IN THE SUPREME COURT OF MISSISSIPPI

2008-CA-0966

DEANNA J. ROWAN
AND GARY ROWAN — **PLAINTIFFS -APPELLANTS**

VS.

KIA MOTORS AMERICA, INC.,
AND PAT PECK NISSAN, INC. — **DEFENDANTS-APPELLEES**

Appeal from Circuit Court of the First Judicial District of Harrison County

BRIEF OF APPELLEES

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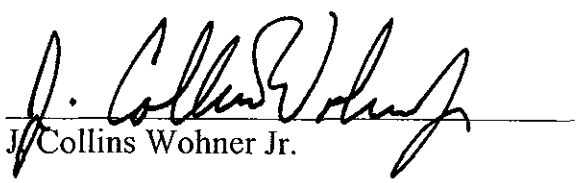
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Deanna J. Rowan,
2. Gary Rowan,
3. Montague, Pittman & Varnado, Hattiesburg,
4. LoCoco & LoCoco, P.A., D'Iberville,
5. Carr, Allison Pugh Howard Oliver & Sisson, Gulfport,
6. Kia Motors America, Inc.,
7. Pat Peck Nissan, Inc.,
8. Watkins & Eager, PLLC, Jackson.

Respectfully submitted,



J. Collins Wohner Jr.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument should not be required to affirm summary judgment. Plaintiffs have not requested oral argument. Their narrow appeal depends entirely on the insupportable assertion that their case is indistinguishable from *Forbes v. General Motors Corp.*, 935 So. 2d 869 (Miss. 2006). In actuality, their case is readily distinguishable on multiple grounds from the fact-driven outcome in *Forbes*. Neither the accident, injury, nor the warranty contentions are materially similar to *Forbes*.

STATEMENT OF THE CASE

Summary judgment should be affirmed for all the reasons stated in the circuit court's detailed opinion. The circuit court granted summary judgment on all plaintiffs' products theories, observing that plaintiffs had failed to "bring forward 'significant probative evidence demonstrating the existence of a triable issue of fact'" on any theory. R 462 (RE tab 2) (citation omitted). The court found the fact-driven *Forbes* decision distinguishable in multiple respects and correctly concluded that *Forbes* not require a trial in this case.

Conceding summary judgment on all other issues, plaintiffs have narrowly appealed, raising only their contention that *Forbes* is "indistinguishable." Brief at 5. Plaintiffs' reliance on *Forbes* is misplaced. Neither the accident, the alleged injuries, nor the warranty contentions are materially similar to *Forbes*. Here, there is no evidence that a relevant warranty existed, that a relevant warranty (if any) was relied

upon, that a relevant warranty (if any) was breached, or that the alleged breach (if any) caused injury. Summary judgment must be affirmed.

I. Statement of Facts.

A. The Accident.

The accident at issue occurred in July 2000 in D'Iberville, Mississippi, at the intersection of Sangani Boulevard and Highway 15. Plaintiff Deanna Rowan was driving her Kia Sephia west on Sangani Boulevard, with the intention of turning south onto Highway 15. At the intersection she stopped for a traffic light. After the light changed, she entered the intersection and began a left turn into the southbound lanes of Highway 15. R 181-82. She estimated that she reached a speed of only 20 mph in attempting the turn. R 237.

As she was attempting her turn, a Mitsubishi Mirage traveling south in the westernmost lane of Highway 15 ran the red light and crossed in front of Mrs. Rowan.[1] R 181-82, T 11. Mrs. Rowan's Kia hit the front side of the Mitsubishi with a glancing impact that caused both cars to spin around. R 181-83. Mrs. Rowan's Kia came to rest facing the direction she had been coming from. *Id.*

Mrs. Rowan – who describes herself as "a larger woman" standing 5'5" and weighing "about 230" at the time – recalled moving from side to side within the vehicle, "whipping toward the back," and finally coming to a rest with her chest "on

[1] Highway 15 is divided, multi-lane roadway, and the Mitsubishi was traveling in the right, or westernmost lane, furthest from Mrs. Rowan. R 236. The Mitsubishi's driver, Mrs. Rigsby, the admitted fault in running the red light, saying she was unfamiliar with the area. R 235.

the steering wheel." R 185-86. This contact between her "chest" and the steering wheel occurred once and was the only contact between her body and the steering wheel. R 186. Her head did not strike the steering wheel, the windshield, or any part of the vehicle. *Id.*; *also* R 160.

After the Kia came to rest, Mrs. Rowan unfastened her seat belt and opened the driver door. R 185-88. She got out of the car and mingled with persons on the scene, including emergency personnel who were working the accident. She reported that she was shaken but unhurt. R 233. She was able to stand and walk around. She did not need to sit down. R 188, 244. She refused help from a medical team that responded to the accident and signed a waiver of medical treatment. R 189.

While at the scene, Mrs. Rowan speculated with emergency personnel about whether the Kia airbag should have deployed. R 189, 241. She then returned home for the afternoon. R 191. Later that evening, she began to feel sore and went to Urgicare, a walk-in clinic. *Id.* She was diagnosed with whiplash and given a collar and a prescription for pain. *Id.*

When deposed in 2003, Mrs. Rowan attributed chronic pain in her neck and lower back to the accident. R 196. But she admitted that her neurologist believed those pains could stem from her pre-existing multiple sclerosis (MS) and that the pains "can't be distinguished" from pain caused by her MS.[2] *Id.* In addition to MS

[2] Mrs. Rowan testified about having disk surgery after the accident. R 194, 197. Defendants dispute that Mrs. Rowan's disk surgeries can be attributed to any aspect of her auto accident, let alone to the airbag non-deployment. Plaintiffs have no competent evidence that the disk surgeries can be

diagnosed in 1999 (R 192), Mrs. Rowan's prior medical history includes a lower back injury at work in the mid-1990s. R 169-70.

Plaintiff Gary Rowan was not involved in the accident and claims only loss of consortium. The Rowans married in 1992 (R 150), were separated for six months in the mid-1990s (R 149), separated again in or around early 2003 (R 148) and remain separated. Mrs. Rowan has been engaged to another man since February 2006. R 314.

There is no evidence in the record regarding what – if any – portion of Mrs. Rowan's accident-related injury could have been prevented by an airbag.[3]

B. Plaintiffs' Express Warranty Contentions.

The facts related to plaintiffs' express warranty contentions are as follows.

When plaintiffs were initially deposed in 2003, Mrs. Rowan testified that the Kia "was actually my choice" and that she decided to purchase a Kia after a friend bought one and she "looked at hers and talked to her" about it. R 173. Mrs. Rowan's main reason for choosing the Kia was "price." *Id.* She was aware that the Kia came with standard airbags but did not recall any pre-purchase discussion with the salesman or anyone else about the airbags or any other safety features. R 172. She did not

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attributed to the accident at all, much less to airbag non-deployment. *See* n.3.

[3] The Rowans disclosed purported expert opinions during discovery, but defendants challenged those opinions as unreliable (R 116 *et seq.* and 379 *et seq.*), and the circuit court agreed, finding that plaintiffs had no evidence. R 455 *et seq.* Plaintiffs are bound by that holding. They did not contest it in their appeal brief or create a record on which that holding could have been contested even if briefed. *See, e.g., Gulledge v. Shaw*, 880 So.2d 288, 296 (¶ 21) (Miss. 2004) (issue conceded by failure to brief); *Mississippi Dept. of Mental Health v. Hall*, 936 So.2d 917, 928 (¶ 34) (Miss. 2006) (issue conceded by breach of appellant's "duty of insuring that the record contains sufficient evidence to support" position). The appellate record is devoid of expert support for the Rowans' case.

review the owners manual or any warranty information before buying the car. R 174 ("No, sir. I'm a typical woman, it's all about color."). To the extent she reviewed the owners manual after the purchase, she "mainly wanted to find out how to adjust the seat belts," because as "a larger woman," she has "a hard time adjusting seat belts so they don't strap across my neck." R 176.

Mr. Rowan testified in 2003 that he understood when the Kia was purchased that airbags do not deploy in all accidents. R 155; *see also* R 285. Otherwise, he did not recall either hearing or reading anything specific about the airbags. *Id.*

In supplemental depositions taken in 2007, both of the Rowans reaffirmed their previous testimony on these points. R 285, 357-58.

