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Dispositive Motions

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I. Overview

§17.1 MCR 2.116 provides the means for a party to test, in whole or in part, any perceived deficiencies in substantive legal claims and defenses. The timing of the filing of a motion for summary disposition may be critical: except for motions asserting lack of subject-matter jurisdiction or governmental immunity, all grounds for summary disposition may be waived if they are not asserted in a timely fashion. This can even include motions under MCR 2.116(C)(8) (failure to state a claim), (9) (failure to state a defense), and (10) (no genuine issue of material fact), which are subject to the time periods contained in a duly entered scheduling order. Moreover, some grounds must be raised in the party's first responsive pleading or first motion to avoid waiver: MCR 2.116(C)(1) (lack of jurisdiction over person or property), (2) (insufficient process), and (3) (insufficient service). Even when the court rules do not require compliance with strict deadlines, an attorney must carefully consider the timing strategy of a motion for summary disposition and must allow time for compliance with special requirements for filing and service. Note that such motions must be filed and served at least 21 days before the time set for the hearing. MCR 2.116(G)(1)(a)(i).

A motion may be brought under MCR 2.116(C)(1) to challenge the court's personal (in personam) jurisdiction (that is, to question whether a nonresident defendant has sufficient "minimum contacts" with the state to enable the court to render a binding personal judgment against that party) or the court's jurisdiction over the real or personal property (in rem jurisdiction). All factual disputes for the purpose of deciding a motion challenging the court's jurisdiction are resolved in favor of the nonmoving party (the plaintiff). If there is a disputed issue of fact, the motion must be denied; however, the court may hold an immediate trial on that issue and render judgment on the facts as determined by the court, or it may defer a decision until trial on the case as a whole (a procedure applicable to the other grounds for summary disposition as well).

Motions may be brought under MCR 2.116(C)(2) or (3) where it appears that the process issued in the action is insufficient or under MCR 2.116(C)(3) where it appears the service of process is insufficient (both grounds may be raised in the same motion). However, it appears that summary disposition should be granted only when the defect in process or service of process is so substantial that it actually affects the court's authority to exercise personal jurisdiction.

A motion should be brought under MCR 2.116(C)(4) where it appears that the court does not have the power to hear and determine a particular class of causes of action. The subject-matter jurisdiction of trial courts is defined and circumscribed by the state constitution, and, in general, the circuit court has general jurisdiction to hear civil claims. The legislature has provided that certain specialized courts or tribunals have exclusive jurisdiction over particular areas of law (such as worker's compensation actions), and certain claims are preempted by federal statutes, thus depriving the state courts of subject-matter jurisdiction.

Where it appears that the party asserting the claim does not have legal capacity to sue, a motion should be brought under MCR 2.116(C)(5). Examples include cases of legal disability such as infancy or mental incompetency.

MCR 2.116(C)(6) provides for summary disposition when another action has been initiated between the same parties involving the same claim. Not all parties and all issues in the two lawsuits need be identical for summary disposition to be appropriate, as long as the two suits are based on the same cause or substantially the same cause.

A motion under MCR 2.116(C)(7) may be brought based on certain specified affirmative defenses (note that not all affirmative defenses are included in this subpart, and motions based on affirmative defenses not referenced in the rule must be based on another subpart). *See also* 1 Ronald S. Longhofer, *Michigan Court Rules Practice* §2116.5, p 390 (5th ed 2004) (“the list contained in MCR 2.111(F)(3) ... encompasses any defenses of a similar nature (i.e., avoidance defenses), while MCR 2.116(C)(7) is limited to the matters specifically stated therein”). Included under MCR 2.116(C)(7) are motions based on the ground that the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

Motions brought under MCR 2.116(C)(8) and (9) are unusual in that the motions are decided on the pleadings alone—no other evidence may be considered. MCR 2.116(G)(2). When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations in the complaint. Illustratively, such a motion should be granted in circumstances under which a complaint fails to state a claim, despite the court taking all factual allegations as true, where the defendant owes no duty to the plaintiff as a matter of law, or where a plaintiff has alleged a claim under common law when the claim is preempted by another remedy created by statute. When deciding a motion under MCR 2.116(C)(9), the court must grant the motion only if the defenses raised are so clearly untenable that no factual development could possibly deny the plaintiff’s right to recovery.

The most common basis for a motion for summary disposition is MCR 2.116(C)(10): there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. A party seeking summary disposition under this subpart is required specifically to identify those issues about which the party believes there are no disputed material facts and must submit affidavits, depositions, admissions, or other documentary evidence in support of the motion. When faced with a properly supported motion under MCR 2.116(C)(10), an opposing party may not rest on mere allegations or denials in its pleadings but must by affidavit or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. Granting the nonmoving party the benefit of any reasonable doubt about material facts, the court must then determine whether a factual dispute exists to warrant a trial—but may not make factual findings or weigh credibility. Although there are no specific deadlines set forth in the rule for such motions, they are generally considered to be premature if discovery concerning a disputed issue is incomplete.

