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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000447-MR

MOUJAHED ACHTAR — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 02-CI-00014

TOYOTA MOTOR CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

TAYLOR, JUDGE: Moujahed Achtar brings this appeal from a November 30, 2006, judgment of the Perry Circuit Court upon a jury verdict in a products liability action in favor of Toyota Motor Corporation. We affirm.

On December 12, 1999, Achtar was involved in a one vehicle automobile accident. He was driving a 1998 Toyota 4Runner. The exact cause of the accident is in controversy. Achtar claims that the right rear axle broke allowing the right wheel to

[1]Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

separate from the vehicle. As a result, he lost control of the vehicle. Conversely, Toyota claims that Achtar initially lost control of his vehicle causing it to roll over and, causing the right rear axle to break. In any event, Achtar suffered severe injuries from the accident and lost all memory of the accident.

Achtar filed a products liability action against, *inter alios,* Toyota. Achtar alleged that the rear axle of his Toyota 4Runner was defective, unreasonably dangerous, and caused the accident on December 12, 1999. He sought various items of damages. A jury trial ensued. The jury found that the right rear axle of the Toyota 4Runner was not defective and was not a substantial factor in causing the accident. Consequently, the circuit court dismissed Achtar's claims against Toyota. This appeal follows.

Achtar argues that the circuit court committed reversible error by excluding as evidence a response and related documents to a request for admissions and interrogatories under Kentucky Rules of Civil Procedure (CR) 36.01. Specifically, Achtar sought to introduce both Toyota's response to a request for admission and relevant documents relating thereto. Achtar tendered to Toyota a request for admission and interrogatory. In request number one, Achtar basically asked Toyota to admit knowledge of other incidents where the axle on a Toyota 4Runner failed. In particular, the request and response read as follows:

> REQUEST NO. 1: The defendant, Toyota Motor Corporation, has no knowledge of any other incident or occurrence where it has been alleged that an axle on a Toyota 4runner [sic] bent, cracked, broke, or otherwise failed in any manner.
>
> RESPONSE TO REQUEST NO. 1:

> [Toyota] denies this Request, but states that such alleged incidents did not demonstrate the existence of any design or manufacturing defect in a 4Runner axle.

Toyota also supplied Achtar with documentation evidencing numerous customer claims and complaints involving alleged defects to the axle or suspension of 1996-2002 4Runners.[2] From this documentation, Achtar sought to specifically introduce "twelve (12) prior incidents, all alleging that an individual lost control while operating a 1996-2002 Toyota 4Runner under normal conditions when a rear axle broke without warning allowing a wheel to separate from the vehicle." Achtar's Brief at 3. We shall initially analyze whether these twelve instances of prior alleged failures of 1996-2002 Toyota 4Runner axles were properly excluded from evidence and then whether Toyota's response to request number one was properly excluded.

In this Commonwealth, evidence showing "similar product failures under similar conditions is relevant and admissible" in a products liability action. *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 783 (Ky. 1984). To be relevant and admissible, the incidents of prior product failures must be "substantially similar" to the product failure at issue. *Id.* And, the burden is on the offering party to preliminarily prove substantial similarity.

In the case *sub judice*, Achtar failed to demonstrate that the prior twelve instances of alleged failures of 1996-2002 Toyota 4Runner axles were substantially similar to the alleged failure of the axle on Achtar's Toyota 4Runner. We have thoroughly reviewed the videotaped trial proceedings upon this issue, and it is evident that Achtar failed to offer any facts showing that the prior twelve instances of alleged failures occurred under similar circumstances or conditions as the alleged axle failure on his Toyota 4Runner. Instead, Achtar offered general statements alleging substantial

[2] Although Moujahed Achtar's Toyota 4Runner was a 1998 model, Toyota 4Runners manufactured between 1996-2002 were also of the same model.

similarity without offering specific factual support thereof. Consequently, we conclude that Achtar failed to prove that the prior twelve instances of alleged axle failures on 1996-2002 Toyota 4Runners were substantially similar to the alleged axle failure at issue. As such, the circuit court properly excluded evidence concerning the prior twelve alleged axle failures on 1996-2002 Toyota 4Runners. We now address Achtar's allegation that his request number one and Toyota's response thereto should have been entered into evidence at trial.

In *Berrier v. Bizer*, 57 S.W.3d 271 (Ky. 2001), the Supreme Court was faced with the legal question of whether a circuit court erred by holding that a response to a request for admission under CR 32.01 may only be used for impeachment purposes and may not be introduced as substantial evidence. The Supreme Court ultimately answered this query in the affirmative and held that a response to a request for admission under CR 32.01 may be introduced as substantive evidence at trial. However, the Court specifically noted that the admission of such evidence was "subject to appropriate objections pursuant to the Kentucky Rules of Evidence." *Id.* at 280.

