

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KELLY GRANT, Individually and As Personal  
Representative of the Estate and Heirs-at-Law  
And/or Wrongful Death Beneficiaries of  
MAKAYLA MAGGARD, Deceased, a Minor

APPELLANT

VERSUS

NO. 2009-TS-01815

FORD MOTOR COMPANY

APPELLEE

**REPLY BRIEF OF THE APPELLANT**

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## **SUMMARY OF THE ARGUMENT**

An injustice has occurred. Ford and Mazda Motor Corporation joined together to manufacture an automobile and put the automobile into the stream of commerce. Grant unknowingly purchased the vehicle, and as a result of its design and/or production defects, Grant and one child were injured while another child was fatally killed.

Feeling aggrieved, Grant filed suit. Ford quickly and wrongfully removed the case to Federal Court delaying the matter for years. Once Grant and her counsel expended massive resources, justice is finally severed and the case was remanded. Discovery was sent to Ford. Ford responded stating that the vehicle which carried its name (i.e. the Ford Probe) was in fact a joint venture between Ford Motor Company and Mazda Motor Corporation. Then, Ford made the most unbelievable statement. We do not have a single document regarding the design and manufacture of said vehicle (which carried our name plate) and Grant would need to get those documents from Mazda in Japan.

Grant complying with the Mississippi Rules of Civil Procedure requested Ford to supplement their responses. Ford failed. Grant then filed a Motion to Compel. The lower Court simply required Ford to state that they asked Mazda for the documents and Mazda failed to honor their request.

In fact, Ford had a contractual right to the documents. Ford argued the Contract was limited in time; however, no effort was made by Ford to attempt to utilize the Contract terms to obtain access to the documents. Instead, they attempted to shift the burden and expense to Grant.

Grant has never questioned that the documents were under the control of Ford. In fact, when Grant served a subpoena upon Mazda Motor of America to attempt to gain access to the documents through Mazda, it was Ford's counsel who called to state that the documents were not going to be made available to Grant.

During all of this time, Grant's expert was without the use of information known to exist in the documents. Grant's expert could utilize the car in question to take certain measurements and perform certain test; however, it would be at extreme costs to Grant. Therefore, Grant continued her appeals to the Lower Court for help. After encountering a brick wall, Grant was left with one alternative ... ask the expert to make the calculations to the best of his ability based upon the evidence in his possession and suffer the costs realizing all of which could be prevented by the production of the design drawings by Ford.

At approximately the same time, Ford filed a Motion to Strike the expert's opinion. Grant responded and furnished all the additional research, investigation, testing, and measurements taken by the Expert. These items in conjunction with the nearly two days of expert testimony, discovery responses, and expert reports more than complied with the requirements of *Daubert*.

Notwithstanding the Mississippi Rules of Civil Procedure allowing for the seasonal supplementation, Ford filed a Motion to Strike the additional research, investigation, testing and measurements taken by the Expert arguing that an expert cannot supplement his opinions after deposition. This is simply not true.

With improper notice being provided to Grant, Grant was forced to hearing and

the Court struck all additional research, investigation, testing and measurements and then found that the experts opinions were not in compliance with the standard set out in *Daubert*. Now, Grant was left with no expert opinions to support her claim.

Thus, Ford, by hiding and concealing the documents successfully, was allowed to design and manufacture a vehicle which was unsafe, put that car in the stream of commerce, and ultimately injure and murder Grant and her children.

This is not justice.

## ARGUMENT

### **The Court Erred in Failing to Compel the Defendant, Ford Motor Company, to produce the Design Drawings of the 1996 Ford Probe?**

The Central issue is whether Ford Motor Company had possession, custody or control of the Design Drawing of the 1996 Ford Probe. If so, Miss R. Civ. P. 34 would require Ford to produce said documents.

It is undisputed that ST44 Product Development Agreement ¶ 5.1 D. Specifications and Drawings. provided as follows:

...When Ford specifies a need for specifications and drawings, Mazda and AAI shall provide to Ford, normally within fourteen (14) days after Ford's request ...copies of specifications, drawings, blueprints, instructions and other supporting documentation prepared or owned by them as well as shoninzu of its vendors ... relevant to the Ford vehicle. (R. E. 1)

Although this contractual provision clearly demonstrates Ford's contractual right to obtain the documents, Ford argues that the Contract term has expired therefore they are unable to obtain the documents from Mazda Motor Corporation. However the contract provides at "9.5 Obligations Following Termination. If the Agreement is terminated (including the termination of purchases for certain Territory), the parties shall not be exempted from any obligations incurred prior to the date of termination." (R. E. 1) It is clear that Mazda had an obligation to Ford Motor Company to produce the design drawings during the term of the Agreement; therefore, Mazda, in accordance with the Agreement, had a duty to produce the documents to Ford. Accordingly, the documents were under Ford's custody and control. Resolution Trust Corp. v. Deloitte & Touche, 145 F.R.D. 108, 110 (D. Colo. 1992); Week v. Cross, 88 F.R.D. 325, 327 (N.D. Ill. 1980); Searock v. Stripling, 736 F. 2d 650, 653 (11<sup>th</sup> Cir. 1984).

**The Court erred by striking the Affidavit of Dr. Charles Benedict.**

After having been granted a continuance by the Lower Court to bring forward its Motion, Ford re-noticed its Motions to Exclude Dr. Charles Benedict's Opinions. Some eleven days later, Ford Motor Company filed their Motion to Strike the Affidavit of Dr. Charles Benedict on June 8, 2009, and noticed same to be heard at the hearing on June 11, 2009.

Counsel for Grant objected to said Motion being heard at the June 11, 2009, hearing, as untimely based upon Miss R. Civ. P. 6 (d). Notwithstanding Miss R. Civ. P. 6(d), the Lower Court refused to grant Grant additional time to prepare. Grant would state that this fact alone is reversible error.

Additionally, Miss. R. Civ. P. 26(4)(A)(i) requires Grant to seasonably supplement her discovery responses, including expert information, which was done by Grant; however, the Court refused to consider any testing, measurements, and other analysis performed after the deposition of Dr. Charles Benedict. There is simply no basis for this ruling.

In fact, Grant specifically reserved her right to supplement, modify, enhance, and/or change said opinions as discovery continued and/or additional information was received and/or discovered. See Deposition Transcript of Charles Benedict, Vol. I, Page 6, L. 9-16, R.E. 5).

Notwithstanding the repeated and exhaustive efforts of Grant's counsel to obtain the design drawings, the design drawings were never discovered and/or produced by Ford and/or Mazda. Therefore, Dr. Benedict was never afforded the opportunity to review said design drawings and/or specifications. Notwithstanding this fact, Dr. Benedict, in accordance with



his deposition testimony, continued his original investigation, research, and testing in preparation for the scheduled trial.

In Young v. Meacham, 999 So. 2d 368 (Miss. 2008), the Mississippi Supreme Court made it clear that a Scheduling Order does not preclude supplementation. Neither does the taking of a deposition, but yet Grant was punished for moving forward with the deposition of Dr. Charles Benedict.

In this case, Grant continued her quest to obtain the documents, serving subpoenas, obtaining Letters Rogatory, and attempting other discovery tactics; however, each and every time Ford responded it did not have the documents. The lower court refused to compel any party to produce the documents. Therefore, Grant was left with no alternative, but to move forward without the documents. Thus, Dr. Benedict conducted additional costly and very time consuming tests, measurements, and analysis more fully set forth in his Affidavits (R.E. 6, 7, and 8 respectfully) and seasonably provided said information to Ford.

In a case directly on point, the Supreme Court reversed, noting:

“Additionally, this Court has stated that “[w]e . . . require that, when an expert's opinion is challenged, the party sponsoring the expert's challenged opinion be given a fair opportunity to respond to the challenge. The provision of a fair opportunity to respond is part of the trial court's gate keeping responsibility . . . .” Smith v. Clement, 983 So. 2d 285, 2008 Miss. LEXIS 172 at 11 (Miss. 2008).”

Kilhullen v. Kansas City So. Railway, 8 So. 3d 168 (Miss. 2009). See also: Young v. Meacham, 999 So. 2d. 368 (Miss. 2008); Bowersfield v. Suzuki, 151 F. Supp. 2d 625 (2001).

It is clear that the Court erred in refusing to allow Grant additional time to respond and further erred in striking the Affidavits of Dr. Benedict.

## CONCLUSION

For the foregoing reasons, Grants again requests this Honorable Court to enter its Order finding that the Court erred in the following ways:

- (1) Failing to Compel the production of certain design drawings in the possession, custody, and/or control of Ford;
- (2) Excluding the Affidavit of Dr. Charles W. Benedict;
- (3) Granting Ford Motor Company's Motion to Exclude Dr. Benedict's Seatbelt, Structural Integrity and Biomechanics Opinions;
- (4) Denying Grant's Motion to Compel the 30(b)(6) Deposition of Ford Motor Company;
- (5) Denying Grant's Motion to Allow Additional Discovery;
- (6) Denying Grant's Motion to Amend the Scheduling Order; and
- (7) Granting Summary Judgment in favor Ford.

RESPECTFULLY SUBMITTED:



STACEY LEA SIMS

Stacey Lea Sims, MS [REDACTED]  
Morris, Sakalarios & Blackwell, PLLC  
Post Office Drawer 1858  
Hattiesburg, MS 39403-1858  
Telephone: (601) 544-3343  
Telefax: (601) 544-9814  
email: ssims@morris-sakalarios.com

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**AMENDED CERTIFICATE OF SERVICE**

This is to certify that on August 15, 2011, I, Stacey L. Sims, caused to be served a true and correct copy of *Appellant's Reply Brief* to the following:

Everett E. White, Esq.  
Baker Donelson Bearman Caldwell & Berkowitz  
4268 I-55 N  
Post Office Box 14167  
Jackson, MS 39236-4167

Michael B. Wallace, Esq.  
Wise Carter Child & Caraway, P.A.  
Post Office Box 651  
Jackson, MS 39205-0651

This will further certify that I, Stacey L. Sims, on this date, cause to be served, a true and correct copy of *Appellant's Reply Brief* to the following::

Honorable Lester F. Williamson  
Clarke County Circuit Court  
P.O. Box 86  
Meridian, MS 39302

This the 17<sup>th</sup> day of August, 2011.

  
STACEY LEA SIMS