IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JANIS ANDERSON, individually and on behalf of all Wrongful Death Beneficiaries of JESSE J. ANDERSON, JR., Deceased — **APPELLANT**

vs. — **NO. 2009-IA-00987-SCT**

ALPS AUTOMOTIVE, INC. — **APPELLEE**

REPLY BRIEF OF THE APPELLANT,

JANIS ANDERSON, individually and on behalf of all Wrongful Death Beneficiaries of

JESSE J. ANDERSON, JR., Deceased

ON INTERLOCUTORY APPEAL FROM
THE CIRCUIT COURT OF LINCOLN COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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ALPS AUTOMOTIVE, INC. **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

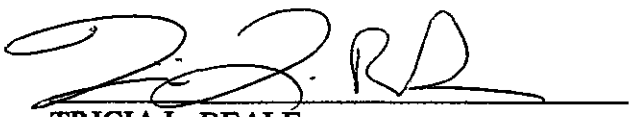
The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Honorable Michael M. Taylor, Circuit Court Judge, Lincoln County, Mississippi;
2. Janis Anderson, Appellant and Plaintiff in the underlying cause of action;
3. Paul T. Benton and Tricia L. Beale, counsel for Janis Anderson;
4. John W. Lee, Jr. and Michael J. Shemper, counsel for Janis Anderson;
5. ALPS Automotive, Inc., Appellee and Defendant in the underlying cause of action;
6. J. Wyatt Hazard and the firm of Daniel Coker Horton & Bell, P.A., counsel for ALPS Automotive, Inc.;
7. Edward M. Kronk and the firm of Butzel Long, P.A., counsel for ALPS Automotive, Inc.;
8. Christopher R. Shaw and the firm of Watkins, Ludlam, Winter & Stennis, counsel for Stan King Chevrolet, Inc., Defendant in the underlying cause of action;
9. W. Brady Kellems and the Kellems Law Firm, counsel for Henry Automotive Services, Inc. d/b/a 51 Bridgestone Firestone, Defendant in the underlying cause of

action;

10. Jimmy B. Wilkins and the firm of Watkins & Eager, counsel for General Motors Corporation, Defendant in the underlying cause of action

11. Paul V. Cassisa, Jr. and the firm of Bernard, Cassisa, Elliot & Davis, counsel for General Motors Corporation, Defendant in the underlying cause of action.



TRICIA L. BEALE
Counsel for Appellant, Janis Anderson

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2. WHETHER THE TRIAL COURT'S INTERPRETATION OF RULE 15(c) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, FINDING THAT A 9 MONTH PERIOD BETWEEN THE TIME THE IDENTITY OF A MISTAKEN DEFENDANT IS KNOWN AND THE TIME LEAVE IS REQUESTED TO AMEND THE COMPLAINT TO ADD THE DEFENDANT IS UNREASONABLE, IS IN ERROR?

3. WHETHER THE TRIAL COURT'S INTERPRETATION OF RULE 9(h) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, FINDING THAT THE PLAINTIFF MUST EXERCISE DUE DILIGENCE TO AMEND THE COMPLAINT AFTER THE IDENTITY OF A FICTITIOUS PARTY IS KNOWN, IS IN ERROR?

4. WHETHER THE TRIAL COURT'S INTERPRETATION OF RULE 9(h) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE, FINDING THAT A 9 MONTH PERIOD BETWEEN THE TIME THE IDENTITY OF A FICTITIOUS DEFENDANT IS KNOWN AND THE TIME LEAVE IS REQUESTED TO AMEND THE COMPLAINT TO ADD THE DEFENDANT IS UNREASONABLE, IS IN ERROR?

REPLY ARGUMENT

A. THE DEATH OF JESSE J. ANDERSON, JR.

The Decedent, Jesse J. Anderson, Jr., was a loving father and husband whose life was terminated prematurely at the age of 52 years old. He was married to the Plaintiff, Janis Anderson, for over twenty-years and had three (3) children. (R. Vol. I at 12)

On February 15, 2003, the Decedent, Jesse Anderson, Jr., was driving the Plaintiff to work in a 1998 Chevrolet Venture Van. The Andersons had just left their home traveling westbound on Highway 84 in Monticello, Mississippi. Around the same time, Michael Beasley was on his way home from work and was traveling eastbound on Highway 84. Mr. Beasley fell asleep and crossed the center line of the Highway hitting the Anderson's vehicle head-on. (R. Vol. I at 13)

Upon impact, Janis Anderson's airbag deployed and she survived. However, at no time during or subsequent to the impact and/or impacts sustained by the 1998 Chevrolet Venture Van did Jesse Anderson's airbag deploy. As a result, Jesse Anderson was killed. (R. Vol. I at 13-14)

In June 2005, before the Complaint was filed and within the original three (3) year statute of limitations, an inspection of the subject 1998 Chevrolet Venture Van took place. A representative from General Motors Corporation and their counsel were present at the inspection. The part of the vehicle called a clockspring was removed and visually inspected. The clockspring is the part of the vehicle that provides the necessary electrical circuit link between the steering wheel column and the steering wheel itself. It is supposed to provide a continuous electrical circuit throughout the entire steering wheel rotation range. Upon command for airbag deployment, a current is sent up the steering column through the clockspring to deploy the airbag. If this electrical circuit is broken at any location, inflation of the airbag will not commence.

