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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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HOYT FORBES and
HILDA FORBES

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APPELLANTS

V.

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SUPREME COURT
COURT OF APPEALS


NO. 2007-CA-00902 *wsj*

ANGELA COLEMAN,
MIKE SMITH MOTORS, INC.
and GENERAL MOTORS CORPORATION

APPELLEES

BRIEF OF APPELLANTS
ORAL ARGUMENT REQUESTED

AN APPEAL FROM THE CIRCUIT COURT
OF MARION COUNTY, MISSISSIPPI
CAUSE NO. 2001-0260

WAYNE DOWDY
DOWDY & COCKERHAM
215 East Bay Street
Post Office Box 30
Magnolia, Mississippi 39762
Telephone: (601) 783-6600
Facsimile (601) 783-3670
MS Bar No. 

Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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HILDA FORBES**

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V.

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215 East Bay Street
Post Office Box 30
Magnolia, Mississippi 39762
Telephone: (601) 783-6600
Facsimile (601) 783-3670
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Attorney for Appellants

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APPELLANTS

V.

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and GENERAL MOTORS CORPORATION

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal.

1. Hoyt Forbes, Appellant
2. Hilda Forbes, Appellant
3. Wayne Dowdy, Attorney for Appellants
4. General Motors Corporation, Appellee
5. Paul Cassisa, Attorney for Appellee
6. Gene Berry, Attorney for Appellee

THIS the 10 of December, 2007.

Respectfully submitted,

HOYT FORBES and HILDA FORBES,
APPELLANTS

BY: Wayne Dowdy
WAYNE DOWDY, ATTORNEY
OF RECORD FOR APPELLANTS

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STATEMENT OF THE ISSUES

Hoyt Forbes and Hilda Forbes respectfully submit that the following issues are relevant on appeal:

I. Whether the Circuit Court of Marion County, Mississippi erred by granting General Motors Corporation's Motion for Summary Judgment.

STATEMENT OF THE CASE

A. Statement of Facts Relevant to the Issues Presented for Review

The Oldsmobile Delta 88 is manufactured and designed, in part, by General Motors' Corporation (hereinafter "General Motors"). Mr. Forbes went to various lengths to have an automobile equipped with an air bag for Mrs. Forbes' safety and protection, and Mr. Forbes paid extra money to have the Oldsmobile Delta 88 equipped with an air bag. (R. 72) Mr. Forbes thought it was safer to have a automobile equipped with an air bag, than not, because he wanted something to protect himself, his wife, or whoever might drive the Oldsmobile Delta 88. (R. 73)

According to the General Motors' owner's manual for the 1992 Oldsmobile Delta 88 that was issued to Mr. and Mrs. Forbes, the 1992 Oldsmobile Delta 88 is equipped with an air bag or "Supplemental Inflatable Restraint System (SIR)". In the owner's manual for the 1992 Oldsmobile Delta 88, General Motors describes the SIR System as follows:

How the SIR System Works

The "air bag" part of the SIR system is in the middle of the steering wheel.

The SIR system is only for crashes where the front area of your vehicle hits something. If the collision is hard enough, the "air bag" inflates in a fraction of a second. It helps restrain the driver, and then it quickly deflates. Some gray "smoke" is normal when this happens, and some people have reported mild coughing and watery eyes from it. But all of these have been temporary. The "air bag" can give extra protection for the driver's upper body. (Emphasis added) (R. 175)

General Motors expressly warrants in its owner's manual for the 1992 Oldsmobile

Delta 88 that the “air bag” of the SIR System will inflate when (1) the front area of the vehicle is involved in a crash and (2) if the collision is “hard enough”.

On December 15, 1997, Mrs. Forbes was driving the 1992 Oldsmobile Delta 88 on Mississippi Highway 13 in Marion County, Mississippi, and Mrs. Forbes rear-ended another vehicle that had stopped without warning. The air bag in the Oldsmobile Delta 88 failed to deploy upon impact. The impact of the frontal collision propelled Mrs. Forbes into the windshield of the Oldsmobile Delta 88, and Mrs. Forbes suffered a subdural hematoma, among other serious injuries. Although General Motors expressly warrants in its owner’s manual that the air bag in the Oldsmobile Delta 88 will inflate in a fraction of a second if the collision is hard enough, the air bag in the Forbeses’ 1992 Oldsmobile Delta 88 failed to function as expressly warranted on the date of Mrs. Forbes’ accident.

