IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION



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| ROBERT HUNT | ) | KNOX COUNTY |
| | ) | 03A01-9706-CV-00209 |
| Plaintiff-Appellant | ) | |
| | ) | |
| | ) | |
| v. | ) | HON. HAROLD WIMBERLY, |
| | ) | JUDGE |
| | ) | |
| TIRE AMERICA, INC., | ) | |
| BRIDGESTONE/FIRESTONE, INC. | ) | |
| | ) | |
| Defendants-Appellees | ) | AFFIRMED AND REMANDED |

HARRY WIERSEMA, JR., OF KNOXVILLE FOR APPELLANT

DENNIS L. BABB and VONDA M. LAUGHLIN OF KNOXVILLE FOR TIRE AMERICA, INC.

DOUGLAS L. DUTTON OF KNOXVILLE FOR BRIDGESTONE/FIRESTONE, INC.

OPINION

Goddard, P.J.

Robert Hunt appeals the dismissal of his suit against Tire America, Inc.("Tire America"), and Bridgestone/Firestone, Inc., by summary judgment.[1] The suit sought damages for personal injuries and vehicle damages against the Defendants based upon breach of warranties of merchantability and fitness for purpose,

[1] The Plaintiff filed a notice of voluntary dismissal as to the Defendant Phyllis Marie Woods, who was also sued, and an order pursuant thereto was entered June 16, 1997.

failure to warn, and violation of the Tennessee Consumer Protection Act, Title 47, Chapter 18, T.C.A.

On December 27, 1992, Mr. Hunt purchased two Bridgestone SE-402 tires, size 185 SR 13, and had them installed on the front of his 1985 Toyota Camry. The tires were purchased from and installed by Tire America. Mr. Hunt did not request a certain brand name or type of tire. The only request by Mr. Hunt was for Tire America to "put two tires on the car that were the same as the ones that were on there and take the two best ones and put them in the rear." At the time Mr. Hunt purchased the new tires he was unaware of the traction rating on the tires that were already on his car. He only knew that all the tires on his car had the same tread pattern and were of the same height and width.

No discussion ever took place between Mr. Hunt and Edward Forton, the Tire America salesman, regarding any sort of tire rating. The only representations made by Mr. Forton regarding the new tires placed on Mr. Hunt's car, were the price of the tires and that the new tires were the same size as those remaining on the car. Tire America did have tire displays in their store but Mr. Hunt did not review the information on the displays. The new tires installed on Mr. Hunt's car were traction B rated tires.

On April 21, 1997, Mr. Hunt was involved in an automobile accident while driving his 1985 Toyota Camry on Harris

Road in Knox County. The road was wet from a recent rain and Mr. Hunt's car slid into another automobile that pulled out in front of him. Before this accident Mr. Hunt had not noticed a difference in performance between the new tires and the tires that were replaced. Expert testimony concluded that had the tires on the front of Mr. Hunt's car been traction A the automobile would have stopped sooner and either avoided the accident or resulted in a less severe collision.

After the accident Mr. Hunt visited the junkyard where his car was being stored, and on the advice of counsel identified the traction ratings of the new and old tires on his car. Mr. Hunt noted that the new tires, purchased from Tire America, were traction B tires and the old tires left on the car were traction A tires.[2] However, Mr. Hunt has no proof of the traction rating on the tires that were removed when the new tires were installed.[3]

The following issues, which we restate, are presented by Mr. Hunt on appeal:

I. Whether the Trial Court erred in granting summary judgment in violation of the Tennessee Summary Judgment standard.

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[2] The Defendants filed a motion to prevent any destructive testing of the tires but the tires and car had already been destroyed by the Chestnut Street Garage.

[3] The front tires that were replaced on Mr. Hunt's automobile were disposed of by Tire America in the normal course of business.

II. Whether the Plaintiff has proven a viable claim under the Tennessee Consumer Protection Act, T.C.A. 47-18-101, et seq.

III. Whether the Defendants violated the Warranties of Merchantability and Fitness for a Particular Purpose, T.C.A. 47-2-314 and 315.

IV. Whether the Plaintiff has proven a viable claim under negligence and strict liability-failure to warn theories.

Mr. Hunt first asserts that the Trial Court erred in granting the Defendants' motion for summary judgment because there are disputed issues of material fact as to the claims of violation of the Tennessee Consumer Protection Act, breach of warranties of merchantability and fitness for a particular purpose, and failure to warn.