(RE 58-66 and RE 67 (photograph))

The only identifying marks on the clockspring are the letters "GM" followed by a set of numbers. There was no way Plaintiff could have known or even thought that anyone other than General Motors manufactured the clockspring. ALPS's name does not appear anywhere on the clockspring. In fact, the identifying name on the clockspring is General Motors. (RE 68-69)

Apparently, General Motors knew who manufactured the clockspring because, after that inspection, in June 2005, General Motors notified ALPS of Plaintiff's defective product claims as was admitted by counsel for ALPS at the April 20, 2009, hearing on ALPS's Motion for Summary Judgment. (Transcript, April 20, 2009, at 15-17)

Thereafter, on February 13, 2006, the instant lawsuit was filed against General Motors Corporation, Stan King Chevrolet, Inc., the seller of the van in question, and two (2) fictitious defendants.

After removal and remand, and the remand stay was lifted, the discovery phase of the litigation began. Thereafter, Plaintiff discovered that ALPS supplied the clockspring through interrogatory answers provided by General Motors, and on November 30, 2007, an inspection of the clockspring took place, wherein a representative from ALPS conducted the inspection.

Plaintiff was then served with a barrage of discovery requests by General Motors: Second Set through Seventh Set of Requests for Admissions, Second Set through Fifth Set of Interrogatories, and Second Set through Sixth Set of Requests for Production. (R. Vol. I at 74 through 140) During this time period, Plaintiff independently discovered that General Motors and ALPS Automotive, Inc. had an indemnity agreement between them called the Foreign Supply Agreement ("FSA"). (*See* ALPS Automotive, Inc. v. General Motors Corp., 2006 WL 51141 (Mich.App.) The FSA provided that "should any claim be made against GM alleging that

personal injury or property damage was caused by an alleged defect in the clockspring, GM will provide to ALPS prompt notice of such claims." Further, that "ALPS will bear the cost of settlements and judgments incurred because of a defective clockspring claim." *Id.* Note that General Motors did not provide this information in discovery. Plaintiff discovered this information independent of this case.

On August 4, 2008, Plaintiff propounded her First Set of Requests for Admissions to General Motors Corporation. (R. Vol. I at 96) On August 27, 2008, General Motors Corporation served its responses. (R. Vol. II at 295) Significant is General Motors's response to **Request for Admission No. 2** as follows:

Admit or deny that you have an indemnity agreement with ALPS Automotive, Inc.

Response: GM objects to this request because it is not limited to whether ALPS Automotive, Inc. has agreed to indemnify GM in this lawsuit and is, therefore, overly broad and asks for information that is beyond the permissible scope of discovery set forth in MRCP 26(b)(1) because it asks for information that is not relevant to the issues raised by the claims or defenses of any party. Without waiving that objection, GM responds that it asked ALPS Automotive, Inc. to indemnify GM in this lawsuit and ALPS Automotive, Inc. has not agreed to indemnify GM in this lawsuit.

After receiving this response, it became clear that ALPS Automotive, Inc. was a necessary party to this products liability litigation. Consequently, and with reasonable diligence, just **nineteen (19) days** after General Motors served its Responses to Plaintiff's First Set of Requests for Admissions, Plaintiff circulated a correspondence and proposed Agreed Order for Leave to all counsel of record in order for Plaintiff to obtain leave to add ALPS Automotive, Inc. as a defendant.

B. ALPS SUFFERS NO PREJUDICE BY THE AMENDMENT

In ALPS's Appeal Brief, it essentially throws away the requirement of Miss. R. Civ. P 15(c)(1) that the party to be brought in by the amendment "has received notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits..." ALPS even goes so far as to argue that "any question of ALPS's notice or prejudice is irrelevant..." (ALPS's Appeal Brief at 20) ALPS repeatedly urges the Court to focus on what it alleges the Plaintiff did or did not do in an attempt to take the attention away from the fact that ALPS obtained counsel, was monitoring the case, and had prepared its defense.

