STATE OF MICHIGAN

COURT OF APPEALS

SYLVANIA RENEE RODGER,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and PAT MILLIKEN FORD, INC.,

Defendants-Appellees.

UNPUBLISHED
October 21, 2008

No. 275578
Wayne Circuit Court
LC No. 05-531152-NP

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

In this product liability case, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

This case arises out of injuries plaintiff Sylvania Renee Rodger sustained when her Ford Five Hundred Limited was struck from behind by another vehicle, causing plaintiff's vehicle to hit a sign, roll over, and hit two trees. The airbags in plaintiff's vehicle did not deploy during the accident. Several months after the accident, on October 26, 2005, plaintiff filed suit against defendant Ford Motor Company (Ford), the designer and manufacturer of plaintiff's vehicle, and defendant Pat Milliken Ford, Inc. (Milliken), the dealership that sold plaintiff the vehicle. Plaintiff's complaint contained the following counts regarding the failure of the airbags to deploy: negligent design; negligent manufacture; failure to warn; and breach of warranty "and/or" strict liability.

On September 8, 2006, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants asserted that plaintiff's vehicle was not equipped with the side airbag system she claimed was defective. The "Safety Canopy System" to which plaintiff referred in her complaint includes side-impact airbags, side-curtain airbags, and rollover sensors. It is an optional feature available on all Ford Five Hundred models. But, because plaintiff did not select or pay for that option, her vehicle was equipped with standard front airbags only. Defendants further asserted in their motion for summary disposition that plaintiff could not establish her claims of negligence, failure to warn, or breach of warranty as to the standard front airbags in her vehicle. In response, plaintiff asserted that defendants had "introduced a surprise

defense," indicating that she was unaware her vehicle was not equipped with a side airbag system until they filed their motion, and requested leave to amend her complaint to include a claim of fraudulent misrepresentation against Milliken. In an order dated October 23, 2006, the trial court denied plaintiff's motion for leave to amend her complaint and granted defendants' motion for summary disposition. The trial court subsequently denied plaintiff's motion for reconsideration. Plaintiff now appeals as of right.

II. Summary Disposition

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants and denying her motion for reconsideration. We disagree.

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all of the evidence submitted by the parties in the light most favorable to the non-moving party. *Id*. at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The non-moving party may not rely on mere allegations or denials, but must go beyond the pleadings to set forth specific facts showing a genuine issue of fact for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

A. Product Liability

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition on her claims of negligent manufacture and design, failure to warn, and breach of express and implied warranty.

In order to establish a prima facie case of product liability, the plaintiff must show "that the defendant supplied a product that was defective and that the defect caused the injury." *Auto Club Ins Ass'n v Gen Motors Corp*, 217 Mich App 594, 604; 552 NW2d 523 (1996). A defect in the product can be established through a variety of theories, including: (1) negligent manufacture of the product; (2) negligent design of the product; (3) negligent failure to warn about some aspect of the product; (4) breach of an express or implied warranty; or (5) misrepresentation or fraud. See generally Torts: Michigan Law and Practice (2d ed), § 8.1.

1. Theories of Liability

Manufacturers can be held liable for manufacturing defects that existed at the time of the manufacture and sale of the product. *Gregory v Cincinnati Inc*, 450 Mich 1, 11 n 7; 538 NW2d

325 (1995). A manufacturing defect claim generally requires evidence that "something [went] wrong in the manufacturing process and the product is not in its intended condition." *Prentis v Yale Mfg Co*, 421 Mich 670, 683; 365 NW2d 176 (1984). To prove a defect, the product "may be evaluated against the manufacturer's own production standards, as manifested by that manufacturer's other like products." *Id*. Such a claim requires proof of "'a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains.'" *Crews v Gen Motors Corp*, 400 Mich 208, 217; 253 NW2d 617 (1977), quoting *Piercefield v Remington Arms Co, Inc*, 375 Mich 85, 98-99; 133 NW2d 129 (1965).

Manufacturers also have a duty to design their products "to eliminate any unreasonable risk of foreseeable injury." *Ghrist v Chrysler Corp*, 451 Mich 242, 248; 547 NW2d 272 (1996) (quotation marks and citation omitted). There are two theories under which a plaintiff may proceed to prove a design defect in a product liability action. Under the first theory, a plaintiff can show that a product was rendered defective by the manufacturer's failure to warn potential users of dangers involving the intended uses, and foreseeable misuses, of the product. *Gregory*, *supra* at 11. To establish a prima facie case of failure to warn, a plaintiff must prove that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach was a proximate cause of the plaintiff's injuries; and (4) the plaintiff suffered damages. *Warner v Gen Motors Corp*, 137 Mich App 340, 348; 357 NW2d 689 (1984). A manufacturer has a duty to warn if it has actual or constructive knowledge of a danger, which is not obvious to users, and the manufacturer failed to use reasonable care in informing users of the danger or the facts tending to make the condition dangerous. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 389-390; 491 NW2d 208 (1992).

