# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| SHERITA WHITE and DERRICK WHITE,<br><br>Plaintiffs-Appellants,<br><br>v<br><br>TAYLOR DISTRIBUTING COMPANY, INC., PENSKE TRUCK LEASING COMPANY, L.P., and JAMES J. BIRKENHEUER,<br><br>Defendants-Appellees. | FOR PUBLICATION<br>May 24, 2007<br>9:00 a.m.<br><br>No. 272114<br>Oakland Circuit Court<br>LC No. 2005-064307-NI<br><br>Official Reported Version |

Before: Markey, P.J., and Murphy and Kelly, JJ.

MURPHY, J.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10) on the basis of the sudden-emergency doctrine. This is a negligence action arising from a motor vehicle accident in which a van driven by plaintiff Sherita White (White) was struck from behind by a tractor-trailer operated by defendant James Birkenheuer after Birkenheuer allegedly blacked out. We reverse, concluding that crucial credibility issues, relative to whether Birkenheuer was negligent and truly faced a sudden emergency, require adjudication by the trier of fact at trial, thereby making entry of the summary disposition order "inappropriate" under MCR 2.116(G)(4). Consistent with MCR 2.116(G)(4), we reach this conclusion regardless of plaintiffs' failure to submit sufficient documentary evidence to counter Birkenheuer's version of events, which was primarily within his exclusive knowledge.

## I. Documentary Evidence Presented at Summary Disposition

On March 15, 2004, White was stopped in her van at the intersection of I-96 and Novi Road in Novi, Michigan, when Birkenheuer, who was driving a tractor-trailer owned by defendant Penske Truck Leasing Company, L.P., in the course of his employment with defendant Taylor Distributing Company, Inc., collided with the rear of White's vehicle, allegedly causing serious injury. Birkenheuer testified at his deposition that on the day of the accident he was driving from Cincinnati to Novi. He indicated that while he was on I-275 he stopped at a rest area around Canton, Michigan, because he suddenly had to use the restroom "big time" to have a bowel movement. Birkenheuer stated that after experiencing an episode of severe diarrhea he hung around the rest area for a while, walked around the area to make sure he was finished using

the restroom, and then left because he felt fine and his destination was not far away. He estimated that he was at the rest area for "maybe 20 minutes." According to Birkenheuer, he had never previously been treated for gastrointestinal issues.

Birkenheuer proceeded traveling and subsequently, when driving on westbound I-96, he drove his truck onto the exit ramp for the Novi Road exit. Ten to fifteen seconds after getting on that ramp he "just broke out into a sweat and got dizzy." Birkenheuer indicated that the very next thing he did when he felt the sudden sweating and dizziness was to "[h]it the brakes." He did not slam the brakes, but he did "[m]ore than a normal stop" because he wanted to stop quickly. Birkenheuer asserted that he had slowed the truck down to between 5 and 10 miles an hour just before he blacked out. When asked why he hit his brakes, Birkenheuer stated, "Because I was dizzy and I told myself—you know, I'm stopping. I don't care if I'm in the middle of this thing and sit here, I'm stopping." He did not apply the emergency brake, nor did he consider driving the truck onto the shoulder. Birkenheuer saw White's van "way up there," at least 250 to 300 yards ahead, at the point where he started to sweat and become dizzy. He remembered applying the brakes with plenty of room to stop before blacking out. He regained consciousness soon afterward by the jarring of his truck as it hit White's van. Birkenheuer indicated that he had no recall between the point of applying the brakes and the collision.

Birkenheuer described his actions after the collision as follows:

> [I] [s]et the brake and hit the flashers, and I wanted to get out and see if [White] was all right. I got out of the car, walked to the front of the truck and passed out again in the street. And the next thing I remember is trying to get up again, and some guys that were already there . . . said just stay where you are, so I never saw her.

Birkenheuer also expressed that after he passed out again on the pavement in front of his truck, he involuntarily urinated and defecated; he had more diarrhea. He claimed that he had never felt dizzy while driving other than during the incident involved in this case and as described above.

Birkenheuer was treated in the local hospital's emergency room (ER) and left against medical advice after a few hours. The medical diagnosis by the ER physician regarding what had occurred to Birkenheuer around the time of the accident was "acute syncopal episode." The ER physician testified that a "syncopal episode" means, in layman's terms, that Birkenheuer "passed out." The ER physician indicated that there were numerous possible causes for a syncopal episode. She further stated that severe bouts of diarrhea could cause dehydration, which in turn could result in a syncopal episode. The ER physician opined, however, that one episode of diarrhea typically would not cause one to pass out, but severe abdominal cramps and pain could cause a syncopal episode. The day after the accident, Birkenheuer saw another physician who diagnosed "viral enteritis with syncopal spell secondary to hypovolemia from diarrhea." This suggested a connection between the severe bout of diarrhea suffered by Birkenheuer and his passing out.

Defendants moved for summary disposition under MCR 2.116(C)(10) on the grounds that Birkenheuer was not negligent with regard to the accident under the sudden-emergency

doctrine because the accident resulted from an unexpected medical emergency not of his making and, alternatively, that White did not suffer a serious impairment of body function as a result of the accident. Thereafter, defendants additionally contended that they were entitled to summary disposition under MCR 2.116(C)(7) on the basis of a release that White had signed in connection with her claim for first-party, no-fault benefits with an insurer who is not a party to this action.

The trial court granted summary disposition in favor of defendants on the basis of the sudden-emergency doctrine without addressing the serious impairment of body function or release issues.[1] The trial court essentially accepted Birkenheuer's version of events, which necessarily reflected a conclusion that he was credible. Plaintiffs appeal as of right.

## II. Analysis

### A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).[2] We similarly review de novo

---

[1] The trial court ruled:

> The evidence establishes that Mr. Birkenheuer passed out while driving his semi truck. He had no prior similar episodes, had no pain or any other symptom just before the accident. He attempted to stop as soon as he began feeling dizzy and lightheaded. The court finds the collision occurred as the result of a sudden emergency not of the defendants' own making.

[2] Summary disposition was granted pursuant to MCR 2.116(C)(10). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "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 [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Generally speaking, where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Courts are liberal in
(continued…)

the interpretation of statutes and court rules. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

B. Rear-End Collisions and the Statutory Rebuttable Presumption

MCL 257.402(a) provides:

> In any action, in any court in this state when it is shown by competent evidence, that a vehicle traveling in a certain direction, overtook and struck the rear end of another vehicle proceeding in the same direction, or lawfully standing upon any highway within this state, the driver or operator of such first mentioned vehicle shall be deemed prima facie guilty of negligence. This section shall apply, in appropriate cases, to the owner of such first mentioned vehicle and to the employer of its driver or operator.

"Under the rear-end collision statute a rebuttable presumption arises that the offending driver is *prima facie* guilty of negligence." *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971), citing *Petrosky v Dziurman*, 367 Mich 539, 543; 116 NW2d 748 (1962), and *Garrigan v LaSalle Coca-Cola Bottling Co*, 362 Mich 262, 263; 106 NW2d 807 (1961); see also *Szymborski v Slatina*, 386 Mich 339, 340; 192 NW2d 213 (1971).[3] Accordingly, because Birkenheuer's truck undisputedly struck the rear of White's vehicle, a rebuttable presumption arose that he was negligent with regard to the collision. A presumption of negligence "may be rebutted with a showing of an adequate excuse or justification under the circumstances[.]" *Dep't of Transportation v Christensen*, 229 Mich App 417, 420; 581 NW2d 807 (1998). When the trial court undertakes to eliminate from the jury's consideration a statutory presumption as a matter of law, at the very least there must be clear, positive, and credible evidence opposing the presumption. *Petrosky, supra* at 544; see also *Szymborski, supra* at 341 (where evidence is less than clear, positive, and credible, the issue of overcoming the rear-end presumption should be settled in the jury room).

C. The Sudden-Emergency Doctrine

The sudden-emergency doctrine was explained by our Supreme Court in *Socony Vacuum Oil Co v Marvin*, 313 Mich 528, 546; 21 NW2d 841 (1946):

(…continued)

finding genuine issues of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

[3] Plaintiffs also maintain that Birkenheuer violated MCL 257.627(1), which provides in part that "[a] person shall not operate a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead," and that this also created a rebuttable presumption of negligence. But given the direct and unambiguous applicability of MCL 257.402(a) to create a rebuttable presumption, we see no reason to consider whether MCL 257.627(1) would independently create such a presumption.

