

STATE OF MICHIGAN
COURT OF APPEALS

JOHNNIE L. McCLAIN and LINDA J. McCLAIN,

Plaintiffs-Appellants,

v

KASLE STEEL CORPORATION,

Defendant-Appellee,

and

HUFFMASTER ASSOCIATES, INC., and
Michael Hogue, Jointly and Severally,

Defendants.

UNPUBLISHED

December 27, 1996

No. 190342

Wayne Circuit Court

LC No. 92-227732-NO

Before: Griffin, P.J. and T.G. Kavanagh* and D.B. Leiber,** JJ.

MEMORANDUM.

Plaintiffs appeal the circuit court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(10) in this defamation, false arrest, negligence and intentional infliction of emotional distress case. We affirm.

We reject plaintiffs' argument that genuine issues of material fact remained based on the written statements of two witnesses, Pendarvis and Hogue. The written statements, one of which is unsworn,¹ were made prior to the depositions of both these witnesses. It is undisputed that both Pendarvis and Hogue recanted the pertinent parts of their written statements at their depositions.

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

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

A party may not raise an issue of fact by simply submitting an affidavit contradicting her own prior deposition testimony. *Peterfish v Frantz*, 168 Mich App 43, 54-55; 424 NW2d 25 (1988). See also *Griffith v Brant*, 177 Mich App 583, 587-588; 442 NW2d 652 (1989)(reversing the circuit court's denial of summary disposition to defendants on the basis of the plaintiff's deposition testimony, and noting that "[w]e disregard plaintiff's affidavit to the extent it contradicts her deposition testimony"). Plaintiffs argue that a line of cases, including *Peterfish* and *Griffith, supra*, preclude an affidavit which contradicts deposition testimony from creating a genuine issue of material fact only if the affidavit is filed subsequent to the witness' deposition. As plaintiffs provide no authority to support this reading, we decline to adopt it. Moreover, the *Peterfish* Court noted that where, as in the instant case, no explanation was presented regarding the differences between the plaintiff's complaint and his affidavit on the one hand, and his deposition testimony on the other, the trial court properly granted summary disposition under MCR 2.116(C)(10). 168 Mich App at 54-55.

Further, we conclude that the recantations of the earlier statements were not material to the summary disposition granted by the lower court. For these reasons, and for the additional reasons stated by the circuit court at the October 19, 1995, hearing, we affirm the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Richard A. Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber

¹ Pendarvis' statement is typed, signed, and unsworn. Hogue's statement is handwritten, signed and sworn.