NOTICE OF ERRATUM

Inadvertently, the headnotes were omitted from the report of *Donaldson v. Lodge & Shipley, Inc., et al.*, as published, this past week, in Vol. 15, No. 2, Pages 7 through 14, of the Franklin County Legal Journal. When an error is discovered, this early, in the publication of a volume, it is our policy, to stop, right there, and correct the error. This prevents complications, later. Accordingly, *Donaldson v. Lodge & Shipley, Inc., et al,* is republished, in the instant issue (that is Vol. 15, No. 3), starting with the same page number (that is, "7"), as before. This way, the numbering will be kept in proper sequence.

We regret this having happened and apologize for any inconvenience the error may have caused.

Managing Editor

ELMER C. DONALDSON and HELEN C. DONALDSON, his wife, Plaintiffs vs. LODGE AND SHIPLEY, INC., ET AL., Franklin County Branch Civil Action - Law No. A.D. 1992 - 440

DONALDSON v. LODGE & SHIPLEY, INC., ET AL.

Products liability - spoliation of evidence - summary judgment

1. Defendants suffer extreme prejudice where a plaintiff is permitted to go forward with a products liability action without the defendant or its expert having had the opportunity to examine the very product which is alleged to have caused the injury.

2. When the plaintiff is responsible for the spoliation of evidence, and the exclusion of the evidence makes it impossible for plaintiff to prove her case, summary judgment is the appropriate remedy.

3. Where the plaintiff is not responsible for the spoliation of evidence, and where both parties can proceed with their respective cases even absent the product, the law does not require dismissal of the action.

4. The examination of the specific product alleged to have caused an injury is not necessary to determine the validity of a claim where the plaintiff's theory is that the defect occurred in all like products.

5. In cases where the plaintiff is able to establish a defect even if the specific product is destroyed, the case must be allowed to proceed.

6. In a design defect case, where the defendant is able to formulate a defense to a claim by examining other similar products, there is a lesser potential for prejudice

7. In a spoliation dispute, the Court will consider (a) the fault of the party who altered or destroyed the evidence, (b) the degree of prejudice suffered by the opposing party, and (c) the severity of the sanction sought.

8. Where the plaintiff is not responsible for the destruction of the allegedly defective product and where the defendant is not prejudiced by the destruction of the same, summary judgment will be denied.

Philip S. Cosentino, Esquire, Attorney for Plaintiffs
John F. Yaninek, Esquire, Attorney for W.E. Shipley Machinery and Rudel Machinery Company, Defendants
William P. Douglas, Esquire, Attorney for Monarch Machine Tool company and Manuflex Corporation, Defendants

OPINION AND ORDER

Kaye, J., September 19, 1997:

OPINION

This products liability case comes before the Court on two separate motions for summary judgment. First, defendants W.E.

Shipley Machinery Co. and Rudel Machinery Co., Inc. (hereafter "moving defendants") seek summary judgment in their favor contending that the destruction of the allegedly defective product at issue has so impaired their ability to defend this lawsuit that Plaintiffs should not be permitted to go forward with their case. Second, defendant Monarch Machine tool Company, Inc. (hereafter "Monarch") asks us to revisit the issue of successor liability addressed by this Court in our opinion on February 5, 1997. Monarch asks that we reconsider our denial of its previous summary judgment motion based on new facts they have uncovered. Based on our review of the parties' briefs and our consideration of the points raised by counsel at oral argument, it is the judgment of this Court that both motions for summary judgment must be denied. We will address the issues of spoliation and successor liability in that order.

I. SPOLIATION

A. Facts

The facts of this case, viewed in the light most favorable to the nonmoving party, reveal the following chronology:

- On Saturday, August 25, 1990, Plaintiff, Elmer C. Donaldson, was injured on the job while inspecting the work of a co-employee at the Frick Company in Waynesboro, Pennsylvania ('Frick"). He was struck on the head by an aluminum work piece thrown from a lathe at the Frick plant. [1]

- Sometime in March of 1992, the lathe was taken out of service ("scrapped") and replaced by another machine. The lathe was disassembled and its remnants taken to an area of Frick's premises known as the foundry. At this time, parts were stripped from the machine

- On May 8, 1992, Plaintiffs' attorney wrote Frick to request that he be allowed to inspect the lathe. The process of stripping the lathe was "put on hold" following this request.

