

STATE OF MICHIGAN
COURT OF APPEALS

CANAL INSURANCE COMPANY, Subrogee of
ATL, INC., and PARRISH LEASING, INC.,

UNPUBLISHED
February 19, 1999

Plaintiffs-Appellants,

v

No. 201740
Wayne Circuit Court
LC No. 96-605599 CZ

GENERAL CAR & TRUCK LEASING SYSTEM,
INC.,

Defendant-Appellee.

Before: Markman, P.J., and Bandstra and J.F. Kowalski*, JJ.

MEMORANDUM.

Plaintiffs appeal as of right from the summary dismissal of their negligence action. MCR 2.116(C)(10). We reverse and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

Implicit in the trial court's decision to grant summary disposition are the conclusions that plaintiffs were obligated to preserve the evidence relevant to the cause of the truck fire and that plaintiffs violated this obligation and destroyed the evidence by authorizing the repair of the truck. These implicit findings are supported by the law and the factual record. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997).

Nevertheless, the trial court prematurely granted summary disposition. Defendant's motion for summary disposition is premised on a challenge to the admissibility of evidence to be introduced through plaintiffs' expert, Tom Loudermilk, who had the opportunity to inspect the fire damage and who opined in a July 5, 1995 letter that defendant should be held liable for damages because their mechanic failed to disconnect the battery upon his initial inspection of the engine compartment and his realization that the truck had experienced electrical malfunctions. Before the court could consider the merits of defendant's summary disposition motion, it was required to rule on the admissibility of this challenged evidence, with the goal of exercising its discretion to carefully fashion a sanction that denies plaintiffs the fruits of their

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

misconduct, but that does not interfere with plaintiffs' right to produce other relevant evidence. *Brenner*, 226 Mich App at 160-161, 164. The court did not address the admissibility of Loudermilk's testimony. Accordingly, we remand this case to allow the court to address the question of what is an appropriate sanction for plaintiffs' misconduct. The court may, in its discretion, properly exclude any evidence that defendant has had no opportunity to rebut because of plaintiffs' failure to preserve the evidence. *Brenner, supra* at 161, 164. In the alternative, the court may conclude that an adequate remedy would be to instruct the jury that it could, but is not required to, draw an adverse inference against plaintiffs from the destruction of the evidence. *Brenner, supra* at 155-156, 161, 164. The court also could limit the testimony of the parties' experts to only that which the experts can discern from the available photographs that show the damage sustained by the truck and other evidence in the record, cf. *Hamman v Ridge Tool Co*, 213 Mich App 252, 259; 539 NW2d 753 (1995). Once the court has made its evidentiary decisions, it may then entertain defendant's motion for summary disposition. If the court decides that the exclusion of certain evidence would be a proper sanction, and that the practical effect of this exclusion would be that plaintiffs are unable to prove their negligence claim, then a grant of summary disposition in favor of defendant would be appropriate at that time. *Brenner, supra* at 165.

We decline to address plaintiffs' remaining issue, our resolution of their first issue being dispositive.

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

/s/ Stephen J. Markman

/s/ Richard A. Bandstra

/s/ John F. Kowalski