STATE OF MICHIGAN

COURT OF APPEALS

SANDRA SINGLETON and DANNY SINGLETON,

Plaintiffs-Appellants,

v

TELEDYNE PEER and PEER DIVISION,

Defendants-Appellees.

UNPUBLISHED
November 21, 1997

No. 198356
Genesee Circuit Court
LC No. 94-032597 NP

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition in this products liability action, based on the inability of plaintiff to produce the actual machine at issue for examination by defendant or its experts. After plaintiff was injured while operating the machine in the course of her employment for General Motors Corporation, new safety guards were installed by General Motors prior to plaintiff's return to work, and subsequently, before suit was filed, the production line was retooled and the machine in question was scrapped by General Motors. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

General Motors had no obligation, subsequent to plaintiff's injury, either to avoid modifying the machine (presumably for the purpose of avoiding additional worker's disability compensation liability), or to preserve the machine. *Panich v Ironwood Products Co*, 179 Mich App 136; 445 NW2d 795 (1989). The occurrence of plaintiff's injury did not divest General Motors of its rights as owner of the machine to dispose of its property according to its own ideas of propriety. *Grand Rapids Trust Co v Lutes*, 258 Mich 609; 242 NW 784 (1932). Nor was equitable relief available to oblige General Motors, on behalf of either party to this lawsuit, to restrict the uses to which its property could be put. *Buckley v Mooney*, 339 Mich 398; 63 NW2d 655 (1954).

In every case in which a presumption has been indulged or a case dismissed due to loss or destruction of evidence, that loss or destruction was caused by a party to the case, or its agent, after once gaining possession or control of the evidence at issue. *Hamann v Ridge Tool & Die Co*, 213

Mich App 252, 254-259; 537 NW2d 753 (1995), and cases there cited. As plaintiff never had possession or control of the machine at issue, those principles have no application to the present case. Under the present circumstances, plaintiff and defendant are on a level playing field: they both must plead and prove their cases (or in defendant's case defend) on the basis of available photographs, the recorded serial number, and defendant's records which establish how the machine was originally designed and manufactured. Whether plaintiff has sufficient evidence to create triable issues of fact on otherwise valid product liability theories is an issue not reached by the trial court and not addressed by this Court at this time.

Defendant makes a procedural argument, that plaintiff provided a transcript only of the summary disposition hearing which resulted in the order from which appeal has been claimed, and not of two prior summary disposition motion hearings, apparently on other theories. As review is de novo, the transcript would in any event be of limited utility, and it should be noted that defendant failed to file a motion to dismiss on this basis, which would have given plaintiff an opportunity to cure any defect in this regard by either filing a motion to proceed on a partial transcript or by obtaining transcription of the additional proceedings. As no showing has been made that such transcripts are pertinent to the issue presented on appeal, in light of the principle that the court rules are to be construed to secure the speedy, just and *inexpensive* determination of every issue consistent with substantial justice, MCR 1.105, dismissal of the claim of appeal or failure to adjudicate the appeal on the merits is unwarranted. *Barney v League Life Ins Co*, 167 Mich App 317; 421 NW2d 674 (1988); *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247; 404 NW2d 233 (1987).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Robert P. Young, Jr.