The airbag brochure emphasized in plaintiffs' brief is a general informational brochure in a question-and-answer format that neither plaintiff remembered ever seeing except at a deposition.[4] To the limited extent it addresses the subject at all, the brochure makes clear that airbags do not deploy in all accidents and that a variety of factors affect whether deployment is triggered. Among other things, the brochure states:

> [T]here are many less severe cases in which airbags won't inflate in a frontal crash. . . . .

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[4] When questioned about it in 2003, neither plaintiffs remembered ever seeing the brochure before. R 155, 198. When questioned about it again in 2007, after having her memory refreshed, Mrs. Rowan remembered seeing the brochure at her 2003 deposition but had no other memory of having seen it. R 360. Mr. Rowan could not recall the brochure at all. R 292.

> Whether a signal [to deploy the airbag] is triggered depends on factors such as the severity and angle of the crash, the speed and the object struck.

R 453 & 454 (RE tab 3).

II. Course of Proceedings and Disposition Below.

Plaintiffs filed suit in November 2002, alleging general negligence and product liability theories, including a generic breach of warranty claim, all based on the non-deployment of the airbag. R 9-14. Plaintiffs sought actual and punitive damages based on unspecified injuries. R 15.

Having deposed plaintiffs in 2003, defendants moved for summary judgment in October 2004, pointing out plaintiffs' lack of evidence to support a claim, and incorporating motions to strike plaintiffs' experts' opinions as unreliable. R 116. In opposition to defendants' summary judgment motion, plaintiffs filed a one-page response stating that defendants' summary judgment assertions were "denied." R 144.

Defendants argued their motions in January 2005 before Judge Vlahos. T 1-58. Disposition of the motions was subsequently delayed by Judge Vlahos's retirement and by Hurricane Katrina.

After this Court decided *Forbes* in 2006 (935 So. 2d 869), plaintiffs expressed the view that *Forbes* entitled them to proceed on a warranty claim despite their lack of defect or causation evidence. As a result, after supplemental depositions in July 2007 (R 275, 310), defendants filed a supplemental submission in support of summary

judgment, distinguishing *Forbes* and emphasizing plaintiffs' continuing inability to provide evidence of defect, breach or causation. R 378.

Plaintiffs responded to defendants' supplemental submission with three pages of argument (R 447), citing a single piece of evidence – the Kia airbag brochure that neither plaintiff remembered ever seeing except at a deposition. *See* n.4. Plaintiffs argued that *Forbes* relieved them of any other obligation, including any need to prove "fault" or defect in the airbag, or any need to produce expert testimony in support of a claim. R 447.

Judge Dodson issued a detailed opinion granting summary judgment for defendants, finding that plaintiffs had not come forward with evidence to support any aspect of a products claim. Judge Dodson correctly observed that plaintiffs had no evidence of defective design or manufacture, failure to warn, or failure to comply with a warranty. R 456-58 (RE Tab 2). Judge Dodson discussed at length and thoroughly rejected plaintiffs' contention that *Forbes* entitles them to a trial in the absence of evidence. R 458-62 (RE Tab 2).

Plaintiffs designated a limited record for appeal. *See* R 466 (designating limited portions of the record for inclusion in the record on appeal). In their appeal brief, plaintiffs do not challenge any aspect of the summary judgment decision except the conclusion that *Forbes* is distinguishable and does require an automatic trial anytime an airbag does not deploy in an accident. Issues that are neither supported in the appeal record nor briefed are waived. *See* n.3.

SUMMARY OF ARGUMENT

The circuit court correctly concluded that *Forbes* is distinguishable and does not mandate an automatic trial for the Rowans, despite their lack of evidence. As the circuit court recognized, this Court stressed that *Forbes* was a "fact-driven" decision, and facts comparable to those that drove the *Forbes* decision are not present here. R 461 (RE tab 2) (quoting *Forbes*, ¶¶ 7, 14). Neither the warranty facts nor the accident facts of this case resemble those before the Court in *Forbes*.

The circuit court correctly concluded that the Rowans had failed to "bring forward 'significant probative evidence demonstrating the existence of a triable issue of fact'" on any theory. R 462 (RE tab 2) (citation omitted). Plaintiffs did not establish a question of fact for trial on any one of multiple necessary elements of a warranty claim. There is no evidence that a relevant warranty existed, that a relevant warranty (if any) was relied upon, that a relevant warranty (if any) was breached, or that the alleged breach (if any) caused injury.

