IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-CA-00078

MARCO J. BORNE AND THE ESTATE OF ELDRIDGE DUPREE, DECEASED, BY AND THROUGH HIS PERSONAL REPRESENTATIVE, NICHOLE DUPREE, AND THE WRONGFUL DEATH BENEFICIARIES OF ELDRIDGE DUPREE, DECEASED

Appellant

vs.

DUNLOP TIRE CORPORATION, INC.

Appellee

Appeal of the Final Judgment of the Rankin County Circuit Court, Honorable Samac Richardson Circuit Judge in Cause No. 2001-228 CIB

BRIEF OF APPELLEE DUNLOP TIRE CORPORATION, INC.

ORAL ARGUMENT IS NOT REQUESTED

LeAnn W. Nealey, [redacted]
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
P. O. Box 22567
Jackson, MS 39225
Tel: 601-985-4581
Fax: 601-985-4500

Jerry L. Saporito
LEAKE & ANDERSSON, LLP
1100 Poydras St.
Suite 1700
New Orleans, LA 70163-1701
Tel: 504-585-7500
Fax: 504-585-7775

ATTORNEYS FOR APPELLEE
DUNLOP TIRE CORPORATION, INC.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Dunlop Tire Corporation, Inc. certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Marco J. Borne – Appellant
2. Nichole Dupree, Widow of Eldridge Dupree, Deceased – Appellant;
3. The Estate of Eldridge Dupree, Deceased – Appellant;
4. Dunlop Tire Corporation, Inc. - Appellee
5. Mark D. Lumpkin, Esq. and James R. Reeves, Esq., Lumpkin & Reeves, PLLC – Attorneys for Appellant Marco J. Borne
6. LeAnn W. Nealey, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC – Attorney for Appellee
7. Jerry Saporito, Esq., Leake & Andersson, LLP, 1100 Poydras St., Suite 1700, New Orleans, LA 70163-1701 – Attorney for Appellee
8. Robert A. Biggs, III, Esq., Robinson, Biggs, Ingram, Solop and Farris - Attorney for Appellee

So certified this the 29th day of August, 2008.

LeAnn W. Nealey
Counsel for Appellee,
Dunlop Tire Corporation, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Rules and Statutes

STATEMENT OF ISSUE

I. Should summary judgment in Dunlop's favor be affirmed because Plaintiffs failed to show that the Dunlop RV Radial Rover they *present* as the accident tire was, in fact, the allegedly defective tire mounted on Borne's 1992 Ford Explorer at the time of the accident.

STATEMENT OF THE CASE

A. Nature of the Case.

This lawsuit originates from a single vehicle rollover accident occurring on February 14, 1998. R. 20. Plaintiff Marco Borne ("Borne") was driving his 1992 Ford Explorer with co-Plaintiff Eldridge Dupree as a passenger. According to the allegations of Plaintiffs' Complaint, the right rear tire of the Explorer failed and caused, along with unspecified defects in the Ford Explorer, the vehicle to roll over. *Id.*

Plaintiffs filed their lawsuit against a number of Defendants, including Appellee Dunlop Tire Corporation ("Dunlop"). Dunlop was sued as the alleged manufacturer of the right rear tire of the Explorer that allegedly failed. Specifically, Plaintiffs presented the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 as the tire allegedly mounted on the right rear of Borne's 1992 Ford Explorer at the time of the accident. *See* R. 20; R. 175-79; D.R.E. 61-65.[1]

During the course of the lawsuit Plaintiffs propounded extensive discovery requests. In July 2004, Dunlop moved for a protective order to limit Plaintiffs' broad discovery requests. The basis for Dunlop's motion for protective order was that Dunlop should not be required to go through extensive research and investigation when Plaintiffs could not show that the tire they presented as the accident tire was actually the tire from the February 1998 accident -- though the case had already been pending since September 2001. D.R.E. 4-42.[2] In fact, all the evidence gathered at that point in the discovery process and presented in Dunlop's motion showed that the

---

[1] Dunlop's additional record excerpts will be referred to as "D.R.E. __".