B. Nature of the Case, Course of Proceedings and its Disposition in the Court Below

On December 7, 2000, Mr. and Mrs. Forbes filed a lawsuit in the First Judicial District of Hinds County, Mississippi for damages sustained in the December 1997 collision. The Forbeses filed an Amended Complaint on December 15, 2000 to add General Motors as an additional defendant. The Forbeses asserted products liability claims against General Motors for the defective seat belt and the air bag system in the Forbeses’ Oldsmobile Delta 88. A jury trial commenced in this case in May of 2003. General Motors moved for a directed verdict after the close of the Forbeses’ case-in-chief. The Forbeses confessed certain portions General Motors’ motion for directed verdict and proceeded only on their claim that the failure of the air bag to deploy upon impact constituted a breach of express warranty.

The trial court granted General Motors' motion for directed verdict.

The Forbeses appealed the trial court's ruling to the Mississippi Court of Appeals, which affirmed the ruling of the trial court. However, on Petition for Writ of Certiorari, the Mississippi Supreme Court reversed the rulings of the trial court and the Mississippi Court of Appeals and remanded the case to the trial court for further proceedings.

On or about March 12, 2007, General Motors filed a motion for summary judgment, asserting that the Forbeses' claim of breach of express warranty is barred by the statute of limitations, Mississippi Code Annotated §75-2-725, which bars breach of warranty claims six (6) years from the date of delivery of the product. In opposing General Motors' motion for summary judgment, the Forbeses argued that their claim against General Motors was not time barred. The Forbeses contend that the General Motors' express warranty extended to a future performance, thereby making the applicable statute of limitations run from the time the defect in the air bag system was or should have been discovered.

The trial court granted General Motors' motion for summary judgment, and it is from this ruling that the Forbeses appeal. (R. 178, 182)

SUMMARY OF THE ARGUMENT

The Circuit Court of Marion County, Mississippi committed error by granting General Motors' motion for summary judgment. The reasons justifying Mr. and Mrs. Forbeses' appeal are as follows:

- General Motors expressly warrants in its owner's manual for the 1992 Oldsmobile Delta 88 that the air bag in the automobile will inflate when the front area of the vehicle is involved in a crash and if the collision is hard enough;
- General Motors' express warranty is a warranty of future performance;
- the future performance exception prevents the Forbeses' claim from being barred by the statute of limitations.

STANDARD OF REVIEW

A trial court's grant of summary judgment is reviewed de novo. *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398 (Miss. 2006). The standard by which the Court reviews the grant or denial of summary judgment is the same standard applied by the trial court pursuant to Rule 56(c) of the Mississippi Rules of Civil Procedure. *Jacox v. Circus Circus Miss., Inc.*, 908 So.2d 18, 183 (Miss. Ct. App. 2005). A motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c) .

ARGUMENT AND AUTHORITIES

I. Whether the Circuit Court of Marion County, Mississippi erred by granting General Motors Corporation's Motion for Summary Judgment.

The Forbeses purchased a 1992 Oldsmobile Delta 88 with the SIR system in either 1991 or 1992. (R. 63) Mrs. Forbes was involved in a frontal collision on December 15, 1997 while driving the Oldsmobile Delta 88 in Marion County, Mississippi. The Forbeses filed a Complaint and an Amended Complaint on December 7, 2000 and December 15, 2007 respectively, for a claim of breach of express warranty relative to the failure of the air bag to deploy during Mrs. Forbes' frontal collision as warranted in General Motors' owner's manual for the Oldsmobile Delta 88.

General Motors filed a motion for summary judgment, asserting that the Forbeses' claim of breach of express warranty is barred by the statute of limitations, Mississippi Code

Annotated §75-2-725. The trial court granted General Motors' motion for summary judgment, ruling that pursuant to Mississippi Code Annotated § 75-2-725, the Forbeses' claim of breach of express warranty was barred by the six (6) year statute of limitations, with delivery of the 1992 Oldsmobile Delta 88 having been made more than six (6) years prior to the Forbeses instituting an action for damages.

Mississippi Code Annotated § 75-2-725 provides, in pertinent part:

- (1) An action for breach of any contract of sale must be commenced within six (6) years after the cause of action has accrued.
- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Miss. Code Ann. §75-2-725.

The Forbeses contend that the future performance exception embodied in Mississippi Code Annotated §75-2-725(2) applies in this case, therefore, the statute of limitations has not run on the Forbeses' breach of warranty action. In order for the warranty to extend beyond the six (6) years after the date of delivery, the warranty "must explicitly relate to the future performance of the goods." *Rutland v. Swift Chemical Co.*, 351 So .2d 324, 325 (Miss. 1997). "Explicitly means something expressed or clearly stated and is more than merely implied. *Id.* The express warranty as to future performance to which the Forbeses refer is contained in the owner's manual for the Oldsmobile Delta 88 and reads as follows:

The SIR system is only for crashes where the front area of your vehicle hits something. If the collision is hard enough, the "air bag" inflates in a fraction

of a second. It helps restrain the driver, and then it quickly deflates. Some gray “smoke” is normal when this happens, and some people have reported mild coughing and watery eyes from it. But all of these have been temporary. The “air bag” can give extra protection for the driver’s upper body. (Emphasis added) (R. 175)

