

STATE OF MICHIGAN
COURT OF APPEALS

TIM C. LALONDE, GARY M. LALONDE, and
DIANA L. MILAN,

UNPUBLISHED
April 12, 2002

Plaintiffs-Appellants,

v

No. 228202
Saginaw Circuit Court
LC No. 98-025354-NO

CITIZENS BANK, as Personal Representative of
the Estate of ARTHUR L. PETERSEN, Deceased,
and ESTHER E. PETERSEN,

Defendants-Appellees.

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition, MCR 2.116(C)(10), and frivolous claim sanctions, MCL 600.2591, in favor of defendants. We affirm.

On appeal, plaintiffs first argue that the trial court erred in granting summary disposition in favor of defendants. We disagree. This Court reviews a trial court's grant of a motion for summary disposition de novo. *Oade v Jackson Nat'l Life Ins Co of Michigan*, 465 Mich 244, 251; 632 NW2d 126 (2001). When reviewing a motion brought under MCR 2.116(C)(10), the evidence is considered in a light most favorable to the nonmoving party to determine whether the movant is entitled to judgment as a matter of law or whether a genuine issue of material fact exists. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

Under MCR 2.116(C)(10) the moving party has the initial burden of specifically identifying the issues on which there are no disputed facts and supporting its position with documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 386; 554 NW2d 49 (1996). Thereafter, the burden shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Here, defendants presented evidence, including medical records and statements from both defendants' expert and plaintiffs' expert, that plaintiffs' alleged physical symptoms were not caused by asbestos exposure and that plaintiffs were unlikely to experience associated adverse physical effects in the future. In response, plaintiffs presented the cursory and conclusory

affidavit of their expert that was unsupported by underlying facts. See *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987). Therefore, plaintiffs failed to establish that a genuine issue of material fact existed regarding their alleged asbestos-related injuries and their alleged need for medical monitoring. Accordingly, the trial court properly granted defendants summary disposition.

Plaintiffs also argue that the trial court erroneously concluded that their claims were frivolous under MCL 600.2591. We disagree. This Court will not disturb a trial court's finding that a claim was frivolous unless it was clearly erroneous. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). The relevant time period in which to scrutinize the plaintiff's action for purposes of MCL 600.2591 is when the lawsuit was commenced. See *Id.* at 702; *Meagher v Wayne State Univ*, 222 Mich App 700, 727; 565 NW2d 401 (1997).

An action is frivolous if the party's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party; the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a). Here, plaintiffs filed their complaint on October 2, 1998, and alleged that they suffered from "present manifestations of disease" caused by their exposure to asbestos in defendants' buildings and that they had a "reasonable fear of suffering future disease" from the exposure. However, the record includes that (1) plaintiffs did not have the alleged asbestos tested until July 1999, (2) plaintiffs' alleged exposure to asbestos was for a very short period of time, (3) the LaLonde's were medically evaluated before filing their complaint and test results were normal or consistent with a smoking history and they were told that it was unlikely that their symptoms were that of asbestosis because it usually takes twenty to thirty years to develop, (4) Milan was not medically evaluated before the complaint was filed, and (5) plaintiffs' expert indicated that "the relatively short period of exposure in the recent period makes the development of an asbestos related lung problem unlikely." In sum, the trial court's finding that plaintiffs' claim was frivolous was not clearly erroneous.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell