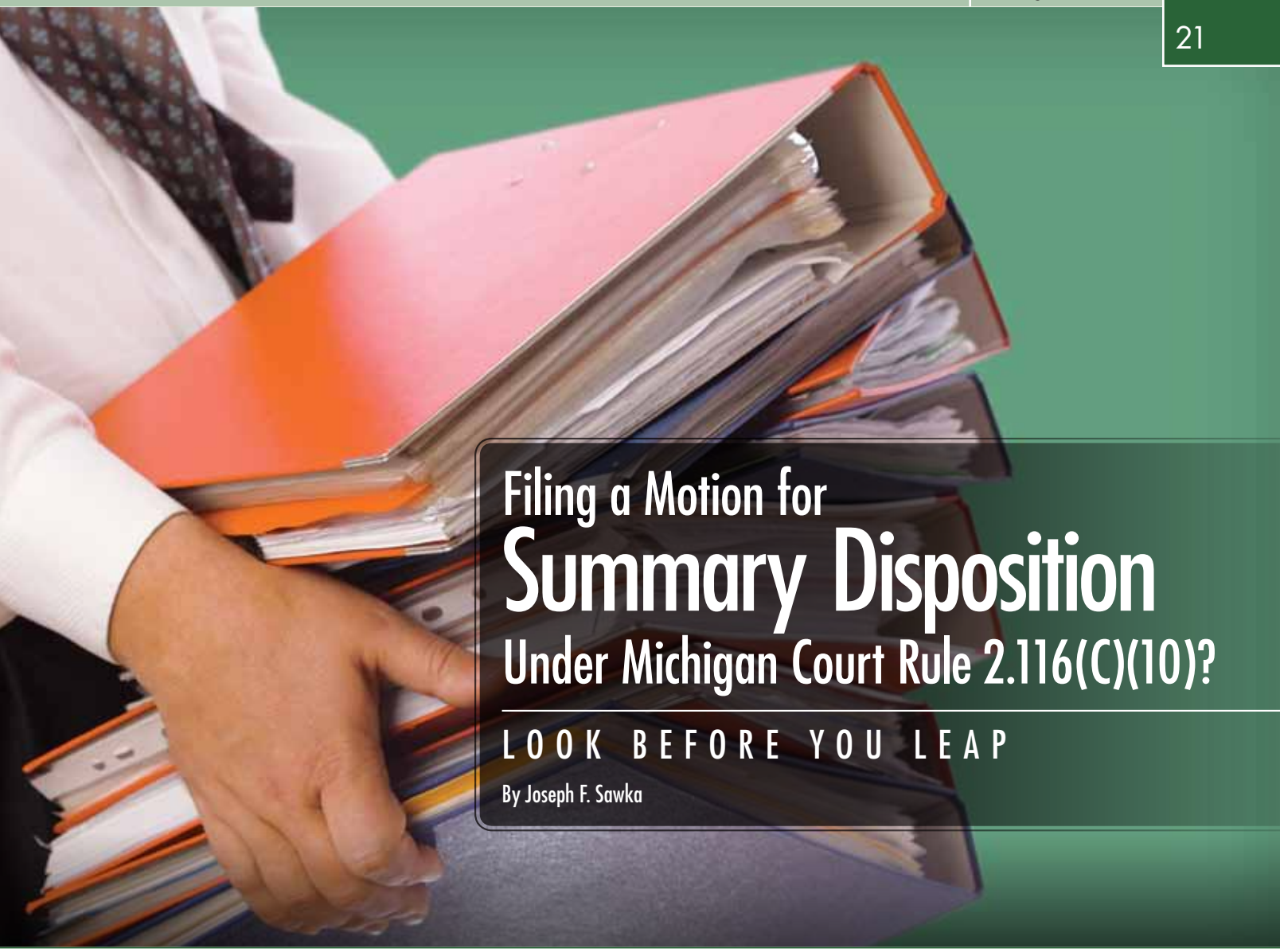

Filing a Motion for Summary Disposition Under Michigan Court Rule 2.116(C)(10)?

LOOK BEFORE YOU LEAP

By Joseph F. Sawka

The federal standard for summary judgment under FR Civ P 56 has come under attack from critics who argue that it is overused, among other things.[1] In pertinent part, FR Civ P 56 provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." With this civil procedure issue at the forefront of federal litigation, it is worthwhile to analyze Michigan's own court rule dealing with summary judgment—or as it is known in Michigan civil procedure, "summary disposition"—under Michigan Court Rule 2.116(C)(10), which is the analogue of FR Civ P 56, and learn what improvements could be made to the rule. From an analysis of the rule, a trend develops that shows that lawyers are jumping the gun, so to speak, when it comes to pretrial dispositions under MCR 2.116(C)(10), resulting in excess proceedings in Michigan courts.[2]

MCR 2.116(C) sets forth 10 separate bases for summary disposition and requires the party seeking summary disposition to specify on which of the 10 grounds the motion is based.[3] MCR

Fast Facts:

The federal summary judgment has been called "overused" by critics, and the same seems to be true for Michigan's summary disposition standard under Michigan Court Rule 2.116(C)(10).

Michigan trial courts face many motions under this rule, but the most troubling are those that are brought before the discovery cutoff date because the rule presupposes discovery has ended.

The language and framework of the law provides attorneys with cues as to whether a motion for summary disposition under MCR 2.116(C)(10) is ripe and the likelihood of success.

2.116(C)(10) is the appropriate basis for summary disposition when "[e]xcept as to any amount of damages there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." At the fundamental level, one must know what a "genuine issue of material fact" is in a case. The simplest, yet vaguest, description of a genuine issue of material fact adopted by the Michigan courts is "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party."[4]

Implicit in a motion under MCR 2.116(C)(10) is the concept that discovery in a case has provided the parties to the contested matter all the necessary facts, evidence, and general information that they will need to succeed in their theory of the case. It would seem difficult to ascertain whether a genuine issue of material fact exists if the attorneys do not have all the facts at hand. So one should not expect a motion under MCR 2.116(C)(10) to be presented to the court for determination until discovery has ended. Yet in many instances, attorneys attempt to bypass extensive and complete discovery in hopes of ending the case early by filing a motion for summary disposition under MCR 2.116(C)(10) before the end of the discovery period. However, as a matter of theory, motions filed in this manner should not result in a favorable decision for the moving party, and tend not to, as the nature of a (C)(10) motion is implicitly premised on complete discovery.

To protect and efficiently represent clients and save the courts countless hours of legal research and review of case files, attorneys should recognize that there are particular sets of circumstances in which a motion for summary disposition under (C)(10) is likely to be denied if filed before the end of discovery.

The Nature of Summary Disposition Under MCR 2.116(C)(10)

At the core of a motion for summary disposition is its policy. Summary disposition is intended to protect courts and the parties from frivolous defenses and claims and defeat attempts to use formal pleading as a means of delay.[5] Notably, MCR 2.116(C)(10) does not instruct a court to grant summary disposition by using words such as "shall" or "must," unlike the federal rule. Rather, the rule is written in a discretionary style, which allows the court to grant summary disposition on the basis of its own review of the facts and law.

In addition, certain types of claims will be more suitable to this summary disposition procedure because of the nature of the action involved. For example, actions involving unambiguous contracts and Michigan's first-party automobile insurance laws are commonly disposed of through summary disposition under MCR 2.116(C)(10).[6] In those cases, extensive discovery is likely to reveal little evidence of significant value that will assist a court. In these areas, the law is very specific about what is required, and there is very little room for interpretation of the law: an unambiguous contract either exists or does not, or an insurer is or is not the primary insurer. Consequently, summary disposition is usually appropriate in these cases, which benefits the parties and the court. However, attorneys frequently seek summary disposition under this rule before the end of discovery in a variety of cases in which factual issues generally exist in practice and the law is open to interpretation.

> Summary disposition is intended to protect courts and the parties from frivolous defenses and claims and defeat attempts to use formal pleading as a means of delay.

Filing a Motion for Summary Disposition Under MCR 2.116(C)(10) *Before* Discovery is Complete

A (C)(10) motion for summary disposition should theoretically not be ripe until discovery has ended regardless of the type of case. Yet many attorneys file under MCR 2.116(C)(10) before discovery has finished because they are confident that their case is a winner or the other side's case is a loser. With the highly discretional authority granted to courts to find a genuine issue of material fact, filing before discovery is complete is questionable except in rare circumstances already noted. While the general rule is that a motion under (C)(10) is premature if discovery is incomplete,[7] nothing in the Michigan Court Rules forbids a (C)(10) motion before discovery has ended—but perhaps there should be.

If an attorney chooses to move for summary disposition under (C)(10) before the end of discovery, he or she is likely increasing the chances that the motion will be denied for two straightforward reasons: the facts and the law.

