

TRUCK DRIVER'S CREDIBILITY MUST BE CONSIDERED WHEN HIS MEDICAL CONDITION FORMS THE BASIS FOR HIS SUDDEN EMERGENCY DEFENSE

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In *White v. Taylor Distributing Co., Inc.*, 275 Mich App 615; 739 NW2d 132 (2007), the Michigan Court of Appeals identified one instance in which a party-witness' credibility would be a proper basis for deeming a trial court's grant of a motion for summary disposition "inappropriate" under MCR 2.116(G)(4). This court rule provides in pertinent part: "... If the adverse party does not so respond, judgement, **if appropriate**, shall be entered against him or her."

In *White*, the plaintiff's vehicle, while stopped at an intersection, was "rear-ended" by a tractor-trailer owned by the defendant, Penske, and driven by the defendant, James Birkenheuer, who was employed by the defendant, Taylor.

The trial court granted the defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) based upon Birkenheuer's deposition testimony. Specifically, Birkenheuer testified that he noticed the plaintiff's vehicle in enough time to stop and immediately began to apply his brakes. However, before he was able to bring his vehicle to a complete stop, he suddenly felt dizzy and blacked out. He was later awakened by the impact between the vehicles. Accordingly, the trial court found that a "sudden emergency" arose out of a severe bout of diarrhea that caused Birkenheuer to experience a "sudden and unexpected" blackout, which precluded a finding of actionable negligence.

However, the appellate court reversed the trial court's ruling, holding that in cases such as the one at bar, where the moving party has the burden of proof in overcoming a rebuttable presumption of negligence, the witness' credibility becomes a crucial determining factor in the final outcome.

The appellate court noted that Birkenheuer's testimony was suspect due to its self-serving nature and the inconsistency between same and the available medical evidence regarding the alleged blackout.

The court also noted that "under the rear-end collision statute [MCL 257.402(a)] a rebuttable presumption arises that the offending driver is *prima facie* guilty of negligence."

"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." ... "where evidence is less than clear, positive and **credible**, the issue of overcoming the rear-end presumption should be settled in the jury room."

Since the jury would have to witness Birkenheuer's demeanor in assessing his credibility, the trial court's grant of the defendant's motion for summary based upon the Sudden Emergency Doctrine, was "inappropriate" under MCR 2.116(G)(4), notwithstanding the plaintiff's failure to submit documentary evidence which would have created a genuine issue of material fact.

Compare to *Davis v. Wisconsin Logistics, Inc.*, 2006 Mich App WL 448795 (unpublished), where the court did not consider witness credibility in affirming the trial court's grant of the defendant's motion for summary based upon the Sudden Emergency Doctrine. In *Davis*, the trial court found that the evidence established that the defendant's driver suffered a heart attack and died immediately before the subject collision.

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