

**SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

NO. 2007-CA-01591

TAMMIE BROWN

APPELLANT

VERSUS

GENERAL MOTORS CORPORATION

DEFENDANT

**APPEAL FROM THE CIRCUIT COURT
GEORGE COUNTY, MISSISSIPPI**

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel fo record certifies that all listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Tammie Brown

A. Malcolm N. Murphy, Attorney for Appellant

General Motors Corporation

Paul V. Cassisa, Jr., Attorney for Appellee

Honorable Dale Harkey, Circuit Judge

RESPECTFULLY SUBMITTED this the 31st day of March, 2008.

TAMMIE BROWN

BY

A. M. MURPHY

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STATEMENT OF ISSUES

- (1) THE COURT ERRED IN ADDRESSING ISSUES NOT RAISED IN GM'S FIRST MOTION FOR SUMMARY JUDGMENT AND DISMISSED TAMMIES CLAIM FOR DEFECTIVE MANUFACTURE.**
- (2) THE COURT ERRED IN SUSTAINING GM'S SECOND MOTION FOR FOR SUMMARY JUDGMENT ON THE STATUTE OF LIMITATIONS BECAUSE (1) SUIT WAS FILED BEFORE § 15-1-49 BARRED THE CLAIM AND (2) THE LIMITATIONS MOTION WAS NOT TIMELY PRESENTED.**

STATEMENT OF THE CASE

This case concerns the history of a 1995 Pontiac Grand Am Automobile that was involved in a serious head on collision on the Barton Agricola Road in George County, Mississippi, on September 7, 1998. The accident was caused by the then owner, Plaintiff, crossing the centerline line into oncoming traffic when the driver was blinded by the morning sun. Plaintiff, Tammie Brown, a restrained operator, suffered sever injury to her head when it struck the steering wheel.

Plaintiff, Appellant, Tammie Brown (Tammie) filed suit September 6, 2001, against General Motors Corporation (GM) for breach of warrant , negligence in design and/or manufacture as the air bag failed to deploy. Tammie alleged that the injuries she suffered during the accident would not have occurred had the air bag deployed.

GM answered the Complaint on March 29, 2002, denying any responsibility and raised the statutes of limitations in its answer as one of it's affirmative defenses pled specifically (Fourth Defense) statute of limitations § 15-1-49 and § 75-2-725.

Defendant, GM filed its first Motion for Summary Judgment Maarch 29, 2006 on two issues: (1) that Tammie did not have expert witnesses to prove the failure of the air bag to deploy and (2) that Tammie did not have a biomechanical expert to prove her injuries were caused by the failure of the air bag to perform.

The Court wile considering arguments on GM's Motions raise other matters (issues of defective design, defective manufacture and failure to warn) that were not raised in the motion. The Court granted in part the motion and denied part, basically granting summary judgment for GM on the matters of design, manufacture and failure to warn, and denied summary judgment on the issues of the necessity to have a biomechanic to explain injury suffered by Tammie and left

only the breach of warranty claim in play.

GM filed its second Motion for Summary Judgment on March 17, 2007, raising the statute of limitations as previously pled in its original answer to the suit.

Tammie responded to the Second Motion for Summary Judgment alleging that there were two statute of limitations, § 15-1-49 and §75-2-275. That under § 15-1-49 Tammie still had a claim under strict liability and that suit had been filed with three years from date of the failure of the air bag and that the failure occurred during the six year statute of §75-2-275.

The Court sustained GM's second Motion for Summary Judgment and dismissed the cause from which Tammie perfected this appeal.

STATEMENT OF THE FACTS

As previously stated in the Sate of the Case, this suit concern the history of one 1995 Pontiac Grand Am Automobile that was purchased new by Randy Gillentine on June 23, 1995. Later the car was sold to Dallis Lavigne Pitts on September 19, 1997, and lastly to Plaintiff, Tammie Brown on march 5, 1998. (R138 - 139)

On September 7, 1998, ,Tammie Brown had an accident in George county, Ms., while she was the operator of the 1995 Pontiac. Tammie was blinded by the morning sun and crossed the center line into an oncoming vehicle while driving at approximately 45 miles per hour. Both vehicles sustained heavy front end damage (Affidavit of Joel Hyatt R -144-147).

