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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000717-MR

SANDRA DENISE MESSERLY; CURTIS ALAN MESSERLY, ADMINISTRATOR OF THE ESTATE OF FOXX ALAN MESSERLY, DECEASED; ESTATE OF FOXX ALAN MESSERLY, DECEASED, BY AND THROUGH CURTIS ALAN MESSERLY, ADMINISTRATOR; AND CURTIS ALAN MESSERLY, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 05-CI-00924

NISSAN NORTH AMERICA, INC.; KERRY NISSAN, INC.; AND NISSAN MOTOR CO. LTD. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE, CAPERTON AND WINE, JUDGES.

CAPERTON, JUDGE: The Appellants, Sandra and Curtis Messerly, appeal from the April 12, 2010 order entered by the Boone Circuit Court granting Appellees' (hereinafter "Nissan") motion for summary judgment in which the court dismissed

the Appellants' complaint with prejudice. On appeal, the Appellants argue that the trial court improperly granted summary judgment. After a thorough review of the parties' arguments, the record, and the applicable law, we reverse and remand this matter for further proceedings.

The essential facts of this case are not in dispute. Appellant Sandra Messerly and her two children were outside on April 15, 2005, when she decided to move her 2002 Nissan Xterra mid-size sport utility vehicle from a concrete pad behind her home to make more room for the children to play. Sandra left Carter, age five weeks, strapped into his stroller just outside the open garage door. Foxx, her nineteen-month-old son, was in the garage sitting on his father's ATV. Sandra started the car, checked her mirrors, and looked over her shoulder, but never looked into the garage to check on her children. Unfortunately, Foxx left the ATV and moved to a location behind the vehicle Sandra was operating. As Sandra was backing up, she hit Foxx with the right side of the Xterra. Foxx sustained fatal injuries.

Thereafter, Sandra and Curtis Messerly sued Nissan alleging that the 2002 Xterra was defective and negligently designed because it was not equipped with a rearview camera or back-up sensors. Nissan moved for summary judgment on the ground that the 2002 Xterra was not defective or unreasonably dangerous as a matter of law. Nissan argued that the risk of striking children while backing a vehicle is an obvious, well-understood risk of operating any passenger vehicle and is inseparable from the product's inherent characteristics.

In support of its summary judgment motion, Nissan presented the trial court with evidence that limited rear visibility is a feature of all vehicles as demonstrated by a federal report, that children are often the ones injured and that there is proposed federal legislation to diminish this risk.[1] Moreover, Nissan argues that regardless of the federal report and legislation, its 2002 Xterra complied with applicable safety regulations at the time of its manufacture. Nissan presented to the trial court that the U.S. Department of Transportation, National Highway Traffic Safety Administration, estimates that approximately 18,000 backover crashes occur each year, with 292 of those crashes resulting in fatalities. Backover fatalities disproportionately affect children under five years old and adults seventy or older. *See* Federal Motor Vehicle Safety Standard; Rearview Mirrors, Proposed Rule, 74 Fed. Reg. 9478-01, 9482-9483 (March 4, 2009) (to be codified at 49 C.F.R. pt. 571).

Nissan also presented evidence that the risk of a backover injury was apparent because the Kentucky Driver Manual stated, "Children or small objects are difficult to see from the driver's seat" while backing up. Kentucky Driver Manual, pg. 26. Moreover, Nissan demonstrated that the Xterra complied with the

[1] We note that Congress passed the Cameron Gulbransen Kids Transportation Safety Act of 2007 which aimed to eliminate blind zones behind vehicles that can hide the presence of pedestrians. Appellants direct our attention to the fact that months after the summary judgment was entered, the National Highway Traffic Safety Administration proposed a rule in compliance with the Cameron Gulbransen Kids Transportation Safety Act of 2007, in which it believed that manufacturers would install rear-mounted video cameras to meet the proposed standards and that all vehicles had to meet the requirements of the proposed rule by September 2014. Of note, the press release of the proposed rule still instructs drivers that, while the new technology will make a difference, drivers should "always know where your children are before you start your car and make sure that there is no one behind you before you back up." Given that this was not properly included in the record, we decline to address it further.

only Federal Motor Vehicle Safety Standard applicable to a driver's visibility of the rear and that no industry standard required the use of advanced back-up aids such as cameras and sensors. In addition, Nissan argued to the trial court that back-up aids do not alleviate the danger completely because "Sensor-based systems tested were generally inconsistent and unreliable in detecting pedestrians, particularly children, located behind the vehicle." 74 Fed. Reg. at 9491. Lastly, Nissan argued that the placement of a rearview video system affected the ability of the driver to see a child behind his vehicle and that weather and lighting conditions also affected the video system. 74 Fed. Reg. at 9490.

In November 2006, the National Highway Traffic Safety Administration of the U.S. Department of Transportation conducted the Vehicle Backover Avoidance Technology Study - Report to Congress. Therein, the report noted that blind spots varied by vehicle type. The report then discussed how the rearview camera system would potentially assist in avoiding collisions while backing. However, the driver must look at the video display, perceive the pedestrian or object and respond quickly enough to avoid the collision. Thus, the true effectiveness of the rearview camera systems could not be known without further testing. Vehicle Backover Avoidance Technology Study at page 40. While no data was presented concerning the percentage of vehicles manufactured in 2002 with back-up aids, in 2007, five years after Messerly's Xterra was manufactured, only 14% of all vehicles produced were equipped with back-up aids. 74 Fed. Reg. at 9486.

The Appellants presented the trial court with evidence that back-up technology, such as sensors and rearview video systems, exists and that Nissan had been developing the technology for years, as demonstrated by Nissan's press releases related to concept cars. Nissan had equipped some of their Japanese models prior to 2002 with back-up aids.[2]

Nissan argued that the Appellants' evidence was concentrated in two areas: showing that advanced back-up aids were used in some Nissan vehicles marketed outside the United States and statistics showing the number of injuries in backing collisions. Nissan contended that the evidence offered by the Appellants did not raise an issue of material fact because Nissan's motion for summary judgment did not question the feasibility of back-up aids and that the evidence of backing injuries only served to confirm that the risk was obvious and well understood by consumers. Moreover, the Appellants did not have an expert that would opine that a reasonable manufacturer would have employed the back-up aids in 2002, or that Nissan had violated an industry or governmental standard by not putting back-up aids on the 2002 Xterra.

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[2] The Appellants additionally contend that Nissan only provided back-up aids on their most expensive cars in the U.S. market but have failed to adequately cite to the record where such evidence was introduced to the trial court. Absent specific citations as required by Kentucky Rules of Civil Procedure (CR) 76.12, we are required to assume that the evidence supported the findings of the lower court. *See Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972). *See also Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006), where this Court addressed a similar issue:

> Carolyn is correct that it is not our responsibility to search the record to find where it may provide support for Jim's contentions. But rather than striking Jim's brief, we choose to give little credence to the arguments by either party that are not supported by a conforming citation to the record.

Smith at 5.

In light of the parties' arguments and the record, the trial court granted Nissan's summary judgment motion. It is from this order that Appellants now appeal.

On appeal, the Appellants present three arguments, namely: (1) a genuine issue of material fact exists as to whether the design of the Nissan Xterra was unreasonably dangerous and that the trial court erred when it ruled that Nissan was entitled to judgment as a matter of law; (2) Texas federal courts have allowed two similar wrongful death backover cases to be tried by a jury, despite a Texas statute that creates a presumption of non-defectiveness where a vehicle meets government safety standards; and (3) the reasoning of the trial judge in deciding to grant summary judgment in favor of the defendants was inappropriate because the video recordings of court hearings show that the judge made factual findings that were not based on any evidence in the record, that the judge conducted an independent investigation of the blind zone on his own vehicle, and ignored Kentucky law on summary judgment.

The Appellees present three counter-arguments, namely: (1) the Nissan Xterra was not unreasonably dangerous as a matter of law; (2) Appellants' evidence did not create any relevant and material questions of fact; (3) criticism of the trial court is unjustified and irrelevant. With these arguments in mind we now turn to our applicable standard of review.

At the outset, we note that the applicable standard of review on appeal of a summary judgment is, "whether the trial court correctly found that there were

no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson,* 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky. App. 2004).

Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind we now turn to the

first and wholly dispositive issue on appeal: whether the trial court erred in granting Nissan's summary judgment motion.

As noted, the Appellants argue that a genuine issue of material fact exists as to whether the design of the Nissan Xterra was unreasonably dangerous and that the trial court erred when it ruled that Nissan was entitled to judgment as a matter of law. In support thereof, the Appellants present three additional arguments: (1) the dangers caused by the lack of rear visibility in the Xterra are neither obvious nor unavoidable; thus, there is a genuine question of material fact as to whether ordinary consumers appreciate the magnitude of the hazard posed by vehicular blind zones; (2) a finding that a particular hazard is "obvious" is not proper ground for relieving a defendant of liability as a matter of law[3] because Kentucky law says the obviousness of a hazard creates a question of fact as to the fault of the defendant and comparative fault, if any, of the plaintiff; (3) there is a genuine question of material fact as to whether the Xterra's blind zone is an "inherent, intrinsic, and unavoidable hazard."

Conversely, Nissan argues that the Xterra was not unreasonably dangerous as a matter of law. In support thereof Nissan argues that: (1) Kentucky law imposes liability only for unreasonably dangerous products; (2) products with obvious, well-understood and inherent risks are not defective; (3) the risk of backover injuries is inherent in motor vehicles; (4) the risk of backover injuries is

[3] Appellants cite to the recent case of *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), for support that the trial court erred in granting summary judgment based on the "open and obvious" doctrine. We do not find such argument to be persuasive because we have more properly characterized the arguments discussed *infra,* and *McIntosh* is a land case.

obvious and well understood; (5) the Appellants failed to raise a fact issue regarding whether a prudent manufacturer would have marketed the Xterra in 2002 knowing of the alleged defect. In addition, Nissan counter-argues that Appellants' evidence did not create any relevant and material questions of fact. In support thereof, Nissan argues that: (1) defectiveness is not invariably a fact question; (2) allegations that parking aids may have prevented the accident do not create a fact issue; (3) backover injury statistics do not create a fact issue regarding the obviousness of the risk.

We believe that a more proper characterization of these numerous arguments presented by the parties concerning this issue is whether the trial court erred by granting summary judgment to Nissan, i.e., whether the risk of a backover injury in the 2002 Xterra was a question for the jury in light of the evidence presented by the parties and our laws.

In *Montgomery Elevator Co. v. McCullough by McCullough*, 676 S.W.2d 776 (Ky. 1984), the Kentucky Supreme Court explained this Commonwealth's approach to products liability law:

> The fundamental shift in products liability law from a negligence standard to the new theory expressed in § 402A of the *Restatement (Second) of Torts* occurred in Kentucky in 1966 when § 402A was adopted in *Dealers Transport Co. v. Battery Distributing Co*., Ky., 402 S.W.2d 441 (1966). The shift is from the conduct of the actor, which is the problem in negligence cases, to the condition of the product. This is the "special liability" in § 402A of persons engaged in the business of manufacturing or selling products and the standard for

> such liability is if the product is "in a defective condition unreasonably dangerous to the user or consumer . . . ."
>
> In *Nichols,* [*Nichols v. Union Underwear Co. Inc*., 602 S.W.2d 429 (Ky. 1980)] we arrived at a simple standard for the ***trier of fact*** to use to apply the words in § 402A. The manufacturer is *presumed to know* the qualities and characteristics, and the actual condition, of his product at the time he sells it, and the question is whether the product creates "such a risk" of an accident of the general nature of the one in question "that an ordinarily prudent company engaged in the manufacture" of such a product "would not have put it on the market." . . . Considerations such as feasibility of making a safer product, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics, while they have a bearing on the question as to whether the product was manufactured "in a defective condition unreasonably dangerous," are all factors bearing on the principal question rather than separate legal questions. In a particular case, as with any question of substantial factor or intervening cause, they may be decisive.

Montgomery Elevator Co. at 780-781 (boldface emphasis added).

We believe that *Montgomery Elevator* elucidated the considerations for the *trier of fact*, i.e., the jury, when determining whether a product was manufactured "in a defective condition unreasonably dangerous." While the parties argue extensively about the obviousness of the danger, i.e., the patency of the danger, and whether as a matter of law the court could decide such questions, *Montgomery Elevator* clearly places this decision in the purview of the jury in the case *sub judice*. We agree with Appellants that the evidence presented to the trial court presented a jury question in light of *Montgomery Elevator.* Thus, the trial

court erred in granting summary judgment to Nissan. As such, we decline to address the parties' remaining arguments.

In light of the aforementioned, we reverse and remand this matter for further proceedings.

WINE, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

Robert E. Sanders
Justin Sanders
W. Matthew Nakajima
Covington, Kentucky

Eric P. Von Wiegen
Lexington, Kentucky

AMICUS CURIAE BRIEF ON BEHALF OF KENTUCKY JUSTICE ASSOCIATION:

Kevin C. Burke
Louisville, Kentucky

BRIEFS AND ORAL ARGUMENT FOR APPELLEES:

David T. Schaefer
Anne K. Guillory
Louisville, Kentucky

E. Paul Cauley, Jr.
Dallas, Texas