

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-00966

**DEANNA J. ROWAN and
GARY ROWAN**

APPELLANTS

VS

**KIA MOTORS AMERICA, INC. and
PAT PECK NISSAN, INC.**

APPELLEES

**APPEAL FROM THE CIRCUIT COURT
OF HARRISON COUNTY MISSISSIPPI**

BRIEF OF THE APPELLANTS

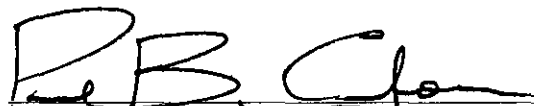
ORAL ARGUMENT NOT REQUESTED

**CAREY R. VARNADO MSB- [REDACTED]
PAUL B. CASTON MSB # [REDACTED]
MONTAGUE, PITTMAN & VARNADO, P.A.
525 Main Street
Post Office Drawer 1975
Hattiesburg, MS 39403
Tel. 601-544-1234
Fax. 601-544-1276
Email pcaston@mpvlaw.com**

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 and / or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

- Deanna Rowan, Plaintiff in the trial court and Appellant on Appeal
- Gary Rowan, Plaintiff in the trial court and Appellant on Appeal
- Kia Motors America, Inc., Defendant in the trial court and Appellee on Appeal
- Honorable Lisa Dodson, Harrison County Circuit Judge
- Montague Pittman & Varnado, P.A., Attorneys of Record for the Appellants
- LoCoco & LoCoco, Attorneys of Record for the Appellants
- Watkins and Eager, Attorneys of Record for the Appellee Kia Motors America, Inc.

Handwritten signatures of Carey R. Varnado and Paul B. Caston. The signature of Carey R. Varnado is on the left, and the signature of Paul B. Caston is on the right.

Carey R. Varnado, MSB [REDACTED]

Paul B. Caston, MSB [REDACTED]

Attorneys For Dianna Rowan and Gary Rowan

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STATEMENT OF THE ISSUES

1. Did the trial court err by granting Kia Motors America, Inc.'s Motion For Summary Judgment?

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Below

This appeal comes to this Court from the Circuit Court of Harrison County, Mississippi from a grant of summary Judgment for the Defendant Kia Motors America, Inc. ("Kia"). The trial court granted summary judgment to Kia, finding, *inter alia*, that the plaintiffs did not base their decision to purchase the Kia automobile on the fact that the vehicle was equipped with airbags. (R. at 455; R.E. at 1). The plaintiff has timely appealed.

II. Statement of the Facts

The plaintiffs Deanna and Gary Rowan purchased a 2000 model Kia Sephia from Pat Peck Honda in early 2000. During the course of shopping for the car, Mr. Rowan spoke with the sales person, Mike Helvey, regarding the safety features of the Kia Sephia. Helvey explained the safety features of the vehicle, including including the airbag feature. (R at 155, 285). Mr. Rowan testified in his first deposition as follows:

Q. Did you ask Mr. Helvey or anybody else at Pat Peck anything about the airbags in the vehicle before you purchased it?

A. Yes, sir. We discussed the safety features of the vehicle. We sat at the Pat Peck showroom for approximately nine or ten hours that day. We didn't get out until almost ten o'clock that night.

Q. What was specifically said about the safety features of the vehicle?

A. Mike Helvey, when I inquired about the safety features, he explained the air bags, the seat restraints. I inquired as to the safety record of the Kia Sephia because it was a fairly new vehicle. He told me that it had a high safety rating. Like I said, we were there for nine hours. We talked a lot about the car.

(Deposition of Gary Rowan, R. at 155).

In a second deposition, Mr. Rowan confirms this testimony”

Q. Okay. And you told me in 2003 that you discussed the safety features of the vehicle, but that he did not tell you anything specific about how the airbag works or fires. Do you remember that testimony?

A. That’s correct

Q. Okay. Do you stand by that testimony?

A. Yes, sir.

(Deposition of Gary Rowan, R. at 419).

Similarly, Mrs. Rowan testified in her second deposition that the airbag feature was part of her reason for purchasing the Kia Sephia:

Q. And I asked you about conversations with the sales person, Mike, at the dealership about airbags or seatbelts and you don’t recall anything that he specifically said. Do you recall any, as we sit here today, any discussion about safety features of the vehicle? In ‘03, you told me that you could not. But since then, has anything occurred to you that may have been said that day.

A. I don’t recall it exactly. That was one of the features that I was sold on, as far as the car

was concerned, because of the dual airbags.

Q. You knew that without talking to Mike about it?

A. Well, we were all standing around. I believe it was just part of the conversation. I can't recall if it was my conversation or Gary's conversation with Mike.

In addition, labels on the steering wheel and the passenger side dash indicated to Mrs. Rowan that the car was equipped with airbags. She testified in her first deposition as follows:

Q. When you purchased the vehicle, did you know whether it had airbags or didn't have airbags?

A. Yes, sir. I did know it had air bags.

Q. And how did you know that?

A. I could see the printing on the steering wheel and on the other side above the glove box.

Q. Printing on the steering wheel, tell me what you saw on the steering wheel.

A. The ABS.

Q. ABS?

A. I believe that's what it is, ABS.

Q. And that was on the steering wheel?

A. Yes, sir.¹

[R. at 172].

Finally, the Kia Motors' Airbag brochure furnished to the plaintiffs provides that "Your Kia airbag system includes the following features: Sensors that can detect a severe frontal collision []

¹Mrs. Rowan subsequently corrected her earlier statement. She was referring to the "SRS" Supplemental Restraint System lettering instead of ABS. [R at 176]

Whenever you have a severe frontal or front-angle collision, the system sensors signal the control unit to instantly inflate the airbags [.] [R.E. at 3; R at 451].

In July of 2000, Mrs. Rowan was involved in a severe frontal collision with another vehicle involving the frontal area of her car. (R. at 81; R at 184). The front of the Rowan vehicle struck the front quarter panel and driver's side door of another vehicle that had improperly entered an intersection. The airbags on the Kia Sephia did not deploy as they should have given the placement and severity of the impact. As a result of the collision and the failure of the airbags to deploy, Mrs. Rowan suffered severe injuries. The plaintiffs filed suit against the defendant on a number of theories, including a claim for breach of warranty.

SUMMARY OF THE ARGUMENT

The trial court erred in granting summary judgment on the plaintiffs breach of warranty claims. The plaintiffs justifiably relied on the representations of the car salesman and the Kia Motors brochure that the car had an airbag system and that in a severe frontal collision or front angle collision that the airbag system would protect the front seat passengers. In the very factually similar case of *Forbes vs. General Motors Corp.*, 935 So. 2d 869 (Miss. 2006) our Supreme Court held that breach of warranty claims do not require proof of fault and that the plaintiffs need only prove that the product did not live up to its warranty.

ARGUMENT

1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF KIA MOTORS AMERICA, INC. ON THE PLAINTIFFS' BREACH OF WARRANTY CLAIMS

A. STANDARD OF REVIEW

"This Court reviews summary judgments *de novo*. We view the facts in the light most

favorable to the nonmovant. If there exists a genuine issue of material fact, summary judgment is inappropriate.” *Collins v. Tallahatchie County*, 876 So. 2d 284 (Miss. 2004) (Internal Citations Omitted). Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c). A party moving for summary judgment bears the initial burden of demonstrating the absence of material fact. *Grange Mutual Casualty Co. v. United States Fidelity and Guaranty Co.* 835 So.2d 1187, 1190 (Miss. 2003).

B. LEGAL ARGUMENT

Viewing the facts of this case in the light most favorable to the Rowans, it is clear that the Rowans relied on the representations of Mike Helvey, the automobile salesman, concerning the airbag system. While Mr. Helvey may not have explained the finer technical points of how the airbag system operated and fired, it was unquestionably a selling point for the car. Mr. Rowan testified that he inquired about the safety systems of the vehicle and that Helvey explained the airbag system and the seat restraints. [R. at 155]. The airbag brochure provided by Kia provided that “Whenever you have a severe frontal or front-angle collision, the system sensors signal the control unit to instantly inflate the airbags [.] [R.E. at 3; R at 451]. Yet, despite Mrs. Rowans severe frontal collision, the airbags did not deploy as advertised.

The facts of this case are indistinguishable from *Forbes*. The facts of *Forbes* had a 1992 Oldsmobile Delta 88 driven by Hilda Forbes rear ending a vehicle that had stopped to turn into a private drive. *Forbes* at 871. The airbags in the Forbes vehicle did not inflate and, as a result, Mrs. Forbes head struck the windshield of her car, leading to brain injuries. The Forbes brought suit on

a number of theories all of which were dismissed or otherwise disposed of except for the breach of warranty claim. The trial court then granted a directed verdict on the breach of warranty claim, finding that there was insufficient evidence for the jury to reach a verdict other than for General Motors. *Forbes* at 872. On appeal, the Mississippi Court of Appeals affirmed the trial court. The Supreme Court of Mississippi granted certiorari and reversed and remanded on the breach of warranty issue. *Forbes* at 882.

As in *Forbes* the salient question for the jury in this case is whether or not the frontal or front angle collision was “severe”² enough to trigger a the activation of the airbag system and whether the Rowan vehicle sustained that amount of force. As in *Forbes*, there is no need to determine fault. As stated by our Supreme Court:

However, in today’s case, we are not to determine fault. No legal authority exists to require expert testimony in this case, and we do not want to encourage such a rule. An expert beyond what the *Forbes* presented should also not be required to point out to the jury that Mr. Forbes thought he was buying a car with an airbag that would inflate in an accident such as this and that the collision was sufficiently hard to deploy the airbag consistent with his expectations. [] The jury should have been presented with the question of whether the impact was hard enough to have deployed the airbag and thus fulfilled a promise on which Mr. Forbes relied when buying his car. *Forbes* at 877.

Viewing the facts in this light, and given the state of the law as set out in *Forbes*, the plaintiffs in this case were entitled to reach the jury with the issue of whether or not the frontal impact on Mrs. Rowan’s Kia Sephia was sufficiently severe that the airbags should have activated as advertised.

²The precise language in *Forbes* was “hard enough”, whereas here, the precise wording is “severe”.

CONCLUSION

In conclusion, the trial court erred in its decision to grant summary judgment to the defendant Kia Motors America, Inc. There existed genuine issues of material fact concerning the severity of the impact which precluded judgment as a matter of law.

Respectfully Submitted this the 8th day of December, 2008.



Paul B. Caston, MSB # 10086

Paul B. Caston, MSB # [REDACTED]
Montague Pittman & Varnado, PA
525 Main Street
Post Office Drawer 1975
Hattiesburg, Mississippi 39403
Tel. 601-544-1234
Fax. 601-544-1276
Email pcaston@mpvlaw.com


CERTIFICATE OF SERVICE

I, Paul B. Caston, hereby certify that I have this day mailed a true and correct copy of the foregoing Appellant's Brief to the following by first class United States mail, postage prepaid:

James J. Crongeyer
Watkins & Eager
P.O. Box 650
Jackson, MS 39205-0650

Hon. Lisa P. Dodson
Circuit Court Judge
P.O. Box 1461
Gulfport, MS 39502

This the 8th day of December, 2008.


PAUL B. CASTON

CERTIFICATE OF FILING

I, Paul B. Caston, hereby certify that I have this day filed with the Clerk of the Supreme Court of the State of Mississippi the foregoing Appellant's Brief by depositing the original and three copies of the same in the United States mail, postage prepaid.

This the 8th day of December, 2008.


PAUL B. CASTON