> "One who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence." [Quoting Huddy on Automobiles (8th ed), p 359.]

To come within the purview of the sudden-emergency doctrine, the circumstances surrounding the accident must present a situation that is unusual or unsuspected. *Vander Laan, supra* at 232, citing *Barringer v Arnold*, 358 Mich 594, 599; 101 NW2d 365 (1960). "[I]t is essential that the potential peril had not been in clear view for any significant length of time[.]" *Vander Laan*, *supra* at 232. *Szymborski* addressed the sudden-emergency doctrine in the context of the rear-end presumption. The Court stated that the sudden-emergency doctrine is a logical extension of the "reasonably prudent person" standard, with the question being whether the defendant acted as a reasonably prudent person when facing the emergency, giving consideration to all the circumstances surrounding the accident. *Szymborski, supra* at 341; see also *Baker v Alt*, 374 Mich 492, 496; 132 NW2d 614 (1965) ("In actuality, the doctrine of 'sudden emergency' is nothing but a logical extension of the 'reasonably prudent person' rule."); *Woiknoris v Woirol*, 70 Mich App 237, 240-241; 245 NW2d 579 (1976) ("A sudden emergency is simply one of the circumstances to be considered in determining whether an act or conduct was negligent."). Accordingly, when a person faces a sudden emergency, it does not create an invitation to act in a negligent manner; rather, due consideration is given to the circumstances involved. While a person confronted by a sudden emergency is not guilty of negligence if he or she fails to adopt what subsequently and upon reflection may appear to have been a better method, *Socony Vacuum, supra* at 546, this principle, given the cases cited above, necessarily comes into play when the person chooses one reasonable, non-negligent course of action over another reasonable, non-negligent course of action that would have resulted in a more favorable outcome when viewed in hindsight.

### D. Discussion

In light of the statutory rebuttable presumption of negligence and because crucial credibility determinations relative to Birkenheuer's alleged negligence and the onset of a sudden emergency beg to be resolved, we conclude that this case needs to be heard and decided by a jury and should not have been decided by the court as a matter of law in the context of summary disposition. Vital to Birkenheuer's overcoming the rebuttable presumption that he was guilty of negligence in the rear-end collision is the establishment of his sudden-emergency claim that he blacked out shortly before the collision. Additionally, the point when Birkenheuer first experienced sweating, unsteadiness, and dizziness is vitally important in determining whether the accident was possibly brought about by Birkenheuer's own negligence and whether it occurred under circumstances deemed unsuspected. If Birkenheuer was feeling somewhat unsteady, light-headed, or dizzy earlier than claimed, and possibly as far back as when he was at the rest area, a reasonable juror might find that he cannot seek shelter under the sudden-emergency doctrine because he created the hazard by deciding to drive or continuing to drive.

It is true that Birkenheuer testified that he first became dizzy and blacked out just before the accident while on the exit ramp and that he felt okay when he left the rest area; however, these claims are virtually impossible to contradict with any documentary evidence because they reflect personal physical sensations that Birkenheuer experienced alone in his truck. The case hinges on the credibility of Birkenheuer's assertions. Arguably, it could be inferred that Birkenheuer was experiencing some level of unsteadiness, light-headedness, or dizziness from the time that he was at the rest area on the basis of the medical evidence suggesting that such symptoms, along with the eventual syncopal episode, were caused by a virus and brought on by the bout of severe, voluminous diarrhea and cramping suffered at the rest area; he supposedly remained at the rest area a full 20 minutes[4] before proceeding and had another episode of diarrhea at the accident scene. However, we decline to rest our decision on this somewhat speculative proposition. Birkenheuer's credibility is crucial to this case in ascertaining negligence and the existence of a sudden emergency, and the trial court's ruling necessarily accepted Birkenheuer's account of events. But courts "may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); see also *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). In *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994), this Court stated:

> The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. [Citations omitted.]

Our Supreme Court in *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), also recognized these principles, stating, "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."

