STATE OF MICHIGAN

COURT OF APPEALS

EDDIE FEARS,

Plaintiff–Appellant,

v

HARPER HOSPITAL,

Defendant–Appellee.

UNPUBLISHED
June 28, 1996

No. 181588
LC No. 93-317027-NM

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) and the order denying plaintiff's motion for rehearing in this medical malpractice action. We affirm.

Plaintiff filed a claim arising out of her stay in the cardiac care unit at defendant hospital. Plaintiff alleged that she was allowed to ambulate without assistance in a confused state and, as a result, she fell and suffered a fractured hip. Defendant moved for summary disposition, arguing that plaintiff's expert's testimony did not support plaintiff's claim that she was in a confused state which required that she be restrained. The trial judge granted summary disposition, finding that plaintiff was disoriented the day before the fall, but there was no evidence that the disorientation was the cause of the subsequent injury or that the disorientation continued until within a reasonable time of the incident.

First, plaintiff contends that the trial court erred in relying on plaintiff's expert's discovery only deposition when granting summary disposition because a discovery only deposition is for discovery purposes and is only admissible for impeachment. We disagree. MCR 2.307(C)(7) limits the admissibility of a deposition into evidence for impeachment purposes only. However, when a deposition is considered for summary disposition purposes, it is not entered or offered into evidence. Moreover, MCR 2.116 does not require that depositions be admitted into evidence before they are considered on a summary disposition motion. The only requirement is that the deposition be filed with

* Circuit judge, sitting on the Court of Appeals by assignment.

the court. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 134; 463 NW2d 442 (1990); MCR 2.302(H). Finally, the purpose of discovery is to narrow the issues and fix the parties' claims. *Ewer v Dietrich*, 346 Mich 535, 542; 78 NW2d 97 (1956). This evidences that materials obtained during discovery would be properly considered on a motion that tests the legal sufficiency of plaintiff's claim. MCR 2.116(C)(10). Accordingly, we find that the trial judge did not err in reviewing and relying upon a discovery only deposition.

Next, plaintiff argues that the trial court erred in denying her motion for reconsideration based on its finding that plaintiff's expert's affidavit contradicted her sworn testimony. We disagree. The decision to grant or deny a motion for reconsideration is within the trial court's discretion and will not be reversed absent an abuse of discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989). The moving party must demonstrate a palpable error by which the court and the parties were misled. *Id.* Parties may not create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991); *Peterfish v Frantz*, 168 Mich App 43, 55; 424 NW2d 25 (1988).

As a whole, plaintiff's expert's testimony indicated that there was no evidence that plaintiff was disoriented or confused at the time of her fall or shortly before the fall and that when a patient is not confused or disoriented, the patient need not be restrained. The only reference to any confusion on the part of plaintiff was evidence that plaintiff could not find her room. Moreover, the nursing records regarding the date of the incident in question indicated that plaintiff was not confused and was able to recite the proper time and place. However, the affidavit stated that plaintiff was disoriented the day before her fall and should have been restrained through the next day. The testimony and affidavit were contradictory to each other. Moreover, the affidavit should have been stricken as it was not signed or notarized. MCR 2.114(C)(2). See also *Prussing v General Motors* Corp, 403 Mich 366, 369-370; 269 NW2d 181 (1978) (an unsigned affidavit cannot create a material issue of fact to avert summary disposition). Therefore, the trial court properly denied plaintiff's motion for reconsideration.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Meyer Warshawsky