IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-00078

MARCO J. BORNE AND THE ESTATE OF ELDRIDGE DUPREE, DECEASED, BY AND THROUGH HIS PERSONAL REPRESENTATIVE, NICHOLE DUPREE, AND THE WRONGFUL DEATH BENEFICIARIES OF ELDRIDGE DUPREE, DECEASED

VS.

DUNLOP TIRE CORPORATION, INC.

APPELLANT'S REPLY BRIEF

Appeal from Circuit Court of Rankin County, Mississippi
The Honorable Samac Richardson

October 10, 2008

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INTRODUCTION

The Appellee's Brief demonstrates the material facts at issue in this case as well as the confusion that surrounds the trial court's ruling. This is a products liability case involving a defective tire manufactured by the Defendant Dunlop Tire Corporation, Inc. (hereafter "Dunlop"). The tire was placed on a Ford Explorer owned and operated by Marco J. Borne. The tire malfunctioned, causing the Ford Explorer to go out of control and flip. Mr. Borne was seriously injured and his passenger, Eldridge Dupree, was killed. Dunlop concedes that the only issue before the trial court was whether the Dunlop tire in Borne's possession was the Dunlop tire on the Ford Explorer at the time of the accident. For purposes of Dunlop's motion, it was not disputed that Borne purchased Dunlop tires and placed them on the Explorer, and it was not disputed that a tire on the Explorer caused it to go out of control and flip.

The one issue before the trial court was whether the *specific* tire in the possession of Borne was the tire on the Explorer at the time of the accident. On this issue, Borne presented sufficient evidence to create a genuine issue of material fact. The trial court, however, impermissibly ***decided*** issues of material fact in granting on Dunlop's Motion for Summary Judgment. In addition, the trial court either improperly struck *or improperly failed to consider* the Affidavit provided by Borne.

The trial court granted Dunlop's Motion for Summary Judgment even though there were genuine issues of material fact demonstrating that the tire in Borne's possession was, in fact, the tire on the Ford Explorer at the time of the accident. For these reasons, summary judgment should not have been granted, and the trial court must be reversed.

IV.

ARGUMENT

A. Standard of Review

As set forth fully in Borne's Brief, summary judgment should be granted only if there are no genuine issues of material fact. See M.R.C.P. 56(c). This Court reviews a trial court's granting of summary judgment *de novo*. Powell v. Clay County Bd. of Supervisors, 924 So. 2d 523, 526 (Miss. 2006). All evidentiary matters are viewed in the light most favorable to the non-movant. Morgan v. City of Ruleville, 627 So. 2d 275, 277 (Miss. 1993). The movant has the burden of proving that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Daniels v. GNB, Inc., 629 So. 2d 595, 599 (Miss. 1993). When there is even the slightest doubt over whether a factual issue exists, the Court should resolve in favor of the non-moving party. Cothern v. Vickers, Inc., 759 So. 2d 1241, 1245 (Miss. 2000).

B. Trial Court Impermissibly Resolved Issues of Fact

A review of Dunlop's Brief demonstrates that there are factual issues in dispute in this case regarding the sole issue on the motion for summary judgment, i.e., whether the tire in Borne's possession was the tire on the Explorer at the time of the accident. It is not the function of the trial court to resolve issues of fact. Mississippi Road Supply Co, Inc. v. Zurich-American Ins. Co., 501 So. 2d 412 (Miss. 1987); Smith v. H.C. Bailey Companies, 477 So. 2d 224, 234 (Miss. 1985). The question is whether there *are* issues of material fact and, if yes, the trial court does not *resolve* disputed issues of fact. Jenkins v. Eastover Bank for Savings, 606 So. 2d 105 (Miss. 1992). The trial court impermissibly *weighed* the evidence and *resolved* the ultimate issues in the case.

Dunlop does not deny that the trial court weighed the evidence, made personal observations, and resolved factual issues. This is clearly demonstrated by the trial court's findings:

> From the argument that you've presented, it appears to me that the - looking at these photographs, *I don't see how in the world this tire could have been purchased in November of '97, and in February of '98 look like it looks.* Because if it was in that bad of shape that it dry rotted on the rack, *I don't even know that it would have held air* when they put air in there to mount it on the rim. ***I've had some personal experience*** with these what I call 'may pop' tires, and that's what this looks like is one of those may pops. You go to the tire store and you buy it and it may pop at any time after you get out of there with it. This, and I'm not an expert, *but I know one thing, this tire has got more than 3 to 4,000 miles on it. I just don't see how it could be the tire.*

(V. 3, p. 23) (emphasis added). The trial court granted summary judgment to Dunlop by *its own observations* and assessment of the evidence. This was not for the trial court to do and therefore, summary judgment should not have been granted.

C. **Summary Judgment Not Warranted Pursuant to Rule 56**

Dunlop filed a Motion for Summary Judgment in which one issue was raised: Was the Dunlop tire in the possession of Borne the tire that was on the Ford Explorer at the time of the accident? Dunlop stated in its Motion for Summary Judgment:

> Plaintiffs have absolutely no factual evidence to support their allegation that the Dunlop tire in their possession was mounted on the subject vehicle at the time of the accident. ... [T]he undisputed factual testimony and physical evidence in this case unequivocally proves that the Dunlop tire in Plaintiffs' possession could not have been mounted on the subject vehicle at the time of the accident.

(R. 48-49). Dunlop's counsel conceded this was the only issue during oral argument on the Motion for Summary Judgment:

> So everything that we have indicates that the tire that they had is not the tire that was on the vehicle at the time of the accident. And there's nothing else to do.

(V. 3, p. 20). Therefore, if there were genuine issues of material fact concerning this issue, then summary judgment should not have been granted.

First, it is well established under Mississippi law that the plaintiff's presentation of the allegedly defective product is ***not*** essential to meet the plaintiff's burden of proof. Daniels v. GNB, Inc., 629 So. 2d 595, 602 (Miss. 1993). Even if, therefore, Borne were unable to produce *any* tire at all, it is possible for him to proceed to trial based upon his unchallenged testimony that he purchased Dunlop tires and had them placed on his Explorer. (R. 20, R. 96-97, R. 120).

Contrary to Dunlop's argument and the trial court's holding, the failure of a party to establish all links in the chain of custody implicates the weight to be accorded the evidence by the jury, not its admissibility. Muscolino v. State, 803 So. 2d 1240, 1244 (Miss. Ct. App. 2002). Establishing a proper chain of custody has never required the proponent to produce every person who handled the object, nor to account for every moment of the day. Pittman v. State, 904 So. 2d 1185, 1191 (Miss. Ct. App. 2004). The test is whether or not there is any indication or reasonable inference of probable tampering with the evidence or substitution of the evidence. Gibson v. State, 503 So. 2d 230, 234 (Miss. 1987).

Dunlop relies on Monsanto Co. v. Hall, 912 So. 2d 134 (Miss. 2005) and Albritton v. Coleman Co., 813 F. Supp. 450 (S.D. Miss. 1992). Neither of these cases, however, supports Dunlop's position. Monsanto is an asbestos case reiterating that the "frequency, regularity, and proximity" test is the standard for establishing product identification in an asbestos case. Id. at 754. In Albritton, the allegedly defective furnace had been destroyed (buried in a landfill) and the plaintiff could testify only that the current furnace was "virtually the same" as the original furnace. Id. at 455. Neither of these cases are analogous to the facts before this Court.

Borne established (and it was not challenged) that he purchased Dunlop tires and that a Dunlop tire was placed in the location of the tire causing the accident. This evidence was not challenged by Dunlop in its summary judgment motion and is not disputed for purposes of the summary judgment motion or this appeal. Instead, Dunlop argued only that it did not think the tire in the Plaintiff's possession could be one of the tires admittedly purchased by Borne and admittedly on his Explorer at the time of the accident. In support of its Motion, Dunlop relied solely upon the self-serving Affidavit of its "Tire Performance Manager." Dunlop's Tire Performance Manager was permitted to examine the Dunlop tire in Bourne's possession and expressed an opinion that the Dunlop tire had excessive tire tread wear and that it was "physically impossible" that the tire in the Plaintiff's possession could be in its current position after 3,000 to 4,000 miles of use. (R. 54). Dunlop argued, therefore, that Borne could not establish that the Dunlop tire in his possession was the tire mounted on the right rear of the vehicle at the time of the accident. (R. 56).