The potential problem with these well-established principles is that they do not appear to be dependent on conflicting documentary evidence that causes the creation of a factual issue or dispute, but rather simply on the existence of a credibility issue relative to a material factual assertion. At first glance, this would appear to run afoul of MCR 2.116(G)(4), which provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this

---

[4] The notes by the physician who treated Birkenheuer the day after the accident reflect that Birkenheuer claimed that he experienced a large volume of severe diarrhea at the rest area, which episode lasted five to six minutes, and that he then began driving again. There is no mention of waiting for 20 minutes at the rest area, which could call into question Birkenheuer's version of the events. Again, a jury needs to resolve this action.

> rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, *if appropriate,* shall be entered against him or her. [Emphasis added.]

The emphasized language clearly and unambiguously indicates that there may be situations in which summary disposition is inappropriate even if the adverse party fails to submit documentary evidence sufficient to show a genuine issue of fact for trial when responding to a properly supported C(10) motion.[5] The case at bar presents such a situation, and reading the court rule in this manner would be consistent with those cases that indicate that the granting of a motion for summary disposition is suspect and improper where the credibility of a witness or deponent is crucial. Defendants submitted documentary evidence showing that Birkenheuer passed out just before the accident and that he did not experience sweating, dizziness, or unsteadiness until he reached the exit ramp. We note that independent medical evidence did not pinpoint when Birkenheuer blacked out or became sweaty and dizzy, nor did the medical evidence establish that Birkenheuer first passed out while operating his rig rather than after the accident, while he was walking near his truck.[6] In other words, defendants' attempt to rebut the statutory presumption of negligence under the sudden- emergency doctrine fails or succeeds on the basis of Birkenheuer's credibility relative to his testimony that he blacked out just before the accident and that he did not experience sweating, dizziness, or unsteadiness until he reached the exit ramp. The ability of plaintiffs to submit documentary evidence to effectively counter Birkenheuer's subjective claims was near to impossible, and plaintiffs understandably failed to do so. We conclude that this case presents the type of situation that demands application of the language in MCR 2.116(G)(4), which indicates that summary disposition may not be appropriate in all cases in which the adverse party fails to submit sufficient documentary evidence in response to a properly supported C(10) motion.

---

[5] The principles governing statutory interpretation apply equally to the interpretation of the court rules. *Richards v Tibaldi*, 272 Mich App 522, 532; 726 NW2d 770 (2006); *Yudashkin v Holden*, 247 Mich App 642, 649; 637 NW2d 257 (2001). If the plain and ordinary meaning of the language is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used. *Yudashkin, supra* at 649-650.

[6] The ER physician indicated that Birkenheuer first passed out right before the collision, but she conceded that this conclusion was based on Birkenheuer's account of what occurred. The ER physician also indicated that EMS personnel found him with a decreased level of consciousness, suggesting that he had previously passed out. However, Birkenheuer's own testimony established that he had also passed out after the accident, which would have been before EMS arrived on the scene, and which could have caused the decreased level of consciousness in and of itself. Birkenheuer testified, "I got out of the [truck], walked to the front of the truck and passed out again in the street." We note that Birkenheuer claimed that he regained consciousness when the vehicles struck and had the presence of mind to set the parking brake and activate his emergency flashers.

We find additional support for our conclusion in federal law. Under the federal rules of civil procedure, FR Civ P 56(e), the counterpart of MCR 2.116(G)(4), provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, *if appropriate*, shall be entered against the adverse party. [Emphasis added.]

The advisory committee notes to FR Civ P 56(e) provide that "[w]here an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is *not appropriate*." (Emphasis added.) We hold that this logic should apply equally to the interpretation of Michigan's similarly worded court rule.[7]

In *Wilmington Trust Co v Manufacturers Life Ins Co*, 624 F2d 707 (CA 5, 1980), the defendant insurer denied coverage under a life-insurance policy on the basis that the deceased insured had made a false statement in his policy application.[8] The plaintiffs-appellants argued, in part, that any misstatement in the application was immaterial to the defendant's decision to issue the policy. The federal district court found, on the defendant's motion for summary judgment, that it was beyond genuine dispute that there was a false statement made by the deceased insured on the policy application and that it was material to the decision to issue the policy. Accordingly, the district court granted summary judgment under FR Civ P 56 in favor of the defendant. *Id.* at 708. The Fifth Circuit Court of Appeals agreed with the district court that there was no genuine issue of fact that the insured had made a false statement in the insurance application form. *Id.* The court then moved on to the issue regarding whether the false statement was material to the defendant's decision to issue the life insurance policy. After first noting that the defendant had the burden to show materiality, the court stated:

---

[7] In *Shields v Reddo*, 432 Mich 761, 784; 443 NW2d 145 (1989), our Supreme Court noted that "[t]his Court does not lightly adopt a position at odds with the federal rules, after which our rules are patterned." Our ruling is consistent with this preference to adopt a position that is consistent with the federal rules.

