IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

May 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

BETTY ANN COX,	)	
	)	
Plaintiff/Appellant,	)	**Shelby Circuit No. 28984 T.D.**
	)	
VS.	)	**Appeal No. 02A01-9502-CV-00024**
	)	
GENERAL MOTORS CORPORATION,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE GEORGE H. BROWN, JR., JUDGE

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REVERSED AND REMANDED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.

This products liability case arises from a fire that originated in plaintiff's car and

spread to her house, resulting in substantial personal injury and property damage. Plaintiff filed suit against General Motors Corp. and Courtesy Pontiac, Inc., alleging various negligence and strict liability theories of recovery. Courtesy Pontiac prevailed on its motion for summary judgment, and the case went to jury trial only against General Motors. The jury returned a verdict in favor of General Motors and judgment was entered accordingly.[1] Plaintiff argues on appeal that the trial court erred in prohibiting her from pursuing strict liability claims against defendant, in excluding certain evidence, and in improperly instructing the jury. For the reasons hereinafter stated, we reverse the judgment of the court below.

On June 21, 1988, plaintiff's 1982 Grand Prix automobile caught fire while the car was parked with the ignition off in the garage of her home. On the evening of June 20, 1988, plaintiff drove her car home from work, drove to a near-by fast food restaurant, and then returned home. She testified that the car was operating properly during this time. Plaintiff parked the car in her garage at approximately 7:30 p.m., and went to bed around midnight.

At approximately 3 a.m. on June 21, 1988, plaintiff's next-door neighbors were awakened by loud, popping noises. One of the neighbors testified that when she looked out of the window, she saw a fire emanating from the hood of plaintiff's car. The neighbors called the fire department and attempted to douse the fire with water.

Captain Branham and Captain Martin of the Memphis Fire Department responded to the fire. After the fire had been extinguished, Branham and Martin conducted an investigation. They concluded that the fire originated in the motor compartment of the car, and that the cause of the fire was an electrical short within the motor compartment.

The day following the fire, plaintiff retained Richard Eley, a certified fire investigator, to determine the origin of the fire. He made an investigation of the scene and concluded

[1]Plaintiff passed away prior to this appeal and the administratrix of her estate has been substituted as a party.

that the fire originated at the Electronic Control Module ("ECM") of plaintiff's car. The ECM is the automobile's computer, which regulates engine functions and sensors. When the automobile is not running, the ECM retains a few milliamps of current. Richard Eley found evidence of electrical activity in the ECM of plaintiff's car. Eley prepared a report and shipped the ECM to an electrical engineer, Lonnie Buie, to determine whether the ECM caused the fire.

Mr. Buie inspected the ECM and found evidence of electrical failure therein. He testified that the ECM was in an unsafe and unreasonably dangerous condition and that the fire was caused by a defect in the ECM that consisted of a loose electrical connection.

At the close of plaintiff's proof, defendant moved for a directed verdict on the basis that there was insufficient proof to show that no one had worked on the ECM between the time of purchase and the time of the fire. The trial court granted defendant's motion, thereby precluding plaintiff from pursuing any claims based on strict liability. The trial court reasoned as follows:

> I didn't hear any proof that no work had been done on this ECM. I never heard any proof that this was actually the ECM that came from the manufacturer. I think the record is silent on both of those two issues... I can't presume that no work had been done on that. She testified that the battery had been done and the alternator. For all we know, her husband before he died had something to do with the car. We just don't know.

Plaintiff's first contention on appeal is that the trial court erred in granting defendant's motion for directed verdict as to strict liability claims.

In ruling on a motion for directed verdict, both the trial judge and the reviewing court on appeal should look at all of the evidence, taking the strongest legitimate view of it in favor of the opponent of the motion and allowing all reasonable inferences from it in his favor. The courts must discard all countervailing evidence, and if there is then any dispute as to any material determinative evidence or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied. Tennessee Farmers Mutual Ins. Co.

v. Hinsen, 651 S.W.2d 235, 237-38 (Tenn. App. 1983). The court should not direct a verdict if there is any material evidence in the record that would support a verdict for the plaintiff under any of the theories that he has advanced. Wharton Transport Corp. v. Bridges, 606 S.W.2d 521, 525 (Tenn. 1980). Directed verdicts are appropriate only when the evidence, viewed reasonably, supports one conclusion. They are inappropriate when material facts are in dispute or when substantial disagreement exists concerning conclusions to be drawn from the evidence. Pettus v. Hurst, 882 S.W.2d 783, 788 (Tenn. App. 1993).