ALPS's interpretation of *Womble v Singing River Hospital* supports the Plaintiff's position that the opinion and holding in *Womble* by this Honorable Court fits squarely within the facts of the instant case. (ALPS Appeal Brief at 13-14) In *Womble v. Singing River Hospital,* the Plaintiff was granted leave to amend her complaint to add two (2) emergency room physicians, as well as other defendants. 618 So.2d at 1254 (Miss. 1993). In particular, Plaintiff amended her complaint and replaced two fictitious defendants with the names of two physicians, Drs. Longmire and Weatherall. Thereafter, Drs. Longmire and Weatherall moved for summary judgment arguing that they were added as defendants after the original two (2) year statute of limitations had expired. *Id.* at 1265. In opposition to the motions for summary judgment, the Plaintiff argued that if the Court decided that the two (2) year statute of limitations had expired, then the requirements of Miss. R. Civ. P. 9(h) were satisfied and the amended complaint would relate back to the original complaint. *Id.* at 1266-1267. This Honorable Court held that the provisions of Miss. R. Civ. P. 9(h) had not been met and therefore, any amendment would have to satisfy the provisions of Miss. R. Civ. P. 15(c) to prevent the claims being time barred. *Id.* at 1267. The opinion reflects that this Court, on its own accord, looked to the provisions of Miss.

R. Civ. P. 15(c) regarding the amendment without any argument to do so by the Plaintiff. This Court concluded:

> Since we have determined that the provisions of 9(h) have not been satisfied in this case, any amendment made by appellants to add additional parties must satisfy the provisions of Rule 15(c) regarding "changing the party against whom a claim is asserted" to prevent time bar by §15-1-36.

Womble v. Singing River Hospital, 618 So.2d 1252, at 1267 (Miss. 1993) This Honorable Court did not conclude that it could not consider the amendment under Miss. R. Civ. P. 15(c) because Plaintiff replaced fictitious defendants for the names of Drs. Longmire and Weatherall. In exercising its duty to view the evidence in the light most favorable to the party against whom the motion had been made, the Plaintiff, the Court looked to the only two (2) rules 9(h) and 15(c) to find whether the amendment adding Drs. Longmire and Weatherall related back to the date of the original complaint. In so doing, this Court concluded that the Plaintiff in the *Womble* case satisfied the requirements of Miss. R. Civ. P. 15(c) and held:

> [W]ithin the statutory period provided by law for commencing this action, Longmire and Weatherall had notice of this suit and knew or should have known that but for a mistake concerning their identities, they would have been included in this suit when it was originally filed on March 28, 1988, is virtually compelled. It is also obvious beyond peradventure that they will not be prejudiced in maintaining a defense on the merits. The record shows that they were already preparing with retained counsel ...

618 So.2d 1252, 1268 (Miss. 1993). Defendant ALPS, in the instant case, would like this Court to believe that Plaintiff is the one who focused on Rule 9(h) in her argument to the Trial Court for bringing in ALPS as a defendant. The truth is that ALPS focused on Miss. R. Civ. P. 9(h) in its Motion for Summary Judgment. (R. Vol. II at170) Regardless, **for the first time** at the Trial Court's hearing on ALPS's Motion for Summary Judgment, ALPS admitted that it had

knowledge of Plaintiff claims as early at **June 2005**, well within the original three (3) year statute of limitations. ALPS knew that it made the defective clockspring and knew that it should have been named in the Complaint but for the Plaintiff's mistaken belief that General Motors manufactured the clockspring.

Before Plaintiff filed this interlocutory appeal, ALPS had numerous opportunities to argue that it suffered some kind of prejudice by the amendment, no matter how small - but it never did. ALPS has never argued a scintilla of prejudice because there is none.

ALPS also urges that the opinion in *Wilner v. White* applies to the facts of the instant case, however, a close reading of *Wilner v. White* shows that the opinion is fact specific and does not apply to the facts in the instant case. 929 So.2d 315 (Miss. 2006) In *Wilner v. White*, the Plaintiff underwent diagnostic laparoscopy performed by Dr. White. Plaintiff was later diagnosed with complications from the surgery and filed suit against Singing River Hospital (where the surgery was performed), a nurse and John Does 1-4. *Id.* at 317. Plaintiff did not bring suit against Dr. White, the very doctor who performed the surgery which Plaintiff alleged caused her complications. Dr. White's name even appeared in the body of the complaint but no claims or causes of action were brought against him. *Id.* at 323. Approximately one (1) year after the original complaint was filed, Wilner filed an amended complaint, without first obtaining leave of court, and named four (4) additional defendants, one being Dr. White. *Id.* at 317. Subsequently, Dr. White filed a Motion for Summary Judgment based on the expiration of the statute of limitations. In its opinion, the Court noted that reasonable diligence is a standard only for determining the efforts made to discover the true identity of a named fictitious party under Miss. R. Civ. P. 9(h) but Wilner did not substitute Dr. White's name for a fictitious party. 929 So.2d 315, 322-323. The Court then looked to Miss. R. Civ. P. 15(c) to see if Wilner's claims against

Dr. White in the amended complaint would relate back to the original complaint. *Id.* at 323. The Court held that Wilner could not meet the requirement of Miss. R. Civ. P. 15(c)(2) because she unquestionably was not mistaken as to Dr. White's identity. *Id.* at 324. The facts of *Wilner v. White* are distinguished from the facts of the instant case because Dr. White actually performed the surgery which allegedly caused Wilner's injury. In the instant case, there was no way Plaintiff could have known or even thought that anyone other than General Motors manufactured the clockspring. ALPS's name does not appear anywhere on the clockspring. The identifying name on the clockspring is General Motors. (RE 68-69) Interestingly, General Motors knew who manufactured the clockspring and even put ALPS on notice of Plaintiff's claims. General Motors and ALPS knew that they had a contract/indemnity agreement with each other but failed to advise Plaintiff of such contract. Once Plaintiff learned of the contract through her own investigation, discovery was propounded. In response to said discovery, Plaintiff determined that ALPS was a necessary party to the litigation. Consequently, and with reasonable diligence, Plaintiff circulated the Agreed Order for Leave to amend the complaint and add ALPS as a defendant just nineteen (19) days after the determination.

Four (4) years passed from the date ALPS had knowledge of Plaintiff's claims to the date ALPS filed its Motion for Summary Judgment on Plaintiff's amendment adding ALPS as a Defendant. ALPS stands prepared, defense mounted, to proceed with the instant case on the merits. To let ALPS escape liability at this point would be an injustice.

CONCLUSION

It is an uncontradicted fact that the only identifying marks on the subject clockspring are the letters "GM" followed by a set of numbers. There was no way Plaintiff could have known or even thought that anyone other than General Motors manufactured the clockspring. ALPS's

name does not appear anywhere on the clockspring. The identifying name on the clockspring is General Motors. (RE 68-69)

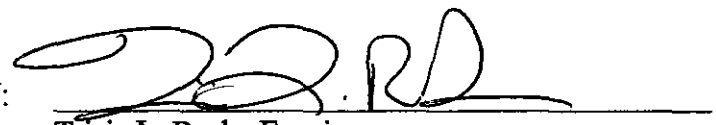
Plaintiff did not know the identity of ALPS Automotive, Inc. at the time she filed her Complaint, whether it was by ignorance of ALPS's identity or by the mistaken belief that General Motors manufactured the clockspring. Pursuant to Miss. R. Civ. P. 9(h) and as found by the Trial Court, Plaintiff exercised reasonable diligence in ascertaining the identity of ALPS Automotive, Inc. and, when it was determined that ALPS was a necessary party to the litigation, Plaintiff circulated an Agreed Order for Leave to obtain agreement of counsel and presented said proposed order to the Trial Court. Once leave was granted, Plaintiff filed her Second Amended Complaint and substituted ALPS Automotive, Inc. in place of a fictitious defendant. Plaintiff complied with all the requirements of Miss. R. Civ. P. 9(h) for her Second Amended Complaint to relate back to the date of the original Complaint.

Pursuant to Miss. R. Civ. P. 15(c), ALPS had actual knowledge of Plaintiff's claims in June 2005, within two (2) years of the Decedent's death and well within the original three (3) year statute of limitations; ALPS suffers no prejudice in maintaining its defense on the merits of the case by the Plaintiff's amendment as found by the Trial Court; and, but for the mistaken belief that General Motors manufactured the clockspring, ALPS would have been named in the original Complaint. Plaintiff complied with all of the requirements of Miss. R. Civ. P. 15(c) for her Second Amended Complaint to relate back the date of the original Complaint.

Plaintiff respectfully requests this Honorable Court to reverse the judgment of the Trial Court granting the Motion for Summary Judgment of ALPS Automotive, Inc. and remand this case back to the Circuit Court of Lincoln County, Mississippi with ALPS Automotive, Inc. remaining as a Defendant in the case.

Respectfully submitted, this the 29th day of March, 2010.

JANIS ANDERSON, individually and on behalf of all Wrongful Death Beneficiaries of JESSE J. ANDERSON, JR., Deceased

BY: 

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CERTIFICATE OF SERVICE

I, Tricia L. Beale, do hereby certify that I have this day mailed, via United States Mail, postage pre-paid, a true and correct copy of the above and foregoing document to the following:

Honorable Michael M. Taylor
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This the 29th day of March, 2010.

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