The Tennessee Supreme Court has clearly set forth the proper summary judgment standard to be applied in Tennessee. The evaluation of a summary judgment motion must address these questions: "(1) whether a *factual* dispute exists; (2) whether the disputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a *genuine* issue for trial." Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993). (Emphasis in original.)

The holdings in Byrd have been summarized by this Court in Canonie Energy, Inc. v. King, an unpublished opinion of this Court filed in Knoxville on March 1, 1996:

> [S]ummary judgment should be employed where there is no dispute over the evidence and there is no issue for a jury to decide. Rather, it is just for the court to apply the law. For a party to avoid summary judgment, it must show that the fact in dispute is material; meaning, this fact is one that "must be decided in order to resolve the substantive claim or defense at which the motion is directed." If such a disputed, material fact does exist, the court "must then determine whether the disputed material fact creates a genuine issue within the meaning of Rule 56.03." Here, "the test for 'genuine issue' is whether a reasonable jury could legitimately resolve the fact in favor of one side or the other. If the answer is yes, summary judgment is inappropriate; if the answer is no, summary judgment is proper because a trial would be pointless. . . ." When applying this test, "the court is to view the evidence in a light favorable to the nonmoving party and allow all reasonable inferences in his favor." It is the burden of the nonmoving party to demonstrate that there are no disputed, material facts creating a genuine issue for trial and that summary judgment is appropriate.

In reviewing the order for summary judgment, we choose to first address whether Mr. Hunt has a viable claim under the Tennessee Consumer Protection Act (TCPA). The TCPA is designed to promote policies that "protect consumers. . . from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." T.C.A. 47-18-102. Tire America provided Mr. Hunt with exactly the kind of tires he asked them to install. As already noted, Mr. Hunt requested that Tire America "put two tires on the car that were the same as the ones that was on there and take the two best ones and put them in the rear." Mr. Hunt later explained that what he meant was for tires of the same width and height be placed on the car. That is exactly what Tire America did. Mr.

Hunt never expressed a desire for a specific brand name or traction rating.

Furthermore, nowhere in the record is there any evidence that the Tire America salesman made any misrepresentations regarding the quality or any characteristics of the tires. The only representation made by the salesman was that the new tires were the same width and height as the tires remaining on the car. Mr. Hunt has presented no evidence to establish any unfair or deceptive acts by Tire America. Therefore, we find Mr. Hunt has not proved a claim under the TCPA.

Mr. Hunt attempts to bolster his claim that the Defendants violated the TCPA by asserting that the Defendants also violated Federal D.O.T. labeling requirements. However, Mr. Hunt did not plead these provisions of the Code of Federal Regulations as required by Rule 8.05 of the Tennessee Rules of Civil Procedure. Pleadings are necessary to apprise parties of claimed acts of negligence and code violations. Rule 8.05 states that any statute, ordinance, or regulation relied upon shall be stated and clearly identified. Therefore, we will not analyze the regulations application to this appeal.

Mr. Hunt next claims that the Defendants violated the warranties of merchantability and fitness for particular purpose by manufacturing and selling the traction B tires. The implied warranties of merchantability assures a buyer that the goods

purchased will "pass without objection in the trade" and that they are "fit for the ordinary purposes for which such goods are used." T.C.A. 47-2-314. However, a manufacturer is not under any duty to manufacture only the safest and best product available. Kerley v. Stanley Works, 553 S.W. 2d 80 (Tenn. App. 1977). Mr. Hunt presents no evidence that the traction B tires were objectionable within the tire trade. In fact, the only testimony regarding this issue discloses that even traction C tires are manufactured in the industry.

Mr. Hunt's expert could only testify to the fact that a traction A tire would stop a vehicle quicker than a traction B tire. Nowhere, however, was there evidence that even suggested that the traction B tires were not fit for their ordinary purpose. There was also no proof submitted that the traction B tires purchased by Mr. Hunt did not perform as a reasonable consumer would expect tires of that traction rating, age, mileage and price to perform. Patton v. McHone, 822 S.W.2d 608 (Tenn. App. 1991).