[2] The parties filed joint stipulations on June 3, 2008 and August 22, 2008 correcting the appeal record. For the Court's convenience these are included in Dunlop's record excerpts.

alleged accident tire was not the tire mounted on Borne's 1992 Ford Explorer when the accident occurred. *Id.*

In ruling on Dunlop's motion for a protective order, the trial court recognized that Plaintiffs were "entitled to some discovery on the front end" (*see* R. 194 (Tr. p. 33:17-19)); and allowed Plaintiffs limited discovery on the manufacturing date, wholesale and retail sale dates and in general any information "on the birth and death date" of the tire presented by Plaintiffs as the accident tire. R. 194 (Tr. p. 33:20-26).

On June 24, 2005, after the trial court ruled on the discovery issues and limited discovery had ensued, Plaintiffs *sua sponte* filed a "supplementation" to their opposition to Dunlop's motion for a protective order, attaching the Affidavit of Jay C. Zainey. D.R.E. 46-53. In their supplementation, Plaintiffs claimed that the Zainey Affidavit "established that the chain of custody [had] not been breached." D.R.E. 47.

Three years later, after the additional discovery allowed by the trial court was concluded, Dunlop moved for summary judgment on the identification issue. Nothing had changed: Plaintiffs still could not show that the Dunlop RV Radial Rover was mounted on Borne's 1992 Ford Explorer at the time of the accident. R. 48-50 (motion for summary judgment); D.R.E. 57-60 (Statement of Uncontested Material Facts); R. 51-237 (memorandum of law with supporting exhibits). As detailed below, Dunlop addressed the invalidity of the Zainey Affidavit in moving for summary judgment (R. 58); and Plaintiffs responded to these arguments in their opposition. R. 249-50.

The trial court granted summary judgment in Dunlop's favor on December 10, 2007, "having reviewed [Dunlop's] Motion and [attached] documentary exhibits, the Response to said Motion filed by Plaintiffs, with [the attached] documentary evidence, and all argument of counsel." R. 259; Pls. R. E. 14.

Plaintiffs filed their notice of appeal on January 4, 2008. R. 260. The parties subsequently filed joint stipulations on June 3, 2008 and August 22, 2008 correcting the appeal record, adding Defendant Dunlop Tire's Motion for Protective Order (July 16, 2004); Defendant Dunlop Tire's Memorandum in Support of Motion for Protective Order and supporting Exhibits (July 16, 2004); Plaintiffs' Response to Motion for Protective Order (August 30, 2004); Plaintiff's Supplementation in Opposition to Defendant Dunlop Tire Corporation's Motion for Protective Order (attaching Affidavit of Jay C. Zainey) (June 24, 2005) (D.R.E. 1-53); and Dunlop's Statement of Uncontested Material Facts (October 11, 2007). D. R. E. 54-60.

B. Statement of Facts Relevant to Issue Presented for Review.

In moving for summary judgment, Dunlop presented the following undisputed facts: Borne purchased his 1992 Ford Explorer, VIN #FMDU32X9NUC62743 on January 13, 1996. R. 96; R. 101-03. On November 24, 1997, Borne purchased three brand new Dunlop RV Radial Rover replacement tires and had them mounted onto the subject 1992 Ford Explorer. R. 20; R. 96-97; R. 120 (p. 60:14-18).

The single vehicle rollover accident occurred on February 14, 1998, two months and 21 days after Borne had the three new Dunlop RV Radial Rover replacement tires mounted on the 1992 Ford Explorer. R. 20; R. 80-88. Plaintiffs presented a Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 as the tire allegedly mounted on the right rear of the subject 1992 Ford Explorer at the time of the accident. R. 20; R. 175-79; D.R.E. 61-65. Plaintiffs agreed that these facts were undisputed in their response to Dunlop's Statement of Uncontested Material Facts. R. 241.

Borne testified in deposition that he drove his 1992 Ford Explorer approximately 3,000 to 4,000 miles between the November 24, 1997 purchase date of the three new replacement Dunlop tires and the February 14, 1998 accident date. R. 166 (p. 243:1-7). Thus, based on Borne's

testimony, the Dunlop tire presented by Plaintiffs as the Dunlop tire allegedly mounted on the right rear of Borne's 1992 Ford Explorer at the time of the accident had only 3,000 to 4,000 miles of accumulated use. *Id.* Though in their response Plaintiffs claimed they were "not able to agree or disagree with this conclusory allegation" (R. 241, ¶ 9), Plaintiffs offered no evidence whatsoever rebutting these facts in their opposition to Dunlop's summary judgment motion.

Dunlop also included the Affidavit of its Tire Performance Manager, Mr. Thomas Johnson, in support of its motion for summary judgment. Mr. Johnson thoroughly photographed, inspected and examined the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 035-22, DOT#:DA66635334. His inspection and examination revealed that the Dunlop RV Radial Rover has excessive tread wear, with only 4/32nds of an inch groove depth down to 2/32nds and 0/32nds inches remaining. R. 181-84. A tire is considered worn when any groove depth reaches 2/32nds of an inch remaining or less. *Id.* As Mr. Johnson explained, if Borne purchased as new the Dunlop RV Radial Rover on November 28, 1997 (as Borne testified in deposition); then it is physically impossible that the tire tread could be in its current condition after just over two months and 3,000 to 4,000 miles of use. *Id.* at ¶ 12. Plaintiffs offered no evidence in opposing Dunlop's summary judgment motion that refuted Mr. Johnson's testimony.

Nor did Plaintiffs offer any evidence rebutting the fact that the tire they present as the accident tire is missing a significant amount of tread indicative of tread separation (R. 175-79; D.R.E. 61-65; *see* R. 183-84) in comparison to the testimony of the investigating state trooper, Joseph Johnson, who saw no evidence of tread separation at the accident scene. As Dunlop showed in its summary judgment briefing, Trooper Johnson testified in deposition that "[i]t appeared to be a blowout. . . . I don't mean -- I mean a blowout, . . . not a tread separation, not a recap slinging off." R. 228 (p. 61:4-16; p. 62-64:6). As clarified in his deposition, to the extent

the tire suffered tread separation and the scene contained evidence of tread separation, Trooper Johnson testified that he would have noted that in his report. *Id.*

The only "evidence" submitted by Plaintiffs in rebutting Dunlop's motion for summary judgment was the same Zainey Affidavit they had filed on June 24, 2005. *Cf.* D.R.E. 46-53 to R. 240-45. On its face, the Zainey Affidavit is not based on the affiant's personal knowledge and does not affirmatively state that the affiant was competent to testify. Substantively, the affiant does not, in any way, address the condition of "the tire" Judge Zainey refers to; nor does the affiant affirmatively connect "the tire" he refers to as the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 presented by the Plaintiffs as the accident tire.

SUMMARY OF THE ARGUMENT

Plaintiffs in this lawsuit allege the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 tire was defective and caused their alleged damages. As an essential element of their claim, therefore, Plaintiffs must show that the Dunlop RV Radial Rover they *present* as the accident tire was, in fact, the allegedly defective tire mounted on Borne's 1992 Ford Explorer at the time of the accident.

In moving for summary judgment on Plaintiffs' inability to show this essential element of their products liability action, Dunlop presented explicit evidence that shows that the Dunlop RV Radial Rover could not have been the accident tire. The burden then shifts to Plaintiffs to "produce *significant probative evidence* showing that there are indeed genuine issues for trial." *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 485 (Miss. 2006) (emphasis added), citing *McMichael v. Nu-Way Steel & Supply, Inc.*, 563 So. 2d 1371, 1375 (Miss.1990) (quoting *Newell v. Hinton*, 556 So. 2d 1037, 1041 (Miss.1990)).

Plaintiffs failed to meet this burden. In particular, Borne testified he traveled between 3,000 and 4,000 miles with the new Dunlop tires in the two months and 21 days that elapsed

the accident. The affidavit of Dunlop's Tire Performance Manager, Thomas Johnson, showed there was excessive treadwear on the tire presented by Plaintiffs as the accident tire. As explained in the Johnson Affidavit, if Borne purchased as new the Dunlop RV Radial Rover on November 28, 1997 (as Borne testified in deposition); then it is physically impossible that the tire tread could be in its current condition after just over two months and 3,000 to 4,000 miles of use. Plaintiffs offered no evidence in opposing Dunlop's summary judgment motion that refuted Mr. Johnson's testimony.