With respect to an action for strict liability in tort, plaintiff must prove that the product was in a defective condition or was unreasonably dangerous at the time it left the manufacturer's control. T.C.A. § 29-28-105(a). The Tennessee Products Liability Act of 1978 defines "defective condition" as "a condition of a product that renders it unsafe for normal or anticipatable handling and consumption." T.C.A. § 29-28-102(2) (1980). "Unreasonably dangerous" is defined as follows:

> [T]hat a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller assuming that he knew of its dangerous condition.

T.C.A. § 29-28-102(8) (1980).

A defect in a product may be proved by circumstantial evidence, direct evidence, or both. Browder v. Pettigrew, 541 S.W.2d 402, 405 (Tenn. 1976). Although the mere occurrence of an accident is insufficient to prove a defect, other circumstantial evidence, "such as proof of proper use, handling or operation of the product and the nature of the malfunction, may be enough to satisfy the requirement that something [is] wrong with [the product]." Browder, 541 S.W. 2d at 406 (quoting Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673 (1974)). A defective condition may be proven by testimony of an expert who either opines as to the product's design or has inspected the product. Id. Additionally, "the issue of whether a product is defective or dangerous is one for the jury." Whaley v.

Rheem Manuf. Co., 900 S.W.2d 296, 300 (Tenn. App. 1995) (quoting Curtis v. Universal Match Corp., 778 F. Supp. 1421, 1425 (E.D. Tenn. 1991)).

In accordance with the above principles, we will review the evidence adduced by plaintiff in order to evaluate the propriety of the trial judge's granting of the directed verdict as to plaintiff's strict liability claims.

Plaintiff purchased the car in November 1981, from Courtesy Pontiac, Inc. As of the date of the fire, the car had approximately 42,000 miles on it. Since its purchase, the battery and the alternator in the car had been replaced at a local service station. Plaintiff also had minor repair work performed under warranty at Courtesy Pontiac, Inc., and she had body work done to the car as a result of a wreck that dented the driver's door and broke the windshield.

Plaintiff introduced the testimony of two expert witnesses, Richard Eley and Lonnie Buie, in support of her claim. The day after the fire, Eley, a certified fire investigator, went to plaintiff's house to investigate the cause of the fire. Upon examining the automobile, he concluded that there had been some arcing or electrical activity inside the ECM. He based his conclusion that the fire originated in the ECM by pinpointing the locations of the intensity of the fire and by tracing the wiring in the car. Eley placed the ECM in a box and shipped it to Mr. Lonnie Buie.

Buie has been an electrical engineer since 1974. He testified that he has investigated approximately 1,500 electrical fires over the course of his career, with one to two hundred of those investigations involving electrical equipment within vehicles. Buie testified that the fire originated in the ECM due to a loose electrical connection that generated heat, thereby causing an electrical failure. He further stated that, in his opinion, the circumstances that caused the connection to become loose would have existed at the time the ECM left the defendant's control. It was Buie's opinion to a reasonable degree of scientific certainty, that the ECM was in an unsafe and unreasonably dangerous condition

at the time that it left the defendant's control. Buie testified in part as follows:

> Q. Did you form an opinion based upon your examination at that time as to whether this component, the ECM, could have and might have to a reasonable degree of scientific certainty contributed to a fire?
> A. Yes, I did.
> Q. Subsequent to your deposition that followed your initial examination--what is your opinion?
> A. That it did, that it could...
> Q. Mr. Buie, do you have an opinion based upon a reasonable degree of scientific certainty whether the condition of this ECM when you examined it had a condition that renders it unsafe for a normal or anticipated use or handling in this particular automobile?
> A. I do have an opinion, yes, sir.
> Q. What is that opinion?
> A. That it does.
> Q. Do you have an opinion, sir, based upon your examination to a reasonable degree of scientific certainty whether this product, the ECM, as your examined it, was unreasonably dangerous?
> A. Yes, I do.
> Q. And was this defect or unreasonable dangerousness that your opinion related to, did it exist at the time the ECM in this Pontiac automobile left the hands of General Motors an went into commerce, whatever commerce it went into?
> A. Well, assuming no one had performed any repairs on it or been inside the kick panel, yes, sir.

Buie stated that the circumstances that caused the connection to become loose would have existed at the time of manufacture, as long as no one had removed the panel from the side of the ECM.

On cross-examination, Buie was asked:

> Q. Can you state to a reasonable degree of scientific certainty that the ECM and the connecters were defective when they left General Motors Corporation?
> A. Yes, sir.
> Q. You can?
> A. Yes, sir, if no one had been in there working on the unit, yes, sir.
> Q. Your answer is assuming no one had touched it, it is your opinion that it was defective?
> A. Yes, sir.

Buie testified that he found no evidence that the ECM had been tampered with or worked on.

Buie explained that while a vehicle is not running, an ECM will typically retain a

current of ten to thirty milliamps, assuming that there is no failure in the ECM. For purposes of comparison, a battery-operated wristwatch generally has ten or less milliamps of current. Buie opined that excessive current had flowed through the ECM.

The law governing motions for directed verdicts, requiring the motion to be denied if there is any material evidence to support plaintiff's theory, results in the conclusion that the trial court erred in precluding plaintiff from pursuing her strict liability theories of recovery. The record reflects that, contrary to the trial judge's assertion, there was proof that no work had been done on the ECM. For instance, Buie testified that he found no evidence of repairs to the ECM. Furthermore, plaintiff testified that the ECM had never been repaired. Finally, available service records indicated that no repairs were ever made to the ECM. Moreover, in contrast to the finding of the trial court, there was proof that the ECM that Buie examined was the one that came from the defendant manufacturer. Plaintiff testified that the ECM had not been replaced since the car's purchase, and Eley testified that he pulled it out of plaintiff's car and sent it to Buie. Finally, with respect to the trial judge's statement that perhaps plaintiff's husband did something to the car before he died, it is undisputed that her husband died before she purchased the car.

As previously stated, the general rule in Tennessee is that the issue of whether a product is defective or unreasonably dangerous is one for the jury. Whaley, 900 S.W.2d at 300. Taking the strongest legitimate view of the evidence in favor of plaintiff and discarding all countervailing evidence, we find that plaintiff's proof was sufficient to survive defendant's motion for directed verdict.

Plaintiff's next contention on appeal is that the trial court erred in excluding reference in trial to a General Motors service bulletin. The content of this bulletin is, in essence, that when a battery goes dead after sitting overnight on any 1980-84 vehicle equipped with an ECM, several potential causes should be investigated in order to determine the cause of the drain on the battery. One of the items that should be checked if excessive amperage draw is present is the ECM. The bulletin states that if testing

indicates that when the ignition is off and the ECM is "staying powered up when it shouldn't be [it] should be replaced... Any ECM found with this failure mode should have the failure noted on the yellow ECM return tag as 'Battery goes dead ECM stays powered up with ignition off.'"

The trial court refused to allow reference to the bulletin, stating:

> The Court is of the opinion that the document is confusing, that its proffered value is outweighed by its prejudicial effect, and lastly, the use of the document by the witness elicited speculative testimony.

Plaintiff argues that the bulletin should have been admitted into evidence because, according to plaintiff, the bulletin indicates that defendant had a problem with ECMs pulling down too much current. It is plaintiff's position that the bulletin explains to the jury how ECMs can draw more current than normal and that defendant knew about the defect prior to the fire.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Buie testified that excessive current flowed through the ECM. Plaintiff sought to introduce the evidence in order to show that ECMs in defendant's cars are capable of drawing more than a minimum of current. We do not find that the probative value of the bulletin would be substantially outweighed by the danger of unfair prejudice, as required by Tenn. R. Evid. 403. In addition, the bulletin would not serve to confuse the jury because its contents could be explained both by defendant's and plaintiff's experts. Consequently, we hold that the trial court erred in excluding reference to the bulletin on grounds of prejudice, confusion, or speculation.

In light of our holding that plaintiff should be allowed to proceed with her strict liability claims, we need not address the allegedly erroneous jury instructions, which were premised solely upon a negligence theory of recovery.

Accordingly, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion. Costs on appeal are taxed to the defendant.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J.,W.S.

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LILLARD, J.