

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GLORIA SMITH and MARSHALL SMITH,

Plaintiffs-Appellants,

v

CYBEX INTERNATIONAL

Defendant-Appellee,

and

NORTHWEST MOTELS d/b/a HOLIDAY INN,  
JACKSON and PATRICIA NORTH,

Defendants.

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UNPUBLISHED

September 17, 2002

No. 232425

Jackson Circuit Court

LC No. 00-000625-NO

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

In this products liability case, plaintiffs appeal from an order of the trial court granting summary disposition to defendant Cybex International under MCR 2.116(C)(10). We affirm.

In September 1997, while plaintiffs were staying at defendant Holiday Inn, Gloria Smith was injured in the motel's exercise room. Plaintiffs were attending a reunion of Marshall Smith's World War II Marine Corps unit. At the time of her injury, Gloria Smith, then 72 years old, was attempting to use a treadmill manufactured by Cybex and purchased by the Holiday Inn in December 1996. Mrs. Smith asserts that she got on the treadmill by placing her feet on side platforms that run parallel to the treadmill's running belt. As she was holding onto the treadmill's handgrips, she pushed the start button located on the machine's display panel. She consistently asserts that the display panel was blank when she started up the machine. Mrs. Smith alleges that after pushing the start button, she was immediately thrown into the back wall of the exercise room by the force created by the accelerating running belt. Specifically, she alleges that the treadmill began accelerating at such a high speed that she was thrown from the machine even though she never stepped onto the running belt. However, she did acknowledge in her deposition testimony that it was possible that the vibrations of the machine caused her feet to inadvertently come into contact with the running belt. She denied that she told the emergency room personnel who attended to her that the accident resulted when after turning the treadmill off, she inadvertently turned it back on. There are no identified witnesses to the accident.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

We do not believe plaintiffs have established their prima facie case. Specifically, viewing the evidence in a light most favorable to the plaintiffs, we do not believe that a trier of fact could have concluded that Cybex supplied a product that was defective. MCL 600.2946(2). "A product is defective if it is not reasonably safe for its foreseeable uses." *Fredericks v General Motors Corp*, 411 Mich 712, 720; 311 NW2d 725 (1981). "This definition of 'defective' is not limited to manufacturing defects, but also includes design defects." *Ghrist v Chrysler Corp*, 451 Mich 242, 249; 547 NW2d 272 (1996).

According to the treadmill's operations manual, when a user presses the start button while the treadmill is dormant with the power switch turned on, the machine will enter the Program Select Mode. At this point, various prompts instructing the user how to proceed in selecting a workout will display on the treadmill's display panel. The treadmill operates in six modes, with "P1 (Manual Mode)" being the standard default setting, and 160 lbs. being the default weight setting. In the P1 mode, the user controls the speed, elevation, and length of use. When the initial mode of operation is displayed after entering the Program Select Mode, users are able to accept that mode, or they can vary the program mode and level of effort by pressing the appropriate keys. To accept a program mode and start the running belt, the user again presses the start key. The manual indicates that in each mode of operation, a three second countdown will run on the display panel. A tone sounds as each second passes, with a steady tone sounding when the countdown reaches one.

In the P1 Mode, the manual indicates that the running belt will accelerate to one mile per hour (mph) and the incline will remain at zero percent elevation. When one of the other modes of operation is chosen, the running belt will initiate and change incrementally until it reaches programmed set points for speed and incline. After a programmed time, the speed and incline will automatically change as proscribed by the program. The user may also manually change the speed and incline of the programmed workouts during the course of a workout. The manual indicates that modes P2 through P5 have nine programmed levels of difficulty. The following are the beginning and ending programmed speeds listed in the manual for each of these modes: (1) P2, 2.8 to 6.2 mph; (2) P3, 2.5 to 5.5 mph; (3) P4, 2.2 to 4.8 mph; and (4) P5, 2.5 to 5.5 mph. The user can manually increase the speed of the belt up to a maximum of 10 mph in all six modes.

The treadmill also includes a "save" function that allows a user to repeat a modified program or create an individual program from scratch. If saved, a modified program will run when selected by the user during a subsequent workout. The control panel will also display an

error code (ERR 6) in the event that the machine recognizes a discrepancy between the actual running belt speed and the displayed speed on the control panel.<sup>1</sup> Additionally, the treadmill has a memory feature that, according to the manual, “remembers the last program number, program level and weight setting used.”

Plaintiffs offer no proof that this treadmill did not operate according to the specifications of the operations manual, and thus did not meet Cybex’s production standards. *Prentis v Yale Mfg Co*, 421 Mich 670, 683; 365 NW2d 176 (1984). Plaintiffs argue that the deposition testimony of Frank Britt and Robert Stryker, who were also staying at the motel, offer support for their cause of action.<sup>2</sup> We disagree. Sometime after the accident, Britt and Stryker went to the exercise room to examine the treadmill. The men took photographs of the treadmill and tested its operation. One of the photographs (marked as Plaintiff’s Exhibit 7 at Britt’s deposition) shows the display panel. While Britt could not recall if the display screen was blank when he encountered the treadmill, this photograph shows that information was displayed on the panel at some point while he and Stryker were examining it. The picture shows the six modes of operation listed across the top of the display panel, with diagrams appearing above modes P2 through P5. Further, the display panel also has a “0” appearing above the word “INCLINE”, and the number “2.8” appearing above the word “SPEED.”

Britt testified in his deposition that after he pushed the start button, the treadmill “started and it worked itself up to a very high speed without me doing anything other than starting it.” Britt opined that the belt achieved its top speed in approximately five seconds. Britt then turned the machine off and back on again. This second time, the treadmill also “went back up to a very high speed.” This second time, Britt testified that when he pressed the “minus” button, the running belt speed decreased “to a very slow speed that I would have felt comfortable stepping onto . . . .” Britt then pressed the “plus” button, and the running belt “went to an even higher speed than it did before.” Britt later explained that the speed of the running belt had “progressively” increased until it reached an unknown peak. Stryker testified that when he started the treadmill, it took a “second or two” for the belt to reach a “high rate of speed.”

While neither Britt nor Stryker actually timed the acceleration of the belt, their testimony does, when viewed in a light most favorable to plaintiffs, tend to support plaintiffs’ contention that the running belt did not gradually speed up, but almost immediately accelerated to a set speed. However, neither Britt’s nor Stryker’s testimony establishes that the running belt accelerated to a speed in excess of the speeds set forth in the operations manual. Their observations about the rate of speed were highly subjective; neither man was able to say if the treadmill registered a speed on its display panel during their tests. Further, Britt testified that he used the “plus” button to raise the speed of the treadmill during his second test of the machine. This establishes that the “very high speed” he spoke of was below the maximum speed the machine could reach.<sup>3</sup> Further, the picture of the display panel noted above indicates that at some point while the men were testing the machine, its rate of speed was “2.8.” Whether this

<sup>1</sup> The manual indicates that “[i]f the actual speed of the belt is 1 mph (1.6 kph) over the set speed for 0.2 seconds . . . , the [ERR 6] error code will be displayed.”

<sup>2</sup> Both men served with Marshall Smith in the same Marine Corps platoon in World War II.

<sup>3</sup> Neither party disputes that this maximum speed is ten mph.

was 2.8 mph or 2.8 kph, this speed is within the established ranges of operation in the six modes of operation.<sup>4</sup> Plaintiffs offer no evidence that these speed ranges are unreasonably dangerous.

The manual indicates that by using the treadmill's memory retention program, the machine can be programmed to use the last entered workout values as the new default. It also indicates that this modified default can be activated by simply pressing the start button twice. Plaintiffs have offered no proof, however, that the default settings have been changed or that the memory retention function was turned on. The subjective speculations on the speed of the running belt provided by Mrs. Smith, Britt, and Stryker cannot establish the speed of the belt, let alone that this observed speed somehow varies from the programmed defaults. Indeed, there is no evidence on which mode was running when the accident occurred. In any event, even if it is presumed the default settings were changed, there is no evidence that the speed of the belt was unreasonably dangerous. Plaintiffs' speculations are not sufficient to defeat this motion for summary disposition.