Nor did Plaintiffs offer any evidence rebutting the fact that the tire they *present* as the accident tire is missing a significant amount of tread indicative of tread separation -- but the testimony of the investigating state trooper, Joseph Johnson, established that there was no evidence of "a tread separation. . . [or] recap slinging off" at the accident scene. R. 228 (p. 61:4-16; p. 62-64:6).

The only items relied upon by Plaintiffs in rebuttal were (i) the unsupported allegations of their Complaint and discovery responses and (ii) the Zainey Affidavit. Unsupported allegations cannot defeat a motion for summary judgment (*see, e.g., Richardson v. Norfolk S. Ry.*, 923 So. 2d 1002, 1008 (Miss. 2006)); and the Zainey Affidavit is both facially and substantively insufficient. Specifically, the Zainey Affidavit does not meet the affidavit requirements of Miss. R. Civ. P. 56(e); and substantively, the Zainey Affidavit wholly fails to set forth "specific facts" that Judge Zainey actually saw or examined the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334; nor does Judge Zainey address in any way the physical condition of the tire. In short, Plaintiffs presented no probative evidence showing that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 was the actual accident tire. Accordingly, Summary judgment in Dunlop's favor is warranted here.

LAW AND ARGUMENT

A. Standard of Review.

This Court "employ[s] the *de novo* standard in reviewing a trial court's grant of summary judgment." *Brown ex rel. Ford v. J.J. Ferguson Sand & Gravel Co.*, 858 So. 2d 129, 130 (Miss. 2003), citing *O'Neal Steel, Inc. v. Millette,* 797 So. 2d 869, 872 (Miss. 2001). In conducting a *de novo* review, the Court looks "at all evidentiary matters before [it], including admissions in pleadings, answers to interrogatories, depositions, and affidavits." *Brown*, 858 So. 2d at 130 (citations omitted); *see Newell v. Hinton*, 556 So. 2d 1037, 1041 (Miss. 1990), *citing Dennis v. Searle*, 457 So. 2d 941, 944 (Miss. 1984).

B. Plaintiffs' Burden of Proof and the Court's Role in Assessing the Evidence Presented.

Plaintiffs suggest that it is "impermissible" for the trial court (or presumably this Court upon *de novo* review) "to resolve issues of fact" on summary judgment (Appellants' Brief at 3-4); but this suggestion incorrectly characterizes the Court's role in assessing whether a plaintiff's claim will survive summary judgment. Contrary to Plaintiffs' suggestion, the trial court -- and this Court upon *de novo* review -- must assess the evidence presented to determine whether Plaintiffs may proceed with their lawsuit.

In particular, the Court must determine whether Plaintiffs, in rebutting Dunlop's summary judgment motion, have furnished "significant probative evidence showing that there are indeed genuine issues for trial." *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 485 (Miss. 2006) (citations omitted)). The evidence necessary to meet this burden must be evidence upon which "a fair-minded jury could return a favorable verdict." *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Thus, though the moving party has the burden of demonstrating the absence of a genuine issue of material fact; the non-movant "must rebut by producing *significant probative evidence* showing that there are indeed genuine issues for trial." *Price,* 920 So. 2d at 485 (emphasis added), citing *McMichael v. Nu-Way Steel & Supply, Inc.,* 563 So.2d 1371, 1375 (Miss.1990) (quoting *Newell v. Hinton*, 556 So.2d 1037, 1041 (Miss.1990)). In rebuttal, "[m]ere allegations are insufficient to defeat a motion for summary judgment." *Richardson v. Norfolk S. Ry.,* 923 So. 2d 1002, 1008 (Miss. 2006). The party opposing the motion must set forth specific facts that show that a genuine issue of fact exists. *Newell,* 556 So. 2d at 1041-42; *see Richardson*, 923 So. 2d at 1008; *Luvene v. Waldrup*, 903 So. 2d 745, 748-49 (Miss. 2005).

Rule 56 mandates the entry of summary judgment where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his case on which he bears the burden of proof at trial. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 416 (Miss. 1988); *see Evan Johnson & Sons Const., Inc. v. State*, 877 So. 2d 360, 365 (Miss. 2004). Moreover, to survive summary judgment, each element of the plaintiff's claim must be based on more than a scintilla of evidence. *Wilbourn,* 687 So. 2d at 1214 (citation omitted). The evidence required to survive summary judgment "must be evidence upon which a fair-minded jury could return a favorable verdict." *Id.*

C. Summary Judgment in Dunlop's Favor is Warranted Because Plaintiffs Cannot Show that the Allegedly Defective Tire They Present Was the Product That Actually Caused Their Alleged Damages.

1. Plaintiffs Have the Burden of Proving the Allegedly Defective Tire They Present Was the Product That Actually Caused Their Alleged Damages.

Plaintiffs allege in their Complaint that the Dunlop tires on the Borne vehicle were "defective" and "unreasonably dangerous" (R. 16-29), characterizing their lawsuit as a "products liability case" (Appellants' Brief at 1) which is delineated under the Mississippi Products Liability Act, Miss. Code Ann. 11-1-63 (1993 and Supp. 2008) (the "MPLA"). In order to

prevail on their MPLA claim, Plaintiffs must show by a preponderance of the evidence that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 contained some type of defect rendering the tire unreasonably dangerous and that the defective and unreasonably dangerous condition of the tire proximately caused their damages. *See* Miss. Code Ann. § 11-1-63(a).

More fundamentally, however, and particularly relevant in this case, is that every plaintiff in a products liability action must first prove that the allegedly defective product was the product that actually caused the alleged damage. *Id.; see Monsanto Co. v. Hall,* 912 So. 2d 134, 136-37 (Miss. 2005) (failure to identify manufacturer's products as products which caused damages precluded plaintiffs from recovering against manufacturer); *Albritton v. Coleman Co.*, 813 F. Supp. 450, 454 (S.D. Miss. 1992) ("The essential element of the plaintiffs' case is the identification of the named defendant as the manufacturer or supplier of the defective product in question.").

Plaintiffs here allege the Dunlop RV Radial Rover tire was defective and caused their alleged damages. Plaintiffs must therefore show that the Dunlop RV Radial Rover they *present* as the accident tire was, in fact, the allegedly defective tire mounted on Borne's 1992 Ford Explorer at the time of the accident. Plaintiffs' failure to do so requires summary judgment in Dunlop's favor. *See Velleca v. Uniroyal Tire Co., Inc.* 630 N.E. 2d 297, 299 (Mass. Ct. App. 1994) (affirming trial court's judgment notwithstanding the verdict based on plaintiff's failure "to prove that the tire and rim introduced into evidence were those involved in the accident."); *see also Albritton,* 813 F. Supp. at 454 (granting manufacturers' motion for summary judgment where plaintiffs failed to establish that defendants manufactured the subject furnace); *Hall,* 912 So. 2d at 136-37 (reversing trial court's refusal to grant summary judgment in manufacturer's favor where plaintiffs failed to identify manufacturer's products as those causing his damages).

2. The Dunlop Tire Could Not Have Been Mounted on the Vehicle at the Time of the Accident.

In support of its motion for summary judgment, Dunlop presented unrefuted evidence that shows that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 could not have been the tire actually mounted on the right rear of Borne's 1992 Ford Explorer at the time of the accident. The burden then shifts to Plaintiffs to "set forth specific facts showing that there is a genuine issue for trial." Miss. R. Civ. P. 56(e); *see Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So. 2d 374, 383 (Miss. 1992). The only items relied upon by Plaintiffs in rebuttal, however, were the unsupported allegations of their Complaint and discovery responses; and the substantively and facially insufficient Zainey Affidavit. In short, Plaintiffs presented no probative evidence showing that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 was the actual accident tire.

a. Borne's Own Timeline and The Affidavit Of Dunlop's Tire Performance Manager, Thomas Johnson, Show The Tire Presented By Plaintiffs Could Not Have Been The Accident Tire.

Based on Plaintiffs' own factual timeline and an objective examination of the subject tire's tread depth, it is a physical impossibility that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 presented as the subject tire by Plaintiffs was mounted on the vehicle at the time of the accident. Here is why:

- Borne purchased three *new* Dunlop replacement tires on November 24, 1997 and had them mounted onto his 1992 Ford Explorer. R. 20; R. 96-97; R. 120 (p. 60:14-18).

- Plaintiffs' accident occurred on February 14, 1998, two months and 21 days after the new Dunlop tires were mounted. R. 69; R. 80-88.