If the grounds asserted for summary disposition are based on MCR 2.116(C)(8), (9), or (10), the court “shall give” the parties an opportunity to

amend their pleadings to correct the defect as provided by MCR 2.118 unless the evidence indicates that an amendment would not be justified. MCR 2.116(I)(5).

It should be noted that MCR 2.116 is not a rule of sanction. Therefore, it is incorrect as a matter of law for a trial court to grant summary disposition as a sanction for some form of misconduct. *Brenner v Kolk*, 226 Mich App 149, 155, 573 NW2d 65 (1997) (error to dismiss for failure to preserve evidence).

Finally, note that if a party bringing a motion for summary disposition mislabels the motion by incorrectly stating the subrule of MCR 2.116 that the party relies on, the defect is not fatal as long as summary disposition is appropriate under another subrule. *Ellsworth v Highland Lakes Dev Assocs*, 198 Mich App 55, 57–58, 498 NW2d 5 (1993); see also *Detroit News, Inc v Policemen & Firemen Ret Sys*, 252 Mich App 59, 66, 651 NW2d 127 (2002) (“If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart.”) (citation omitted).

II. When Summary Disposition Is Available

A. Time to Raise

§17.2 Because MCR 2.116 covers so many different forms of challenges to claims and defenses, an advocate must have a sound knowledge of the requirements of MCR 2.116(D) concerning when and how a particular ground for summary disposition must be raised for it to be preserved.

Practice Tip:

- *Caution: All of the grounds for summary disposition under MCR 2.116 except lack of subject-matter jurisdiction and governmental immunity may be waived if they are not asserted in a timely fashion. Although motions may usually be brought at any time under MCR 2.116(C)(8) (failure to state a claim), (9) (failure to state a defense), and (10) (no genuine issue of material fact), they may be subject to the trial court’s scheduling order that establishes a specific time within which to bring such motions.*

Consequently, an advocate’s first task is to determine how many possible grounds for summary disposition can be asserted consistent with the obligations of MCR 2.114(D) (attorney’s certification that the paper filed and signed is offered in good faith) and when and how these must be asserted to be properly preserved.

Although the summary disposition rule provides clear direction about when a challenge to a claim or defense must be made, a distinction must be made between the acts necessary to preserve a particular ground for summary disposition (that is, how to avoid waiving it) and the acts necessary to make an actual challenge.

For preservation purposes, MCR 2.116(D) establishes certain time lines within which the various grounds for summary disposition must be raised. Moreover, the rule imposes different sanctions for an untimely filing. Failure to adhere to these requirements can result in the permanent waiver of some grounds for summary disposition.

Summary disposition grounds that may be raised at any time, even after a scheduling order deadline

A motion brought under MCR 2.116(A) (judgment on stipulated facts) may be filed at any time. A motion brought under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) or based on governmental immunity may be filed at any time, even after the cutoff date for filing dispositive motions established in a scheduling order. MCR 2.116(D)(3).

Summary disposition grounds that may be deemed waived if brought in violation of the scheduling order

Motions brought under MCR 2.116(C)(8) (failure to state a claim), (9) (failure to state a defense), and (10) (no genuine issue of material fact) may be filed at any time, unless a cutoff date for filing dispositive motions is established in a scheduling order. If the motion is filed after that cutoff date, it is within the trial court's discretion to consider it. MCR 2.116(D)(4).

Summary disposition grounds that must be raised initially to avoid waiver

1. *Untimely assertion results in a permanent waiver.* MCR 2.116(D)(1). Motions brought under MCR 2.116(C)(1) (lack of jurisdiction over person or property), (2) (insufficient process), and (3) (insufficient service of process) must be raised in the party's responsive pleading or first motion (whichever is filed first) or the challenge is permanently waived. In essence, this means that the first paper filed, whether it is a motion or a responsive pleading, must contain all objections to the court's personal or in rem jurisdiction and to the process issued in the action or the service of process.
2. *Untimely assertion results in a waiver that may be cured.* MCR 2.116(D)(2). Motions brought under MCR 2.116(C)(5) (lack of capacity to sue), (6) (another action pending between the parties), and (7) (claim barred due to release, immunity, prior payment, res judicata, etc.) must be brought in the party's responsive pleading unless stated in the first motion brought before the first responsive pleading or the challenge is waived. Note that although MCR 2.116(C)(7) includes "immunity granted by law," governmental immunity may be raised at any time. MCR 2.116(D)(3).

Thus, unlike those summary disposition grounds covered by MCR 2.116(D)(1), a party is free to raise some of the grounds covered under MCR 2.116(D)(2) in a first-filed motion and some in the responsive pleading, as long as all grounds covered by MCR 2.116(D)(2) are raised no later than the first responsive pleading. Moreover, the grounds covered by MCR 2.116(D)(2) are not permanently waived but may be revived if an amended pleading is filed in accordance with MCR 2.118. In *Board of Trs v City of Pontiac*, 309 Mich App 611, 620, 873 NW2d 783 (2015), the court of appeals held that MCR 2.116(D)(4) also gives the trial court discretion to allow an otherwise untimely motion asserting grounds listed in MCR 2.116(C)(5), (6), and (7):

MCR 2.116(D)(2) provides that a motion for summary disposition based on the "grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's