

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**HOYT FORBES AND HILDA FORBES**

**APPELLANTS**

**V.**

**NO. 2007-CA-00902-COA**


**GENERAL MOTORS CORPORATION**

**APPELLEE**

**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.

- A. Hoyt Forbes, Appellant
- B. Hilda Forbes, Appellant
- C. Wayne Dowdy, Attorney for Appellants
- D. John Sturgeon, Attorney for Appellants
- E. General Motors Corporation, Appellee
- F. Paul Cassisa, Attorney for Appellee
- G. Gene Berry, Attorney for Appellee

  
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PAUL V. CASSISA, JR.

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**STATEMENT REGARDING ORAL ARGUMENT**

General Motors Corporation, Appellee, believes that the single issue raised by the Appellant in this appeal is clear and that oral argument is not necessary.

### **STATEMENT OF THE ISSUES**

The Trial Judge correctly granted General Motors Corporation's Motion for Summary Judgment. Plaintiffs' only claim is for breach of express warranty. That claim is barred by the six year statute of limitations for breach of warranty claims, which begins to run from the date of delivery of the product. Miss. Code Ann., §75-2-725.

## **STATEMENT OF THE CASE**

### **A. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW**

This case involves an automobile accident that occurred on December 15, 1997 when a 1992 Oldsmobile Delta 88 driven by Hilda Forbes rear-ended a 1981 Chevrolet Chevette driven by Angela Coleman.

Hilda and Hoyt Forbes filed this lawsuit in the Circuit Court of Hinds County, Mississippi on December 7, 2000.<sup>1</sup> Plaintiffs filed an *Amended Complaint* on December 15, 2000 that added General Motors Corporation (GM) as an additional defendant.

This case was previously tried for 3 days during May, 2003. GM moved for a directed verdict, and the plaintiffs confessed all of their claims concerning manufacture, design and warning issues. Although not previously raised in their pleadings and their discovery responses, plaintiffs argued that GM breached an express warranty concerning the air bag system in their car.<sup>2</sup>

A directed verdict was granted in GM's favor. The directed verdict was AFFIRMED by the Mississippi Court of Appeals, but then REVERSED by the Mississippi Supreme Court.

On remand, GM responded to plaintiffs' previously unpled and unidentified breach of warranty claim by filing a Motion for Summary Judgment, showing that the statute of limitations had run on any breach of warranty claim. The trial judge granted GM's Motion for Summary Judgment. Plaintiff filed a Notice of Appeal.

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<sup>1</sup>*Complaint*, (Clerk's Paper's "C.P." 25-32).

<sup>2</sup>Trial Transcript pages, C.P. 42-61.

Plaintiffs raise only one issue for this Court - whether the Trial Judge erred when he granted GM's Motion for Summary Judgment based on the six year statute of limitations for express warranty. §75-2-725. The decision of the trial court should be AFFIRMED.

## STATEMENT OF THE FACTS

The following material facts are uncontested:

1. The car at issue in this case is a 1992 Oldsmobile Delta 88.<sup>3</sup>
2. Plaintiffs bought the 1992 model year car in either 1991 or 1992.<sup>4</sup>
3. Plaintiffs filed this lawsuit on December 7, 2000.<sup>5</sup>
4. Plaintiffs filed an *Amended Complaint* that named GM as an additional defendant in this case on December 15, 2000.<sup>6</sup>
5. More than 6 years elapsed between the date that plaintiffs bought this car in 1991 or 1992 and the date the original *Complaint* was filed on December 7, 2000.
6. More than 6 years elapsed between the date that plaintiffs bought this car in 1991 or 1992 and the date the *Amended Complaint* that added GM as an additional defendant was filed on December 15, 2000.

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<sup>3</sup>*Complaint* at ¶III. (C.P. 25-32).

<sup>4</sup>Deposition of Hoyt Forbes at page 8, line 11 - page 9, line 1. (C.P. 62-64).

<sup>5</sup>*Complaint*. (C.P. 25-32).

<sup>6</sup>*Amended Complaint*. (C.P. 33-41).

## **SUMMARY OF ARGUMENT**

### **THE TRIAL JUDGE CORRECTLY GRANTED GM'S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs' only remaining claim is for breach of an express warranty.<sup>7</sup> That claim is barred by the statute of limitations.

Under Miss. Code Ann. §75-2-725, a breach of warranty claim filed more than 6 years from the date of the delivery of the product is barred by the statute of limitations. *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, ¶147 (Miss. 1999).

As demonstrated by the testimony of Hoyt Forbes, the plaintiffs took delivery of the subject car in 1991 or 1992. As demonstrated by the dates on which their *Complaint* and *Amended Complaint* were filed, more than 6 years elapsed between the time the plaintiffs took delivery of the car and the date they filed this lawsuit against GM. Therefore, plaintiffs' breach of warranty claim is barred by MCA §75-2-725. See *Estate of Hunter*, 729 So.2d at ¶147.

