

STATE OF MICHIGAN
COURT OF APPEALS

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

UNPUBLISHED
May 11, 1999

Plaintiffs-Appellants,

v

GENERAL CAR & TRUCK LEASING SYSTEM,
INC.,

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

Defendant-Appellee.

ON REHEARING

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

MEMORANDUM.

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

Plaintiffs commenced this action alleging that defendant's mechanic negligently failed to disconnect the battery cables on a truck after concluding that the truck had experienced an electrical failure, which caused a fire that damaged the truck. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiffs' repair of the truck resulted in the destruction of evidence necessary for defendant's rebuttal of the negligence claim; thus, plaintiffs' evidence acquired through inspection of the fire damage was inadmissible. Although neither party originally supported its motion or response with documentary evidence, plaintiffs did not rectify this failure even after the motion was adjourned by the trial court for this purpose. The court stated, "the party opposing the motion cannot rely on only conclusions but also must offer documentary evidence," and granted defendant's motion for summary disposition.

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

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

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). Although plaintiffs claim on appeal that photographs of the damaged truck adequately show the cause of the fire, even without inspection of the actual truck, and thus support the negligence action, they did not attach affidavits, depositions, admissions, or other documentary evidence “showing that there is a genuine issue for trial.” MCR 2.116(G)(4). The court rule regarding summary disposition plainly states that “[i]f the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.” *Id.* We agree that if plaintiffs had submitted any documentary evidence regarding the admissibility of evidence of causation, the trial court first would have had to rule on the admissibility of the evidence, with the goal of fashioning a sanction that denied plaintiffs the fruits of their misconduct while not interfering with their right to produce other relevant evidence. *Brenner, supra* at 160-61. However, since there was no other evidence submitted, as required by MCR 2.116(G)(4), no fact question existed upon which the trial court could have denied defendant’s motion for summary disposition. Plaintiffs cannot now raise on appeal new evidence upon which the trial court was not afforded the chance to rule. Thus, we conclude that the trial court’s order granting summary disposition in favor of defendant was not premature and must be affirmed.

Affirmed.

/s/ Stephen J. Markman

/s/ Richard A. Bandstra

/s/ John F. Kowalski