On September 6, 2001, Tammie filed suit against General Motors Corporation (R- 6-8) for breach of warrant, negligence in design and/or manufacture as the air bag failed to deploy. Tammie alleged the injuries she suffered during the accident would not have occurred had the air bag deployed.

On March 29, 2002, General Motors answered the complaint and set forth all of its affirmative defenses, including the statute of limitations (Fourth Defense) (R-40-45).

After completing discovery General Motors filed its first Motion for Summary Judgment which is missing from the record. However, the Motion contained only two issues (1) that Tammie did not have an expert witness to prove the failure of the air bag to deploy and (2) that Tammie did not have a biomechanic expert to explain here injuries. The Court permitted General Motors to raise other issues that were not mentioned in this motion (Transcript 1-35) which ultimately led to the issues of negligent design, negligent manufacture and negligent failure to warn to be dismissed from the suit. Plaintiff argues that this was prejudicial in that Counsel for Tammie was not prepared to address this issue. The effect of this led to the Court dismissing all

of Tammies claims except for "breach of warrant" and brought the case down from §15-1-49 to §75-2-275.

GM filed its second Motion for Summary Judgment on March 17, 2007, raising the statute of limitations as previously pled in its original answer to the suit. (R-156-159).

Tammie responded to the Second Motion for Summary Judgment alleging that there were two statute of limitations §15-1-49 and §75-2-275. That under § 15-1-49 Tammie had a claim under strict liability for a defective product and that suit had been filed within three years from date of the failure of the air bag and that the failure occurred during the six year statute of §75-2-275. (R-209-210).

The Court sustained GM's second Motion for Summary Judgment and dismissed the cause from which Tammie perfected this appeal. (R-212)

SUMMARY OF THE ARGUMENT

The Circuit Judge erred in permitting General Motors to raise issues that were not set forth in its first Motion for Summary Judgment. When the Court struck the issue of negligent manufacture it prevented Plaintiff from presenting the defective product argument which was controlled by the statute of limitations, §15-1-49.(Transcript 3 - 34).

General Motors' second Motion for Summary Judgment on the issue of Limitations of Warranty under §75-2-725 should not have been the only limitations presented, as §15-1-49 had been wrongly precluded by General Motors' first Motion for Summary Judgment. The affirmative defense of limitations was not timely presented. (R 156-159).

ARGUMENT

(1) THE COURT ERRED IN ADDRESSING ISSUES NOT RAISED IN GM'S FIRST MOTION FOR SUMMARY JUDGMENT AND DISMISSED TAMMIE'S CLAIM FOR DEFECTIVE MANUFACTURE.

GM'S first motion for summary judgment, for some unexplained reason, and which was overlooked by Appellant's Attorney when the record was examined, was omitted from the record on appeal. The Motion is listed in the copy of the Docket Book, (R-3 dated 3-29-06) and Appellant would move the Court to permit the record to be supplemented to include the Motion. A certified copy of said motion is attached to the Motion to Supplement the Record which has been filed with this Court.

GM's first Motion for Summary Judgment was based on two points. The First Point was that Plaintiff did not have an expert witness to prove defective design, defective manufacture and defective notice regarding the failure of the air bag to deploy. Plaintiff conceded that there was no expert on any of these three elements other than the air bad did not deploy during a severe crash. (R 1 - 3). The Motion did not raise these issues, the way the Motion was written was to the effect that Plaintiff could not prove the chain of custody of the vehicle as to the condition of same since manufacture to date of accident. Plaintiff's counsel was not aware that the Court would raise these issues at this time. There was no question, at any time, that Plaintiff did not have any expert witnesses on any issue of this trial. Plaintiff relied on the severity of the crash and the photographs of the subject car to prove the force of collision and failure of the air bag to deploy (R 132 147). Raising issues for argument on summary judgment that were not set out and presented in the motion is the same thing as "trial by ambush" and counsel for the Plaintiff was not prepared for effective argument on those three issues. (T 3 -34). MRCP 55 (d) permits the

Court to interrogate counsel to determine issues and this the Court did, but the Court also permitted issues to be presented that were not presented in the motion. The Court erred in pushing the design, manufacture and notice issues at a time when the matters were not properly raised and counsel was not prepared for a presentation on manufacture to warranty application.

