

2010-CA-01924-SCT

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2010-CA-01924-SCT**

PAMELA LYNN LAWSON

APPELLANT

v.

**HONEYWELL INTERNATIONAL, INC.
(f/k/a AlliedSignal, Inc.)**

APPELLEE

**APPELLANT'S REPLY BRIEF
(ORAL ARGUMENT REQUESTED)**

**APPEAL FROM THE CIRCUIT COURT FOR THE
TENTH JUDICIAL DISTRICT OF WAYNE COUNTY, MISSISSIPPI**

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**THE ISSUE AND RECORD ON THIS APPEAL IS CONFINED TO THE
EFFECT AND SCOPE OF THE MPLA**

Because there seems to be a reason Honeywell wants to expand the issue on appeal, and confuse the issue with such statements in its brief as: "consistently denied," but admitted "*arguendo*" that it was the original designer of the defective buckle; "[L]awson . . . lacks proof of multiple statutory elements under the MPLA" at pages 2 and 13 of its Brief, the issues in this appeal should be clarified and the factual record corrected.

First, Chrysler did not agree with Honeywell's contention that Chrysler designed the buckle, (see Chrysler's sworn answer to Plaintiff's Interrogatory number 8 at R. p. 183). Secondly, see Honeywell's own expert, Dan Davee's, testimony (R. p 137), "Q. Did Allied Signal further that design, yes or no? A. Yes . . . Q. Did it have computer models of that design made up in Allied's facility? A. Yes . . . Q. who was the [Allied's] design engineer? A. Stew Staniszewski." No wonder Honeywell "assumed *arguendo*," that it was the original designer of the buckle.

The issue in the Motion for Summary Judgment before the Trial Court was stated very succinctly by that Court:

"Defendant Honeywell filed . . . claiming that the Mississippi Products Liability Act ("MPLA"), Miss. Code Ann. § 11-1-63 is the sole remedy for products liability actions in Mississippi . . . (and concluded) Honeywell

cannot be considered a manufacturer and Summary Judgment must be granted” (R. p. 183).

On the last page of his Order denying Plaintiff’s Motion for Reconsideration, the Court explained again, “Therefore, under the current language of the statute, Honeywell cannot be considered a manufacturer as defined under the MPLA. . . . (R. p. 272). Similarly, the Trial Court had held in its initial Order, “Therefore... Honeywell cannot be considered a manufacturer and Summary Judgment must be granted as to the issue of strict liability as joint tortfeasor and negligent design.” (R. pp. 279-286). That interpretation of the statute is what is at issue here.

If this is a back door effort by Honeywell to expand the issue for appeal, or to insinuate that the Plaintiff did not meet her *prima facie* burden of proof in the lower Court, it should be seen for what it is. However, Lawson pointed out in her initial Brief that she had met her burden of proof. (Appellant Br. pp. 25-27). Add to that the references to alternative designs, of the Gen-IV and Gen-II. (R. pp. 138, 170, 171).

Because new issues may not be raised for the first time on appeal, Lawson did not designate available, voluminous, deposition testimony regarding the design issue. As this Court recently pointed out in *Mckee v. Bowers Inc. et al*, No. 2009-CA-01314-SCT, April 21, 2011, “One of the most fundamental and long-established rules of law in Mississippi is that [the appellate court] will not review matters on appeal that were not raised at the trial court level” citing *Shaw v. Shaw*, 603 So.2d 287, 292 (Miss. 1992).

OVERVIEW OF THE ISSUE PRESENTED

Honeywell’s arguments that a designer can never be a “manufacturer” and secondly, that the Statute abrogates the common law of negligence, requires that we examine the structure, content and context of the Statute. (Appellee Br. p. 11). The MPLA was enacted because of the push to protect manufacturers and sellers from

common law strict liability. In so doing, the legislature enacted the MPLA to protect **manufacturers and sellers** of products that are alleged in a civil action to have caused damages. They required that, depending on the allegations of the claim, the claimant prove one of four elements; the third is applicable here. The MPLA provides in subsection (i)3:

Subject to the provisions of 11-1-64, in any action for damages caused by a product except... (a) The manufacturer or seller of a product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller...
(i)3. The product was designed in a defective manner....(emphasis added)

Note should be taken of the form of this enactment. It is not the broad form of a sweeping enactment of remedial legislation; it provides only that a **“manufacturer or seller” (a surgical strike without the collateral damage to our jurisprudence of the 2,000 pound cluster bomb)** shall not be liable in a product suit, “if the claimant does not prove (W, X, Y or Z)....” To avail itself of the requirement of that, enactment, Honeywell must be either a “manufacturer or seller” of the Gen-3 safety buckle.

