IN THE COURT OF APPEALS OF MISSISSIPPI

2009-CA-0554

NANCY CLARK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SHENENDOAH H. CLARK; AND CHRISTIE CLARK	PLAINTIFFS-APPELLANTS /CROSS-APPELLEES
V.	
TOYOTA MOTOR SALES U.S.A., INC., ET AL.	DEFENDANTS-APPELLEES /CROSS-APPELLANTS

Appeal from Circuit Court of Hinds County

REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

ORAL ARGUMENT NOT REQUESTED

David L. Ayers (MSB#[redacted]
J. Collins Wohner, Jr. (MS[redacted]
Jimmy B. Wilkins (MSB#[redacted]
Jennifer A. Rogers (MSB#[redacted]
WATKINS & EAGER PLLC
400 East Capitol Street (39201)
P. O. Box 650
Jackson, MS 39205
Phone: 601-965-1900
Fax: 601-965-1901

ATTORNEYS FOR TOYOTA MOTOR CORPORATION,
TOYOTA MOTOR SALES, U.S.A, INC.,
TOYOTA MOTOR DISTRIBUTORS, INC., AND ROPER TOYOTA, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

The judgment in favor of Toyota[1] should be affirmed on the direct appeal. Toyota's cross-appeal should require consideration only because plaintiffs have threatened to multiply proceedings in the trial court despite the judgment.[2]

Plaintiffs' response to the cross-appeal demonstrates that Toyota obtained this judgment fairly despite having been compelled to defend in an improper venue and despite having been unfairly denied the use of substantial probative evidence in its favor. Since plaintiffs have threatened continued proceedings in Hinds County in defiance of the judgment, the decision affirming the judgment should address the cross-appeal to make clear for the purpose of any future proceedings by plaintiffs that Hinds County was not and is not a proper venue and that the exclusion of alcohol evidence was error.

ARGUMENT

I. Plaintiffs' Speculation About "Some" Hypothetical "Involvement" Does Not Excuse the Improper Venue.

Plaintiffs' response demonstrates that plaintiffs never had a "reasonable claim of liability" against Toyota Motor Distributors and therefore that Hinds County was never a proper venue for this case. *Penn Nat. Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 433 (¶ 14) (Miss. 2007).

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[1] Unless otherwise indicated, "Toyota" is used collectively herein to include all defendants: Toyota Motor Corporation, Toyota Motor Sales, U.S.A, Inc., Toyota Motor Distributors, Inc., and Roper Toyota, Inc.

[2] *See* Toyota's opening brief at 31, n.43.

Plaintiffs do not dispute that Toyota Motor Distributors ceased to exist as a separate corporation in 1995, roughly 5 years before the subject 2000 Tundra model was introduced into the United States. From the outset of this case, therefore, it was obvious as a matter of public record that Toyota Motor Distributors could have played *no part* in the sale or distribution of the subject Tundra. Since Toyota Motor Distributors thus could not possibly have been a commercial "seller" of the subject 2000 Tundra, there was never any basis for naming it in this case. Since Toyota Motor Distributors was the only defendant arguably "resident" in Hinds County, Hinds County was never a proper venue for this case.

Plaintiffs do not dispute that a product liability claim can arise only against a commercial "seller" of an allegedly defective product.[3] Plaintiffs do not deny that they would have had *no* basis for alleging that Toyota Motor Distributors was a commercial "seller" of the subject 2000 Tundra – had they bothered to do so, which they did not.

Plaintiffs do not deny that the same public record on which they relied to assert that Toyota Motor Distributors remained "resident" in Hinds County in 2001 (when suit was filed) also disclosed that Toyota Motor Distributors dissolved in 1995 – thereby affirmatively precluding the possibility that Toyota Motor Distributors could have been a commercial "seller" of a 2000 Tundra. Supp CP 72 (Supp RE Tab 9). Plaintiffs also do

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[3] As noted in our opening brief (at 38), a product liability claim can arise only against a commercial "seller" of an allegedly defective product. *See, e.g., Scordino v. Hopeman Bros., Inc.*, 662 So. 2d 640, 645 (Miss. 1995) ("a contractor [or] subcontractor is not a seller, . . . and is therefore not liable for any component parts it may supply in compliance with the performance of a job or service"); *Harrison v. B.F. Goodrich Co.*, 881 So. 2d 288, 290 (Miss. App. 2004) (one who licenses a trademark not a "seller" of the product that bears the mark, and § 11-1-63 "by its explicit terms, confines product liability claims to manufacturers or sellers of products").

not deny that their counsel acquired actual knowledge of Toyota Motor Distributors' 1995 dissolution in 1997. Supp CP 365-70.

Instead of addressing any of these material points, plaintiffs argue that Toyota Motor Distributors might nevertheless somehow have had "some involvement in the development" of the Tundra. Brief at 14. The "involvement" that plaintiffs speculate about is not any actual role in the design process, direct or otherwise. It consists entirely of an alleged *lack* of contribution to the design process by allegedly failing to have "a mechanism for reporting any warranty information" to its corporate parent. *Id.*

Since the Tundra model involved in this case was not introduced into the United States until 2000, any "warranty information" that allegedly went unreported by Toyota Motor Distributors before it dissolved in 1995 could not have been for the Tundra itself. It could only have been for other, much older vehicles. Plaintiffs have never explained how old "warranty information" about other, much older vehicles could have been expected to affect any aspect of vehicle design relevant to this case. Plaintiffs never produced any evidence (an expert would have been required) to support their conjecture that a lack of old warranty information about other vehicles had *any* discernable impact on *any* aspect of the 2000 Tundra design. The record is devoid of any factual support for any of this speculation.

The lack of factual support aside, plaintiffs cite no authority whatsoever to support their legal assumption that such an indirect impact on product design, even if it existed, could be legally actionable. Their cursory citation of § 11-1-63(c) (Brief at 14) provides

no support at all for such a contention. MISS. CODE ANN. § 11-1-63(c). Section 11-1-63(c) defines the requisites for proving an alleged warnings defect against a "manufacturer or seller." The section provides no support whatsoever for radically expanding the scope of *design* defect liability (on which plaintiffs depended in this case) to encompass not just manufacturers and sellers but also *anyone* who might *ever* have learned *anything* that *might* have affected product development if it had been communicated to the manufacturer or seller. There is no legal support whatever for such an expansive view of product liability.

Speculation such as this is not sufficient to state a claim for pleading purposes, much less to oppose summary judgment, which was the purpose for which plaintiffs first offered it this case. "[F]ailure to withstand a motion for summary judgment means that *Frazier*'s third prong is not met." *Penn Nat. Gaming*, 954 So. 2d at 434 (¶ 16) (citing *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, 1003 (Miss. 2004)). "[T]he trial court therefore erred in denying the motion to transfer venue, as there was no reasonable basis to keep [Toyota Motor Distributors] in the suit." *Id.*

Such speculation is even less excusable after a trial. Here, plaintiffs were permitted to go through the pretense of putting on a case against Toyota Motor Distributors, right through submission to the jury. They thus have a full trial record at their disposal to justify their purported claim. That they still can offer nothing more than the thinnest of speculation to do so – speculation of type that ought not be sufficient even for an initial pleading – shows how meritless their venue contentions have always been.

Toyota fairly won a just judgment in its favor despite having been deprived of its right to a proper venue, and that judgment should be affirmed. Toyota should not be required to oppose any further trial court proceedings by plaintiffs in this matter in the improper venue of Hinds County. The judgment should be affirmed with instructions to dismiss any further Hinds County proceedings by plaintiffs for lack of proper venue.

II. Plaintiffs Cannot Justify the Exclusion of Alcohol Evidence.

Plaintiffs' response does not excuse the egregiously harmful error of excluding all evidence of Clark's drinking and intoxication – all of which was highly relevant to Clark's credibility, to plaintiffs' expert Jerry Wallingford's credibility and reliability, to understanding the basic crash facts, to determining the cause of injury, and perhaps most of all, to assessing the "*amount* of negligence attributable to the person injured," as required by Mississippi comparative negligence law. MISS. CODE ANN. § 11-7-15 (1972) (emphasis added).

Nor can plaintiffs' response excuse the stunning refusal to rescind the erroneous *in-limine* ruling after plaintiffs repeatedly abused it by using it as cover for outright misrepresentations of fact – including Wallingford's stated assumption that Clark was driving like a "normal" or "typical" driver (T 409-11), and Clark's own brazen insistence that he never took his "eyes off the road" and "was obeying the law."[4] The insulation of these obvious falsehoods from cross-examination based on the truth of Clark's heavy alcohol use and intoxication deprived Toyota of the most basic form of due process. *See,*

[4] T 890 ("But I was obeying the law so I'm sure I wasn't doing much more than over 40. . . . I can't recall, but I do go by the law), T 894 ("I did not take my eyes off the road, no, sir).

e.g., *Pulliam v. Chandler*, 872 So. 2d 752 (¶ 7) (Miss. App. 2004) ("To entertain . . . testimony which was not subject to cross-examination . . . violates . . . procedural due process rights").

Plaintiffs do not even attempt to reconcile the alcohol exclusion with the law requiring the jury to assess the "*amount* of negligence attributable to the person injured." MISS. CODE ANN. § 11-7-15 (emphasis added). Just as in the trial court, the plaintiffs completely ignore the actual law. Instead, they repeat the same false excuses they employed in the trial court, beginning with their false dichotomy between the cause of the crash and the cause of the alleged enhanced injuries.

There may be cases in which the cause of a crash is legally and factually distinguishable enough from the cause of enhanced injury to justify excluding alcohol evidence, especially where comparative negligence is not an issue. The Texas case to which plaintiffs devote several pages of their brief may be good example of such a case.[5] But that case offers no analogy to this one.

The alleged enhanced injuries in the Texas case were *not* those of a severely intoxicated driver in a one-car accident. They were those, rather, of an innocent passenger in a car hit by an intoxicated driver. Comparative negligence was therefore is not an issue. This isolated Texas decision on completely different facts provides no justification for the exclusion of Clark's alcohol use and intoxication in this case, where

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[5] Plaintiffs' Reply/Response Brief at 14-16 (discussing *Frazier v. Honeywell International, Inc.*, 518 F.Supp. 2d 831 (E.D. Tex. 2007)).

alcohol evidence was directly relevant and highly probative of central disputed issues, including especially comparative negligence and Clark's and Wallingford's credibility.

Plaintiffs' alternative excuses for excluding alcohol evidence are no better than their first one.

Rule 403 balancing could not have justified the exclusion of such highly probative evidence on a central disputed issue like comparative negligence even if plaintiffs had not abused the *in-limine* ruling by misrepresenting facts. MRE 403. "It is inherent that nearly all evidence is prejudicial to a party in one way or another." *Abrams v. Marlin Firearms Co.*, 838 So. 2d 975, 981 (¶ 22) (Miss. 2003). "The inquiry . . . is whether that prejudice is *unfair*." *Id.* (emphasis added). To qualify as "*unfair* prejudice" for Rule 403 balancing, the alleged danger must stem from something other than probative value on a disputed issue. *Id.*; *James v. Carawan*, 995 So. 2d 69, 77 n.23 (Miss. 2008) ("'[u]nfair prejudice' . . . 'means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one'") (quoting federal advisory committee). What plaintiffs sought to avoid here was not "*unfair*" prejudice, but rather *probative value* adverse to their claim. Rule 403 cannot excuse the exclusion.

Moreover, even where Rule 403 balancing is proper initially, it has no place after a party "opens the door," as plaintiffs did here through their multiple misstatements of fact. Even where probative value is incidental rather than central as it is here, a party has a right to address subjects raised by an opponent in order to clarify or cure misrepresentations. *See, e.g.*, *Martin v. State* 970 So. 2d 723, 725 (¶ 11) (Miss. 2007)

("It is well-settled that a defendant who 'opens the door' to a particular issue runs the risk that *collateral, irrelevant, or otherwise damaging* evidence may come in on cross-examination") (emphasis added). Toyota was denied that basic right with evidence that was in no way collateral or irrelevant, but rather directly relevant and probative.

Plaintiffs' assertion that *Abrams* and *GM v. Myles* are distinguishable is unsupported.[6] Plaintiffs identify no material distinction and none exists.

Plaintiffs next turn to a hyper-technical chain-of-custody argument about the blood alcohol test results in the medical records from Clark's hospitalization on the night of the crash. Brief at 18-19. The same argument was made to, but not accepted by, the trial court.[7]

Plaintiffs do not identify any genuine issue about the validity of the 0.16 blood alcohol test results. The only "critical information" allegedly missing (Brief at 19) from Clark's medical record is nothing more than the name of the individual who drew the blood sample on the night of the crash – an extraordinarily minute technicality in light of the emergency circumstances of Clark's care that night. This sort of technicality is not material in a civil case. "[W]e are dealing with a civil, not criminal, matter, and there are no statutorily prescribed procedures." *Buel v. Sims*, 798 So. 2d 425, 429 (¶ 17) (Miss. 2001). "[W]e have a test administered by hospital personnel for medical purposes . . . no

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[6] Brief at 17-18 (discussing *Abrams*, 838 So. 2d 975 and *General Motors Corp. v. Myles*, 905 So. 2d 535, 541 & 546 (¶¶ 12 & 30) (Miss. 2005)). *Compare* Toyota's opening brief at 41, explaining relevance of *Abrams* and *Myles*.

[7] *See* T 151-52 (Supp RE Tab 2) (plaintiffs' motion granted solely on grounds that "the issue of the cause of them running off the road has been admitted to by the plaintiffs").

different from . . . [the] myriad of [other] medical tests" in Clark's medical records, on which plaintiffs themselves relied in this case. *Id.* The 0.16 test result is consistent with other evidence of Clark's alcohol consumption on the night of the crash, including the testimonial evidence of Clark's heavy drinking before the crash and Clark's apparent stupor at the time of the crash. There is no reason to doubt the validity of the blood alcohol test results.

