UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1495

(Summary Calendar)

KATHY LEE ROBERTS, WIFE, ET AL.,

Plaintiffs-Appellants,

VERSUS

OTTO L. WILLBANKS, M.D., ET AL.,

Defendants,

PILLING CO., a Pennsylvania Corporation,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(3:91 CV 0589 H)

(December 1, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

Plaintiffs, Kathy Lee Roberts, her husband, and her minor son (hereafter, collectively "Roberts"), brought suit against Pilling Company ("Pilling"), for injuries allegedly caused by a surgical instrument manufactured by Pilling. The district court granted summary judgment for Pilling. Roberts appeals, contending that the

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court improperly granted summary judgment on her claims of breach of express and implied warranties. We affirm.

I

In March 1987, mercury from a mercury-weighted device known as a "30 French bougie," spilled into Kathy Lee Roberts' abdomen during surgery. Doctors Willbanks and Lovitt performed the surgery at Baylor University Medical Center ("Baylor"), and Pilling manufactured the 30 French bougie. By December 14, 1987, Roberts knew of her mercury poisoning, and that the mercury originated from the March 1987 surgery.

In September 1989, Roberts filed suit against Baylor, Willbanks, Lovitt, and Pilling, seeking damages on the theories of negligence, strict products liability, and breaches of express and implied warranties. This suit was dismissed without prejudice in March 1990, pursuant to Roberts' stipulation of dismissal without prejudice.[1]

On March 22, 1991, Roberts filed the underlying suit against the same defendants. The district court eventually dismissed all the named defendants, except Pilling.[2] The district court

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[1] The statute of limitations period is not tolled when a suit is filed within the applicable statutory period and then voluntarily abandoned. *Armstrong v. Ablon*, 686 S.W.2d 194, 196 (Tex. App.))Dallas 1984, no writ).

[2] Willbanks and Lovitt were dismissed because suit was not filed within the statute of limitations period. Baylor was dismissed, pursuant to Roberts' motion for nonsuit. *See* Record on Appeal, vol. 5, at 544.

subsequently granted summary judgment for Pilling.[3] Roberts appeals, contending that: (a) Pilling's express warranty covers the 30 French bougie; and (b) she filed her cause of action within the limitations period for breach of implied warranty based on contract.

II

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Central R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most

[3] The summary judgment record consists of: (i) affidavit of Kathy Lee Roberts; (ii) Record of *Roberts v. Willbanks*, first suit, No. CA3-89-2321-G; (iii) Plaintiffs Brief and Response to Willbanks Motion to Dismiss, filed on September 19, 1991; (iv) Order Dismissing the first Suit, filed on March 23, 1990; (v) affidavits "A" and "B" of Donald K. Pike, Vice President of Pilling charged with overseeing records of sales to all customers; (vi) affidavit of Martha J. Rusk, charged with overseeing purchases of medical products at Baylor; and (vii) affidavit of John Weeks, charged with overseeing payments for medical products at Baylor.

favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

III

A

Roberts contends that Pilling's express warranty covers the 30 French bougie. Pilling provides an express warranty in its price list, which is included with all instruments sold by Pilling to Baylor. *See* Record on Appeal, vol. 5, at 551-52. The warranty provides:

> Pilling Company warrants its instruments to be free from defects in workmanship or materials for five years from date of purchase, when used for intended surgical purpose and cared for in accordance with recommended procedure. *Warranty does not apply to Pilling In-Ex Floor Grade Instruments, Fiber-Optic Cables, Light Carriers, consumable products, and rubber goods.*

Brief for Pilling, Exhibit 1 (emphasis added).

Roberts interprets this language as extending a warranty to all instruments, and then disclaiming a warranty for rubber goods.[4] Citing *Bowen v. Young,* 507 S.W.2d 600 (Tex. Civ. App.))El Paso

[4] Both parties concede that the 30 French bougie is a rubber good. *See* Brief for Roberts at 7-9; Brief for Pilling at 15-16.

1974, no writ),[5] she then argues that the disclaimer is unreasonable, and therefore, invalid. We disagree.

Even if the warranty language were read to constitute a disclaimer,[6] the disclaimer is reasonable in the context of the remaining warranty language.[7] In *Bowen,* the seller issued a disclaimer, which provided that the buyer take a mobile home "as is" after the buyer was shown model homes. *See Bowen,* 507 S.W.2d at 601. The court held that where the seller expressly warrants that the actual product conforms to a model or sample, it would be unreasonable to allow a disclaimer, particularly where the buyer previously bargained for the express warranty. *See id.* at 605.

Here, the record does not show that Pilling's warranty language was unbargained for, or that it surprised purchaser Baylor. *See Mercedez-Benz of North America v. Dickenson,* 720 S.W.2d 844, 852 (Tex. App.))Fort Worth 1986) ("The principal

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[5] Federal jurisdiction is based on diversity of citizenship. Texas law applies because the alleged injury occurred in Texas. *See Clark v. DeLaval Separator Corp.,* 639 F.2d 1320, 1321-22 (5th Cir. 1981) (applying Texas implied warranty statute where product manufactured out of state caused injury in state).

[6] The district court held that the warranty language did not constitute a disclaimer, arguing "Pilling's warranty language plainly specifies the degree to which the warranty is extended initially, including which products are and are not covered; it does not extend and disclaim warranty sentence by sentence." Record on Appeal, vol. 5, at 552; *see also Lankford v. Rogers Ford Sales,* 478 S.W.2d 248, 250 (Tex. Civ. App.))El Paso 1972, writ ref'd n.r.e.) (where there is an express warranty, the seller will not be bound beyond the terms of the warranty).

[7] Texas law concerning disclaimers provides:

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable.

Tex. Bus. & Com. Code Ann. § 2.316(a) (West 1968 & Supp. 1992).

purpose of section 2.316 is to protect a buyer from unexpected and unbargained for language of disclaimer . . . ."). Furthermore, Pilling never represented that the express warranty covered rubber bougies.[8] Therefore, the disclaimer for rubber goods was valid.[9] *See Arkwright-Boston Mfrs. Mut. v. Westinghouse Elec. Corp.,* 844 F.2d 1174, 1182 (5th Cir. 1988) (where a disclaimer of an express warranty is "neither unexpected nor unbargained for," the disclaimer is valid under Texas law).

B

Roberts also contends that she brought suit within the limitations period for a breach of implied warranty based on contract. Under Texas law, the statute of limitations for a breach of implied warranty based on contract is four years. Tex. Bus. & Com. Code Ann. § 2.725 (West 1968 & Supp. 1992).[10] A cause of

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[8] In a separate Guarantee and Warranty document, Pilling expressly states, "Pilling makes no warranty and does not warrant In-Ex branded instruments, fiber optic cables, fiber optic light carriers, knives, malleable items, and delicate instruments or *rubber bougies."* Brief for Pilling, Exhibit 3 (emphasis added).

[9] Roberts also contends that Pilling's disclaimer of incidental and consequential damages))as applied to products covered by the express warranty))is prima facie unconscionable. Because we conclude that the express warranty does not extend to the 30 French bougie, we need not reach this issue.

[10] Section 2.725 provides:

> (a) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .
>
> (b) 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 tender of delivery is made . . . .

action accrues when tender of delivery is made.[11] *Id.* Before the March 1987 surgery, Pilling last delivered French bougies to Baylor in September 1986. *See* Record on Appeal, vol. 4, at 454. Roberts did not file suit until March 22, 1991, more than four years after her cause of action accrued. Accordingly, her cause of action for breach of implied warranty prescribed.

Roberts maintains that equating the accrual date with the date delivery of goods was tendered, is unjust. She cites a concurring opinion by this Court which states that the running of limitations from tender of delivery seems unjust because a "plaintiff's cause of action may have accrued and been extinguished before the plaintiff is injured." *Garvie v. Duo-Fast Corp.,* 711 F.2d 47, 49 (5th Cir. 1983) (Rubin, J., concurring). Judge Rubin concurred with the majority opinion because of Fifth Circuit precedent, but noted that Texas courts had not definitively answered when the limitations period begins to run in an action based on an implied breach of warranty based on contract. *Id.*

Since *Garvie,* the Texas Supreme Court has held that a cause of action for breach of implied warranty based on contract "accrues at the time of delivery, not at the time of discovery . . . `regardless of the aggrieved party's lack of knowledge of the

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[11] Where a warranty explicitly extends to future performance of goods, a cause of action accrues when the breach is or should have been discovered. Tex. Bus. & Com. Code Ann. § 2.725 (West 1968 & Supp. 1992). Citing this future performance exception, Roberts contends that her four year limitations period began on December 14, 1987))the date she discovered her mercury poisoning. However, this exception applies only to express warranties, and not implied warranties. *Safeway Stores, Inc. v. Certainteed Corp.,* 710 S.W.2d 544, 547-48 (Tex. 1986). Since we conclude that Pilling's express warranty does not extend to the 30 French bougie, the issue of future performance is moot.

breach.'" *Safeway Stores,* 710 S.W.2d at 546 (quoting section 7.275). Thus, we are guided by Texas jurisprudence and hold that the statute of limitations for a contractual breach of implied warranty begins when delivery of the product is tendered.

IV

For the foregoing reasons, we **AFFIRM.**