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<sup>7</sup>Plaintiffs' *Amended Complaint* did not allege the breach of an express warranty as a theory of recovery against GM. (C.P. 33-41). *Estate of Stevens v. Wetzel*, 762 So.2d 293, 295-96 (Miss. 2000) (theory of conversion was properly dismissed because it was not asserted in the Complaint); *Ladner v. Jordan*, 848 So.2d 870 (Miss. App. 2002), (the Court held that plaintiff's claim for breach of warranty of fitness was properly dismissed where plaintiff failed to plead that in her complaint). The theory of an alleged breach of express warranty was not raised for the first time until after GM moved for a directed verdict.

GM's Interrogatory No. 3 specifically asked the plaintiffs to identify their claims in this lawsuit, including the specifics of any breach of express warranty or other express factual representation that plaintiffs might be asserting. (C.P. 54-57). Plaintiffs did not identify breach of express warranty as one of their claims in this case. (C.P. 54-57).

## **ARGUMENT**

### **THE TRIAL JUDGE CORRECTLY GRANTED GM'S MOTION FOR SUMMARY JUDGMENT**

#### **Plaintiffs' Only Remaining Claim is Barred by the Statute of Limitations**

Plaintiffs' breach of warranty claim was filed more than 6 years from the date of the delivery of the product. Under Miss. Code Ann. §75-2-725, it is barred by the statute of limitations. *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, ¶47 (Miss. 1999).

#### **Plaintiff's Sole Argument**

Plaintiffs' only opposition to GM's motion is that the "future performance" exception of MCA §75-2-725 applies. In support of their argument, plaintiffs cite 3 federal court cases — one from Texas, one from Illinois and one from Pennsylvania. None of these 3 cases (all of which are more than 30 years old) apply Mississippi law.

#### **The Non-Mississippi Cases Cited by Plaintiffs are not Applicable**

*Morton v. Texas Welding and Manufacturing Co.*, 408 F.Supp. 7 (S.D. Texas 1976) does not support plaintiffs' position in this case. In *Morton*, a federal court in Texas determined that the 4-year statute set forth in the Texas version of the UCC applied and found that the plaintiff had filed suit within the applicable 4-year time period. *Id.* at 11. The *Morton* Court determined that prior Texas law, which held that a warranty action in Texas begins to run when the buyer discovers (or should have discovered) an injury, was unchanged by the enactment of the UCC. *Id.* That is not the law in Mississippi. See *Estate of Hunter v. General Motors Corp.*, *supra* and *Rutland v. Swift Chemical Co.*, 351 So.2d 324 (Miss. 1977). Therefore, the pronouncement of the Texas federal court in *Morton* does not support plaintiffs' position in this case.

*Klondike Helicopters, Limited v. Fairchild Hiller Corp.*, 334 F. Supp. 890 (N.D. Ill. 1971) also does not support plaintiffs' position in this case. The *Klondike* Court included some language discussing the Illinois statute of limitations. *Id.* at 893. HOWEVER, that language was merely *dicta* because the Court held that the California statute of limitations (not the Illinois statute of limitations) applied to plaintiff's breach of warranty claims in that case. *Id.* at 895. Applying the California statute of limitations, the *Klondike* Court found that plaintiff's breach of warranty claims were barred. Therefore, *Klondike* does not support plaintiffs' position in this case.

*Carney v. Barnett*, 278 F. Supp. 572 (E.D. Pa. 1967) also does not support plaintiffs' position in this case. The *Carney* Court did not interpret a statute similar to MCA §75-2-725. *Carney* includes a description of the applicable Pennsylvania statute of limitations for survival actions and a refusal by the Court to look to the law of New Jersey to determine warranty rights. *Carney* does not support plaintiffs' position in this case.

#### **Mississippi Automotive Crashworthiness Cases Interpreting MCA §75-2-725**

The only Mississippi Supreme Court case that has addressed MCA §75-2-725 in the context of an automotive crashworthiness case is *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, ¶47 (Miss. 1999), and that is the case the GM relies on in support of its arguments in this case. In *Estate of Hunter*, the plaintiffs sought recovery for injuries they sustained in a crash because a seat in a GM car allegedly failed in a crash. Like Mr. and Mrs. Forbes, the plaintiffs in *Estate of Hunter* would not have known of an alleged defect in the crashworthiness of the vehicle until a crash occurred. Nevertheless, the Mississippi Supreme Court held that their breach of warranty claims were barred by the statute of limitations.

There have also been Mississippi federal court cases that have interpreted MCA §75-2-725 in automotive crashworthiness cases, and each one of them supports GM's position in this case. One

of those cases involved an allegation of breach of warranty because an air bag failed to deploy in a crash. See *Kelly v. General Motors Corp.*, 1998 U.S. Dist. LEXIS 18233;1998 WL 930616 (N.D. Miss.). The other 2 cases involved allegations that seat belts failed to properly restrain occupants in crashes. See *Childs v. General Motors Corp.*, 73 F. Supp. 2d 669, 673-674 (N.D. Miss. 1999) and *Robinson v. General Motors Corp.*, 150 F. Supp. 2d 930, 933 (S.D. Miss. 2001). Like Mr. and Mrs. Forbes, the plaintiffs in each of those cases could not have known of an alleged defect in the crashworthiness of the vehicles at issue until a crash occurred. Nevertheless, each of these Mississippi federal courts held that the plaintiffs' breach of warranty claims were barred by the statute of limitations.

**The "Future Performance" Exception Requires a Clear, Unambiguous and Unequivocal Promise or Guarantee**

As recently explained in *Babishkan v. Southern Homes/Southern Lifestyles*, 2006 U.S. Dist. LEXIS 67827, 2006 WL 2727972, \*3 (S.D. Miss.):

For the future performance exception to apply a warranty must explicitly promise or guarantee future performance of the goods; it must be clear, unambiguous and unequivocal. Citing *Rutland v. Swift Chemical Company*, 351 So.2d 324, 325 (Miss. 1977).

*Crouch v. General Electric Co.*, 699 F.Supp. 585, 594 (S.D. Miss. 1988) ("The overwhelming majority of courts have interpreted future performance exceptions such as those contained in Section 75-2-725 very strictly.") (emphasis added); *Progressive Ins. Co. v. Monaco Coach Corp.*, 2006 U.S. Dist. LEXIS 21251 (S.D. Miss.) ("only rarely has an express warranty been held to be a warranty explicitly extended to future performance).

**No "Clear, Unambiguous and Unequivocal" Promise or Guarantee In GM's Owner's Manual**

In *Forbes*, this Court has already determined that there was no "clear, unambiguous and unequivocal" promise or guarantee by GM concerning the future performance of the vehicle. Even

when this Court considered the evidence *de novo*, in the light most favorable to Mr. and Mrs. Forbes, and gave Mr. and Mrs. Forbes the benefit of all reasonable inferences that may be reasonably drawn from the evidence, this Court could only say that the language in GM's Owner's Manual was "ambiguous" concerning "the impact threshold for an air bag to inflate." *Forbes v. General Motors Corp.*, 935 So.2d 869, ¶¶4 and 15 (Miss. 2006).

The language at issue in GM's Owner's Manual, which this Court has already determined to be "ambiguous," cannot meet the requirement that a "future performance" exception to MCA §75-2-725 must explicitly promise or guarantee future performance. *See Rutland v. Swift Chemical Co.*, 351 So.2d 324 (Miss. 1977).

#### **No Mississippi Supreme Court Case Supports Plaintiff's Position**

There are 5 Mississippi Supreme Court cases that cite Mississippi Code Annotated §75-2-725. None of them support plaintiffs' position.

The most recent Mississippi Supreme Court case that cites MCA §75-2-725 is *Estate of Hunter, supra*, which GM relies on and which plaintiffs cannot distinguish.

In *Rutland, supra*, the plaintiff essentially made the same argument that the plaintiffs make in this case. He argued that the nature of fertilizer is such that any warranty must relate to the future performance of the product and, therefore, no cause of action could accrue until a farmer discovered that his fertilizer failed to perform properly. *Id.* This Court rejected that argument, finding that MCA §75-2-725 states in "unmistakable language" that a warranty will not extend beyond 6 years after the date of tender unless the warranty "explicitly" relates to the future performance of the goods. *Id.* This Court held that it could not "circumvent the clear intent of the statute" and refused to find that the "future performance" exception applied to plaintiff's claim. *Rutland* does not support plaintiffs' claim in this case.

This Court reached similar results, and rejected plaintiffs' warranty claims as barred by the statute of limitations, in both *Huff v. Hobgood*, 549 So.2d 951 (Miss. 1989) and *Schiro v. American Tobacco Co.*, 611 So.2d 962 (Miss. 1992). Neither *Huff* nor *Schiro* supports plaintiffs' position in this case.

*Hughes v. Collegedale Distributors*, 355 So.2d 79 (Miss. 1978) mentions and applies MCA §75-2-725, but is otherwise inapplicable to the current issue before this Court. *Hughes* does not support plaintiffs' position in this case.

These are the only Mississippi Supreme Court opinions that address MCA §75-2-725. None of these cases support the plaintiffs' position that the "future performance" exception should be applied in this case. That is, apparently, why the plaintiffs did not cite any of those cases to the Court.

### **Conclusion**

The Trial Judge correctly granted GM's Motion for Summary Judgment. Established case law from this Court compels that result. The Trial Court's ruling should be AFFIRMED.

Respectfully submitted,  
GENERAL MOTORS CORPORATION

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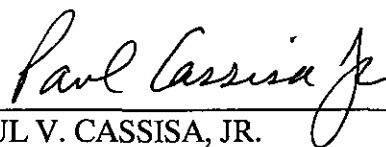
**CERTIFICATE OF SERVICE**

I, Gene D. Berry, do hereby certify that I have caused to be served this day, via United States Mail, postage prepaid, a true and correct copy of General Motors Corporation's Brief to the following:

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This, the 11 day of February, 2008.

  
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PAUL V. CASSISA, JR.