion of the Court of Appeals, issued February 29, 2024 (Docket No. 365939) (“Defendants failed to respond to plaintiff’s motion [for summary disposition] and did not present any documentary evidence establishing the existence of a material factual dispute. In so doing, defendants failed to meet their burden. The trial court, therefore, did not err by granting plaintiff’s unopposed 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.⁴

⁴ Perplexingly, PHAC’s Reply does not note that the wrong party responded to the instant Motion. Nor does Great Northern acknowledge that it is responding to a motion in which it has no stake, and it fails to cite any authority to suggest that it has standing to respond in lieu of the Simons.

III

Summary Disposition Under MCR 2.116(C)(10) is Warranted⁵

Simply put, the Motion dispository establishes that a fire occurred at the Simons' single family home (the "Property") on October 31, 2023; the Simons' allege that "combustible building materials near the flue pipe [for a 40-inch Montebello fireplace (the "Subject Fireplace")] ignited and caused a fire," [Simons' Complaint, §33]; PHAC only performed at the Property in the mechanical room; prior to the fire, PHAC last performed work at the Property during November 2021; PHAC did not perform work on the Subject Fireplace at the Property; PHAC did not pull a permit for work to be performed on the Subject Fireplace at the Property; PHAC did not design, fabricate or install flue piping for Subject Fireplace at the Property. There is no genuine issue of material fact that PHAC did not breach a duty to the Simons upon which it can be held liable. Accordingly, summary disposition of Plaintiffs Sam R. Simon and Nada Simon's claims for

⁵ 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). If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

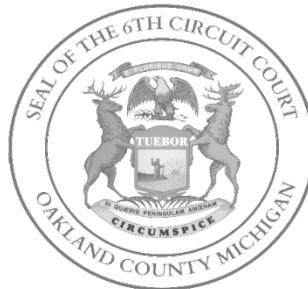
Negligence⁶ (Count V) and Breach of Implied Warranty of Workmanship⁷ (Count VI) against PHAC is warranted.

ORDER

In light of the foregoing Opinion, Professional Heating & Air Conditioning, Inc. d/b/a Professional Heating & Cooling's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) in lieu of an Answer to Plaintiffs' Complaint is GRANTED.

/s/ Michael Warren

**HON. MICHAEL WARREN
CIRCUIT COURT JUDGE**



⁶ "To establish a *prima facie* negligence claim, a plaintiff must present evidence of the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Anderson v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, issued July 11, 2024 (Docket No. 363840), p 4 (internal quotation omitted).

⁷ Every contract for services includes an implied duty to perform skillfully, carefully, diligently, and in a workmanlike manner. *Nash v Sears, Roebuck & Co*, 383 Mich 136, 142-143 (1970). Where a party to a contract fails to comply with the implied duty to perform in a workmanlike manner, the other party may be entitled to damages resulting from the deficient performance. *Id.*

