

STATE OF MICHIGAN
COURT OF APPEALS

CASSANDRA MCDONALD,

Plaintiff-Appellant,

v

GUY ALEXANDER VAUGHN and
HONEYWELL INTERNATIONAL, INC., f/k/a
ALLIED SIGNAL, INC.,

Defendants-Appellees.

UNPUBLISHED

May 18, 2004

No. 244687

Oakland Circuit Court

LC No. 2001-028660-NI

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition. This Court reviews de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *Spiek, supra* at 337. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999).

As noted above, the trial court granted summary disposition based on MCL 500.3135. The relevant provisions of MCL 500.3135 are as follows:

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

* * *

(7) As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

We conclude that the trial court did not err in granting defendants' motion for summary disposition based on its conclusion that plaintiff failed to meet the threshold requirement in MCL 500.3135 that she have suffered a "serious impairment of body function" as defined by MCL 500.3135(7). A " 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). To determine if a plaintiff's injury meets the threshold for a serious impairment of body function under MCL 500.3135(7), it should be examined under the three-part test articulated in *Kreiner v Fischer (On Remand)*, 256 Mich App 680, 684; 671 NW2d 95 (2003), lv gtd 469 Mich 948 (2003). "First, there must be an objectively manifested impairment. Second, the impairment must be of an important body function. Third, the impairment must affect a person's general ability to lead his or her normal life." *Id.* For an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002).

In this case, plaintiff failed to present documentary evidence that established a material factual dispute regarding whether she suffered a "serious impairment of body function" under MCL 500.3135(7). With the exception of an affidavit from Dr. Bharat Tolia, the only documentary evidence plaintiff presented regarding her injuries was one excerpt from her deposition in which plaintiff stated that she hurt her head, back and neck in the accident and that her chest was affected. Dr. Tolia's affidavit provided, in relevant part:

I, Bharat M. Tolia, M.D., hereby swear or affirm under oath to the following:

1. That I am a licensed medical physician;
2. That I am trained and qualified and regularly diagnose and/or treat closed head injuries;

3. That Casandra [sic] McDonald has been diagnosed with a closed head injury which may be a serious neurological injury as a result of her automobile accident of January 21, 1999.

We hold that the trial court correctly ruled that plaintiff failed to create a genuine issue of material fact regarding whether she suffered a serious impairment of body function under MCL 500.3135(7) because the excerpt from plaintiff's deposition and Dr. Tolia's affidavit did not contain any facts or details showing that plaintiff suffered an objectively manifested impairment of any important body function that affected her general ability to lead a normal life. Mere conclusory allegations that are devoid of detail do not satisfy the burden of a party opposing a motion for summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). An affidavit that simply states an expert's opinion, without providing any scientific or factual support, is insufficient to create a genuine issue of material fact. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 175; 551 NW2d 132 (1996). Accordingly, plaintiff failed to establish that there was a factual issue regarding whether she suffered a serious impairment of body function, and the trial court did not err in granting defendants' motion for summary disposition on this basis.

We also reject plaintiff's argument that the trial court erred in ruling that Dr. Tolia's affidavit did not comply with MCR 2.119(B) and that plaintiff therefore failed to establish a genuine issue of material fact under MCL 500.3135(2)(a)(ii). The trial court was correct in ruling that Dr. Tolia's affidavit did not comply with MCR 2.119(B)(a) through (c) because it does not state that it was made with personal knowledge, it contains no specific facts or details about plaintiff's closed head injury or neurological impairments, and it does not show affirmatively that Dr. Tolia could testify competently to the facts. Moreover, we reject plaintiff's contention that the trial court sua sponte raised the issue of the sufficiency of the affidavit and that defendants waived any issue regarding defects in the affidavit by failing to raise the issue of any irregularities in the affidavit. Although defendants did not explicitly argue that the affidavit was insufficient under MCR 2.119(B), on the record at the hearing on defendants' motion for summary disposition, defendants did challenge the sufficiency of the affidavit, arguing that Dr. Tolia's affidavit did not satisfy MCL 500.3135 and MRE 703. In addition to challenging the sufficiency of Dr. Tolia's affidavit on the record at the hearing on their motion for summary disposition, defendants also argued in their reply brief in support of their motion for summary disposition that Dr. Tolia's affidavit was "insufficient" because it was "nothing more than a conclusory 'net opinion' " that failed to supply any details about the nature of plaintiff's alleged injury.

Although plaintiff concedes in her appellate brief that Dr. Tolia's affidavit does not comply with MCR 2.119(B)(1)(a) and (c), she nevertheless contends that the fact that the affidavit does not comply with the court rule is harmless error. Plaintiff is correct that when an affidavit submitted in support or in opposition to a motion for summary disposition violates the court rules, there must be a showing of prejudice due to the noncompliance or any error is harmless. *Hubka v Pennfield Twp*, 197 Mich App 117, 119-120; 494 NW2d 800 (1992), rev'd on other grounds 443 Mich 864 (1993). In this case, however, the failure of Dr. Tolia's affidavit to comply with MCR 2.119(B) was not harmless. As explained previously, a party opposing a motion for summary disposition must set forth specific facts showing that a genuine issue of material fact exists. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). An

affidavit that simply states an expert's opinion, without providing any scientific or factual support, is insufficient to create a genuine issue of material fact. *Travis, supra*, 175. Therefore, irrespective of the fact that Dr. Tolia's affidavit failed to comply with MCR 2.119(B)(1), the affidavit did not provide specific facts to show that a genuine issue of material fact existed regarding whether plaintiff suffered a "serious impairment of body function" under MCL 500.3135(7) or whether plaintiff suffered a "serious neurological injury" under MCL 500.3135(2)(a)(ii).

We next address plaintiff's argument that the trial court erred in refusing to consider Dr. Tolia's second affidavit as well as additional documentary evidence in deciding her motion for reconsideration and in ultimately denying her motion for reconsideration. This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

MCR 2.119(F)(3) provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

We find that the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration. First, all of the issues raised in plaintiff's motion for reconsideration were ruled on by the trial court previously, either expressly or by implication. Second, plaintiff's attempt to cure the deficiency in Dr. Tolia's affidavit by submitting a second affidavit is not grounds for granting plaintiff's motion for reconsideration because plaintiff could have submitted an affidavit that complied with MCR 2.119(B)(1) in her brief in opposition to defendants' motion for summary disposition. *Churchman, supra*, 233. There is "no abuse of discretion in the denial of a motion for reconsideration that rests on testimony that could have been presented the first time the issue was argued." *Id.*, 233. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood