

STATE OF MICHIGAN
COURT OF APPEALS

MELISSA ARMOUR,

Plaintiff-Appellant,

v

POSITIVE SAFETY MANUFACTURING
COMPANY,

Defendant-Appellee.

UNPUBLISHED

November 14, 1997

No. 199019

St. Joseph Circuit

LC No. 94-000450-NP

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

This products liability claim is premised solely on defendant's alleged *failure to warn or instruct* about use of a safety pull-back device. Plaintiff identifies no defect in design or manufacture. Plaintiff appeals as of right from the trial court's grant of summary disposition to defendant, and we affirm.

I

Plaintiff contends that the trial court's dismissal of her entire case was erroneous because the dismissal addressed only her failure to warn theory, despite her theories regarding "failure to instruct" and "foreseeability of the pinch point." However, assuming plaintiff indeed articulated these theories, they were nonetheless properly dismissed because of plaintiff's failure to present evidence on the dispositive element of proximate cause.

The trial court decided this case as a matter of proximate cause. That is, the trial court concluded that there was no causation because the factory continues to use the safety device in the same manner despite its awareness of plaintiff's accident. In other words, a pre-accident warning concerning the possibility of creating additional pinch points would not have altered the manufacturing process or the use of the safety device where, after the accident, the factory had this information and yet did not alter the manufacturing process or the use of the safety device. Thus, plaintiff's argument based upon *Taylor v Wyeth Laboratories, Inc.*, 139 Mich App 389, 398; 362 NW2d 293 (1984), that "the adequacy of a warning and the reasonableness of a failure to warn are questions of fact," is misplaced.

The issue here was proximate cause, and, where the facts are not in dispute, a trial court may decide the issue of proximate cause as a question of law. *Marcelletti v Bathani*, 198 Mich App 655, 662; 500 NW2d 124 (1993).

Plaintiff argues that the creation of additional pinch points was foreseeable and that defendant breached its duty to “give adequate, accurate and effective instructions” regarding its product. Assuming this to be true, plaintiff provides no answer to the proximate cause problem identified by the trial court.

Plaintiff’s expert testified that the manual had inadequate instructions about additional pinch points, but that if the instructions had been correctly written, the accident could have been prevented. Again, this argument cannot stand in the face of evidence that, after the accident, the factory had this information and did not alter the manufacturing process or the use of the safety straps.

II

Plaintiff next asserts that evidence exists that production parts created a pinch point outside of the die space that caused plaintiff’s injury. However, defendant did not dispute this, and the trial court assumed this in making its decision. Notably absent is any argument by plaintiff as to how the possibility of this “movable” pinch point warrants reversal of the trial court’s grant of summary disposition to defendant, in light of plaintiff’s failure to present evidence to overcome the absence of proximate cause.

III

Finally, plaintiff argues that the trial court erroneously concluded that the device that caused plaintiff’s injury would be rendered useless with alteration of the existing safety straps and that the trial court improperly characterized plaintiff’s argument regarding defendant’s new evidence. Assuming without deciding that the trial court erred in these areas, plaintiff fails to demonstrate how these errors warrant reversal. Again, plaintiff’s speculation is insufficient to overcome the lack of evidence necessary to create a genuine issue of material fact regarding proximate cause.

Affirmed.

/s/ Henry William Saad

/s/ Janet T. Neff

I concur in result only.

/s/ Maureen Pulte Reilly