- In June of 1992, Plaintiffs' counsel and experts inspected the disassembled lathe. At this time, Plaintiffs' experts took pictures of the disassembled lathe and received the manufacturer's literature on the machine.

- On August 17, 1992, Plaintiffs commenced this lawsuit by Writ of Summons.

- By letter dated October 26, 1992, Frick notified Plaintiffs' counsel that the lathe was slated for disposal after November 15, 1992. Plaintiffs' counsel did not respond to this letter.

- On or about June or July of 1993, Frick disposed of the lathe. Frick took certain parts off the lathe that could be used on other machines as replacements parts and sent the remaining body to Maryland Metals for recycling.

- On July 8, 1994, defendants Rudel and Shipley entered appearances.

- On September 20, 1994, Plaintiffs filed a Complaint alleging, *inter alia,* that Defendants are liable in strict liability and negligence for designing, manufacturing and selling a defective lathe.

- On October 11, 1994, defendant Monarch Tool Company ("Monarch") entered its appearance.

Following the passage of at least three years[2], moving defendants now ask this Court to grant their motion for summary judgment because the lathe which allegedly caused the Plaintiff's injuries is unavailable for their inspection. They argue that the Plaintiffs' failure to prevent the destruction of the lathe

[1] The machine was a Lodge and Shipley Numeritun IV lathe, Serial Number 50491. Frick maintenance records refer to the subject lathe as asset No. 2923 or asset No. 2916 (hereafter, "the lathe").

[2] This cause of action arose in 1990, suit was commenced in 1992 and the parties had ample opportunity to resolve this issue long before now. At oral argument, counsel were unable to provide a satisfactory explanation for this long period of delay. We have concern about the timeliness of raising this issue at the current time

constitutes spoliation of evidence, and as such, the Plaintiffs' case should be dismissed. The moving defendants further contend that they will be prejudiced if the case is allowed to proceed because they will not be able to prepare any defenses or point to alternative causes due to the absence of the allegedly defective product. Plaintiffs argue that they were not responsible for the destruction of the lathe, and that the moving defendants will not be prejudiced because the allegations of liability involve a design defect common to all Numeriturn IV lathes. According to Plaintiffs, both sides can prepare their respective cases by examining other similar machines even in the absence of the particular model involved in this accident. For the reasons set forth below, it is the judgment of this court that the motion for summary judgment must be denied.

B. Discussion

Motion for summary judgment may properly be granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a mater of law. Pa.R.C.P. No. 1035.2, *Hopewell Estates, Inc. v. Kent,* 435 Pa. Super. 471, 646 A.2d 1192 (1994). summary judgment should be granted only in cases that are free and clear of doubt. *Id.* On a motion for summary judgment, the record and any inferences therefrom must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the movant. *Coleman v. Coleman,* 444 Pa. Super. 196, 663 A.2d 741 (1995), alloc. denied, 543 Pa. 722, 673 A.2d 330. The party moving for summary judgment has the burden of proving that there is no genuine issue of material fact. *First Wisconsin Trust Co. v. Strausser,* 439 Pa. Super. 192, 653 A.2d 688 (1995).

In product liability cases, the doctrine of spoliation has been used to exclude evidence regarding a product where the allegedly defective item is not available for inspection by the defendant. Courts in Pennsylvania have recognized the extreme prejudice suffered by a defendant where a plaintiff is permitted to go forward with a products liability action without the defendant or

its expert having had the opportunity to examine the very product which is alleged to have caused the injury. *See, Sipe v. Ford Motor Co.,* 837 F. Supp. 660 (M.D. Pa. 1993). The importance of preserving the product cannot be understated; without it, plaintiff cannot make out a *prima facie* case and defendant cannot hop to mount a successful defense. When the plaintiff is responsible for the spoliation, and the exclusion of the evidence makes it impossible for plaintiff to prove her case, summary judgment is the appropriate remedy. *Donohoe v. American Isuzu Motors, Inc.,* 155 F.R.D. 515 (M.D. Pa. 1994). However, where the plaintiff is not responsible for the spoliation, and where both parties can proceed with their respective cases even absent the product, the law does not require dismissal of the action.