In Achtar's request number one, he asked Toyota to admit or deny whether it possessed "no knowledge" of other incidents where an axle on a Toyota 4Runner allegedly "bent, cracked, broke, or otherwise failed in any manner." Toyota responded by denying the request and by stating that "such alleged incidents did not demonstrate the existence of any design or manufacturing defect in a 4Runner axle." Thus, Toyota admitted that there existed other incidents where it was alleged that a Toyota 4Runner axle failed in some manner. However, we do not think that such admission was relevant and, thus, admissible as substantive evidence. Again, prior incidents of product failures are only relevant and admissible if such prior incidents are substantially similar to the product failure at issue. *Montgomery Elevator Co.*, 676

S.W.2d 776. The admission that other incidents existed where an axle on a Toyota 4Runner allegedly failed in some manner is simply not evidence of substantially similar product failures. Simply put, we conclude that Toyota's response to request for admission number one was properly excluded from evidence as being irrelevant. Kentucky Rules of Evidence 401; *Montgomery Elevator Co.*, 676 S.W.2d 776.

Achtar next alleges that the circuit court erred by denying his motion for a directed verdict pursuant to CR 50.01. A directed verdict is properly granted when viewing the evidence and inferences therefrom in favor of the nonmoving party, a reasonable person could only conclude that the moving party was entitled to a verdict. L*ee v. Tucker*, 365 S.W.2d 849 (Ky. 1963); *Taylor v. Kennedy*, 700 S.W.2d 415 (Ky.App. 1985).

Specifically, Achtar maintains that the evidence clearly established that the wheel on his "Toyota 4Runner separated prior to the rollover due to the broken axle," thus entitling him to a directed verdict. Achtar's Brief at 15. Achtar relies upon eyewitnesses to the accident who testified that the wheel separated from the vehicle before it rolled over. And, he relies upon the fact that the right rear tire was still inflated after the accident. According to Achtar, the tire could only support a maximum load of 8,000 pounds; whereas, it would take about 14,200 pounds of force to break the rear axle of a 4Runner. As the 4Runner tire was still inflated, the rear axle of the vehicle must not have been exposed to more than 8,000 pounds, which is not enough to break the rear axle.

While there existed evidence upon which a jury could have found in favor of Achtar, there also existed substantial evidence to the contrary. At the time of the accident, Achtar was returning home after working a twelve-hour shift. Sergeant James Perkins testified that Achtar's vehicle left the road, traveled on the shoulder for some

four feet, and then returned to the road before rolling over. Dr. Gary Fowler was a metallurgist and testified on behalf of Toyota. Dr. Fowler opined that the right rear wheel of the 4Runner separated from the 4Runner after the rear axle broke due to a single overload impact which occurred when the 4Runner rolled over.

It is well-established that the weight and credibility of evidence is within the sole province of the fact-finder. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky. 1990). Here, there was conflicting evidence concerning the cause of the accident, and the jury simply found more credible Toyota's evidence. Stated differently, there existed sufficient evidence upon which a reasonable person could differ, thus precluding entry of a directed verdict. *See Lee*, 365 S.W.2d 849. Consequently, we conclude that the circuit court properly denied Achtar's motion for directed verdict.

Achtar finally contends that the circuit court erroneously instructed the jury. Achtar contends that the jury instructions erroneously defined the term "defective" as meaning that "the 1998 Toyota 4Runner created such a risk of accidental injury to a prospective user that an ordinarily prudent manufacturer of similar products, being fully aware of the risk, would not have put it on the market."[3] Instead, Achtar claims that the proper definition of defective "is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety." Achtar's Brief at 17. We reject Achtar's claim. The definition of defective in the jury instructions is consistent with Kentucky law and is the same definition set forth in Palmore*, Kentucky Instructions to Juries*, Vol. 2 § 49.05 (5th ed. 2007). *See also Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991).

Achtar also alleges that the circuit court erroneously failed to instruct the jury that "when there in common experience that a particular accident does not normally occur without a defect, the inference of a defect is permitted." Achtar's Brief at 17. We

[3] This definition was set forth in Instruction No. 2 of the trial court's jury instructions.

do not believe Achtar is entitled to such an "instruction." According to the evidence introduced by Toyota, this accident was simply caused by Achtar's negligence. Upon the whole, we view Achtar's allegations of error regarding the jury instructions to be without merit.

For the foregoing reasons, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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