The manual also indicates that a programmed workout can be paused and then restarted at the values established before the treadmill was paused. According to the manual, a program can be paused for up to five minutes. Theoretically, the treadmill could have been paused by someone using the machine just prior to Mrs. Smith. There is, however, no evidence to support this hypothetical. Indeed, Mrs. Smith's own testimony leads us to the opposite conclusion. The manual states that when the treadmill is in pause, a five-minute countdown is displayed on the display panel. During the final thirty seconds of this countdown, the message "PRESS START" also flashes on the panel. Mrs. Smith testified that the display panel was blank when she started the treadmill. There is no evidence that this countdown function was not operating. Thus, there is no evidence that the treadmill was paused at some elevated speed when Mrs. Smith tried to use it.

Additionally, plaintiffs offer no expert testimony establishing that the treadmill was defectively manufactured. In their answer to Cybex's interrogatories specifically requesting that plaintiffs identify the evidence they would rely on to establish that Cybex had negligently designed or manufactured the treadmill, plaintiffs responded by identifying Steve Bernheim, a potential expert witness. However, plaintiffs' motion to add Bernheim as an expert to their witness list was denied by the court. Without Bernheim, plaintiffs argued in their response to Cybex's motion for summary disposition that they would rely on an expert witness listed on Cybex's witness list to establish their prima facie case:

Now, pursuant to the Trotter manual, a copy of which was sent to the Court, if [Gloria Smith] . . . simply pressed the start button, the program should have gone to the default setting which would start at one mile per hour. Now, Counsel in his motion specifically says, their experts said it started at 2.3 miles an hour. That should be impossible according to the Trotter manual that it could start up at 2.3 miles an hour. And that in and of itself proves at least a prima facie defect in this particular equipment.

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<sup>4</sup> The manual indicates that 2.8 mph is the programmed speed for a level one workout in the P2 mode, or a level three workout in the P4 mode.

Plaintiffs repeat this argument on appeal.

It is true that Cybex did argue in its brief in support of its motion for summary disposition that this treadmill initially operates at a speed of 2.3 miles per hour. In support of this assertion, Cybex cited an engineering report done by Michael McGuire, Senior Engineer at CH & A Corporation.<sup>5</sup> We have reviewed this report and can find no statement or reference in that report indicating that this treadmill has a start up speed of 2.3 mph. It appears that Cybex simply misspoke in its brief. Accordingly, because there is no evidence that the treadmill did start up at 2.3 mph, plaintiffs' argument that this "in and of itself" establishes their prima facie case is without merit. In fact, McGuire writes in his report that "[f]unctional testing indicated that the treadmill is functioning normally. There was no evidence that a failure of this treadmill has occurred."

Plaintiffs also have offered no proof that the treadmill was defectively designed. There is no evidence in the record concerning alternative safer designs and their accompanying risks, *Gregory v Cincinnati Inc*, 450 Mich 1, 13; 538 NW2d 325 (1995), nor any evidence concerning the magnitude and unreasonableness of the risks posed by this treadmill, *Owens v Allis-Chalmers Corp*, 414 Mich 413, 432; 326 NW2d 372 (1982). There is no evidence regarding the cost of potential alternative designs, or regarding the likelihood that the treadmill will cause injury and the probable severity of a potential injury. Plaintiffs have also failed to show "that the manufacturer knew or should have known of the design's propensity for harm." *Gregory, supra* at 13 (quoting 1 Madden, Products Liability [2d ed], § 8.1, p 290). In short, plaintiffs have not brought forth any proof that Cybex's conduct has been unreasonable or that the treadmill was not reasonably safe. *Id.* at 13; *Fredericks, supra* at 720.

In any event, even if plaintiffs had established that the treadmill was "not reasonably safe for its foreseeable uses," plaintiffs have not "demonstrate[d] by a reasonable probability, that [such a] . . . defect is attributable to the manufacturer and that such hypothesis is more probable than any other hypothesis reflected by the evidence." *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 399; 586 NW2d 549 (1998). Without this causal link, plaintiffs' cause of action must fail. *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994).

Therefore, because plaintiffs have failed to proffer evidence establishing a genuine issue regarding any fact material to their claim, we conclude that the trial court did not err in granting Cybex's motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Brian K. Zahra

/s/ Donald S. Owens

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<sup>5</sup> McGuire was on Cybex's witness list.