[8] We may look to federal caselaw construing comparable court rules for guidance when there is a lack of Michigan cases on the subject. *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997).

> To meet this burden, the company rested on the testimony of Mr. John L. Cummins, the underwriter who accepted Winsor's application. Cummins testified that, but for the misrepresentation, the company would not have issued Winsor's policy without an aviation exclusion. Cummins emphasized, however, that actuarial evaluation of aviation risks is largely subjective, calling for case-by-case analysis. For their part, appellants produced no competent evidence to rebut Cummins, in whose sole knowledge the truth lay. Their plan, rather, was to impeach Cummins as biased in favor of his employer, the defendant. The district court concededly deprived appellants of this opportunity.
>
> The question, then, becomes whether prospective impeachment of the movant's evidence, without more, can suffice to preclude summary judgment. On the facts of this case, it can and does. See *Irwin v. United States*, 558 F.2d 249, 252-253 (5th Cir., 1977). Here, as in *Irwin*, the disputed fact is (1) within the exclusive knowledge of the movant, whose supporting evidence is (2) subjective in character, and (3) upon whom the burden of persuasion rests. [*Wilmington Trust, supra* at 708-709 (citations omitted).]

The federal appeals court explained that the jury would be free to find that the defendant had not met its burden because of a lack of credibility on the part of the witness. *Id.* at 709. Therefore, on the issue of materiality, the court reversed the federal district court's ruling that had granted summary judgment to the defendant. *Id.*

Here, defendants' attempt to rebut the statutory presumption, on which they had the burden of proof, relied on the credibility of Birkenheuer with respect to his deposition testimony that he blacked out before the accident while on the exit ramp and that he was not feeling ill when he left the rest area. These are matters that are subjective in character and primarily within the exclusive knowledge of Birkenheuer. It is self-evident that Birkenheuer would have the motivation to give a version of events that would be favorable to him and that would distance him, and thereby all the defendants, from liability. A jury should be permitted to assess his credibility while on the witness stand. Summary disposition is simply *not appropriate* under these circumstances. MCR 2.116(G)(4).[9]

---

[9] Contrary to the dissenting opinion's allegation, we are not making a finding that Birkenheuer's testimony lacks credibility; rather, we are leaving that issue for the jury to resolve. It is the dissent that is making a credibility determination by arguing that we should affirm the trial court's implicit determination that Birkenheuer was telling the truth and by independently finding his version of events credible. The dissent maintains that Birkenheuer's account was corroborated by the state police and medical personnel, but this "corroboration" was based on Birkenheuer's own statements to police and medical personnel with respect to what transpired, which statements could have been self-serving. To the extent that the corroboration was based on observed physical symptoms and medical testing, there is no dispute that Birkenheuer actually blacked out after the accident, which would explain the characteristics he exhibited, but this does not necessarily corroborate Birkenheuer's claims of what occurred before the accident or his

(continued…)

## III. Conclusion

Because crucial credibility determinations need to be resolved with regard to the issues of negligence and the sudden-emergency doctrine, the trial court erred in summarily dismissing the action. Further, because the trial court did not address in any manner defendants' alternative arguments in support of summary disposition with respect to whether White suffered a serious impairment of body function and in regard to the release White signed with her no-fault insurer, we decline to address these issues on appeal, especially considering the intensive review of documentary evidence that is entailed in analyzing the serious-impairment question. See *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999); *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996) (appellate review generally limited to issues ruled on by the trial court).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Markey, P. J., concurred.

/s/ William B. Murphy
/s/ Jane E. Markey

---

(…continued)

physical state of being at that time. The dissent maintains that there was no evidence that Birkenheuer was dizzy or ill earlier than claimed, but one must appreciate the extreme difficulty in obtaining such evidence, especially given that Birkenheuer was traveling alone.