Defendants rely, in part, on the seminal case of spoliation in Pennsylvania, namely *Roselli v. General Elec. Co.,* 410 Pa. Super. 223, 599 A.2d 685 (1991), alloc. granted 607 A.2d 255. In that case, summary judgment was granted where the glass carafe that allegedly caused the injury to Plaintiff was unavailable for inspection by the defense. The plaintiff in that case, however, alleged that a defect which existed in that particular carafe caused it to shatter and injure her hand. In this case, Plaintiffs allege that the defect in the lathe is present in all similar models. In essence, this is a design defect claim, and for this reason, the logic of *Roselli* is not directly applicable to the facts of this case. The holding in Roselli is not a broad as to mandate the dismissal of a products liability action whenever the allegedly defective product is discarded. *See, O'Donnell v. Big Yank, Inc.,* _____ Pa. Super. _____, 696 A.2d 846, 848 (1997). The Superior court in *O'Donnell* held that the examination of the specific product alleged to have caused an injury is not necessary to determine the validity of a claim where the Plaintiff's theory is that the defect occurred in all like products.[3] *Id.*, ___, 696 A.2d at 849. "[I]n

[3] *See also, Martin v. Volkswagen of America, Inc.,* No. 88-8261, 1989 WL 81296 at 2, n. 3 (E.D. Pa. 1989) (unpublished) [the production of the allegedly defective product is not always necessary]; *Quail v. Carol Cable company, Inc.,* No. 90-7415, 1993 WL 53563 at 2 (E.D. Pa. 1993) [where the defect is common to all of the defendant's products, a plaintiff may be excused from producing the product].

cases where the plaintiff is able to establish a defect even if the specific product is lost or destroyed, the case must be allowed to proceed." *Id.*, _____696 A.2d at 848.

The moving defendants also rely heavily on the case of *Schroeder v. Dept. Of Transp.*, 676 A.2d 727 (Pa. Cmwlth. 1996), alloc. granted 685 A.2d 549. In *Schroeder*, even though Plaintiff alleged a design defect, the Commonwealth Court upheld a grant of summary judgment because the Plaintiff had permitted the destruction of the truck which allegedly killed Plaintiff's decedent. In that case, however, the record showed that the truck in question had been altered. "At some point prior to the accident, the length of the frame rails had been modified by cutting them and welding the frame rails back together, i.e. shortening the length of the truck." *Id.*, at 728. This evidence of modification makes it clear that, without the opportunity to inspect the vehicle, the defendants in *Schroeder* "would be deprived of the opportunity to determine if the vehicle was abused, misused and whether Decedent's uncontested substantial alterations to the truck caused his death." *Id.*, at 730. In the case at hand, there is no evidence on record that the machine was altered in any significant way. In fact, the evidence indicates that Frick made no modifications or alterations to the lathe prior to its disposal (Buhrman depo., p.40, lines 15 - 17; Aldridge depo., p.49, lines 7 - 11; Erdly depo., p. 49, lines 18-24). These facts distinguish this case from *Schroeder*. Plaintiffs argue that the main defect in the lathe was its lack of an interlock device which would prevent its operation while the lathe door was partially open. They contend that, had the lathe been equipped with an interlock system, the work piece would have been contained in the machine and Mr. Donaldson would not have been hurt. Defendants are able to formulate a defense to this claim by examining other similar machines. In other words, there is a lesser potential for prejudice in this case because a design defect is alleged. *See, Schmid v. Milwaukee Elec. Co.*, 13 F.3d 76, 80 (3rd Cir. 1994).

The Third Circuit, in interpreting Pennsylvania law on spoliation of evidence, has devised a balancing test to resolve the issue. For example, in *Schmid, supra.*, the Court of Appeals considered three factors: (1) the fault of the party who altered or

destroyed the evidence, (2) the degree of prejudice suffered by the opposing party, and (3) the severity of the sanction sought. *Id.*, at 79. We are persuaded that this test leads to equitable results in product liability cases where spoliation of evidence is an issue. Additionally, this balancing approach is preferable to a *per se* rule that mandates exclusion or dismissal every time the allegedly defective product is unavailable for inspection by one or more of the parties in this type of litigation.

First, in this case, it is undisputed that some two years after the accident, Frick disposed of the Numeriturn IV lathe which allegedly caused the injuries to Plaintiffs. Although, arguably, Plaintiffs could have prevented the destruction of the remnants of the lathe, it would be unfair to hold them responsible for its destruction. It is clear on the record that, by the time Plaintiffs' experts examined the machine, it had been "disassembled," "stripped," and "scavenged." (Erdly depo., pp. 39, 40 & 45). In fact, Frick had dismantled the lathe and placed it in storage in the foundry before May 8, 1992, the date of Plaintiffs' first contact with Frick. Also, pictures taken at the time of the initial inspection show the lathe in pieces and in an advance state of disrepair. All these facts lead us to the conclusion that Plaintiffs were not at fault for the destruction of the lathe. The lathe had already been torn down by the time Plaintiffs' experts first inspected it. The machine had been disassembled by Frick and Plaintiffs cannot be said to be a t fault for its destruction.

Second, we believe that, in a design defect case, the prejudice to the defendant is reduced because the alleged defect can be found, if at all, in all similar models of the product. Both parties are in relatively equal positions with regard to their respective preparation of the case. Their presentations would be stronger if the actual product which caused the injury were available. However, both parties can have their experts examine another Lodge & Shipley Numeriturn IV lathe and reach conclusions regarding a defect or the absence thereof. Defendants are not precluded from introducing evidence of operator error or similar evidence of alternative causes for the accident. For these reasons, we are of the opinion that the defendants have not been significantly prejudiced by the destruction of the lathe.

Third, we believe that summary judgment would be too harsh a sanction in a case where the Plaintiffs were not at fault for the destruction of the evidence and where the defendants have not suffered extreme prejudice as a result. Summary judgment should be reserved for only the clearest of cases. *See, DeWeese v. Anchor Hocking,* 427 Pa. Super. 47, 628 A.2d 421 (1993). Other remedies, such as complete exclusion of evidence regarding the lathe, are equally harsh and are not warranted under the facts and circumstances of this case. This Court, however, may be amenable to arguments in favor of a jury instruction on the so-called "spoliation inference" if an when this case reaches trial. Such an instruction would advise the jury that it may infer that the party responsible for the destruction of the evidence had something to gain from its destruction. *See, Donohoe v. American Isuzu Motors, Inc.,* 157 F.R.D. 238, 241 (M.D. Pa. 1994).

For the above reasons, moving defendants' motion for summary judgment is denied.

II. SUCCESSOR LIABILITY

A. Facts

We hereby incorporate the discussion of the facts in our February 5, 1997 opinion by reference.

B. Discussion

In its Memorandum in Support of the Motion, Monarch has attached an affidavit by George W. Fels, Lodge & Shipley's former Vice President of Finance. The most significant facts that can be adduced from this statement are that (1) the sale of assets by Reprise to Monarch in July, 1992 did not cause L&S to go out of business, and (2) L&S would have gone out of business regardless of the sale. These facts are significant because they address one of several concerns that we expressed in the February 5, 1997 opinion, specifically, whether the sale of assets to Monarch precluded Plaintiffs' recovery from L&S. However, Mr. Fels affidavit only serves to confirm what this Court suspected, and leaves other questions unanswered.

Many factual disputes remain which preclude our grant of Monarch's motion for summary judgment. Mr. Fels' affidavit does nothing to resolve the question of whether Monarch acquired all or substantially all of L&S's turning product line. Neither does it address the issue of whether Monarch continued essentially the same manufacturing operation as L&S. The record, viewed in the light most favorable to the nonmoving parties, reflects that Monarch purchased the entire Turning Products Line, including assets related to Numeriturn lathes. The existence of these disputed issues of fact requires that we allow this case to go to the jury.

Based on the foregoing, it is the judgment of this Court that Monarch's motion for summary judgment must be denied.

ORDER OF COURT

NOW, September 19, 1997, upon consideration of the motions for summary judgment referenced in the attached opinion, of briefs submitted, and after oral argument, it is ordered that the motions are DENIED.