The air bag system in the Forbeses’ Oldsmobile Delta 88 was designed to inflate only once. General Motors expressly warrants that the air bag will inflate in a fraction of a second if the collision is hard enough. The Forbeses presented testimony at trial from Danny Alexander and Major John Wayne Tollar that the impact of the collision was hard enough to inflate the air bag in the Forbeses Oldsmobile Delta 88. The nature/extent of Mrs. Forbes’ injuries is additional evidence of the collision’s severity. The warranty relied on by the Forbeses expressly guarantees future performance of the air bag, and the warranty is clearly stated, not merely implied. Under General Motors’ express warranty, inflation of the air bag should happen sometime in the future, if ever, and would only happen if the front of the vehicle was involved in a frontal collision. From the time the Forbeses purchased the 1992 Oldsmobile Delta 88 in 1991 or 1992, the front end of the vehicle was not involved in a collision until the frontal collision that occurred on December 15, 1997. (R. 176) The Forbeses’ discovery of the breach of the express warranty could not occur and would not occur until the automobile was involved in a frontal collision. As a consequence, the future performance exception contemplated in Mississippi Code Annotated, §75-2-725(2) is applicable.

General Motors contends that the Forbeses’ breach of warranty claim is barred by the statute of limitations and relies primarily on the *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss. 1999). However, the Forbeses assert that the *Estate of Hunter* is not

applicable or relevant to the case *sub judice*. The plaintiffs in *Estate of Hunter* instituted a crash worthiness claim against General Motors for injuries sustained in a car accident, and the plaintiffs argued that the trial court erred in failing to instruct the jury on their claims for breach of warranty. *Estate of Hunter*., 729 So.2d 1264 ¶ 47 (Miss. 1999). In its opinion, the Court generally states that the breach of the warranty claim on the 1981 Tornado is barred by the statute of limitations, without further discussion or explanation regarding the six (6) year statute of limitations being applied to the plaintiff's claim. *Id.* Likewise, *Childs v. General Motors Corporation*, 73 F.Supp. 2d 669, 673-673 (N.D. Miss. 1999) and *Robinson v. General Motors Corporation*, 150 F. Supp. 2d 930, 933 (S.D. Miss. 2001), on which General Motors relies in support of its motion for summary judgment, are not definitive. Unlike the Forbeses, the plaintiffs in both *Childs* and *Robinson* did not even argue that the future performance exception applied and there was no discussion or analysis regarding the plaintiffs' arguments for applying the future performance exception.

To require the Forbeses to stage a collision in an effort to determine whether the air bag would function as expressly warranted would be potentially dangerous and impracticable. For this reason, there is an exception that makes the statute of limitations run from the time that the defect was or should have been discovered, and this exception is applicable to the facts of this case. *See Morton v. Texas Welding & Mfg. Co.*, 408 F. Supp. 7 (S.D. Tex. 1976); *Klondike Helicopters, Ltd. v. Fairchild Hiller Corp.*, 334 F. Supp. 890 (N.D. Ill. 1971); and *Carney v. Barnett*, 278 F. Supp. 572 (E.D. Pa. 1967).

When considering that the collision's level of impact has and continues to remain a highly contested issue and when considering that General Motors' express warranty falls

within the future performance exception embodied in Mississippi Code Annotated §75-2-725(2), the trial court erred by granting General Motors' motion for summary judgment.

CONCLUSION

In light of the foregoing argument, Mr. and Mrs. Forbes respectfully request that this Court reverse the trial court's ruling and remand this case to the trial court for further proceedings.

Respectfully submitted,

HOYT FORBES and HILDA FORBES,
APPELLANTS

BY: Wayne Dowdy
WAYNE DOWDY

WAYNE DOWDY
ATTORNEY AT LAW
215 East Bay Street
Post Office Box 30
Magnolia, MS 39652
(601) 783-6600 (Telephone)
(601) 783-3670 (Facsimile)
MS Bar No. [REDACTED]

CERTIFICATE OF SERVICE

I, Wayne Dowdy, attorney for the Appellants, Hoyt Forbes and Hilda Forbes, do hereby certify that I have this day caused to be mailed, by United States mail, postage prepaid, a true and correct copy of the Brief of Appellants, Hoyt Forbes and Hilda Forbes, to the following:

Gene Berry, Esq.
Baker Donelson Bearman & Caldwell
Post Office Box 14167
Jackson, MS 39236

Paul Cassisa, Esq.
Bernard Cassisa Ellion & Davis
Post Office Box 1138
Oxford, MS 38655

Honorable R.I. Prichard, III
Marion County Circuit Court Judge
Post Office Box 1075
Picayune, MS 39466

THIS the 10 day of December, 2007.



WAYNE DOWDY