The affidavit of Dunlop's Tire Performance Manager did not dispute that Borne had purchased Dunlop tires or that Borne had placed the Dunlop tires on the Explorer; more specifically, it did ***not*** address whether the tire was defective. (R. 181). Dunlop made no effort to qualify its Manager as an expert and did not provide his education, qualification, and experience. Instead, Dunlop's Manager expressed his opinion that if the subject tire had been purchased at the time alleged by the Plaintiff, it would be "impossible" for the tire to exhibit the wear and tear he observed after 3,000 to 4,000 miles of use. The ***only opinion expressed in the Affidavit,*** therefore, was that the subject tire "could not have been on the vehicle at the time of the accident." (R. 184).

As Dunlop readily concedes, the only issue before the Court, therefore, was whether there was a genuine issue of material fact regarding whether the Dunlop tire in Borne's possession was the tire on the Ford Explorer at the time of the accident. Contrary to Dunlop's assertions, in Borne's opposition to the Motion for Summary Judgment, he presented the Affidavit of United States District Court Judge Jay C. Zainey, the original attorney for Borne. Judge Zainey stated the following:

1. His firm investigated the motor vehicle accident in which Bourne was injured and Mr. Dupree was killed;
2. His records indicate that on April 8, 1998, his firm requested the tire from the vehicle from State Farm;
3. His employee, Wayne Parker, traveled to Long Beach, Mississippi, and retrieved the subject tire;
4. The tire was sent to a consultant and then returned to his possession and placed in storage in New Orleans, Louisiana;
5. The tire remained in this storage facility until it was turned over to Borne's subsequent attorney, Mark Lumpkin.

(R. 257-58).

Based upon Judge Zainey's Affidavit, Borne properly rebutted Dunlop's claim that summary judgment should be granted. The ultimate issue in this case was whether the tire was defective. It was not challenged on summary judgment that a tire on Borne's Ford Explorer caused the accident and that Borne had placed Dunlop tires on the Explorer. The only issue before the trial court, therefore, was whether the tire *in Borne's possession* was the specific tire

that was on the Ford Explorer.

Judge Zainey's Affidavit clearly created a genuine issue of material fact on this question. Judge Zainey explained the chain of custody from the time of the accident until the tire was turned over to Borne's attorney. Any questions about this chain of custody of the tire would go to the weight of the evidence, not its admissibility. Judge Zainey's Affidavit should have been considered by the trial court, and the Motion for Summary Judgment should have been denied.

C Judge Zainey's Affidavit Was Not Properly Considered

The status of Judge Zainey's Affidavit further demonstrates the confusion surrounding the trial court's ruling and granting of summary judgment to Dunlop. Borne believes that the court struck the Affidavit, while Dunlop argues that it did not. Either way, however, the court should not have granted summary judgment to Dunlop.

At the hearing, Dunlop moved for the first time to strike the Affidavit of Judge Zainey. (V. 3, p. 5). In its Brief, Dunlop argues that it raised the *sufficiency* of the Affidavit prior to the hearing; however, Dunlop concedes that it did not file a motion *to strike* the Affidavit prior to the hearing. Obviously, there is a difference between challenging the sufficiency of an affidavit and moving to have the affidavit stricken.

Borne's counsel vigorously objected to Dunlop's request to strike the Affidavit as this issue was being brought up for the first time at the hearing and no formal motion having been filed. (V. 3, p. 6). Counsel for Dunlop conceded, "We will file it today. We will give you a copy. You will have, under the rules, time to respond to that." (V. 3, p. 7). Counsel for Dunlop then apparently changed his mind and countered, "We don't believe it's necessary to file a motion to strike the affidavit." (V. 3, p. 7). This is incorrect, and Dunlop does not disagree.

See Van v. Grand Casinos of Mississippi, Inc., 767 So. 2d 1014, 1023 (Miss. 2000), citing Auto Drive-Away Co. of Hialeah, Inc. v. Interstate Commerce Comm'n, 360 F.2d 446, 448-49 (5th Cir. 1966).