The Facts

First, before discovery completion, it is entirely logical for a court to reason that the facts presented to it have not been fully developed. A motion under (C)(10) is premised on the litigants providing full factual development so that a court can make an informed, sensible, and legally sound decision regarding the disposition of a highly contentious case. When a litigant asks the court to dispose of the case in a particular way or resolve a material right of a party to the litigation before the end of discovery, the court may be skeptical that factual development is complete. Thus, the court may conclude that summary disposition under (C)(10) is premature and deny the motion on the basis of the insufficiency of the facts in relation to the underlying law, rather than assuming the facts are complete and making a decision using the facts presented.[8]

For example, consider the following scenario, which occurs in a general negligence case. Assume, of course, that the case will survive summary disposition by a court under MCR 2.116(C)(1) through (9). In this scenario, the plaintiff filed a complaint on February 1, 2010, and the defendant responded on February 16, 2010. Subsequently, a couple of interrogatories are sent and answered

Whenever the law requires a multistep analysis or proof of multiple required elements to establish a claim, an attorney must examine the language carefully and understand the vital and trivial elements of his or her argument.

by each side and filed with the court, by which time it is April 1, 2010. The interrogatories are run-of-the-mill questions and responses. Then, a scheduling order is entered on April 15, 2010, that indicates that the discovery cutoff is August 1, 2010, and the cutoff for a summary disposition motion is September 1, 2010. Yet the plaintiff decides to move for summary disposition under MCR 2.116(C)(10) on May 1, 2010. At this point, all that the court will have in front of it when deciding the motion for summary disposition is the complaint, answer, some general interrogatories, the motion itself, the response to the motion, and the briefs in support of the motion and response.

While the plaintiff may feel that the case is open and shut in his or her favor, a critical court will likely find that the facts before it are undeveloped even if no genuine issue of material fact exists at that specific moment. Without even considering the law, the court would be inclined to question whether further discovery could prove useful to each side and, consequently, the court. While such a consideration is not required, it certainly helps the court to decide the issues presented to it. Again, the general discretion of a court under this rule is a significant factor in the court's deliberation when the motion is filed before the end of discovery. Moreover, courts are the gatekeepers of justice, and to afford the litigants a fair adjudication, a court would likely find it necessary to deny the summary disposition motion and allow the motion to be refiled at a later time. If courts were inclined in general to grant (C)(10) motions under the circumstances described, the moving party would in all cases only need to strategically file a (C)(10) motion at the "right" time, even if it knew that discovery could develop the facts further. Certainly, this would be against the principles of our American system of law.

Now, assume that the discovery cut-off date has passed, that the plaintiff refiled the motion on August 2, 2010, and that the same facts and pleadings are before the court. In this instance, the court will likely grant a motion for summary disposition. Assuming discovery was diligently undertaken but did not produce any additional evidence, a court will generally be more favorably inclined to grant the summary disposition motion because it will have a clear conscience that the facts presented to it are the only facts available. Although time, money, and effort were expended to produce no additional evidence, the result was a solid ground on which to base a favorable decision in the plaintiff's favor.

The Law

The second reason a motion brought prematurely under (C)(10) is more prone to denial is because of the body of law developed under this rule. As a general rule, when a party moves for summary disposition under MCR 2.116(C)(10), the facts are viewed in the light most favorable to the nonmoving party.[9] Thus, if the court has any inkling that there is conflicting evidence concerning a material factual issue, then summary disposition is inappropriate. Even if the evidence is only circumstantial, it is nonetheless evidence that can create a genuine issue of material fact.

Beyond the standard under which a (C)(10) motion is reviewed, the law applicable in any given case is also highly important when determining whether a genuine issue of material fact exists. Particularly when bringing a (C)(10) motion, an attorney must realize that the specific language of the common law or statute contains clues associated with a finding of a genuine issue of material fact. Certain terms imply that an issue is proper only for a jury to

decide unless the facts are overwhelmingly in the favor of one side. Terms that courts tend to associate with genuine issues of material fact, necessitating denial of a summary disposition motion, include:

- Reasonable
- Foreseeable
- Intentional/intent
- Probability/probable

This short list is certainly not exclusive, but in a majority of cases in which a court has denied summary disposition under MCR 2.116(C)(10) these words appear somewhere within the common law, statutory text, or legal analysis.[10]

In addition to specific terms, the framework of the law may also be a clue to whether a court will likely grant a summary disposition motion. In employment discrimination cases, for example, the analysis involves a test with different prongs that must be met to establish a claim.[11] A failure to establish even one prong or element of a prong may be fatal to a summary disposition motion. Analyzing statutory language for conjunctive or disjunctive terms is also crucial. For example, MCL 500.3113(a) states:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident…:
>
> (a) [t]he person was using a motor vehicle or motorcycle which he or she had taken unlawfully, *unless* the person *reasonably believed* that he or she was entitled to *take and use* the vehicle. [Emphasis added.]