THE MPLA IS A PROTECTIVE STATUTE FOR MANUFACTURERS AND SELLERS ONLY

The broadly resourced and multifaceted Brief of Honeywell could remove focus from the very narrow issues involved in this case. To the Plaintiff, Pam Lawson, it only serves to highlight the central, even narrow, thrust of the issues presented by this appeal. If Honeywell is covered as a co-manufacturer under the MPLA, she wins this appeal and if Honeywell is not covered under the Statute as a co-manufacturer, then she wins this case under her theory of negligent design because the Act does not abrogate

common law negligence. Honeywell is either a manufacturer of some description, co-manufacturer or other, or simply not protected, not covered, by the Statute.

Consider the structure of and the words in the Statute that Honeywell points to make its point that it is the exclusive source of liability for all products cases: “[i]n any action... (a) The **manufacturer** or **seller** of the product shall **not be liable** if the Claimant does not prove... (i) 3. The product was designed in a defective manner....” (Emphasis added) Those very words make Plaintiff’s point. **If, and only if**, Honeywell, a designer of this very unsafely designed, safety buckle, is a co-manufacturer, it may avail itself of any benefit of this statute. In urging a hard, restrictive, and narrow definition of the word, “manufacturer,” Honeywell, would prove too much. It would prove to the Court that Honeywell is not covered under the Statute at all.

Honeywell’s attempt to cite **the caption of the MPLA** to support its position that the **MPLA abrogates the common law is similarly without any merit**. Yes, the MPLA’s caption, “Product Liability Actions,” describes the content of the Act, but abrogates nothing. ¹ The heading of the Statute under consideration here, the MPLA, serves only to separate it from the other ‘tort reform’ provisions added to Chapter 11. For example, Section 11-1-61 is captioned “Actions Against Physicians,” Section 11-1-62 is captioned “Damages Caused by Prescription Drugs...” These captions simply mark the subject matter within the Chapter.

As Oliver Wendell Holmes famously said, “A word is not a crystal, transparent and unchanged; it is the skin of a living thought; and it may vary greatly in color and meaning according to the circumstances in which it is used.” This Court will decide what the living thought of the MPLA is as it relates to this case and explain to us all,

bench and bar, what the scope of the skin, the word, “manufacturer,” is, and explain to us whether the MPLA is a surgical strike by the legislature, or a cluster-bomb.

This Court in *Williams v. Bennett*, 921 So. 2d 1268, 1272 ¶13 (Miss. 2006), pointed out that the MPLA, “supplants common law **strict liability**.” (Emphasis added). That **common law strict liability** was based on the adoption by our Court of *Restatement of Torts Section 402(a)* in *State Stove Manufacturing Co. v. Hodges*, 189 So.2d 113 (Miss. 1996). The *Restatement of Torts 402(a)* restricts its positive imposition of liability (as opposed to protection) to **manufacturers and sellers** only. Thus, the need to protect **manufacturers and sellers** by the MPLA and at the same time not intrude into our states common law negligence jurisprudence.

But, if this Court determines that this design, unaltered and exclusive (exclusively for the manufacturer to which the design was sold) is not within the statutory term, “manufacturer,” it avails Honeywell nothing. In such an event the provider of the design is still subject to a Mississippi common law negligence action, “[a] new statute will not be considered reversing long-established principles of law and equity unless the legislative intention to do so clearly appears.” *McKee v. Bowers Window and Door Company Inc. and Weathershield Manufacturing Co.*, No. 2009-CA-01314-SCT (MS April 21, 2011). The Plaintiff in this case submitted to the Court below a well established *prima facie* case based on the Mississippi common law tort of negligent design.

MISSISSIPPI’S COMMON LAW OF NEGLIGENCE IS NOT ABROGATED BY THE MPLA

There are simply no words of abrogation in the Statute. Not only is negligent design not abrogated but, also, causes of action based on implied warranties, which would seem more likely than negligence to be abrogated in a products liability statute, are not.

In the recent “products” case of *McKee v. Bowers Window and Door Company, Inc. and Weathershield Manufacturing, Inc.*, the Court went out of its way to discuss both a failed implied warranty cause of action and a negligence cause of action against the seller when it could have more easily said that each is preempted by the MPLA and need not be considered. Yet the Court did make the analysis. In *McKee*, the Court said, “this Court addresses this claim because it was addressed by *Bowers Window*,” and referred to footnote 9 in its Opinion where it was pointed out where the McKees had made no claims of negligence against Bowers Window in neither its second supplemental nor its Amended Complaint. In *McKee*, the Plaintiff had no proof of negligence to support a negligent design theory, their expert having been ruled unqualified under *Daubert* to offer opinion testimony, and there was simply no proper pleading, nor issue on appeal to support the claim of negligence.

Honeywell cites and quotes this Court’s holding in *Watson Quality Ford, Inc. v. Casanova*, 999 So.2d 830, 833 (Miss. 2008), “we find no statutory requirement that makes the MPLA is the exclusive remedy for claims of malfunctioning automobiles. Moreover, this Court has previously held that breech of implied warranty claims are not barred by the MPLA. **That answers the question!** If there is no statutory requirement that makes the MPLA the exclusive remedy for claims of malfunctioning automobiles, then how can Honeywell even make its assertion that the MPLA preempts all actions for damages because of malfunctioning automobiles? There is no more reason to say that a negligence claim is barred by the MPLA than the implied warranty claim referred to by the *Watson* court.

Honeywell’s brief again supports Plaintiff’s argument that negligent design claims survive the Act by citing *Milford v. Commercial Carriers, Inc.*, 210 F.Supp.2d

987 (N.D. Ill. 2002). Though Honeywell's point in citing *Milford* is to support its position that, although a manufacturer may be held strictly liable for defective designs, it does not follow that a non-manufacturing designer such as Honeywell can be as well. (Appellee Br. p. 28), the *Milford* case specifically finds that, although in its opinion, strict liability does not extend to a designer who does not also manufacture the product, such designers are still accountable for negligence. *Milford* at 991. See also *Laukkanen v. Jewel T. Co.*, 78 Ill.App.2d 153, 222, N.D.2d 584, 589 (1966). The *Milford* Court found, that to claim that an entity that designs a product has no duty to make it reasonably safe for the end user is simply untenable. *Id.*

Honeywell points out that Lawson's Brief at page 18 stated that, *Healey v. McGhan Medical Corp.*, 2001 WL 717110 (Mass. Super. Ct 2001) "is of no precedential value because it did not discuss design." Lawson must admit that design was discussed. Although *Healey* did discuss the **fact** that a design defect was the basis of that appellants claim, it did not discuss the specifics of the design; just the fact that there was one. In fact, the Appellant in that case had not specifically plead or assigned as error a "negligent design" specifically, but argued that "negligent design" was included within its general negligence pleading and assignments on appeal. But, was *Healy* simply proof of the old adage that, 'bad facts make bad law?'

In *Healey*, Donald McGhan who became "McGhan I" had sold the design to 3m when it entered the breast implant business. Three years later McGhan III bought it back. The defectively designed implants were then sold to the consumer, by McGhan III. So, **the original designer in that case was McGhan, not 3M**, and McGhan was the only "manufacturer," or "seller" involved. The Court did hold that 3M, which was a past (interim between McGhan I and III), owner of the design, was not subject to

liability under a negligence theory simply, “[b]ecause they (the implants) were made identical in design to those manufactured and sold by 3M prior to divestiture.” *Healey* at p. 4 of the Opinion. It is true that, as Lawson pointed out on page 10 of her brief, “courts have gone both ways.” Lawson likes the Courts closer to home.

Courts in Mississippi have directly rejected the conclusion that the MPLA abrogated common law claims by explaining that, “[i]f the Legislature intended to restrict any available claims, especially given the fact that Mississippi has a ‘long standing tradition of pleading alternative theories in one action,’ then its Legislature would have clearly done so.” *Childs v. General Motors Corp.*, 73 F.Supp.2d 669, 672 (N.D. Miss. 1999) (Quoting *Taylor v. General Motors Corp.*, 1996 WL 671648 at *2 (N.D. Miss. Aug. 6, 1996)).

The *Childs* Court noted that, “[s]ince [MPLA] is silent on alternative causes of action, but expressly discusses those areas that effect a change in the common law, it is reasonable to presume the Legislature did not intend to preclude that which is so prevalent in practice.” Accordingly, it concluded that, “the MPLA established the procedures to be followed for a strict liability claim and did not abolish claims brought under negligence and breach of implied warranty.” *Id.* See also *Hodges v. Wyeth/Ayerst Labs*, 2000 WL 33968262 at *3 (S.D. Miss. May 18, 2000) (citing *Childs* and *Taylor* and agreeing that “the MPLA does not bar plaintiff from pleading negligence and other common law causes of action in the alternative to any strict liability claims they may allege under the MPLA”); *Rials v. Phillip Morris, USA*, 2007 WL 586796 at *5 (S.D. Miss. Feb. 21, 2007) (suggesting without analysis that a negligence claim might survive the MPLA, but finding the claim in that case would fail for other reasons).

Although these Federal district court cases are taking their best *Erie* guess as to what Mississippi State law requires, in 2002, the Mississippi Supreme Court cited *Childs* with approval by stating that, “[G]enerally speaking, ‘a new statute will not be considered reversing long-established principals of law and equity unless the Legislative intention to do so clearly appears.’” *Bennett v. Madakasira*, 821 So. 2d 794, 808 (Miss. 2002) (quoting *Thorp Comm. Corp. v. Miss. Road Supply Co.*, 348 So. 2d 1016, 1018 (Miss. 1977)). Essentially, the *Bennett* Court ruled, “[Even] though the MPLA creates a cause of action in tort for breach of expressed warranty, it does not preclude the breach of implied warranty claims under the Mississippi Uniform Commercial Code in products liability actions.” *Id.*

Honeywell strains on page 12 of its Brief to find support for its position that the Act is exclusive and abrogates the common law in its obtuse interpretation of another part of the Act. It tries to find support for its cause in the language of the MPLA, which specifically saves for sellers and manufacturers, all existing common law defenses in an action for damages “caused by a product.” Miss. Code Ann. § 11-1-63(i). That language does not logically give rise to Honeywell’s conclusion of its purpose. Plaintiff could just as easily, and probably with a great deal more verity, claim that clause to her benefit, and conclude that the Legislature included the common law defenses savings language because the common law of negligence was not abrogated; therefore, the reservation of defenses would be necessary.

PLAINTIFF REMEDIES FRUSTRATED IF MPLA IS EXCLUSIVE

Honeywell asserts that the failure of Plaintiff’s cause of action against the designer would not leave her (and by extension plaintiffs in general) without a remedy, because she can pursue a claim against Key Safety, the fabricating producer of the

defective Gen-3 seatbelt buckle. Honeywell's logic is flawed as shown by the realities of what the Plaintiff has faced in this case. In fact, in the case *sub judice*, **Key Safety**, the fabricating manufacturer of the Gen-3 seatbelt buckle, filed **its own Motion for Summary Judgment** seeking to dismiss Plaintiff's claims against it on a number of grounds, including the fact **that it would be illogical to hold a non-designer liable under a theory of design defect. (R. p. 102.)**. This shows the cat-and-mouse games that multiple entities involved in the overall manufacturing process of a defective product can use to escape liability.

It is inherently unfair to allow the competing Defendants to make opposite and conflicting claims, complicit with one another, in their defense. In this case the fabricating, and non-designing, producer of a defective product sought dismissal of the design defect claim against it on the basis that it did not design the product, while on the other hand the designing co-manufacturer argues that it should not be liable to the Plaintiff since it did not actually produce the defective product. All this while **at trial both were represented by the same attorney**, who now represents Honeywell in this appeal.

If this Court holds that under the MPLA, Honeywell is, or can be found by the jury under proper instructions to be, a co-manufacturer, then the question of control is resolved: the design was defective when it left the control of both manufacturers; the defect was fabricated v by one of the "co-manufacturers".

CONTROL - FORESEEABILITY

In its expansive briefing, Honeywell raises the point of remoteness (this writer's words) and in the same vein "control." On page 4 of it's briefing, Honeywell refers to "original designer," "exited the occupant restraint business," "had divested itself." It

goes on; the safety buckle “was manufactured. . . one year after Honeywell stopped manufacturing” (See Appellee Br. p. 4, and references on pp. 31, 32 and 36 of its Brief). But, in doing that, Honeywell betrays its misunderstanding of the requirement to prove control by misstating the language of the MPLA itself by stating that the control must have existed when it “[l]eft the control of the **[Defendant.]**” (Appellee Br. pp. 31, 32). (Emphasis added). The difference is huge! The act absolutely says no such thing; it says “[l]eft the control of the **manufacturer**...” (Emphasis added). The design left the control of Honeywell when it sold the design, drawings, specifications to Key Safety, knowing that it would be used to fabricate Gen-3 buckles for Jeep Cherokees, in its defectively designed condition; the finished safety seat belt buckle, left the fabricating “**manufacturer**” (Plaintiff says Honeywell’s “co-manufacturer) in its defective condition.

If this Court determines that Honeywell is not a manufacturer, under the MPLA, then the Plaintiff must prove foreseeability under her negligence action, rather than “control” under the MPLA. Plaintiff, Pamela Lawson, will not burden this Court with repetition of her multiple references of her proof of foreseeability at pages 4 and 5 of her Principal Brief, but remember that the 30(b)(6) designee, Terrie Meyers, for Key Safety Systems, Inc., testified as follows:

Question: And as well this mockup or sketch here . . . is a sketch of the Gen 3 Buckle, is that correct?

Yeah. This . . . that you’re pointing to there is . . . the end item drawing for the buckle assembly. p. 26 ll. 10-14. (R. p. 190).

Question: When that purchase was made, did AlliedSignal realize that you were going to be in the business of manufacturing the buckles that they had been manufacturing? Did they understand that that was the purpose of Breed, now Key Safety Systems. Making that purchase? (R. p. 192).

A. Yes, I would say so. p. 29 l. 1, (R. p. 193).

Further, answering at Page 29, Lines 11-13:

"Key Safety Systems purchase - - when they purchased this business, the designs that were part of the business came with it." (R. p. 193).
The actual drawing by AlliedSignal was received in evidence in its entirety and marked as Exhibit 2 to the corporate designee's testimony. p. 25 ll. 14-19... (R. p. 253).

Q. You didn't receive any information from AlliedSignal at the time that you purchased this about those crash tests?

A. No, sir. (R. p. 194).

Key Safety Systems' designee, Terrie Meyers, at Page 25 of her deposition, identified the graphic below as the "end item drawing," used to manufacture the buckle, and at Page 27 identified the AlliedSignal insignia on the drawing.

MODEL TYPE		MATERIAL	
02D DATA		SEE DETAILS	
03D WIREFRAME			
04PARTIAL SURFACE			
05FULL SURFACE			
06PARTIALLY FACED			
07FULLY FACED			
08CLOSED VOLUME			
09SOLID MODEL(S)			
00DRAWING TYPE			
0100 TRANSPARENCY			
020XVIEW2 DRAW EXTRACT			
		UNLESS OTHERWISE NOTED ALL DIMENSIONS ARE IN IN.	
		THIS DOCUMENT CONTAINS PROPRIETARY INFORMATION AND SUCH INFORMATION MAY NOT BE DISCLOSED TO OTHERS FOR ANY PURPOSE OR USED FOR REPRODUCING WITHOUT WRITTEN PERMISSION FROM THE ALLIEDSIGNAL CORPORATION.	
		SAFETY RESTRAINT SYSTEMS 7000 NINETEEN MILE ROAD STERLING HEIGHTS, MI 46314	
TITLE		(CUSTOMER INSPECTION SHEET) SEAT BELT ASSY FIB BKT (TRAVELING BUCKLE) (MANUAL SEAT)	
NEXT ASSEMBLY	FIRST USED ON	SIZE	DRAWING NO.
E28783-03	LH OPP.	R	E28782-01
REV.	05	DO NOT SCALE	SHEET 1 OF 1
REF.	E26682 (REV 03)	SCALE	1:1
2		DATE	JUNE 1, 1999
		TIME	10:30

If this Court holds that under the MPLA Honeywell is, or can be found by the jury under proper instructions to be, a co-manufacturer, then the question of control is resolved: the design was defective when it left the control of both manufacturers. If, on the other hand, this Court decides that under the structure, wording, and within the meaning of, the MPLA, it cannot be a co-manufacturer, then foreseeability under the common law theory of negligent design is the issue to be determined by the jury.

CONCLUSION

If Honeywell is not a covered "manufacturer" it is subject to Mississippi's common law; if it is a co-designer, then it is subject to the MPLA, and probably also Mississippi common law. This Case should be reversed and remanded for trial under one or both theories, according to this Court's decision on this issue of first impression.

Respectfully submitted, this the 11th day of May, 2011.


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CERTIFICATE OF SERVICE

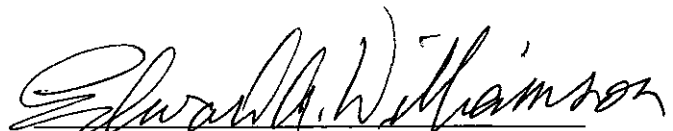
The undersigned counsel hereby certifies that a true and correct copy of the *Appellant's Reply Brief* has been forwarded via regular United States Mail, postage pre-paid, today, to the following addresses:

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Respectfully submitted, this the 11th day of May, 2011.


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