Failure of proof on any one of the necessary elements of a claim is sufficient to mandate summary judgment, as it renders all other facts immaterial. Plaintiffs' proof is deficient on every element. Summary judgment must be affirmed.

STANDARD OF REVIEW

Plaintiffs' statement of the standard of review is incomplete, in that it does not acknowledge plaintiffs' obligation, in opposing summary judgment, to be diligent and to come forward with "significant probative evidence' showing that there are indeed

genuine issues of material fact" for trial. *Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co.*, 914 So.2d 169, 175 (¶ 9) (Miss. 2005) (citations omitted).

"[T]he party opposing the motion must be diligent and 'may not rest upon the mere allegations or denials of the pleadings, but instead the response must set forth specific facts showing that there is a genuine issue of material fact for trial.'" *Harmon v. Regions Bank*, 961 So.2d 693, 697 (¶ 10) (Miss. 2007) (citations omitted). "The party opposing the motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues." *Stuckey v. The Provident Bank*, 912 So.2d 859, 866 (¶ 11) (Miss. 2005) (citations omitted).

In addition, "where 'the summary judgment evidence establishes that one of the essential elements of the plaintiff's cause of action does not exist as a matter of law, . . . all other contested issues of fact are rendered immaterial.'" *Williams v. Bennett*, 921 So.2d 1269, 1277 (Miss. 2006) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 323 (1986)).

"When claimants do not fulfill their statutory obligation, they leave the courts no choice but to dismiss their claims because they fail to proffer a key element of proof requisite to the court's determination of whether the claimant has advanced a valid claim under the statute." *Id.* "Summary judgment is mandated where the respondent has failed 'to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Dearman v. Christian*, 967 So.2d 636 (¶ 12) (Miss. 2007) (citations omitted).

ARGUMENT

I. The Circuit Judge Correctly Concluded that *Forbes* Is Distinguishable and Does Not Require a Trial in this Case.

The circuit court correctly concluded that *Forbes* is distinguishable on multiple grounds and does not require a trial of the Rowans' baseless warranty contentions. As the circuit court noted, *Forbes* was a "fact-driven" decision. *Forbes v. General Motors Corp.*, 935 So. 2d 869, 874 & 878 (¶¶ 7, 14) (Miss. 2006) ("this case is largely fact-driven"; "The nature of these fact-driven actions is such that we must approach them on a case-by-case basis"); *see* R 461 (RE tab 2) (quoting *Forbes*). The salient facts of *Forbes* are not present here. Neither the accident, the alleged injury, nor the warranty contentions are similar to the unusual facts that drove the decision in *Forbes*.

The *Forbes* appeal came to the Court on a full trial record of plaintiffs' case-in-chief. The Court considered the plaintiffs' full trial presentation, which included expert testimony, in reaching its "fact-driven" decision. Having considered that full record, the divided Court concluded only that "the [Forbeses' trial] evidence was at least sufficient to require GM to go forward with [its] case-in-chief" on the warranty issue. *Forbes*, 935 So. 2d at 878 (¶ 15).

The *Forbes* accident occurred when Mrs. Forbes rear-ended the car ahead of her after it suddenly braked. The impact "propelled [Mrs. Forbes] forward into the

windshield," and she suffered a significant brain injury. *Id.* at 871 (¶ 2). The Forbeses offered expert testimony to show that Mrs. Forbes's collision with the windshield and resulting brain injury "would not have occurred if the air bag had inflated." *Id.* at 880 (¶ 19). The Forbeses also offered expert testimony to support their contention that the impact was "hard enough" to cause a properly functional airbag to deploy. *Id.* at 876-77 (¶ 12).