- Borne testified in deposition that he traveled between 3,000 and 4,000 miles with the new Dunlop tires during that two month and 21 day period. R. 166 (p. 243:1-7).

- The Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 was manufactured in the 33rd week of 1994 and thoroughly examined by Dunlop's Tire Performance Manager, Thomas Johnson. R. 81-84.

- Mr. Johnson's physical examination revealed excessive tread wear, measuring 4/32nds of inch groove depth down to 2/32nds and 0/32nds inches at the serial side shoulder. *Id.*

Mr. Johnson's unrefuted opinion is that it is physically impossible for a new tire to exhibit the measured treadwear after only 3,000 to 4,000 miles of use. Based on Plaintiffs' timeline the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 presented by Plaintiffs could not have been mounted on the 1992 Ford Explorer on the February 18, 1998 date of the accident.

b. Additional Factual Testimony Shows That The Tire Presented By Plaintiffs Could Not Have Been The Accident Tire.

In addition to the physical and expert evidence cited above, the uncontroverted factual testimony in this case further proves that the tire presented by Plaintiffs is not the tire mounted on the vehicle at the time of the accident:

- The tire presented by Plaintiffs is missing a significant amount of tread indicative of tread separation. R. 175-79; D.R.E. 61-65; *see* R. 183-84.

- In contrast, the investigating state trooper, Joseph Johnson, testified in his deposition that his personal inspection of the tire at the accident scene revealed nothing more than a blowout; his inspection did not reveal a tread separation: "It appeared to be a blowout. . . . I don't mean -- I mean a blowout, . . . not a tread separation, not a recap slinging off." R. 228 (p. 61:4-16; p. 62-64:6).

- To the extent the tire suffered tread separation and the scene contained evidence of tread separation, Trooper Johnson testified that he would have noted that in his report. *Id.*

3. Plaintiffs Did Not Meet Their Burden Of Showing, By Significant Probative Evidence, That The Tire They Presented Was The Accident Tire.

In the face of the evidence Dunlop presented, Plaintiffs "must rebut by producing *significant probative evidence* showing that there are indeed genuine issues for trial" (*Price,* 920 So. 2d at 485 (citations omitted) (emphasis added)) -- evidence upon which "a fair-minded jury could return a favorable verdict." *Wilbourn,* 687 So. 2d at 1214. Specifically, Plaintiffs were

required to submit "significant probative evidence" that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 -- presented as the subject tire by Plaintiffs -- was mounted on the vehicle at the time of the accident.

Other than the mere allegations contained in their Complaint and discovery responses ("insufficient to defeat a motion for summary judgment" (*Richardson,* 923 So. 2d at 1008)); the only "evidence" Plaintiffs relied upon in rebutting Dunlop's summary judgment motion was the Zainey Affidavit. R. 244-45 (originally filed on June 24, 2005 (D.R.E. 46-53)). The Zainey Affidavit, however, is insufficient on its face; and, more importantly, it is substantively deficient. The Zainey Affidavit wholly fails to rebut the evidence Dunlop presented which shows the tire presented is not the accident tire.

a. The Zainey Affidavit is Deficient as to Form.

As an initial matter, the Zainey Affidavit is deficient because it is not based on the affiant's personal knowledge, but rather is written in terms of the affiant's ability to "best recall" the information stated therein. *See* R. 244-45. Nor does the Zainey Affidavit affirmatively state the affiant was competent to testify as to the matter stated therein. *Id.* An affidavit must contain these elements under Miss. R. Civ. P. 56(e). Plaintiffs' failure to include them in the Zainey Affidavit are grounds for this Court, on *de novo* review, to disregard the Zainey Affidavit in its entirety. *See Briscoe's Foodland, Inc. v. Capital Associates, Inc.,* 502 So. 2d 619, 622 (Miss. 1986) (recognizing as deficient affidavit not based on personal knowledge and failing to state affiant was competent to testify).

Plaintiffs inexplicably contend, however, that (i) Dunlop "first raised the issue of the sufficiency of the [Zainey] affidavit at the [summary judgment] hearing;" and (ii) Plaintiffs were "not provided an opportunity to respond to . . . and/or correct any alleged deficiencies in the

affidavit." Appellants' Brief at 7. These statements are incorrect and Plaintiffs' suggestion that Dunlop waived its deficiency objections is meritless. *See* Appellants' Brief at 7-8.

To be clear, the Zainey Affidavit had been in the court record since June 2005 when Plaintiffs filed it as supplementation to their opposition to Dunlop's motion for a protective order. D.R.E. 46-53. Dunlop raised the issue of its deficiencies in its opening brief supporting its summary judgment motion (R. 58) -- and Plaintiffs addressed the merits of Dunlop's assertions in their opposition to Dunlop's motion. R. 249-50. Plaintiffs' argument that a formal motion to strike was necessary is simply a red herring: Dunlop briefed its objections and Plaintiffs responded. The parties reiterated their arguments at the summary judgment hearing.

Plaintiffs also suggest that the Zainey Affidavit was "improperly stricken" at the hearing on Dunlop's summary judgment motion (Appellant's Brief at 7-8) -- but there was no ruling to that effect by the trial court. Though the trial court did not strike the Zainey Affidavit, it did note its deficiencies in assessing whether Plaintiffs met their burden of proof in rebutting Dunlop's summary judgment motion. Tr. 25-26.

It is, of course, the role of the trial court -- and this Court sitting in *de novo* review -- to assess the sufficiency of any evidence before it in making its summary judgment determination. *Newell*, 556 So. 2d at 1042 (recognizing court, on summary judgment, must assess whether non-movant has brought forward "*significant probative evidence* demonstrating the existence of a triable issue of fact.") (emphasis added); *see Price*, 920 So. 2d at 485; *McMichael*, 563 So. 2d at 1375. The Court must ensure that the non-moving party's claim is "supported by more than a mere scintilla of colorable evidence" (*Wilbourn*, 687 So. 2d at 1214); and must determine if Plaintiffs here furnished sufficient evidence upon which "a fair-minded jury could return a favorable verdict." *Id.* The Court's role in this regard certainly encompasses determining the validity of supporting affidavits, whether a motion to strike is made or not. *See Luvene v.*

Waldrup, 903 So. 2d 745, 746-49 (Miss. 2005) (assessing sufficiency of summary judgment affidavit and finding it fatally defective (no motion to strike filed)); *Briscoe's*, 502 So. 2d at 622 (assessing sufficiency of summary judgment affidavits filed by both movant (Briscoe's) and non-movant (Capital) and finding both deficient, though only Briscoe's filed a motion to strike). Plaintiffs' implication that any such assessment is "improper" is unfounded.

b. The Zainey Affidavit is Substantively Deficient.

In any event, even if the Zainey Affidavit were in proper form, Plaintiffs still have wholly failed to rebut the evidence Dunlop presented in support of its summary judgment motion that shows the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 could not have been the tire actually mounted on the right rear of Borne's 1992 Ford Explorer at the time of the accident. Indeed, Judge Zainey did not even link the averments in his affidavit to the tire Plaintiffs present as the accident tire: Nowhere in his affidavit did he attest that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 was the tire he describes therein.

The chain of custody cases Plaintiffs cite (Appellants' Brief at 4) do nothing to further their argument that the affidavit somehow creates a genuine issue of fact. In the cases Plaintiffs rely upon, the chain of custody was established by the witness directly involved in handling the objects at issue. *See Gibson v. State*, 503 So. 2d 230, 234 (Miss. 1987) (chain of custody on blood sample established by testimony of officer that witnessed the blood being drawn; obtained the vials of blood; placed them in a styrofoam kit and sealed it); *Pittman v. State*, 904 So. 2d 1185, 1190 (Miss. Ct. App. 2004) (testimony of officer directly in charge of inventory of items recovered when search warrant executed on property held sufficient to establish chain of custody on items recovered); *Muscolino v. State*, 803 So. 2d 1240, 1244 (Miss. Ct. App. 2002) (weapon chain of custody established by Deputy's testimony that he seized the weapon from under

defendant's car seat and it was the same weapon identified in court). These cases have no applicability here where the Zainey Affidavit contains no statement whatsoever that Judge Zainey actually saw or examined the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334.

Nor does the Zainey Affidavit address, in any way, the condition of the tire Plaintiffs present as the accident tire. The affidavit does nothing to rebut the Affidavit of Dunlop's Tire Performance Manager, Thomas Johnson, in which Mr. Johnson affirmatively states that it is physically impossible for a new tire to exhibit the measured treadwear after only 3,000 to 4,000 miles of use (R. 181-84); an opinion buttressed by Borne's own testimony. R. 166 (p. 243:1-7).

Likewise, the Zainey Affidavit does not rebut the physical evidence of the tire itself which shows tread separation (R. 175-79; D.R.E. 61-65; *see* R. 183-84) -- as compared to the testimony of the investigating State Trooper Joseph Johnson who stated that he saw no evidence of "tread separation . . . or a recap slinging off" with respect to the tire he inspected at the accident scene. R. 228 (p. 61:4-16; p. 62-64:6).

Plaintiffs have the burden of showing by significant probative evidence that the Dunlop RV Radial Rover they *present* as the accident tire was, *in fact*, the allegedly defective tire mounted on Borne's 1992 Ford Explorer at the time of the accident. In opposing Dunlop's summary judgment motion, Plaintiffs rely solely on the Zainey Affidavit to rebut the explicit and detailed evidence Dunlop provided in support of its motion that shows the tire presented is not, in fact, the accident tire. Just as the Zainey Affidavit is deficient as to form, it is likewise deficient in substance.

The Zainey Affidavit wholly fails to set forth "specific facts" that Judge Zainey actually saw or examined the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334. Nor does it address in any way the physical condition of the tire.

Plaintiffs' sole evidentiary submission is silent on these issues and thus Plaintiffs cannot rebut the evidence submitted by Dunlop showing that the tire Plaintiffs present is not the accident tire. Because Plaintiffs did not provide the "significant probative evidence" sufficient to create a genuine issue of fact on this essential element of their products liability claim; summary judgment in Dunlop's favor is warranted. *See Luvene,* 903 So. 2d at 748-49 (affirming summary judgment where plaintiffs' rebuttal affidavit was silent on element of malpractice claim and thus failed to set forth "specific facts" sufficient to create a genuine issue of fact "and certainly did not provide more than 'a mere scintilla of colorable evidence.'").

CONCLUSION

For all the reasons set forth above, the Court should affirm the trial court's summary judgment in Dunlop's favor because Plaintiffs failed to show by significant, probative evidence that the Dunlop RV Radial Rover M-S, 30X9.50R15LT, 1035-22, DOT#:DA66635334 they present as the accident tire was, in fact, the allegedly defective tire mounted on Borne's 1992 Ford Explorer at the time of the accident.

This, the 29th day of August, 2008.

Respectfully submitted,

LeAnn W. Nealey

LeAnn W. Nealey, MB[redacted]
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
P. O. Box 22567
Jackson, MS 39225-2567

Jerry L. Saporito
Leake & Andersson, LLP
1100 Poydras St.
Suite 1700
New Orleans, LA 70163-1701

ATTORNEYS FOR APPELLEE
DUNLOP TIRE CORPORATION, INC.

OF COUNSEL:

Butler, Snow, O'Mara, Stevens & Cannada, PLLC
17th Floor, AmSouth Plaza
Post Office Box 22567
Jackson, MS 39225-2567
(601) 948-5711

CERTIFICATE OF SERVICE

I, LeAnn W. Nealey, one of the attorneys for Appellee, hereby certify that I have this day caused to be served a true and correct copy of the above and foregoing to the following:

Mark D. Lumpkin
James R. Reeves
LUMPLIN & REEVES, PLLC
P.O. Drawer 1388
Biloxi, MS 39533

ATTORNEYS FOR PLAINTIFF/APPELLANT

Honorable Samac S. Richardson
Rankin County Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043

CIRCUIT COURT JUDGE

THIS, the 29th day of August, 2008.

LeAnn W. Nealey

LeAnn W. Nealey

CERTIFICATE OF FILING

I, LeAnn Nealey, certify that I have had hand-delivered the original and three copies of the Brief of Appellee Dunlop Tire Corporation, Inc. and an electronic diskette containing same on August 29, 2008, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

LeAnn W. Nealey

LEANN W. NEALEY