

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GERALD K. SPRY, ELIZABETH SPRY and  
MEGHAN BETH SPRY,

UNPUBLISHED  
October 25, 1996

Plaintiffs-Appellants,

v

No. 181447  
LC No. 94-3655-NO

THE GRAND HOTEL,

Defendant-Appellee,

and

CLIFFORD M. HOLUBIK,

Defendant.

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Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,\* JJ.

PER CURIAM.

In this action stemming from a sexual assault, plaintiffs appeal as of right the order granting defendant The Grand Hotel summary disposition pursuant to MCR 2.116(C)(10) on the basis that plaintiffs' claims against defendant hotel were barred by the exclusive remedy provision of the Worker's Disability Compensation Act. MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.* We reverse.

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). The nonmoving party has the burden of producing documentary evidence sufficient to create a genuine issue of material fact. *Id.* Generally, a motion for summary disposition may be raised at any time, except that it is premature if granted before discovery on a disputed issue is complete.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

*Jordan v Jarvis*, 200 Mich App 445, 452; 505 NW2d 279 (1993). Our review is de novo. *Michigan Mutual, supra*.

Upon reviewing the record, we find that the trial court's grant of summary disposition was premature. The record contains virtually no *evidence*, as opposed to allegations contained in the complaint and unsupported representations made by the parties in their respective briefs. We attribute this dearth of evidence to the fact that defendant hotel moved for summary disposition pursuant to MCR 2.116(C)(10) apparently before any discovery had been conducted. While defendant may justifiably have prevailed on a motion for summary disposition brought pursuant to MCR 2.116(C)(8) at such an early stage, defendant's motion pursuant to MCR 2.116(C)(10) was clearly inappropriate.

Further, we decline to treat defendant's motion for summary disposition brought pursuant to MCR 2.116(C)(10) as one brought pursuant to MCR 2.116(C)(8) for purposes of our review. While, generally, "[a]n order granting summary [disposition] under the wrong court rule may be reviewed under the correct rule," *Ginther v Zimmerman*, 195 Mich App 647, 649; 491 NW2d 282 (1992), here, the circuit court relied on factual assumptions not alleged in the pleadings, meaning the court at no time considered defendant's motion in terms of MCR 2.116(C)(8). Further, both plaintiffs and defendant continue to frame their arguments on appeal in terms of MCR 2.116(C)(10). Therefore, given that the lower court did not consider defendant's motion for summary disposition in the context of MCR 2.116(C)(8) and that neither party, either below or on appeal, has addressed MCR 2.116(C)(8), we believe that any decision we might render based on MCR 2.116(C)(8) would deprive the losing party of its right to present its best argument.

In summary, the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) was premature, and we, accordingly, reverse that order. We decline to address whether summary disposition pursuant to MCR 2.116(C)(8) would have been appropriate because neither the lower court nor the parties have framed the issues on appeal in terms of this subrule.

Reversed.

/s/ Michael J. Kelly

/s/ Peter D. O'Connell

/s/ Kenneth W. Schmidt