IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

A.J. STOVALL, APPELLANT

VS.

W.L. HAYES AND HOLLY SPRINGS TIRE, APPELLEE

NO. 2006-CA-02144

APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI
M2005-487 JC

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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ARGUMENT

I. The Lower Court Was Not Correct in its Factual Finding that the Parties Modified the Original Agreement

For a contract to exist, essential elements must exist: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent and (6) no legal prohibition precluding contract formation. ***Murray Envelope Corp. v. Atlas Envelope Corp.***, 851 So.2d 426 (Miss. 2003); ***Hunt v. Coker***, 741 So.2d 1011 (Miss.Ct.App. 1999); ***Mauldin Co. v. Lee Tractor Co. of Miss., Inc.***, 2006 So.2d (2004-CA-02150-COA).

The Court did not disagree that an agreement had been reach by the parties. However, the Court used the wrong standard when determining if a modification of the agreement had taken place. During the first visit to the shop, Wilson assured Stovall that he could fix the vehicle. Stovall did not speak with Hayes when he dropped off the car. (T.rec. 13). When Stovall picked the car up, Wilson presented Stovall with the bill and Stovall presented the bill to Hayes for payment. Stovall paid the bill or invoice. This is a separate contract or agreement apart from Stovall's second trip to the repair shop. The Defendants misrepresent that Stovall took the car for a test drive prior to payment.[1]

The second trip, which was the next day, began a new agreement or contract. Once again, Stovall dealt with Greg Wilson. Wilson had apparent authority to act as agent for

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In the trial record, pages 17 & 19, Stovall paid invoice dated August 15, 2005. He test drove the car after he picked it up before he would allow his wife to drive the car. He drove the car to Red Banks, Mississippi which is outside the city limits of Holly Springs, Mississippi.

Holly Springs Tire. Stovall relied to his detriment on the representations made by Wilson. The Apellees will contend not only that Wilson did not have the actual authority to commit repairing the vehicle for $200.00 but that his employment does not extend beyond that of master-servant.

The lower court never addressed the issue of whether Greg Wilson was simply an employee under the master-servant principle. (T.rec. 71-73). In fact the court seemed to acknowledge that Wilson had the authority to act for Hayes after listening to the testimony of Hayes who admittedly was not apart of any conversations between Wilson and Stovall. Wilson obligated the shop to work on Stovall's vehicle. The action or inaction of Hayes established Wilson as having the apparent authority. Mississippi law requires the acts or conduct indicating the agent's authority be performed by the principal, not the agent. ***Trinity Mission of Clinton, LLC v. Barber***, 2007 MSCA 2005-CA-02199-082807 *citing* ***Eaton v. Porter***, 645 So.2d 1323 (Miss. 1994). At the least, Wilson has an implied agency relationship with Hayes Tire Shop as Hayes took no part in speaking with Stovall about the problems with his car or the necessary repairs to be made. He only received payment. Wilson set the terms of the repair, not Hayes. He presented Stovall with the ticket/invoice, not Hayes.

Wilson admitted that he dealt with Stovall initially and claimed he did not remember quoting Stovall an amount. (T.rec. 47, 48). He also stated that he did not see Stovall go inside and speak with Hayes about a quote. (T.rec. 52). Hayes testified that he was not apart of any discussions between Wilson and Stovall. (T.rec. 63). The lower court found that any agreement that was formed included various and saundry changes in the agreement, thus

acknowledging Wilson's apparent authority.

There was never a mutual assent between the parties in the case at bar. Any contract may, before a breach occurs, be changed or modified in one or more of its details, by a new agreement also bilateral, by the **mutual assent of the parties**, without any new independent or distinct consideration. ***Albert Mackie & Co. LTD. v. S. Dale & Sons***, 122 Miss. 430, 84 So.2d 453 (Miss. 1920). Stovall purchased new parts (water pump and timing belt) prior to the price quote which is at issue in this matter. The only part he was told he needed afterwards was a head gasket. (T.rec. 21-22). He also testified and it was undisputed that he checked almost everyday with shop and was not told about a price change aside from the one quoted to him initially. Stovall was told his car was ready approximately two (2) weeks later. This case is tantamount to a contractor who proceeds with work without procuring a written change order. One who does so proceeds at his own peril. ***City of Mound Bayou v. Collins***, 499 So.2d 1354 (Miss. 1986). The Court has recognized that a pattern of conduct may not require a written modification if the work was orally ordered, requested, directed, authorized or consented by the owner or his duly authorized agent. ***Id* at 1358**. However, Stovall constantly stated that he did not intend to go over the quote of $200.00 and throughout the record he stated such. Among the acts or conduct amounting to waiver are the owner's knowledge of, agreement to, or acquiescence in such extra work, a course of dealing which repeatedly disregards such stipulation, and a promise to pay for extra work, orally requested by the owner and performed in reliance on that promise. ***Eastline Corp. v. Marion Apartments, LTD***, 524 So.2d 582 (Miss. 1988). The subsequent purchase of a head gasket does not constitute "a pattern or subsequent conduct" to deem Stovall's actions a waiver of

his initial dealings with Wilson to establish a modification. Any modification of the initial agreement between the parties lacked mutuality of assent, therefore making any alleged subsequent agreement void. Modifications to an agreement still require mutuality of consent (even where there is no new consideration). ***Gregory v. Lacy***, 156 Miss. 147, 125 So. 722 (Miss. 1930).

II. Overruling the Lower Court's Factual Finding Would Result in Unjust Enrichment

It is not the desire of Dr. Stovall unjustly enrichment himself to the detriment of the Defendants. He does not seek services for free or at discount. From the record it appears, that unnecessary work was done to justify an unwarranted price for repairs. (T.rec. 13-22). To collect under an **unjust enrichment** or quasi-contract theory, the claimant must show "there is no legal contract but . . .the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another." ***Harris v. Harris***, 879 So.2d 457 (Miss. Ct.App. 2004) *citing* ***Estate of Johnson v. Adkins***, 513 So.2d 922, 926 (Miss.1987) (quoting ***Hans v. Hans***, 482 So.2d 1117, 1122 (Miss. 1986)). First, unjust enrichment is a principle based upon equity but no party can claim unjust enrichment when they come to the court without clean hands. The Plaintiff asked about his car several times and was not given any substantive information about the repairs or work being done. Hayes did not deal with Stovall with clean hands from the moment Wilson began work on the vehicle and is not in a position to claim unjust enrichment. ***Harris***, 879 So.2d at 465. Once again any modification lacked mutual assent, therefore the Defendants should honor the original agreement of two hundred dollars

($200.00).

CONCLUSION

Appellant respectfully prays that this Court reverse the Judgment of the Marshall County Circuit Court. The lower Court did not deny the existence of an agreement to repair the 1998 Plymouth Neon for $200.00. There was not a modification of the agreement between the parties and the lower court's decision was not supported by substantial, credible and reasonable evidence.

Respectfully Submitted this the 11th day of October, 2007.

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CERTIFICATE OF SERVICE

I, LATRICE WESTBROOKS, do hereby certify that I have this day forwarded, via facsimile and U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing the Reply Brief of the Appellant to all parties concerned as listed below:

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Honorable Andrew K. Howorth
Marshall County Circuit Court Judge
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THIS the 24th day of October, 2007.

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