The error in the Court's logic in finding that Plaintiff had a warranty claim, but not one for **manufacture**, is flawed in that one can not have a failure of warranty claim without having a manufacture failure. When the Court found no manufacture failure, then the Court in essence killed strict liability and the limitations period under §15-1-49. This ruling is contrary to the ruling in *Forbes vs. General Motors Corporation*, 933 So.2d 285 (Miss. 2006) which provides that expert testimony is not needed to establish that an automobile did not perform as warranted. This authority was presented to the trial judge, but somehow was not followed.

The Affidavit of the investigating office, the Affidavit of Tammie Brown and that of her daughter (R143 - 147), along with the photographs of the car, leave little to doubt that the severe crash was more than sufficient to cause the air bag to deploy.

The second issue in GM'S first Motion for Summary Judgment, necessity for a biomechanical engineer was correctly handled by the Court and that part of the judgment is not appealed as this matter has been clarified by the Forbes case.

(2)

THE COURT ERRED IN SUSTAINING GM'S SECOND MOTION FOR SUMMARY JUDGMENT ON THE STATUTE OF LIMITATIONS BECAUSE (1) SUIT WAS FILED BEFORE §15-1-49 BARRED THE CLAIM AND (2) THE LIMITATIONS MOTION WAS NOT TIMELY PRESENTED.

When the Court took out "manufacture" in GM'S first Motion for Summary Judgment and left only the claim for "breach of warranty" it effectively took out the strict liability aspect of

the breach of warranty precluding the application of §15-1-49 limitation period and left only §75-2-725. The breach of warranty claim under §75-2-725 is time barred under the 6 year prescription but would not have been barred under §15-1-49 had The issue of “manufacture” remained in the cause.

The affirmative defenses of limitations of action were set out in GM’s answer as follows:

“FOURTH DEFENSE. Plaintiff’s claim may be barred by the statute of limitations, including §§ 15-1-49 and 75-2-725”

GM filed its answer and affirmative defenses on March 29, 2002, and did not raise the matter of limitations until March, 17, 2007, almost exactly 5 years later after all of the discovery, motions and pleadings were had in this cause. At time of presentation of the motion the undersigned did not raise waiver of the affirmative defense as a barr to the issues raised in the second GM Motion for Summary Judgment; however, it certainly could have been addressed by the court and the cases that have come down such as *East Mississippi State Hospital vs. Adams*, 947 So.2d 887 (Miss. 2007) and the *Estate of Grimes v. Warrington*, 2008 MSSC-Ca-01926 (Miss. 2008) would preclude this cause being disposed of on summary judgment.

CONCLUSION

The Circuit Judge erred in permitting issues not raised in GM’S first Motion for Summery Judgment to be presented which placed Counsel for Plaintiff at a disadvantage to respond to same for which he was not prepared. The ruling of the Court in finding that “Manufacture” is separate from “Warranty” is error as you must have both in order to have the other. This was also a defective product case as well as a warranty case.

Because GM waited until almost exactly five (5) years to raise its affirmative defense of limitations of action, same should be barred and this cause should be remanded for trial.

RESPECTFULLY SUBMITTED this the 31st day of March, 2008.

TAMMIE BROWN

BY


A. M. MURPHY
FOR APPELLANT.

CERTIFICATE OF SERVICE

I, A. M. MURPHY, do hereby certify tht I have this day mailed by U.S. Mail, Postage Prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to the following:

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SO CERTIFIED this the 31st day of March, 2008.


A. M MURPHY, MSE