In concluding that the Forbeses had created an issue of justifiable reliance, the majority stressed that Mr. Forbes made "his purchase conditional on one factor, the presence of a functional driver's side air bag," "inquired about the presence of an air bag from the salesman and ensured that the vehicle he was purchasing was equipped with one as a specific feature," and "[m]ore importantly, . . . paid a higher price to have an air bag included." 935 So. 2d at 875 (¶ 9). The Court found the Forbeses' evidence sufficient to raise a question whether an express warranty consisting of "the promise of a functional driver's side air bag" had been fulfilled. *Id.*

The circuit court was correct to conclude that the Rowans do not have evidence sufficient to bring their case within the "fact-driven" *Forbes* decision so as to require a trial of the Rowans' baseless warranty contentions. The Rowans' assertion that *Forbes* is "indistinguishable" (Brief at 5), on which their appeal wholly depends, is insupportable. In reality, as the circuit court recognized, *Forbes* is distinguishable in every significant respect.

First, there is no evidence that the Rowans bargained or paid specially for an airbag, or selected the Kia based on any special warranty or assurance about when an airbag would deploy. All the evidence here is to the contrary. The Kia airbag was standard equipment that was not specially bargained for. R 172-73, 285, 358. Mrs. Rowan chose the Kia based on a friend's experience and "price" and had no special interest in the airbag. R 172-73. As the circuit court observed, Mrs. Rowan now says "that the airbags were some part of the conversation between her husband and the salesman, but she does not recall specifically." R 459 (RE tab2); R 362.

Second, even if a brochure that a plaintiff cannot remember ever having seen except at a deposition (*see* n.4) could be deemed the source of an express warranty "justifiably relied [upon] in electing to use the product" (MISS. CODE ANN. § 11-1-63(a)(i)(4)), the Kia brochure cited by plaintiffs still could not be construed to create a simplistic assurance about when an airbag will inflate. The Kia brochure makes clear that airbag deployment is complex and that there "are many less severe cases in which airbags won't inflate in a frontal crash." R 453 (RE tab 3). As the circuit court found, Mr. Rowan "agrees that airbags do not deploy in all accidents." R 460 (RE tab 2), *see* R 155, 285. "He says that his general understanding concerning airbags and their operation was acquired before he went to the dealership to buy the vehicle" and "is the same understanding he has now." *Id.* For her part, Mrs. Rowan "admits that no one told her when or how the airbags would work." R 459 (RE tab 2), *see* R 358, 362, 365.

Third, the Rowans have no evidence that an alleged warranty (if any) was breached. The Forbeses offered expert opinion that Mrs. Forbes's accident was of the type and magnitude to have caused a properly functioning airbag to deploy. The Rowans have no such evidence.[5]

Fourth, the Rowans have no evidence of relevant injury or proximate cause. Mrs. Forbes's head hit the windshield, and the Forbeses offered expert proof that a properly functioning airbag should have kept Mrs. Forbes from hitting the windshield and prevented the severe brain injury for which recovery was sought. Mrs. Rowan did not hit her head on the windshield and has no brain injury. She has no evidence that any injury she experienced in the accident would have been prevented by the deployment of an airbag.[6]

Under Mississippi law, a manufacturer or seller "shall not be liable" for products liability based on alleged breach of warranty "if the claimant does not prove by the preponderance of the evidence" that "[t]he product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product"; that "[t]he defective condition [resulting from the alleged breach] rendered the product unreasonably dangerous to the user or consumer"; and that "[t]he defective and unreasonably

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[5] *See* n.3.

[6] *See* n.3.

dangerous condition of the product proximately caused the damages for which recovery is sought." MISS. CODE ANN. § 11-1-63(a)(i)(4), (a)(ii) and (a)(iii).

The Rowans cannot satisfy any aspect of this standard. They have no evidence that a relevant "express warranty or . . . other express factual representation" existed; that a relevant warranty or representation (if any) was "justifiably relied" upon, either "in electing to use the product" or otherwise; that a relevant warranty or representation (if any) was breached or not conformed to; that the alleged breach or non-conformance (if any) rendered the product unreasonably dangerous; or that the resulting unreasonably dangerous condition (if any) caused injury. Failure of proof on any one of these elements would be sufficient to render all other facts immaterial and mandate summary judgment. *Williams*, 921 So.2d at 1277. Plaintiffs' proof is deficient on every element. Summary judgment must be affirmed.

CONCLUSION

The judgment must be affirmed.

Dated: January 9, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a photocopy of the above and foregoing to be mailed, by postage paid United States mail, to the following recipients:

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THIS, the 9th day of January, 2009.

J. Collins Wohner Jr.