The second, more traditional theory of design defect "questions whether the design chosen renders the product defective, i.e., whether a risk-utility analysis favored an available safer alternative." *Gregory*, *supra* at 11. This risk-utility analysis "considers alternative safer designs and the accompanying risk pared against the risk and utility of the design chosen 'to determine whether . . . the manufacturer exercised reasonable care in making the design choices it made.'" *Id*. at 13 (footnote and citation omitted). Such an inquiry requires the plaintiff to prove that (1) the product was not reasonably safe for its foreseeable uses when it left the control of the manufacturer; and (2) a feasible, alternative design was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to its users. MCL 600.2946(2); see also *Ghrist*, *supra* at 249 and *Gregory*, *supra* at 11-13.

While a design defect claim tests the conduct of the manufacturer and whether it was reasonable, "[a] breach of warranty claim tests the fitness of the product." *Gregory*, *supra* at 12. Like a manufacturing defect claim, to establish a breach of warranty claim, a plaintiff must "'prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains.'" *Id*., quoting *Piercefield*, *supra* at 98-99. Further, while implied warranty and design defect claims remain separate causes of action, under certain circumstances they involve identical facts and require proof of exactly the same elements. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001). A non-manufacturer seller may be liable in a product liability action where "the seller failed to exercise reasonable care, including the breach of any implied warranties, with respect to the product and that failure was a proximate cause of the person's injuries." MCL 600.2947(6)(a).

"An express warranty is created by a [manufacturer or] seller by setting forth a promise or affirmation, description, or sample with the intent that the goods will conform." *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 42; 550 NW2d 809 (1996), citing MCL 440.2313; see also M Civ JI 25.11. Pursuant to MCL 600.2947(6)(b), a non-manufacturer seller may be liable for breach of an express warranty if "[t]he seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm."

2. Plaintiff's Claims

We agree with the trial court that plaintiff has failed to establish a prima facie case of product liability. Plaintiff asserts that the failure of her front airbags to deploy and the severity of her injuries is circumstantial evidence of a defect. She is correct that, under certain circumstances, the existence of a defective condition may be inferred from circumstantial evidence and without the benefit of expert testimony. See *Holloway v Gen Motors Corp (On Reharing)*, 403 Mich 614, 618, 629; 271 NW2d 777 (1978); but see *Lawrenchuk v Riverside Arena*, 214 Mich App 431, 435-436; 542 NW2d 612 (1995) (holding that expert testimony is generally required to establish a design defect). But, plaintiff's mere assertion that her airbags did not deploy when she thought that they should is insufficient to create a material factual dispute as to defect. See *McCart*, *supra* at 115.

First, plaintiff claims that there was a manufacturing defect in the front airbags of her Ford Five Hundred. According to plaintiff, she has established a manufacturing defect because a "demonstrable malfunction is generally clear evidence of a defect." See *Kenkel v Stanley Works*, 256 Mich App 548, 558; 665 NW2d 490 (2003) (quotation marks and citation omitted). Plaintiff has not, however, presented any evidence that the front airbags in her vehicle actually malfunctioned, or that they failed to operate according to manufacturer specifications. See *Prentis*, *supra* at 683. To the contrary, plaintiff's Ford Five Hundred owner's manual specifically states that the vehicle's front airbags "are designed to activate only in frontal and near-frontal collisions (not rollovers, side impacts or rear impacts) unless the collision causes sufficient longitudinal deceleration." Here, plaintiff's vehicle was struck from behind, causing it to hit a sign, roll over, and hit two trees. While plaintiff asserts that the front grill of her vehicle was dislodged during the accident, there is no evidence of a frontal collision warranting the activation of the front airbags.

In claiming that a manufacturing defect exists in this case, plaintiff argues that the trial court misinterpreted this Court's reasoning in *Monte v Toyota Motor Corp*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2001 (Docket Nos. 220671 and 220983), and erred in citing *Monte* as an analogous, persuasive authority. In *Monte*, this Court held that the plaintiffs had failed to establish a prima facie case of product liability "because there was no showing that the airbag system in [the] plaintiffs' vehicle was 'defective'." *Id*., slip op at 3. Plaintiff argues that the *Monte* Court based its holding on evidence presented by the defendant that the airbag system functioned properly and that "there was no such showing by defendants in this case." We find, however, that plaintiff has misinterpreted *Monte* and the published cases cited therein. The *Monte* Court emphasized, in ruling in favor of the defendant, that, "the burden to prove a defect and a causal connection to the injury always remains with the plaintiff. The defendant never has the burden to prove a non-defect." *Id*., slip op at 4, citing *Holloway v Gen Motors Corp*, 399 Mich 617, 627; 250 NW2d 736 (1977), on reh at 403 Mich

614 (1978). In this case, plaintiff failed to meet her burden of establishing a prima facie case of manufacturing defect and the trial court properly granted summary disposition to defendants on that theory.

Plaintiff also claims a defect in the design of the front airbags in her vehicle. Plaintiff conclusively asserts that the "magnitude of foreseeable risk, is not in question, given the severity of [her] injuries," and that the "demonstrable and unexplained failure of the crash sensors and driver airbag in [her] vehicle effectively impute constructive knowledge [of a design defect] to Ford." As explained *infra*, however, the front airbags in plaintiff's vehicle were "designed to activate only in frontal and near-frontal collisions (not rollovers, side impacts or rear impacts)," and plaintiff has presented no evidence that she was involved in a frontal collision warranting the activation of the front airbags. Thus, plaintiff has failed to show that the airbags failed to deploy as a result of a design defect or that the airbags, as designed, were not reasonably safe for their foreseeable use. Plaintiff has also failed to demonstrate, through expert testimony or otherwise, that a safer, alternative design was available. See MCL 600.2946(2); *Ghrist*, *supra* at 249; *Gregory*, *supra* at 11-13. Therefore, plaintiff's claim of design defect fails. Furthermore, because plaintiff has failed to establish a defect in the front air bags, her breach of implied warranty claim also fails. See *Gregory*, *supra* at 12. The trial court's grant of summary disposition with respect to those claims was proper.

Plaintiff further claims that she established a prima facie case of failure to warn because defendants failed to warn her that her vehicle was not equipped with a side airbag system. Plaintiff's claim is nonsensical. While a product may be rendered defective by the manufacturer's failure to warn potential users of dangers involving the intended uses, and foreseeable misuses, of the product, *id*. at 11, plaintiff cannot establish that the front airbags in her vehicle were rendered defective because defendants allegedly failed to inform her that her vehicle was not equipped with a different product, i.e., a side airbag system. Therefore, the trial court properly granted summary disposition to defendants on that theory as well.

Additionally, plaintiff claims that defendants made express warranties about the reliability of her vehicle's safety features, and that those safety features failed to operate as warranted. In making her claim, plaintiff points to a particular section of the Ford Five Hundred advertising manual:

> **Customized Protection**
>
> Occupant Protection Systems – On every 2005 Five Hundred the Personal Safety System and Occupant Classification System enhance protection for both driver and front passenger. Utilizing a network of smart sensors, the deployment level of the dual-stage front airbags is based on 4 criteria: whether a front passenger is present and his/her weight range; the position of the driver's seat; whether the front safety belts are in use; and the overall severity of the crash. These details help the systems deploy the front airbags in just the right manner, at just the right time. Just more evidence of our commitment to delivering vehicles that can truly improve your life.

This section of the advertising manual describes, in general terms, how the Ford Five Hundred's front airbag system is designed to operate. It does not guarantee, as plaintiff suggests,

that the front airbags will deploy during certain types of accidents, let alone under the particular circumstances of plaintiff's accident. Plaintiff has not established that her front airbags failed to deploy as a result of a defect or in breach of an express warranty.

Furthermore, any alleged oral statements made by Milliken's representatives about the reliability of the Ford Five Hundred's safety features are subject to the UCC statute of frauds and are therefore excluded to the extent they are inconsistent with the parties' written expressions. MCL 440.2202. The evidence shows that plaintiff's vehicle was delivered with a contractual disclosure statement containing an express disclaimer of any warranty. Plaintiff asserts that the contractual disclosure statement signed by both she and the salesman "is a fraud on the Court" because it states that it is for "used vehicle[s] only." Plaintiff is correct that the boilerplate language of the statement indicates that it applies to used vehicles, but the statement describes the specific vehicle plaintiff was purchasing and refers to the vehicle as "new." Therefore, we are not persuaded by plaintiff's assertion that the statement is somehow fraudulent. The trial court appropriately granted summary disposition on plaintiff's claim of express warranty.

B. Strict Liability

Next, plaintiff argues that defendants are liable under a theory of strict liability. But, Michigan does not recognize strict liability as a theory of recovery in product liability actions. See *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 612 n 10; 719 NW2d 40 (2006); *Seasword v Hilti, Inc (On Remand)*, 207 Mich App 609, 613-614; 525 NW2d 501 (1994), vacated in part on other grounds 449 Mich 542 (1995). Plaintiff cites *Ayyash v Henry Ford Health Sys*, 210 Mich App 142; 533 NW2d 353 (1995), for the proposition that strict liability applies in negligence actions. We note, however, that the narrow issue before the *Ayyash* Court was whether strict liability should be imposed on doctors and hospitals, whose primary function is to render services. *Id*. at 145. The *Ayyash* Court specifically stated that it would not comment "on the wisdom of imposing [strict] liability on those who make or sell products." *Id*. at 144-145. Therefore, plaintiff's claim that strict liability applies in this case must fail.

C. Discovery

Additionally, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition before defendants had complied with an outstanding discovery order. We review a trial court's decision regarding discovery for an abuse of discretion. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 200; 732 NW2d 88 (2007); *Churchman*, *supra* at 233.

As this Court stated in *VanVorous v Burmeister*, 262 Mich App 467; 687 NW2d 132 (2004),

> Although incomplete discovery generally precludes summary disposition, summary disposition may nevertheless be appropriate if there is no disputed issue before the court or if further discovery does not stand a fair chance of finding factual support for the nonmoving party. A party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists.

> Although Michigan's discovery rules should be construed broadly, Michigan's commitment to open and far-reaching discovery does not encompass "fishing expeditions." [*Id*. at 476-477 (quotation marks, brackets, and citations omitted).]

On September 22, 2006, after defendants moved for summary disposition, plaintiff filed a motion requesting the trial court to: (1) compel full and complete responses to her interrogatories; (2) order the production of certain documents; and (3) consider defendants' failure to timely reply to interrogatories as admissions of fact. The trial court granted plaintiff's motion in part, ordering defendants to produce: (1) a list of any lawsuits and arbitration actions pertaining to the design, manufacture, and operation of the Ford Five Hundred airbag system and alleging a failure of the airbags to deploy; and (2) a list of any employment or insurance records pertaining to plaintiff that defendants had obtained for this case.

Plaintiff argues that the trial court's grant of summary disposition before defendants had complied with the discovery order precluded her from uncovering factual support for her claims. But, plaintiff has failed to provide any independent evidence that a material factual dispute existed as to any of her claims. "Without any assertion regarding what facts are disputed or likely to be uncovered by further discovery, allegedly incomplete discovery will not bar summary disposition." *Id*. at 477. The fact that there may have been other lawsuits and arbitration actions pertaining to the design, manufacture, and operation of the Ford Five Hundred airbag system does not, in and of itself, establish a prima facie case of product liability. Furthermore, whether defendants obtained employment or insurance records pertaining to plaintiff has absolutely no bearing on the issues considered by the trial court. Plaintiff's assertion that further discovery would have produced support for her claims is nothing more than conjecture. "Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition." *Id*. Therefore, we conclude that the trial court properly granted summary disposition to defendants, notwithstanding the outstanding discovery order.

III. Motion to Amend Complaint

Finally, plaintiff argues that the trial court erred in denying her motion for leave to amend her complaint and her motion for reconsideration of that issue. Again, we disagree.

We review a trial court's decision on a motion for leave to amend pleadings for an abuse of discretion. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). A trial court should grant leave to amend a complaint if justice so requires and deny leave to amend only "for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Id*.; see also MCR 2.118(A)(2).

Plaintiff argues that because she was unaware that her vehicle was not equipped with a side airbag system until defendants filed their motion for summary disposition, she should have been permitted to amend her complaint to include a claim of fraudulent misrepresentation against Milliken. To prove a claim of fraudulent misrepresentation, a plaintiff must establish that: "(1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention

that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury." *Roberts v Saffell*, __ Mich App __; __ NW2d __ (2008), slip op at 3.

We agree with the trial court that granting plaintiff leave to amend her complaint would be futile. According to plaintiff, she was never informed that the side airbag system was an optional feature for additional purchase. She asserts that the Ford Five Hundred advertising manual and representations by Milliken's representatives led her to believe that her vehicle was equipped with a side airbag system. Contrary to plaintiff's assertion, however, the advertising manual specifically states that the "Safety Canopy System," which includes side-impact airbags, side-curtain airbags, and rollover sensors, is "available on all models" of the Ford Five Hundred as an "optional" feature. Plaintiff's vehicle invoice and contractual disclosure statement do not list the "Safety Canopy System" among the optional equipment she purchased. Considering that plaintiff admits reading the advertising manual before purchase, reviewing the vehicle invoice at purchase, and signing the contractual disclosure statement at purchase, plaintiff's claim of fraudulent misrepresentation is futile.

Accordingly, we conclude that the trial court properly exercised its discretion in denying plaintiff's motions for leave to amend her complaint and for reconsideration.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering