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 BRIEF

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

May 28, 2008

Counsel for Appellant:

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Marco J. Borne, et al., v. Dunlop Tire Corporation, Inc.

Case No. 2008-CA-00078

I.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. The Plaintiff Marco J. Borne;
2. Nichole Dupree, Widow of Eldridge Dupree, Deceased;
3. The Estate of Eldridge Dupree, Deceased;
4. The attorneys for the Appellants, Mark D. Lumpkin and James R. Reeves;
5. The Defendant Dunlop Tire Corporation, Inc.

So certified this the 28 day of May, 2008.

MARK D. LUMPKIN

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1. Whether the trial court erred in granting summary judgment to the Defendants?
2. Whether the trial court erred in striking the Affidavit in support of the Plaintiffs' Response in Opposition to Motion for Summary Judgment?

V.

STATEMENT OF THE CASE

A. Nature of Case

This is a products liability case involving a defective tire manufactured by the Defendants. 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.

B. Course of Proceedings and Disposition Below

On September 27, 201, the Appellants Marco J. Borne and the Estate of Eldridge Dupree, Deceased (hereafter "Borne") filed a Complaint against Bridgestone/Firestone, Inc., Ford Motor Company, Dunlop Tire Corporation, and Interstate Ford, Inc. (R. 15). Borne and Mr. Dupree were traveling in a 1992 Ford Explorer equipped with Dunlop RV Radial Rover tires. The right rear tire malfunctioned and the Explorer went out of control and rolled over. Borne was seriously injured and Mr. Dupree was killed.

On October 11, 2007, the Defendant Dunlop Tire Corporation ("Dunlop") filed a Motion for Summary Judgment. (R. 48). Dunlop asserted that there was no evidence that

the Dunlop tire in Borne's possession was mounted on the Ford Explorer at the time of the accident. On November 19, 2007, Borne filed his Response in Opposition to Dunlop's Motion for Summary Judgment. (R. 240). After a hearing, the Circuit Court granted Dunlop's motion and on December 10, 2007, entered Final Judgment in favor of the Defendants. (R. 259). Borne timely filed a Notice of Appeal on January 4, 2008. (R. 260).

VI.

SUMMARY OF THE ARGUMENT

The trial court impermissibly decided issues of material fact in ruling on Dunlop's Motion for Summary Judgment. In addition, the trial court incorrectly struck the Affidavit provided by Borne even though Dunlop had not filed a Motion to Strike and Borne was not provided an opportunity to respond to such motion. 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 should be reversed.

VII.

ARGUMENT

C. Standard of Review

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 a 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).

D. Trial Court Impermissibly Resolved Issues of Fact

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). In this case, the trial court impermissibly *weighed* the evidence and *resolved* the ultimate issues in the case.

At the hearing, the trial court concluded:

> 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 got 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). The trial court granted summary judgment to Dunlop by *its own observations* and its own assessment of the evidence. This was not for the trial court to do, and

therefore summary judgment should not have been granted.

E. **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.

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).

In support of its Motion, Dunlop relied upon an elaborate sequence of events based

on Borne's recollection of events, odometer readings, and the Affidavit of its own "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 own Tire Performance Manager 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*** was that the subject tire "could not have been on the vehicle at the time of the accident." (R. 184).

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, and it is undisputed that the Dunlop tire on Borne's Ford Explorer caused the accident. The only issue before the trial court, therefore, was whether the tire in Borne's possession was indeed the 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.

D. Judge Zainey's Affidavit Improperly Stricken at Hearing on Motion

At the hearing, Dunlop moved for the first time to strike the Affidavit of Judge Zainey. (V. 3, p. 5). Borne's counsel vigorously objected to this issue 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. A party claiming that an affidavit is insufficient must file *a timely motion* or any defects are waived. 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. It is undisputed that Dunlop first raised the issue of the sufficiency of the affidavit at the hearing before the trial court and that Borne was not provided an opportunity to respond to the motion to strike and/or correct any alleged deficiencies in the affidavit. The

trial court erred, therefore, in granting Dunlop's request to strike the affidavit. The trial court should have considered the Affidavit or provided Borne an opportunity to respond to a properly filed Motion to Strike Affidavit.

Nevertheless, the Affidavit of Judge Zainey was not 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, 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 and - had Borne been provided timely notice and an opportunity to respond - could have been easily cured. First, Dunlop stated at the hearing 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. 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 they 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).

VIII.

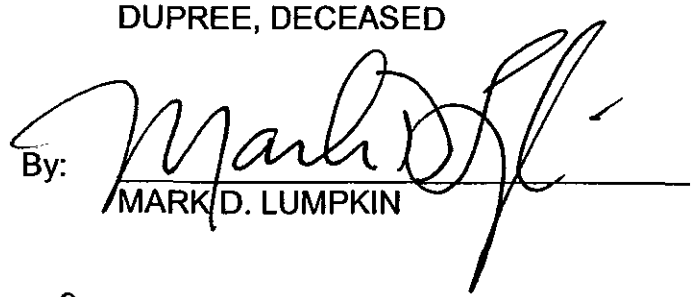
CONCLUSION

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

DATED: **May 28, 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 Brief to be filed with the Clerk of the Supreme Court and that I have served one (1) copy of the Appellant's Brief on counsel for the Appellee and the Circuit Court Judge at the following addresses:

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So certified this the 28 day of May, 2008.

Mark D. Lumpkin

RULE 25(a) CERTIFICATE OF MAILING

The following certification is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure:

I, Sandy Johnson, an employee of Lumpkin & Reeves, PLLC, hereby certify that I personally caused the APPELLANT'S BRIEF to be mailed via United Postal Service, overnight delivery, along with three (3) copies of the APPELLANT'S BRIEF, on Wednesday, May 28, 2008.

So certified this the 28 day of May, 2008.

Sandy Johnson
SANDY JOHNSON