The Mississippi Supreme Court has stated:

> Where the party against whom a motion for summary judgment is made wishes to attack one or more of the affidavits upon which the motion is based, he must ***file in the trial court a motion to strike*** the affidavit.

Brown v. Credit Ctr., Inc., 444 So. 2d 358, 365 (Miss. 1983) (emphasis added). "Failure to file the motion to strike constitutes waiver of any objection to the affidavit." Board of Education of Calhoun Co. v. Warner, 853 So. 2d 1159, 1163 (Miss. 2003).

It is undisputed that Dunlop did not file a motion to strike the affidavit provided by Borne. The trial court erred, therefore, in granting Dunlop's request to strike the affidavit. The trial court should have considered the Affidavit or given Borne an opportunity to respond to a properly filed Motion to Strike Affidavit. Recognizing this fatal flaw, Dunlop proceeds to argue that the trial court did *not* strike the Affidavit. If the trial court did, in fact, consider the Affidavit of Judge Zainey, then it was clearly error for him to disregard the Affidavit.

Dunlop argues that the Affidavit of Judge Zainey was insufficient under Rule 56(e). Counsel for Dunlop argued that the Affidavit was not on "personal knowledge" of Judge Zainey and that it did not state that he was competent to testify as to the matters asserted. (V. 3, p. 8). Later, however, counsel for Dunlop asserted that the issue was one of "hearsay problems" in the Affidavit but never identified any specific evidentiary rule or alleged "hearsay" rule that was violated. (V. 3, p. 17). The trial court, without requiring a timely motion and without providing Bourne an opportunity to respond, held, "The affidavit that's given by Judge Zainey,

in my opinion, is not sufficient in that it does not meet the requirements of Rule 56(e)." (V. 3, p. 25).

Pursuant to Rule 56(e), an affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. See M.R.C.P. 56(e). Formal defects in an affidavit are ordinarily waived. Van v. Grand Casinos of Mississippi, Inc., 767 So. 2d 1014, 1023 (Miss. 2000).

The objections to Judge Zainey's affidavit were without merit. First, Dunlop argued that the Affidavit was not on "personal knowledge" and did not affirmatively state that Judge Zainey was "competent to testify." The trial court could take judicial notice that Judge Zainey - a fellow judge recently approved for a federal judgeship - was competent to testify. See M.R.E. 201(b) (judicial notice of facts not subject to reasonable dispute); Eidt v. City of Natchez, 421 So. 2d 1225, 1231 (Miss. 1982). Indeed, Dunlop makes no assertion that Judge Zainey was anything less than competent to testify.

Dunlop's argument regarding "personal knowledge" fares no better. Although Judge Zainey's Affidavit does not affirmatively state that it is based on his personal knowledge, it is clear that the statements made in the Affidavit are based on his personal knowledge. Judge Zainey specifically states that he is basing the Affidavit on his own recollection and on his own records.

The only "objection" remaining, therefore, is Dunlop's broad assertion of "hearsay problems." Dunlop failed to set forth any specific hearsay objection and, therefore, it was impossible for Borne to adequately respond. Furthermore, no statements in Judge Zainey's

affidavit go to prove the truth of the matter asserted and, therefore, do not constitute "hearsay." Judge Zainey based his statements on his own recollection of events or review of his records, a hearsay exception under Rule 803(5).

V.

CONCLUSION

For these reasons, the Defendants' Motion for Summary Judgment should have been denied.

DATED: October 10, 2008.

Respectfully submitted,

MARCO J. BORNE AND THE ESTATE OF ELDRIDGE DUPREE, DECEASED, BY AND THROUGH HIS PERSONAL REPRESENTATIVE, NICOLE DUPREE, AND THE WRONGFUL DEATH BENEFICIARIES OF ELDRIDGE DUPREE, DECEASED

By: _____
Mark D. Lumpkin

CERTIFICATE OF SERVICE

I, Mark D. Lumpkin, attorney of record for the Appellant, hereby certify that I have on this day caused the Appellant's Brief and three (3) copies of the Appellant's Reply Brief to be filed with the Clerk of the Supreme Court and that I have served one (1) copy of the Appellant's Reply Brief on counsel for the Appellee and the Circuit Court Judge at the following addresses:

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So certified this the 10 day of October, 2008.

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