Moreover, even if it had some merit otherwise, which it does not, plaintiffs' chain-of-custody argument regarding the blood alcohol test results could not excuse the exclusion of *other* alcohol evidence, of which there was an abundance. Plaintiffs' own *motion in limine* includes a long list of such evidence, including Clark's own testimony. Supp. CP 3397-98 (plaintiffs' motion summarizing extensive alcohol evidence). As plaintiffs' own motion demonstrates, Clark *admitted* drinking before the crash, and there was ample testimonial evidence that Clark had been drinking heavily. *Id.* Such evidence is separately admissible regardless of a blood alcohol test. *See, e.g.*, *Abrams*, 838 So. 2d at 980 (¶ 18) (testimonial evidence of "possible alcohol consumption . . . highly relevant and probative"); *Buel*, 798 So. 2d at 428 (¶ 13) ("We have previously held that one's own admission of alcoholic consumption in the hours preceding an accident provides a sufficient evidentiary basis to submit the question to the jury"); *Mills v. Nichols*, 467 So. 2d 924, 928-29 (Miss. 1985) ("We recognized in *Allen v. Blanks* that one need not be legally intoxicated in order for the question of impairment of reaction time by intoxicating liquors to be properly submitted to the jury. In the case sub judice, the *plaintiff's own*

admission that he had consumed several beers in the hours preceding the accident formed a sufficient evidentiary basis for submitting the question to the jury . . ., notwithstanding the absence of alcohol on his breath, and liquor bottles in his car.") (emphasis added).

Plaintiffs' final tack on this issue is to assert that Toyota had "an opportunity to clarify" Clark's and Wallingford's misrepresentations. Brief at 20. Instead of attempting to defend that assertion, however, plaintiffs go on to simply deny that misrepresentations were made. Brief at 20-21. The record speaks for itself on that issue.[8] The trial court's inexplicable refusal to rescind the erroneous *in-limine* ruling prevented cross-examination based on the truth of Clark's heavy alcohol use and intoxication, depriving Toyota of this most basic form of due process.

Toyota fairly won a just judgment in its favor despite having been deprived of the use of this probative, fair evidence and of its due-process right to cross-examination. That judgment should be affirmed. Since plaintiffs have threatened continued proceedings in spite of the defense judgment, the decision affirming the judgment should recognize that the exclusion of alcohol evidence was error.

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[8] *See, e.g.*, T 890 ("But I was obeying the law so I'm sure I wasn't doing much more than over 40. . . . I can't recall, but I do go by the law), T 894 ("I did not take my eyes off the road, no, sir) (discussed in our opening brief at 35); Toyota's opening brief at 35.

CONCLUSION

The judgment should be affirmed on appeal. With respect to the cross-appeal, the error of the alcohol exclusion should be noted and the case should be remanded with instructions to dismiss any further Hinds County proceedings by plaintiffs for lack of proper venue.

Dated: July 15, 2011.

Respectfully submitted,

J. Collins Wohner Jr. (MSB No. [redacted])
WATKINS & EAGER PLLC

ATTORNEYS FOR TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A, INC., TOYOTA MOTOR DISTRIBUTORS, INC., AND ROPER TOYOTA, INC.

OF COUNSEL:

David L. Ayers (MSB# [redacted])
Jimmy B. Wilkins (MSB# [redacted])
Jennifer A. Rogers (MSB# [redacted])
WATKINS & EAGER PLLC
400 East Capitol Street (39201)
P. O. Box 650
Jackson, MS 39205
Phone: 601-965-1900
Fax: 601-965-1901

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the above and foregoing paper to be delivered by United States mail, postage prepaid, to the following:

Hunter W. Lundy
Lundy, Lundy,
Soileau & South, LLP
501 Broad Street
Post Office Box 3010
Lake Charles, Louisiana 70601

Kristie M. Hightower
Lundy, Lundy,
Soileau & South, LLP
713 South Pear Orchard Rd.,
Suite 301
Ridgeland, Mississippi 39157

Wayne E. Ferrell, Jr.
405 Tombigbee Street
Post Office Box 24448
Jackson, MS 39225-4448

J. Ashley Ogden
Ogden & Associates, PLLC
500 E. Capitol Street Ste 3
Jackson, MS 39201-2703

Counsel for Plaintiffs

The Honorable Winston L. Kidd
Hinds County Circuit Court Judge
P.O. Box 327
Jackson, MS 39205

THIS, the 15th day of July, 2011.

J. Collins Wohner Jr.