STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL, ex rel, DEPARTMENT OF NATURAL RESOURCES,

Plaintiff-Appellee,

V

RICHFIELD IRON WORKS, INC., HOWARD D. CAMPBELL and WILMA M. CAMPBELL,

Defendants/Cross-Plaintiffs-Appellants,

and

THOMPSON SHOPPING CENTER and NBD BANCORP, INC.,

Defendants,

and

MARATHON FLINT OIL COMPANY,

Third-Party Cross-Defendant/Appellee,

and

MARATHON OIL COMPANY, FLINT PAINTERS SUPPLY, INC., MARV'S ELECTRIC COMPANY, INC., CLARENCE D'AIGLE, BETTY D'AIGLE, MORRIS LEIBOV, ROBERT A. STORK, DOUGLAS GOOCH, MERLE GOOCH, ROY DIRING, MARY DIRING, DONALD S. THOMPSON, FRANCES A. THOMPSON, MARGARET THOMPSON, GERALD J. MANSOUR, GEORGE J. MANSOUR, AND PATRICIA STORK,

Third-Party Defendants.

UNPUBLISHED
October 9, 2001

No. 224318
Ingham Circuit Court
LC No. 94-77873-CE

Before: Griffin, P.J., and Neff and White, JJ.

GRIFFIN, P.J. (*dissenting*).

Defendants Richfield Iron Works, Inc., Howard D. Campbell, and Wilma M. Campbell (herein referred to as RIW defendants) appeal by leave granted an order of summary disposition dismissing their cross-claims pursuant to MCR 2.116(C)(10). I would affirm and therefore respectfully dissent.

I

This Court reviews the grant or denial of a motion for summary disposition de novo and reviews the entire record to determine whether the moving party was entitled to summary disposition as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In Q*uinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), the Supreme Court set forth the following standards for the trial court to employ in deciding motions for summary disposition brought under MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Newbacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. *Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993). [Emphasis added.]

Further, "a litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden*, *supra* at 120. The court rule plainly requires the nonmoving party to set forth specific facts at the time of the hearing showing a genuine issue for trial.

The Supreme Court in *Smith v Globe Life Insurance Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), explained that under the General Court Rules of 1963, summary disposition was not to be granted if a record "might be developed" that would create a genuine issue of material fact. See *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). However, the *Smith* Court emphasized that under our current court rules a mere promise to offer factual support in support of a claim is no longer sufficient to withstand a motion for summary disposition brought pursuant to MCR 2.116(C)(10):

> We take this occasion to note that a number of recent decisions from this Court and the Court of Appeals have, in reviewing motions for summary disposition brought under MCR 2.116(C)(10), erroneously applied standards derived from *Rizzo v Kretschmer,* 389 Mich 363, 207 NW2d 316 (1973). These decisions have variously stated that a court must determine whether a record "might be developed" that will leave open an issue upon which reasonable minds may differ, see, e.g., *Farm Bureau Mut Ins Co of Michigan v Stark,* 437 Mich 175, 184; 468 NW2d 498 (1991); *First Security Savings Bank v Aitken,* 226 Mich App 291, 304; 573 NW2d 307 (1997); *Osman v Summer Green Lawn Care, Inc,* 209 Mich App 703, 706; 532 NW2d 186 (1995), and that summary disposition under MCR 2.116(C)(10) is appropriate only when the court is satisfied that "it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome." *Paul v Lee,* 455 Mich 204, 210; 568 NW2d 510 (1997); *Horton v Verhelle,* 231 Mich App 667, 672; 588 NW2d 144 (1998).
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> These *Rizzo*-based standards are reflective of the summary judgment standard under the former General Court Rules of 1963, not MCR 2.116(C)(10). See *McCart*,[*v J Walter Thompson*, 437 Mich 109] *supra* at 115, n 4 [469 NW2d 284 (1991)]. Under MCR 2.116, it is no longer sufficient for plaintiffs to *promise to offer* factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4).
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> Consequently, those prior decisions of this Court and the Court of Appeals that approve of *Rizzo*-based standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10) are overruled to the extent that they do so. [*Smith, supra* at 455-456, n 2 (emphasis in original).]

See also *D'Ambrosio v McCready,* 225 Mich App 90, 96, 97-100; 570 NW2d 797 (1997) (Griffin, J., dissenting).

In opposing the motion for summary disposition in the present case, RIW defendants failed to submit documentary evidence to substantiate any claims regarding matters not addressed in a consent order. In fact, at the March 31, 1999, hearing in the trial court, counsel for RIW admitted that it had not yet incurred any cleanup costs and stated, "there are some expenses *that some day we may want to recover*. Depending on what happens between the State and us, this all may become . . . a moot issue." (Emphasis added.) In granting summary

disposition pursuant to MCR 2.116(C)(10), the lower court ruled in regard to RIW's cross-claims, "[i]f you brought your action for damages that you incur for cleanup, that may be something different under the Act, *but at this point you have no action*."[1] (Emphasis added.)

On appeal, RIW defendants have not expanded the record but have merely promised that they *may* at some point in time submit documentary evidence to substantiate they have claims that are independent of the matters for which plaintiff Attorney General sought relief in this action. In its reply brief in the instant case, RIW argues "[t]he trial court's ruling on liability resulted in RIW never being allowed to submit evidence on damages." RIW is incorrect. The trial court did not prevent RIW from submitting proofs in opposition to the motions for summary disposition.

It appears the majority acknowledges in footnote six that necessary proof in support of RIW's cross-claims is lacking:

> Marathon Flint asserts that this Court should affirm the dismissal of the RIW defendants' cross-claims in any event, because the RIW defendants did not present documentary evidence below substantiating these costs. However, Marathon Flint's motion for summary disposition was not brought on this basis, rather, it was brought on the ground that the consent decree extinguished as a matter of law any right to contribution of the RIW defendants.

In my view, the majority has misapplied the MCR 2.116(C)(10) summary disposition rule as set forth in *Maiden, supra*; *Smith, supra,* and *Quinto, supra.* The motion for summary disposition asserted that the consent decree extinguished, as a matter of law, any right to contribution of RIW defendants because all of RIW's claims for contributions were matters addressed by the consent order. If this factual assertion were incorrect, RIW had the burden of so establishing by documentary evidence. MCR 2.116(G)(4).

Under Michigan's Environmental Response Act (MERA), a consent order bars all claims for contribution "regarding matters addressed in the consent order." MCL 299.612c(5). Further, the consent order in the present case is broad and includes "other matters for which plaintiff [Attorney General] seeks relief in this action." Here, plaintiff Attorney General sought investigative costs together with cleanup costs. In my view, it is pure speculation and conjecture that RIW defendants incurred costs for investigation or cleanup that may have been independent from those sought by plaintiff. In any event, it was the burden of RIW defendants to set forth documentary evidence in opposition to the (C)(10) motion to substantiate a claim independent from plaintiff's. Because RIW defendants failed to sustain this burden, the trial court correctly

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[1] The March 31, 1999, hearing regarded a motion brought by the PERC defendants in Docket No. 219654. At a November 11, 1999, hearing in the present case regarding a substantially similar motion for summary disposition brought by Marathon Flint Oil Co., the trial court granted the motion stating: "I'm going to take a consistent position with the ruling I've already made . . ."

granted summary disposition on the cross-claims. MCR 2.116(G)(4); *Smith*, *supra*; *Maiden*, *supra*.

I would affirm.

/s/ Richard Allen Griffin