This law requires a *reasonable belief* of entitlement to "take" *and* "use," illustrating perfectly the previously discussed concept that particular language can give rise to questions of material fact, e.g., what is a reasonable belief of entitlement to take *and* use a motor vehicle? Thus, whenever the law requires a multistep analysis or proof of multiple required elements to establish a claim, an attorney must examine the language carefully and understand the vital and trivial elements of his or her argument.

Conclusion

Filing a summary disposition motion under MCR 2.116(C)(10) before discovery is over forces courts to spend needless time on issues that are not truly appropriate for summary disposition. In doing so, attorneys create an ineffectual use of opposing counsel's, the client's, the court's, and their own time. Thus, it is important that an attorney seeking a favorable decision on a summary disposition motion under MCR 2.116(C)(10) understand all the relevant factors that a court considers when it deliberates, which include the timing of the motion, factual development, and the language of the law.

Arguments similar to those asserting that the federal summary judgment standard is overused can be made about summary disposition under MCR 2.116(C)(10). If attorneys can better recognize when a genuine issue of material fact exists, it would save the courts considerable time and effort that could be used on other matters. While a (C)(10) motion may be very appropriate in some circumstances before the end of discovery, a majority of time it is not. The inclusion of specific language in MCR 2.116(C)(10) that prohibits a decision on the motion until after the completion of discovery, except in extraordinary circumstances, would be beneficial to courts and would certainly cause attorneys to think twice before filing a (C)(10) motion. ■

Joseph F. Sawka is an assistant prosecutor in Oakland County. Previously, he served as a judicial law clerk with the Seventh Circuit Court of Michigan in the County of Genesee. He holds a BA from the University of Michigan, high honors and high distinction, and a JD from the University of Miami School of Law, cum laude. He previously worked as a federal judicial intern in the Eastern District of Michigan.

FOOTNOTES

1. See Brunet, *Six summary judgment safeguards,* 43 Akron L R 1165 (2010).
2. See Michigan Supreme Court, *Annual Report 2009,* available at <http://courts.michigan.gov/scao/resources/publications/statistics/2009/2009execsum.pdf> (accessed February 20, 2012).
3. Other subsections of MCR 2.116(C) are similar to other Federal Rules of Civil Procedure. For example, MCR 2.116(C)(8) (failure to state a claim on which relief can be granted) is the functional equivalent of FR Civ P 12(b)(6). Similarly, MCR 2.116(C)(1) (lack of jurisdiction over person or property) is the functional equivalent of FR Civ P 12(b)(1).
4. *Allison v AEW Capital Mgt, LLP,* 481 Mich 419, 424; 751 NW2d 8 (2008).
5. Sunderland, *The new Michigan court rules,* 29 Mich L R 586, 590–591 (1931).
6. Comment, *Preliminary motion practice under the Michigan General Court Rules of 1963,* 8 Wayne L R 399, 414 (1961); see also, e.g., *Ajax Paving Industries, Inc v Vanopdenbosch Constr Co,* 289 Mich App 639; 797 NW2d 704 (2010) (upholding the trial court's grant of summary disposition under MCR 2.116(C)(10) given the contract's unambiguous language); *Farmers Ins Exch v Farm Bureau Gen Ins Co,* 272 Mich App 106; 724 NW2d 485 (2006) (affirming the trial court's grant of summary disposition under MCR 2.116(C)(10) and determining that the insurer of the owner of the motor vehicle was first in priority to pay no-fault benefits).
7. *Davis v City of Detroit,* 269 Mich App 376, 379–380; 711 NW2d 462 (2005).
8. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club,* 283 Mich App 264, 292; 769 NW2d 234 (2009) (discussing that when granting a motion under MCR 2.116(C)(10) and stating that "[t]he question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position") (citations omitted).
9. *Walsh v Taylor,* 263 Mich App 618, 621; 689 NW2d 506 (2004).
10. A general list can be compiled by running a Westlaw or Lexis search using the individual terms within the same sentence as the phrase "MCR 2.116(C)(10)." A person conducting such a search will generate a substantial list.
11. See, e.g., *Town v Mich Bell Tel Co,* 455 Mich 688, 695; 568 NW2d 64 (1997).