The implied warranty of merchantability also provides that goods be adequately labeled and conform to the promises made on the label. T.C.A. 47-2-314(e)&(f). Tire America had labels on their tire displays referencing to traction, tread wear, etc. The sides of the tires themselves showed a traction B rating. Mr. Hunt introduced no proof that the labels on the tires misrepresented anything about the tires. The tires were labeled

traction B and there is no evidence to suggest that the tires performed to the contrary.

The implied warranty of fitness for particular purpose, states:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

T.C.A. 47-2-315.

Tire America's salesman had reason to know that Mr. Hunt would use his tires for normal driving purposes and no proof was shown that the tires were not fit for that purpose. In order for Mr. Hunt to defeat the summary judgment order on a claim that the Defendants breached an implied warranty of merchantability or fitness for a particular purpose, Mr. Hunt is required to produce some evidence that the tires were somehow defective or not fit for the purpose for which it was sold. Masters By Masters v. Rishton, 863 S.W.2d 702 (Tenn. App. 1992). Therefore, with no evidence that a reasonable jury could find to support the assertion that the Defendants violated the warranties of merchantability and fitness for particular purpose, a claim on this issue must fail.

Mr. Hunt's final argument is that he has a triable claim under negligence and strict liability for the Defendants'

failure to warn. In a Tennessee products liability case the plaintiff must show that the product in question was either defective or unreasonably dangerous at the time it left the control of the manufacturer or seller. T.C.A. 29-28-105(a). However, this Court has held that "'defective condition' as the term is contemplated by the Act has no application to the ordinary failure to warn case." Goode v. Tamko Asphalt Products, Inc., an unpublished opinion of this Court filed in Knoxville on September 30, 1988. A plaintiff in a failure to warn case is still required to show that the product was unreasonably dangerous.

The Tennessee Products Liability Act defines an unreasonably dangerous product as follows:

> "Unreasonably dangerous" means that 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).

The Act provides for two tests in determining whether a product is unreasonably dangerous: the consumer expectation test and the prudent manufacturer test.

Under the consumer expectation test a product is determined to be unreasonably dangerous if it would be "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." Ray by Holman v. Bic Corp., 925 S.W.2d 527 (Tenn. 1996)(citing Restatement Second of Torts). The plaintiff is required to establish what an ordinary consumer purchasing the product would expect. Mr. Hunt has failed to provide any evidence to establish what an ordinary consumer would expect from the purchase of a traction B tire. Although not evidence of consumer expectation, this Court would reasonably guess that an ordinary consumer would expect a traction B tire to perform like an ordinary tire except with less traction than a traction A tire and more traction than a traction C tire. We see no proof anywhere in the record that the tires in question performed in a contrary manner.

Since Mr. Hunt provides no proof that the tires are unreasonably dangerous under the consumer expectation test he must alternatively turn to the prudent manufacturer test. "[T]he prudent manufacturer test requires proof about the reasonableness of the manufacturer or seller's decision to market a product assuming knowledge of its dangerous condition." Ray, supra. Essentially this requires a risk-utility analysis. The risk-utility analysis is based on consideration of usefulness, costs, seriousness and likelihood of potential harm, etc. Ray, supra. Again, no evidence appears in the record that shows the risk of

producing and selling traction B tires outweighing their utility. Furthermore, the fact that traction B tires are manufactured and sold throughout the industry, although not dispositive, adds great weight to the Defendants' side of the scale. Therefore, in the face of no proof to the contrary the traction B tires were not unreasonably dangerous and, thus, Mr. Hunt has no triable claim under a theory of failure to warn.

Mr. Hunt has done nothing in this suit but establish that traction A tires will stop a car quicker than traction B tires. We can find no evidence in the record that establishes any wrongdoing on the part of the Defendants. Bridgestone/ Firestone has clearly not violated the unreasonably dangerous standard by manufacturing traction B tires and Tire America did not act in a deceptive manner but only provided Mr. Hunt with what was asked. In light of the complete lack of evidence to support any of Mr. Hunt's claims we find no error in the Trial Court's use of the Tennessee summary judgment standard.

For the reasons stated above, the judgment of the Trial Court granting Tire America, Inc., and Bridgestone/Firestone, Inc., summary judgment is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against Mr. Hunt.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Clifford E. Sanders, Sp. J.